# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

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**Matter No D7/2000**

THE COMMONWEALTH OF AUSTRALIA — APPELLANT

AND

MARY YARMIRR & ORS — RESPONDENTS

**Matter No D9/2000**

MARY YARMIRR & ORS — APPELLANTS

AND

THE NORTHERN TERRITORY OF AUSTRALIA & ORS — RESPONDENTS

*The Commonwealth v Yarmirr*
*Yarmirr v Northern Territory*
[2001] HCA 56
*11 October 2001*
D7/2000 and D9/2000

**ORDER**

*Appeals dismissed with costs.*

On appeal from the Federal Court of Australia

**Representation:**

**Matter No D7/2000**

D M J Bennett QC, Solicitor-General of the Commonwealth and M A Perry and S B Lloyd with J S Stellios for the appellant (instructed by Australian Government Solicitor)

J Basten QC with K R Howie SC and S A Glacken for the first and ninth respondents (instructed by Northern Land Council)

T I Pauling QC, Solicitor-General for the Northern Territory with R J Webb for the second respondent (instructed by Solicitor for the Northern Territory)

G E Hiley QC with N J Henwood for the third, fourth, fifth, sixth and seventh respondents (instructed by Cridlands Lawyers)

No appearance for the eighth respondent

**Interveners**

R J Meadows QC, Solicitor-General for the State of Western Australia with K M Pettit intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with S E Carlton intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

B A Keon-Cohen QC with C F Thomson intervening on behalf of the Mirimbiak Nations Aboriginal Corporation (instructed by Mirimbiak Nations Aboriginal Corporation)

G M G McIntyre with G M Irving and D L Ritter intervening on behalf of the Yamatji Barna Baba Maaja Aboriginal Corporation (instructed by Yamatji Barna Baba Maaja Aboriginal Corporation)

G M G McIntyre intervening on behalf of the Kimberley Land Council (instructed by Kimberley Land Council)

D F Jackson QC with S J Gageler SC intervening on behalf of the Lardil, Kaiadilt Yangkaal and Gangalidda Peoples (instructed by Chalk & Fitzgerald)

**Matter No D9/2000**

J Basten QC with K R Howie SC and S A Glacken for the appellants (instructed by Northern Land Council)

T I Pauling QC, Solicitor-General for the Northern Territory with R J Webb for the first respondent (instructed by Solicitor for the Northern Territory)

D M J Bennett QC, Solicitor-General of the Commonwealth and M A Perry and S B Lloyd with J S Stellios for the second respondent (instructed by Australian Government Solicitor)

G E Hiley QC with N J Henwood for the third, fourth, fifth, sixth and seventh respondents (instructed by Cridlands Lawyers)

No appearance for the eighth and ninth respondents

**Interveners**

R J Meadows QC, Solicitor-General for the State of Western Australia with K M Pettit intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with S E Carlton intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

H B Fraser QC with P J Flanagan intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

G M G McIntyre with G M Irving and D L Ritter intervening on behalf of the Yamatji Barna Baba Maaja Aboriginal Corporation (instructed by Yamatji Barna Baba Maaja Aboriginal Corporation)

G M G McIntyre intervening on behalf of the Kimberley Land Council (instructed by Kimberley Land Council)

D F Jackson QC with S J Gageler SC intervening on behalf of the Lardil, Kaiadilt Yangkaal and Gangalidda Peoples (instructed by Chalk & Fitzgerald)

## CATCHWORDS

**The Commonwealth v Yarmirr**
**Yarmirr v Northern Territory**

Aboriginals – Native title in relation to waters – Application for determination of native title to seas, sea-bed and sub-soil – Territorial application of *Native Title Act* 1993 (Cth) – Whether common law applies to territorial sea beyond low-water mark – Whether common law recognises native title in territorial sea beyond low-water mark – Whether recognition by common law influenced by legislative purpose of *Native Title Act* 1993 (Cth) – Relevance of concept of radical title – Effect of successive acquisitions of sovereignty over the territorial sea and sea-bed by the Crown in right of the United Kingdom in 1824 and the Crown in right of the Commonwealth by the *Seas and Submerged Lands Act* 1973 (Cth) – Nature and effect of right and title to the territorial sea and sea-bed vested in the Northern Territory by the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth).

Aboriginals – Native title in relation to waters – Whether evidence demonstrated rights under traditional law and custom to possession, occupation, use and enjoyment of the territorial sea and sea-bed within the claimed area to the exclusion of all others – Whether evidence demonstrated right under traditional law and custom to exclusive fishery – Whether right of exclusive possession asserted effectively – Whether public rights to fish and to navigate and international right of innocent passage in territorial sea inconsistent with exclusive native title rights.

*Acts Interpretation Act* 1901 (Cth), s 15B.
*Coastal Waters (Northern Territory Powers) Act* 1980 (Cth), s 5.
*Coastal Waters (Northern Territory Title) Act* 1980 (Cth), s 4.
*Native Title Act* 1993 (Cth), ss 6, 11, 223, 225 and 253.
*Off-shore Waters (Application of Territory Laws) Act* 1985 (NT), ss 2 and 3.
*Seas and Submerged Lands Act* 1973 (Cth), ss 6, 7 and 11.

1 GLEESON CJ, GAUDRON, GUMMOW AND HAYNE JJ. Croker Island lies to the north of Cobourg Peninsula, a promontory of land at the north-western tip of Arnhem Land in the Northern Territory. Mary Yarmirr and others, on behalf of a number of clan groups[1], applied under the *Native Title Act* 1993 (Cth) ("the Act") for determination of native title in respect of an area which the application said "may generally be described as the seas in the Croker Island region of the Northern Territory". (It is convenient to refer to the applicants and those whom they represented as "the claimants".) The area the subject of the application was set out on maps attached to the application for determination. The area included the seas and sea-beds contained within the area and extended to "any land or reefs contained within the boundary other than land or reefs which has been granted for the benefit of Aboriginal people pursuant to the [Commonwealth] *Aboriginal Land Rights (Northern Territory) Act* 1976". Several islands, including Croker Island, lie within the claimed area. In 1980, pursuant to the last-mentioned Act, all of those islands were granted to the Arnhem Land Aboriginal Land Trust for the benefit of Aboriginal people. The islands were, therefore, excluded from the claim.

Proceedings at first instance

2 The application was heard and determined in the Federal Court of Australia[2]. The primary judge (Olney J) determined that native title exists in relation to the sea and sea-bed within an area described in the determination, an area which, for present purposes, may be taken to be generally similar to the area claimed. It was determined that, where the area abuts the coast of an island or the mainland, the *sea-bed* in relation to which native title exists ends at the mean *low*-water mark, and the *seas* in relation to which those rights exist are the waters above that sea-bed and the waters above the inter-tidal zone adjacent to that sea-bed (being an area ending at the mean *high*-water mark). It was determined that the native title rights and interests "do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others". The determination further provided that:

> "5. The native title rights and interests that the Court considers to be of importance are the rights and interests of the common law holders,

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**1** Described in the amended Native Title Determination Application as the Mandilarri-Ildugij, Mangalarra, Muran, Gadurra, Minaga, Ngayndjagar and Mayorram peoples.

**2** *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533.

in accordance with and subject to their traditional laws and customs to -

(a) fish, hunt and gather within the claimed area for the purpose of satisfying their personal, domestic or non-commercial communal needs including for the purpose of observing traditional, cultural, ritual and spiritual laws and customs;

(b) have access to the sea and sea-bed within the claimed area for all or any of the following purposes:

(i) to exercise all or any of the rights and interests referred to in subparagraph 5(a);

(ii) to travel through or within the claimed area;

(iii) to visit and protect places within the claimed area which are of cultural or spiritual importance;

(iv) to safeguard the cultural and spiritual knowledge of the common law holders."

(In the course of argument of the present appeals there was no discussion about what was meant by pars 5(b)(iii) and (iv) or how effect might be given to a right of access to "protect" places or "safeguard" knowledge. We say nothing about such issues.)

3 The determination provided that the native title is held by the Aboriginal peoples who are the *yuwurrumu*[3] members of the Mandilarri-Ildugij, the Mangalara, the Murran, the Gadura-Minaga and the Ngaynjaharr clans. Nothing was said to turn on the disconformity between this description of the native title holders and the description given in the application for determination. It may therefore be put aside.

Appeals to the Full Court

4 From this determination both the claimants and the Commonwealth appealed to the Full Court of the Federal Court. The Commonwealth contended that, because the claimed area was the sea and the sea-bed, no native title exists within that claimed area. The claimants contended that the native title rights and

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**3** A group of people who trace or claim descent through the male line.

interests they hold confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others. Both the Commonwealth and the claimants made a number of other contentions but for the moment they need not be noticed. By majority, the Full Court of the Federal Court (Beaumont and von Doussa JJ; Merkel J dissenting) dismissed both appeals[4]. Merkel J was of the opinion that the Commonwealth's appeal failed but considered that the claimants' appeal should be allowed and the proceeding remitted for further hearing by the primary judge. By special leave the Commonwealth and the claimants now each appeal to this Court.

The Act

5 The application for determination of native title was made under the Act as it stood before the amendments made by the *Native Title Amendment Act* 1998 (Cth) came into force. It was common ground that the amendments have no application in the present matter. There are several provisions of the Act to which reference should be made at this point.

6 First, it is necessary to notice the territorial application of the Act. Section 6 provides that the Act extends to each external Territory of the Commonwealth and "to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*". "Coastal sea" has the meaning it is given by s 15B(4) of the *Acts Interpretation Act* 1901 (Cth)[5] and thus, in relation to Australia, means the territorial sea of Australia and the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal Territory. By s 6 of the *Seas and Submerged Lands Act* 1973 (Cth) it was declared and enacted that sovereignty in respect of the "territorial sea of Australia"[6] and "in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth". Section 7 of the *Seas and Submerged Lands Act*, as originally enacted, empowered the Governor-General from time to time, by Proclamation, to declare, not inconsistently with Section II of Part I of the Convention on the Territorial Sea and the Contiguous Zone done at Geneva on 29 April 1958, the limits of the whole or any part of the territorial sea. (In 1994 the *Seas and*

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**4** *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171.

**5** s 253.

**6** *Seas and Submerged Lands Act* 1973 (Cth), Pt II, Div 1.

*Submerged Lands Act* was amended to take account of, and refer to, the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982[7].) By s 11, it was declared and enacted that the sovereign rights of Australia as a coastal state in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth.

7 It must next be noted that the objects of the Act include providing for "the recognition and protection of native title"[8]. In so far as the Act provides for protection of native title it can be seen as supplementing the rights and interests of native title holders under the common law of Australia and thus, in this way at least, giving effect to one of the purposes of the Act recorded in its preamble. Section 11(1) of the Act and its provision that native title is not able to be extinguished contrary to the Act is, perhaps, the most important of the Act's protection provisions[9]. It is of the first importance, however, to recognise that it is in the Act that the rights and interests which are claimed by the claimants must find reflection. The relevant starting point for determining the controversies in the present matters is the Act.

8 It is also necessary to notice some of what the Act refers to in the heading to Div 2 of Pt 15 as "Key concepts", especially those of "native title" and "native title rights and interests". Section 223 provides:

> "**(1)** The expression **'native title'** or **'native title rights and interests'** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
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> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

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**7** *Maritime Legislation Amendment Act* 1994 (Cth).

**8** s 3(a).

**9** *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 453, 468 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

(c) the rights and interests are recognised by the common law of Australia.

**(2)** Without limiting subsection (1), '**rights and interests**' in that subsection includes hunting, gathering, or fishing, rights and interests.

**(3)** Subject to subsection (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression '**native title**' or '**native title rights and interests**'.

**(4)** To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):

(a) in a pastoral lease granted before 1 January 1994; or

(b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994."

"Native title holder" is defined[10] in relation to native title as:

"(a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust—the prescribed body corporate; or

(b) in any other case—the person or persons who hold the native title."

A "determination of native title" is defined[11] as a determination of:

"(a) whether native title exists in relation to a particular area of land or waters;

(b) if it exists:

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**10** s 224.

**11** s 225.

(i) who holds it; and

(ii) whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others; and

(iii) those native title rights and interests that the maker of the determination considers to be of importance; and

(iv) in any case—the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests."

"Waters" is defined[12], unless the contrary intention appears, as including:

"(a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or

(b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a))."

The reference to "sea" in this definition, taken both with the other elements of the definition of "waters" and with the provisions of s 6 of the Act, indicates clearly that the Act is drafted on the basis that native title rights and interests may extend to rights and interests in respect of the sea-bed and subsoil beyond low-water mark and the waters above that sea-bed.

Native title rights and interests

9 The rights and interests with which the Act deals may be communal, group or individual rights and interests. They are described as rights and interests *in relation to* land *or waters*. They are rights and interests which must have three characteristics[13]. First, they are possessed under the traditional laws acknowledged, and the traditional customs observed, by the peoples concerned. Secondly, those peoples, *by those laws and customs*, must have a "*connection*" with the land or waters. Thirdly, the rights and interests must be *recognised* by the common law of Australia.

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**12** s 253.

**13** s 223.

10 Disputes of the present type require examination of the way in which two radically different social and legal systems intersect. As was pointed out in the joint judgment in *Fejo v Northern Territory*[14]:

> "Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title[15]. Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law[16]. There is, therefore, an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title."

11 Because native title has its origin in traditional laws and customs, and is neither an institution of the common law nor a form of common law tenure, it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer. As Viscount Haldane said[17] in relation to a claim to native title in Southern Nigeria:

> "There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence."

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**14** (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

**15** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 58 per Brennan J.

**16** *Mabo [No 2]* (1992) 175 CLR 1 at 59-61 per Brennan J.

**17** *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 403.

As his Lordship rightly noted[18], "[a]bstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

12 It is, of course, important to notice that the native title rights and interests with which the Act deals are rights and interests *in relation to* land or water. Those rights and interests may have some or all of the features which a common lawyer might recognise as a species of property. Neither the use of the word "title" nor the fact that the rights and interests include some rights and interests in relation to land should, however, be seen as necessarily requiring identification of the rights and interests as what the common law traditionally recognised as items of "real property". Still less do those facts necessarily require analysis of the content of those rights and interests according to those features which the common law would traditionally identify as necessary or sufficient to constitute "property".

13 Exactly how the common law uses the word "property" is not without its own difficulties[19]. As was pointed out in *Yanner v Eaton*[20], property can be used as a description of a legal relationship with a thing, referring "to a degree of power that is recognised in law as power permissibly exercised over the thing". It can also be seen as consisting primarily in control over access to something[21]. But as was also pointed out in *Yanner*[22], there are limits to the use of "property" as an analytical tool.

14 Even if difficulties about the meaning of the word "property" were resolved, it would be wrong to start consideration of a claim under the Act for determination of native title from an a priori assumption that the only rights and interests with which the Act is concerned are rights and interests of a kind which the common law would traditionally classify as rights of property or interests in

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**18** [1921] 2 AC 399 at 404.

**19** Gray and Gray, *Elements of Land Law*, 3rd ed (2001) at 93-99; Rotherham, "Conceptions of property in common law discourse", (1998) 18 *Legal Studies* 41 at 43-45, 57-58.

**20** (1999) 201 CLR 351 at 366 [17] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

**21** *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18], quoting Gray, "Property in Thin Air", (1991) *Cambridge Law Journal* 252 at 299.

**22** *Yanner* (1999) 201 CLR 351 at 366 [17].

property. That is not to say, however, that native title rights and interests may not have such characteristics. The question is where to begin the inquiry.

15 The relevant starting point is the question of fact posed by the Act: what are the rights and interests in relation to land or waters which are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples? It is not necessary, at least at that point of the inquiry, to ask whether each claimed right and interest has qualities of the kind described by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*[23], namely, being "definable, identifiable by third parties, capable in its nature of assumption by third parties, and hav[ing] some degree of permanence or stability".

16 Nor is it necessary to identify a claimed right or interest as one which carries with it, or is supported by, some enforceable means of excluding from its enjoyment those who are not its holders. The reference to rights and interests enjoyed under traditional laws and customs invites attention to how (presumably as a matter of traditional *law*) breach of the right and interest might be dealt with, but it also invites attention to how (as a matter of *custom*) the right and interest is observed. The latter element of the inquiry seems directed more to identifying practices that are regarded as socially acceptable, rather than looking to whether the practices were supported or enforced through a system for the organised imposition of sanctions by the relevant community. Again, therefore, no a priori assumption can or should be made that the only kinds of rights and interests referred to in par (a) of s 223(1) are rights and interests that were supported by some communally organised and enforced system of sanctions.

17 The primary judge determined that the landward boundary of the sea which was subject to the identified native title rights and interests was, in relation to the sea, the mean high-water mark (and therefore includes the sea in the inter-tidal zone) but in relation to the sea-bed was the mean low-water mark (and therefore does not include the sea-bed in the inter-tidal zone).

18 These areas straddle a number of different, and in some cases overlapping, maritime zones although the whole area is embraced by what are now the seaward limits of the 12 nautical mile territorial sea. The whole of the area is, therefore, within the area to which the Act's operation is extended by s 6.

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**23** [1965] AC 1175 at 1247-1248; cf *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343 per Mason J.

19 Detailed consideration of the legal status of the seas and sea-bed in the claimed area would require reference to many different steps taken first by Imperial, then later colonial, and still later State and federal executive and legislative authorities. Not all of these matters need, however, be noticed and their consideration can be deferred.

20 Against this background it is convenient to turn to consider first the appeal by the Commonwealth.

The Commonwealth's appeal

21 The Commonwealth's submissions focused upon the third of the elements identified earlier: whether the claimed rights and interests are recognised by the common law of Australia. It was said to be necessary to trace the history of the ambit of the territorial sea in the area claimed by the claimants because, so the argument went, native title could not be "recognised" by the common law if the common law did not "extend" to the area in question. This in turn was said to invite attention to when exactly the common law could be said to have "extended" to the area.

22 The territorial sea now extends from low-water mark to 12 nautical miles to sea. That was not always so. Until 1990 it extended from the low-water mark to three nautical miles to sea. The Commonwealth submitted that native title rights exist only by virtue of the presence of the common law and that the absence of the common law is fatal to the claim. It submitted that the common law does not apply of its own force to the area between three to 12 nautical miles and has not been applied to that area by statute. The Commonwealth further submitted that, in the area from low-water mark to three nautical miles, the provisions of the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth) ("the NT Title Act") vesting title in the Northern Territory do not allow for the imposition of a native title upon that title. It was further submitted that the statutory application of the common law which occurred pursuant to the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT) took place *after* the vesting of a title in the Northern Territory which was unqualified by native title.

23 There are two premises underlying these submissions which must be examined. First, they attribute a territorial reach or operation to the common law. Secondly, they assert a central and essential role to the concept of radical title in the relationship between native title and the common law.

Territorial reach of the common law

24 The Commonwealth submitted that "[i]t has long been a principle of English common law that the limits of each county and of the realm lie at low-water mark". This principle, it was submitted, was recognised in *R v Keyn*[24], accepted and applied by this Court in *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*")[25] and accepted and applied by the Supreme Court of Canada in *Re Offshore Mineral Rights of British Columbia*[26].

25 It is convenient to begin examination of the asserted principle with the decision in *Keyn* if only because of the prominence given to it in the argument of the present matters and in the *Seas and Submerged Lands Case* and the Canadian cases to which reference has been made. The question reserved in *Keyn*, for consideration of the Court for Crown Cases Reserved, was whether the Central Criminal Court had jurisdiction to try a charge of manslaughter against the Master of the German vessel *Franconia*. The *Franconia* had collided with the British vessel *Strathclyde* at a point within three miles of the shore of England. The *Strathclyde* sank. The victim of the alleged manslaughter was a passenger on the *Strathclyde* who had drowned. Seven members of the Court (Cockburn CJ, Kelly CB, Bramwell JA, Lush and Field JJ, Sir R Phillimore and Pollock B) held that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged; six members of the Court (Lord Coleridge CJ, Brett and Amphlett JJA, Grove, Denman and Lindley JJ) concluded, contrary to the views of the majority, that the sea within three miles of the coast of England was part of the territory of England, that the English criminal law extended over those limits, and that the Admiral formerly had, and the Central Criminal Court then had, jurisdiction to try offences committed there although on board a foreign ship.

26 The question in *Keyn* was, therefore, a question about the jurisdiction of a criminal court. The word "jurisdiction" was used as identifying whether the subject-matter of the proceeding could be entertained by the particular court, not

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**24** (1876) 2 Ex D 63.

**25** (1975) 135 CLR 337. See also *Bonser v La Macchia* (1969) 122 CLR 177 at 184 per Barwick CJ, 218-219 per Windeyer J; *R v Bull* (1974) 131 CLR 203 at 219 per Barwick CJ.

**26** [1967] SCR 792 at 804-805. See also *Re Newfoundland Continental Shelf* [1984] 1 SCR 86.

as describing the amenability of the defendant to the court's authority[27]. The amenability of the defendant to the court's authority was asserted, or assumed, when he was required to enter a plea to the charge, the challenge to "jurisdiction" not being mounted until after the close of the prosecution case[28]. As was said in *Lipohar v The Queen*[29]:

> "What has been identified as the refusal of common law courts to entertain prosecutions save at and by the law of the place where the offence had been committed appears to have grown out of the classification of criminal trials as local actions … Conditions respecting venue thereby arose[30]. Further, it was significant that, at common law, the grand jury was sworn to inquire of acts done within their vicinage, so that if a person were wounded in one vicinage but died in another, the offender was indictable in neither[31]. These considerations appear also to have provided the source of the rule attributed to *British South Africa Co v Companhia de Moçambique*[32] whereby the common law courts refused to try issues respecting title to immovables located outside the forum[33]. However, venue is concerned with the place of trial whilst 'jurisdiction' is aptly used here to identify the existence of authority to adjudicate a particular dispute."

27 As a matter of history, the administration of the criminal law of England had been divided between the courts of oyer and terminer, which took cognisance of offences committed within the relevant county, and the Court of the Lord High

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**27** cf *Lipohar v The Queen* (1999) 200 CLR 485 at 517 [79] per Gaudron, Gummow and Hayne JJ; Marston, "Crimes on Board Foreign Merchant Ships at Sea: Some Aspects of English Practice", (1972) 88 *Law Quarterly Review* 357 at 360.

**28** (1876) 2 Ex D 63 at 64.

**29** (1999) 200 CLR 485 at 517-518 [81] per Gaudron, Gummow and Hayne JJ.

**30** Leflar, "Extrastate Enforcement of Penal and Governmental Claims", (1932) 46 *Harvard Law Review* 193 at 198.

**31** Blackstone, *The Laws of England*, vol 4, §303.

**32** [1893] AC 602.

**33** *Dagi v Broken Hill Proprietary Co Ltd [No 2]* [1997] 1 VR 428 at 438-439.

Admiral, which asserted jurisdiction over offences committed at sea[34]. In the 14th century, statutes were passed to confine the jurisdiction of the Admiral[35] to things done upon the sea and in the main streams of great rivers beneath the bridges. This arrangement continued until 1536 with the passing of the statute 28 Hen 8 c 15[36]. This provided in respect of offences committed in or upon the sea for trial pursuant to commissions issued by the Crown. By the statute 7 & 8 Vict c 2 (1844) the need for special Commissioners was removed and authority was conferred upon all judges holding commissions of oyer and terminer or general gaol delivery. The accused in *Keyn* was indicted at the Central Criminal Court; this had been established in 1834 by 4 & 5 Will 4 c 36.

28 What is to be noted, however, is the early intervention of statute. As Lush J said in *Keyn*[37]:

> "They [the adjacent waters] are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. *But the dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period the three-mile radius had not been thought of.* International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal

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**34** *R v Keyn* (1876) 2 Ex D 63 at 66 per Sir R Phillimore.

**35** 13 Rich 2 st 1 c 5 and 15 Rich 2 c 3.

**36** *Keyn* (1876) 2 Ex D 63 at 66-67 per Sir R Phillimore.

**37** (1876) 2 Ex D 63 at 239.

jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament." (emphasis added)

29 The decision in *Keyn* must also be understood bearing in mind that much of the argument in that case was founded on the rules of international law which had evolved about two subjects concerning the territorial sea: the authority of the coastal state over that area, and the use which that state and the ships and nationals of other states might make of it. First, it was recognised that, by international law, every vessel has a right of innocent passage through the territorial sea[38]. Secondly, it was acknowledged that, by international law, merchant vessels at sea are, generally, subject only to the law of the state to which they belong[39].

30 The Commonwealth contention that the common law does not apply beyond the low-water mark sometimes appeared, in the course of argument, to go so far as contending that the courts could give no remedies in respect of transactions or events which occurred in that area. *Keyn* does not warrant such a general or absolute proposition. *Keyn* established that, absent statutory authority, a criminal court cannot punish as criminal, conduct which happens beyond the low-water mark on vessels flying the flag of a foreign state. The same proposition, with respect to the Colonial Courts of Admiralty, previously had been established in New Zealand by *R v Dodd*[40]. That conclusion owed much to the history of the criminal law and trial by jury and is a conclusion about the reach of the *criminal* law. As it happens, legislative action to reverse the effect of the decision in *Keyn* was soon taken[41] but this may be put aside as irrelevant to the Commonwealth's contention about the *common* law.

31 In a civil action brought by the legal personal representative of another victim of the collision against the owners of the *Franconia* for damages under *Lord Campbell's Act*, *Harris v Owners of Franconia*[42], it was held that the rules

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**38** *Keyn* (1876) 2 Ex D 63 at 70 per Sir R Phillimore. See also *The "Twee Gebroeders"* (1801) 3 C Rob 336 at 352 [165 ER 485 at 491]; *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192 [11 ER 1305]; *Foreman v Free Fishers and Dredgers of Whitstable* (1869) LR 4 HL 266.

**39** *Keyn* (1876) 2 Ex D 63 at 70-71 per Sir R Phillimore.

**40** (1874) 2 NZCA 598.

**41** *Territorial Waters Jurisdiction Act* 1878 (Imp).

**42** (1877) 2 CPD 173.

of court did not authorise service of the proceedings out of the jurisdiction where the cause of action arose outside the jurisdiction. Lord Coleridge CJ said[43]:

> "The ratio decidendi of that judgment [*Keyn*] is, that, for the purpose of jurisdiction (except where under special circumstances and in special Acts parliament has thought fit to extend it), the territory of England and the sovereignty of the Queen stops at low-water mark."

Yet, as the argument in *Harris* and the judgments of Lord Coleridge CJ and Grove J acknowledged, there was no doubt that Admiralty jurisdiction (for example, under the *Merchant Shipping Act* 1854 (Imp), s 527) extended so far. It being clear in *Harris* that the action which had been brought was not a claim in rem against the ship under that provision of the *Merchant Shipping Act*, the only question was whether there was some relevant statutory basis for service of the originating process out of the jurisdiction. There is no reason to think that, had the originating process been served on the defendant *within* the jurisdiction, the action could not have proceeded in the ordinary way, notwithstanding that the events which gave rise to it had occurred in the territorial waters[44].

32 It was noted in *Lipohar*[45] that the distinction between local and transitory proceedings, which can be seen as lying behind the attitude of the common law courts to crimes committed outside the jurisdiction, underpinned the (often criticised) decision of the House of Lords in *British South Africa Co v Companhia de Moçambique*[46]. It was there held that the Supreme Court of Judicature of England and Wales had no jurisdiction to entertain an action to recover damages for trespass to foreign land[47].

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**43** (1877) 2 CPD 173 at 177. See also *Blackpool Pier Co v Fylde Union* (1877) 36 LT (NS) 251.

**44** cf *Fennings v Lord Grenville* (1808) 1 Taunt 241 [127 ER 825], an action for trover for a whale caught off the Galapagos islands which was held to fail on the merits, not for want of any applicable law.

**45** (1999) 200 CLR 485 at 517 [81] per Gaudron, Gummow and Hayne JJ.

**46** [1893] AC 602.

**47** See also *Potter v Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479 at 496-497 per Griffith CJ; *Norbert Steinhardt and Son Ltd v Meth* (1961) 105 CLR 440; *Potter v Broken Hill Proprietary Co Ltd* [1905] VLR 612 at 640 per Hodges J; *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30; *Corvisy v Corvisy* [1982] 2 NSWLR 557; *Dagi v Broken Hill Proprietary Co Ltd [No 2]* [1997] 1 VR

(Footnote continues on next page)

33 *Moçambique* established that the civil courts will not entertain (at least some) actions in respect of immovables in a foreign country[48] or "a dispute involving the title to foreign land"[49]. That principle can be seen to derive from the fact that the rights with which actions of the kind embraced by the principle are concerned, are rights which arise under the law of the place where the land, or other immovable property, is situated. It is a principle which, whatever its merits may be, represents a resolution of the problems thought to result from the intersection between what can be seen as two competing systems of law – the law of the place in which the land is situated and the law of the forum. In *Moçambique*, Lord Herschell LC pointed to what he saw to be great inconveniences that might follow if the courts of England and Wales were to exercise jurisdiction in claims concerning the title to foreign land[50]. These arguments may or may not be thought to warrant the conclusion reached in that and later cases. For present purposes, however, the critical point to recognise is that the rule grew out of difficulties which it was thought would follow if one system of law (the law of the forum) did not leave a dispute about title to foreign land to be resolved entirely by another, competing system (the law of the place).

34 If the contention that the common law does not "extend", "apply", or "operate" beyond low-water mark is intended to mean, or imply, that, absent statute, no rights deriving from or relating to events occurring or places lying beyond low-water mark can be enforced in Australian courts, it is altogether too large a proposition and it is wrong. The territorial sea is not and never has been a lawless province[51]. The courts of England and Wales and the courts of Australia have long since given effect to rights and duties which derive from transactions and events which have occurred in that area. The very existence of the body of Admiralty law denies the generality of a proposition understood in the way we have identified. It suggests at least that the reference to "common law", in the

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428; *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382; *Tyburn Productions Ltd v Conan Doyle* [1991] Ch 75.

**48** *In re Trepca Mines Ltd* [1960] 1 WLR 1273 at 1277 per Hodson LJ; [1960] 3 All ER 304 at 306.

**49** *Rediffusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136 at 1151.

**50** [1893] AC 602 at 625-626.

**51** *Post Office v Estuary Radio Ltd* [1968] 2 QB 740 at 754 per Diplock LJ.

proposition about its reach, is to be understood as restricted to that part of the unwritten law which was administered in the common law courts. Reference to the history of the jurisdictional conflicts between the courts of Admiralty and the common law courts[52] reinforces that view, especially when it is recalled that from 1536[53] the criminal jurisdiction of the Admiralty in relation to crimes at sea was exercised by the judges of the common law courts as commissioners of oyer and terminer[54].

35 Even the more limited proposition, that so much of the unwritten law as was administered in the common law courts does not extend beyond low-water mark, may well be too broad[55]. In personal actions, the first question for the court is whether it has jurisdiction over the defendant. If it does, the question which then must be addressed is what are the rights and duties of the parties. If there are factors which connect parties or events to some other legal system, there may be questions of choice of law which fall to be answered by application of the rules and principles of conflict of laws. But the fact (if it be the fact) that the events occurred outside Australia does not of itself, and without more, bar relief. Questions may intrude in actions about status or in actions in rem of a kind which do not arise in personal actions. As *Keyn* demonstrates, other questions do intrude in criminal matters. But, importantly, the *Moçambique* principle demonstrates that the common law does not have only a limited territorial operation. If the common law was limited in its operation to events occurring and places lying within the area bounded by the low-water mark, there would be no occasion to distinguish between local and transitory actions.

36 The Commonwealth's argument about the limited territorial operation of the common law was directed in aid of the proposition that the existence of rights in relation to land is sustained by the law of the place where the land is located (the lex situs). It was said that, because the common law did not apply beyond the low-water mark, there was no lex situs and there was, therefore, no law which could "recognise" native title rights and interests.

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**52** Mears, "The History of the Admiralty Jurisdiction", in *Select Essays in Anglo-American Legal History*, (1908), vol 2 at 312-364; Prichard and Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, Selden Society, (1992), vol 108 at xlvii-lviii.

**53** 28 Hen 8 c 15.

**54** Holdsworth, *A History of English Law*, 7th ed (1956), vol 1 at 550-552.

**55** cf *De Lovio v Boit* 7 Fed Cas 418 (1815).

37 There is no doubt, as s 223 of the Act makes clear, that the native title rights and interests with which the Act deals, exist "in relation to" land or waters. It by no means follows, however, that it is necessary or appropriate to apply the taxonomy of the common law rules of choice of laws in deciding whether the rights and interests in issue are "recognised" by the common law or, if it is, that even according to that taxonomy, the rights and interests which now are in issue are properly to be classed, in every case, as immovables[56]. It is inappropriate to see the present issues as engaging the common law rules of choice of laws because the Act requires no resolution of any conflict or competition between two systems of law[57]. The Act presupposes that, so far as concerns native title rights and interests, the two systems – the traditional law acknowledged and traditional customs observed by the relevant peoples, and the common law – can and will operate together. Indeed, not only does it presuppose that this will happen, it requires that result.

38 No less importantly, it is always necessary to recall that the rights and interests to which the Act gives effect are not rights and interests that are *derived* from the common law. If it were relevant to examine the present issues by reference to principles of choice of laws, it would not be right to conclude that there is not, or was not at whatever may be the relevant time, any law of the place which is the subject of the claimants' claim. Even if it is right to say that the common law has, or had, no application in that area, that says nothing about whether traditional law and custom has or had application. It must be remembered that the unchallenged finding of fact is that traditional laws and customs were and are observed in relation to the claimed area. If it is necessary to identify the lex situs, there is no basis for ignoring this finding. The question would then become whether the common law will give some effect (some "recognition") to that traditional law and custom. That question is not answered by the bare assertion that there is no lex situs or that the only possible candidate for consideration is the common law.

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**56** *Lewis v Balshaw* (1935) 54 CLR 188; *Livingston v Commissioner of Stamp Duties (Q)* (1960) 107 CLR 411; *Haque v Haque [No 2]* (1965) 114 CLR 98; *In re Hoyles; Row v Jagg* [1911] 1 Ch 179; *In re Berchtold; Berchtold v Capron* [1923] 1 Ch 192; *Macdonald v Macdonald* [1932] SC (HL) 79.

**57** *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1118 [43] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; 172 ALR 625 at 638.

39 It is unnecessary to explore further what is meant by the proposition that the common law does not extend beyond the low-water mark. For the reasons given earlier, a proposition in those general and unqualified terms cannot be accepted. For present purposes, however, it is necessary to consider only a narrower question – whether the common law will "recognise" native title rights and interests in respect of areas beyond the low-water mark. In examining that narrower question, it will be necessary to consider three issues: what is meant by "recognition" of native title; what is meant by the assertion of sovereignty over areas beyond the low-water mark; and how, if at all, the concept of the radical title to land intrudes into the debate. It is convenient to deal first with the question of "recognition", then with the role of radical title, and only then turn to what is meant by the assertion of sovereignty.

"Recognition" of native title rights and interests

40 The requirement in s 223(1)(c), that the native title rights and interests which are claimed are "recognised by the common law of Australia", is not elucidated elsewhere in the Act. It is useful to approach the requirement from two opposite poles: the negative, when will the common law *not* recognise such rights and interests; and the positive, when *will* the common law recognise them? At the risk of some over-simplification, the fundamental question which lies behind both of these approaches is a question about inconsistency between the asserted rights and the common law.

41 In *Mabo v Queensland [No 2]*, the Court examined the consequences of the acts of State which established the colonies in Australia. (We need not examine what constituted each of the relevant acts of State[58].) All members of the Court accepted that on settlement of an Australian colony the settlers brought the common law with them[59]. The members of the Court differed in some respects about how the common law and the claimed native title rights and interests interacted. Central to the consideration of that issue by a majority of the members of the Court, however, was the conclusion that at common law the native title rights and interests survived acquisition of sovereignty and that an express act of recognition by the new Sovereign was not necessary to their being

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**58** (1992) 175 CLR 1 at 95-96 per Deane and Gaudron JJ.

**59** (1992) 175 CLR 1 at 34-38 per Brennan J (with whom Mason CJ and McHugh J agreed), 79-80 per Deane and Gaudron JJ, 122 per Dawson J, 206 per Toohey J.

recognised[60]. The members of the majority may be thought to have differed in some respects about how the native title rights and interests could be extinguished and, if they were, what would be the consequences of extinguishment[61] but those differences can now be put aside. What is important to notice is that the common law which the settlers brought with them was, as Deane and Gaudron JJ said[62], "only so much of it … as was 'reasonably applicable to the circumstances of the Colony'[63]". That rule was itself a common law rule[64] and the Crown had no prerogative right to override the common law by executive act[65]. As was said in the joint judgment in *Western Australia v The Commonwealth* (*Native Title Act Case*)[66]:

> "At common law, a mere change in sovereignty over a territory does not extinguish pre-existing rights and interests in land in that territory[67]. Although an acquiring Sovereign can extinguish such rights and interests

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**60** (1992) 175 CLR 1 at 55-57 per Brennan J (Mason CJ and McHugh J agreeing), 97-99 per Deane and Gaudron JJ, 182-183 per Toohey J; *Native Title Act Case* (1995) 183 CLR 373 at 422 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

**61** (1992) 175 CLR 1 at 111-112 per Deane and Gaudron JJ, 204 per Toohey J.

**62** (1992) 175 CLR 1 at 79.

**63** *Cooper v Stuart* (1889) 14 App Cas 286 at 291; see also *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 esp at 634; Blackstone, *Commentaries*, 17th ed (1830), vol 1, par 107.

**64** *Mabo [No 2]* (1992) 175 CLR 1 at 79 per Deane and Gaudron JJ; *Sammut v Strickland* [1938] AC 678 at 701; Blackstone, *Commentaries*, 17th ed (1830), vol 1, par 107.

**65** *Mabo [No 2]* (1992) 175 CLR 1 at 80 per Deane and Gaudron JJ; *Sammut v Strickland* [1938] AC 678 at 701.

**66** (1995) 183 CLR 373 at 422-423.

**67** See *Mabo [No 2]* (1992) 175 CLR 1 at 54-57 per Brennan J (Mason CJ and McHugh J agreeing), 82 per Deane and Gaudron JJ, 182 per Toohey J and authorities there cited.

> in the course of the act of State acquiring the territory[68], the presumption in the case of the Crown is that no extinguishment is intended[69]. That presumption is applicable by the municipal courts of this country in determining whether the acquisition of the several parts of Australia by the British Crown extinguished the antecedent title of the Aboriginal inhabitants[70]."

42 Thus the question about continued recognition of native title rights requires consideration of whether and how the common law and the relevant native title rights and interests could co-exist. If the two are inconsistent, it was accepted in *Mabo [No 2]* that the common law would prevail. (The central issue for debate in *Mabo [No 2]* was whether there was an inconsistency.) If, as was held in *Mabo [No 2]* in relation to rights of the kind then in issue, there is no inconsistency, the common law will "recognise" those rights. That is, it will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them[71]. It will "recognise" the rights by giving effect to those rights and interests owing their origin to traditional laws and customs which can continue to co-exist with the common law the settlers brought.

43 With these considerations in mind, we turn to look at the role of "radical title" in the present debate.

Radical title

44 We have already set out part of Viscount Haldane's advice, on behalf of the Privy Council, in *Amodu Tijani v Secretary, Southern Nigeria*[72]. There his Lordship spoke of a "very usual form of native title [being] that of a usufructuary

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**68** *Mabo [No 2]* (1992) 175 CLR 1 at 95 per Deane and Gaudron JJ; cf at 193-194 per Toohey J.

**69** *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876 at 880; [1957] 2 All ER 785 at 788.

**70** *Mabo [No 2]* (1992) 175 CLR 1 at 57 per Brennan J (Mason CJ and McHugh J agreeing), 82-83 per Deane and Gaudron JJ, 183-184 per Toohey J.

**71** (1992) 175 CLR 1 at 61 per Brennan J (Mason CJ and McHugh J agreeing). See also at 88-90 per Deane and Gaudron JJ.

**72** [1921] 2 AC 399 at 403.

right, which is a mere *qualification of or burden on the radical or final title* of the Sovereign where that exists" (emphasis added) and of the title of the Sovereign in such a case being "a pure legal estate, to which beneficial rights may or may not be attached". As his Lordship pointed out, this analysis derived from earlier cases about Indian title in Canada, particularly *St Catherine's Milling and Lumber Company v The Queen*[73] and *Attorney-General for Quebec v Attorney-General for Canada*[74].

45 The *St Catherine's Milling Case* arose out of a treaty between commissioners appointed by the Government of the Dominion of Canada and representatives of a tribe of Ojibbeway Indians by which the tribe released and surrendered to the Government of the Dominion the whole right and title of the Indian inhabitants to certain land. The treaty stipulated that the Indians were "to have right to pursue their avocations of hunting and fishing throughout the surrendered territory"[75] subject to some exceptions that do not now matter. The Privy Council considered the nature of the rights which the Indians had held before the making of the treaty and concluded[76] that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign". Lord Watson, who gave the advice of the Judicial Committee, said that[77] "there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished". A similar analysis was adopted in *Attorney-General for Quebec v Attorney-General for Canada*[78].

46 This method of analysis was applied in *Mabo [No 2]*. As Brennan J said[79]:

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**73** (1888) 14 App Cas 46.

**74** [1921] 1 AC 401.

**75** (1888) 14 App Cas 46 at 51-52.

**76** (1888) 14 App Cas 46 at 54.

**77** (1888) 14 App Cas 46 at 55.

**78** [1921] 1 AC 401.

**79** (1992) 175 CLR 1 at 69 (Mason CJ and McHugh J agreeing).

> "On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part. … Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title."

Other members of the majority of the Court made a similar analysis[80].

47 The analysis reveals how native title to land survived the Crown's acquisition of sovereignty over the land. It does so by revealing that when the Crown acquired sovereignty over land it did not acquire beneficial ownership of that land in the same way as a subject may, by grant from the Crown, acquire beneficial ownership. What the Crown acquired was a "radical title" to land, a "substantial and paramount estate, underlying the [native] title"[81]. The native title rights and interests could co-exist with that radical title and, although inherently fragile, could, so long as they existed, be seen as a burden on that radical title.

48 Again, however, it is of the very first importance to bear steadily in mind that native title rights and interests are not created by and do not derive from the common law. The reference to radical title is, therefore, not a necessary pre-requisite to the conclusion that native title rights and interests *exist*. The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*. To adopt the words of Brennan J in *Mabo [No 2]*[82], it explains *how* "[n]ative title to land survived the Crown's acquisition of sovereignty" over a particular part of Australia.

49 It is, however, not right to say, as the Commonwealth contended, that native title rights and interests cannot exist without the Crown having radical title to the area in respect of which the rights and interests are claimed. This contention gives the legal concept of radical title a controlling role. The concept

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**80** (1992) 175 CLR 1 at 80-83 per Deane and Gaudron JJ, 180-184 per Toohey J.

**81** *St Catherine's Milling and Lumber Company v The Queen* (1888) 14 App Cas 46 at 55.

**82** (1992) 175 CLR 1 at 69; see also at 48, 50 and *Wik Peoples v Queensland* (1996) 187 CLR 1 at 186 per Gummow J, 234 per Kirby J.

does not have such a role. It is a tool of legal analysis which is important in identifying that the Crown's rights and interests in relation to land can co-exist with native title rights and interests. But it is no more than a tool of analysis which reveals the nature of the rights and interests which the Crown obtained on its assertion of sovereignty over land.

50 It by no means follows that it is essential, or even appropriate, to use the same tool in analysing the altogether different rights and interests which arose from the assertion of sovereignty over the territorial sea. In particular, it is wrong to argue from an absence of radical title in the sea or sea-bed to the conclusion that the sovereign rights and interests asserted over the territorial sea are necessarily inconsistent with the continued existence of native title rights and interests. The inquiry must begin by examining what are the sovereign rights and interests which were and are asserted over the territorial sea. Only then can it be seen whether those rights and interests are inconsistent with the native title rights and interests which now are claimed.

51 In identifying those sovereign rights and interests it is, of course, necessary to pay due regard to some matters of history. Nevertheless, care must be exercised in looking at the very earliest development of the understanding of sovereign authority over the sea. First, as Stephen points out in his *History of the Criminal Law of England*[83], the critical question for a municipal court is what reach the Sovereign claims for *itself*, not what reach other Sovereigns may concede to it. Secondly, the earliest understandings of sovereign authority over the sea grew out of the then state of legal development, and the absence of any clear distinction between sovereignty and ownership. Those earliest understandings are rightly described by an American writer, writing at the start of the 20th century, who said[84]:

> "As stated by Pollock and Maitland there was no thought which could separate the lands of the nation from the lands of the King; in fact there were no lands belonging to the nation in such a sense that the subjects could assert a common right in it[85]. The distinction between private rights

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**83** (1883), vol 2 at 36-37.

**84** Farnham, *The Law of Waters and Water Rights*, (1904), vol 1 at 166-167.

**85** Pollock and Maitland, *The History of English Law*, (1895), vol 1 at 502, 505; Woolrych, *A Treatise on the Law of Waters, and of Sewers*, (1830) at 448.

> and governmental powers was faintly perceived, if perceived at all[86]. Even the most learned had the greatest difficulty in distinguishing between property rights and political power, between personal relationships and the magistracy to which the land was subject[87]. Since the governmental power was in the King, he assumed, without objection, the right to do as he pleased with the land to which his governmental power extended. … In process of time the representative character of the Crown was perceived, and it was regarded as holding its representative or governmental rights as something pertaining to it solely for the benefit of all its subjects. … This principle, however, did not become established until the titles throughout the Kingdom had for the most part been in private possession for many years."

Sovereignty and the territorial sea

52 It is neither necessary nor appropriate to attempt some comprehensive description, or definition, of the powers, rights and interests which Australia claims, or the Imperial authorities claimed, in respect of the territorial sea. Inquiries about those powers, rights and interests are usually expressed in terms of "sovereignty" but, as long has been recognised, that is a notoriously difficult concept which is applied in many, very different contexts[88]. In the present context it is necessary to distinguish between external or international sovereignty and internal sovereignty. As Jacobs J said in the *Seas and Submerged Lands Case*[89]:

> "[S]overeignty under the law of nations is a power and right, recognized or effectively asserted in respect of a defined part of the globe, to govern in respect of that part to the exclusion of nations or states or peoples occupying other parts of the globe. External sovereignty, so called, is not mere recognition by other powers but is a reflection, a response to, the sovereignty exercised within the part of the globe. Looked at from the outside, the sovereignty within that part of the globe, assuming it to be full

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**86** Maitland, *Domesday Book and Beyond*, (1897) at 170.

**87** Maitland, *Domesday Book and Beyond*, (1897) at 101, 240.

**88** *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 479 per Jacobs J; H W R Wade, "The Basis of Legal Sovereignty", (1955) *Cambridge Law Journal* 172.

**89** (1975) 135 CLR 337 at 479-480.

> sovereignty and not the limited sovereignty which may exist in the case of protectorates and the like, is indivisible because foreign sovereigns are not concerned with the manner in which a sovereign state may under the laws of that sovereign state be required to exercise its powers or with the fact that the right to exercise those powers which constitute sovereignty may be divided vertically or horizontally in constitutional structure within the State. Therefore, although a sovereignty among nations may thus be indivisible, the internal sovereignty may be divided under the form of government which exists. However, that does not mean that external sovereignty and internal sovereignty are in kind different. Sovereignty in each case has the same content, the right and power to govern that part of the globe."

53 Before federation the boundaries of the colonies ended at low-water mark[90]. Any assertion of sovereignty, before federation, over the area beyond low-water mark was made, therefore, by the Imperial Crown, not the colonies[91].

54 In 1824, Great Britain acquired sovereignty over the land mass which now constitutes the Northern Territory. When it did so, it acquired a territorial sea extending three nautical miles from the low-water mark[92]. It may be accepted that, as the Commonwealth submitted, the assertion of sovereignty by Great Britain in 1824 over the part of the claimed area that then lay within the territorial sea did not amount to an assertion of ownership to or radical title in respect of the sea-bed or superjacent sea in that area, whether as a matter of international law or of municipal law.

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**90** *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 371 per Barwick CJ, 378 per McTiernan J, 467-468 per Mason J, 484 per Jacobs J.

**91** It may be noted, however, that the Federal Council of Australasia passed two Acts dealing with fishing for pearl shell or beche-de-mer in waters beyond the territorial jurisdiction of the colonies of Queensland and Western Australia. See *The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act of* 1888 and *The Western Australian Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act of* 1889 which were continued in force by covering cl 7 of the Constitution until their repeal by the *Pearl Fisheries Act* 1952 (Cth). The Queensland Act applied to boats and ships of any nationality; the Western Australian Act applied only to British ships and boats attached to British ships.

**92** See, for example, *"Twee Gebroeders"* (1800) 3 C Rob 162 [165 ER 422]; *The "Leda"* (1856) Swab 40 [166 ER 1007]; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 354.

55 The decision in *Keyn*, that the sea within three nautical miles of the coast, although internationally recognised as territorial sea subject to British sovereignty, is not within the territory of England, denies that the sovereignty claimed amounted to a claim that the area was "owned" by the Crown. As a matter of municipal law, there is no doubt that the Imperial authorities claimed the right to legislate in respect of the area of the territorial sea of both Britain and its colonies. The *Territorial Waters Jurisdiction Act* 1878 (Imp) exemplifies that claim. It may be accepted, therefore, that the claimed authority over the area extended, if thought appropriate, to a power to legislate for the grant of ownership or lesser rights in respect of the area, but no such legislation was enacted and no grants of ownership were made.

56 At one time, and perhaps from time to time, the Crown of Great Britain claimed very extensive rights in respect of wide areas of sea. Some of those claims were noted by Lord Cockburn CJ in his judgment in *Keyn*[93]. But as was also noted by his Lordship[94]:

> "[T]he claim to such sovereignty, *at all times unfounded*, has long since been abandoned. No one would now dream of asserting that the sovereign of these realms has any greater right over the surrounding seas [that is, the three mile territorial seas] than the sovereigns on the opposite shores …" (emphasis added)

57 As a matter of international law, the right of innocent passage is inconsistent with any international recognition of a right of ownership by the coastal state of territorial waters. The nature and extent of the rights of the coastal state over its territorial sea was, as a matter of international law, regarded by Lord Cockburn CJ in *Keyn*[95] to be still then a matter of controversy and it was thought in 1913 to remain so[96]. Yet as early as 1801 Sir William Scott (later Lord Stowell) recognised in *The "Twee Gebroeders"*[97] that "the act of inoffensively passing over [territorial portions of the sea] … is not considered as

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**93** (1876) 2 Ex D 63 at 174-176, 195-196, 211.

**94** (1876) 2 Ex D 63 at 175.

**95** (1876) 2 Ex D 63 at 191-193.

**96** *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 174-175.

**97** (1801) 3 C Rob 336 at 352 [165 ER 485 at 491].

any violation of territory belonging to a neutral state – permission is not usually required".

58 There may, therefore, be some dispute about when the right of innocent passage came to be regarded as forming part of customary international law. In particular, there may be some question about whether statements made by writers of the 17th and 18th centuries are to be taken as recognising the right, and the better view may be that in 1824 Great Britain may not have recognised such a right[98]. However this may be, what is important for present purposes is that it is not suggested by the Commonwealth, or for that matter by other parties or interveners, that the assertion in 1824 by Great Britain of sovereignty over that part of the area now in question which lies between low-water mark and three nautical miles to sea was on terms inconsistent with what (if not then, at least later) was recognised as the right of innocent passage. It may be, as Jacobs J said in the *Seas and Submerged Lands Case*[99], that the Imperial Crown, by virtue of its prerogative, could have sought in 1824, or at some later time, to deny innocent passage to foreign ships in the area and that, if it had done so, the legality of the assertion would not have been cognisable in any municipal court. It was not suggested, however, that this had occurred and the possibility may be put to one side.

59 What is clear, then, is that at no time before federation did the Imperial authorities assert any claim of ownership to the territorial seas or sea-bed. Great Britain contended that it had sovereignty over the area which the then understanding of international law identified as the territorial sea and that claim was generally conceded by the international community. As was recognised in the *Seas and Submerged Lands Case*, the acquisition of sovereignty over the territorial sea can be understood as occurring by operation of *international* law because Great Britain was the internationally recognised nation holding sovereignty over the adjoining land mass[100].

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**98** O'Connell, *The International Law of the Sea*, (1982), vol 1 at 260.

**99** (1975) 135 CLR 337 at 493.

**100** (1975) 135 CLR 337 at 361, 362-363, 374 per Barwick CJ, 468 per Mason J, 487, 493, 494 per Jacobs J. See also *Bonser v La Macchia* (1969) 122 CLR 177 at 186-187 per Barwick CJ, 221-222 per Windeyer J.

60 The acquisition of sovereignty can also be understood, from the point of view of municipal law, as a claim made in exercise of the prerogative[101]. The prerogative rights of the Crown in relation to the territorial sea were limited, however, in some important respects. The most relevant of those limitations were the public rights of fishing in the sea and in tidal waters[102] and the public right of navigation. So far as the high seas beyond tidal waters are concerned, both rights might be seen as owing their origin to custom since time immemorial[103]. The public right to fish in tidal waters might be seen as having been preserved by the Magna Carta of John[104]. Whatever may be the origins of those rights, no party or intervener disputed their existence and no party or intervener submitted that the sovereign rights asserted in 1824 did not acknowledge the continuation of those rights.

61 Sufficient has been said about the nature of the sovereignty which was claimed in 1824 to show that at that time (subject to one important qualification) there was no *necessary* inconsistency between the rights and interests asserted by Imperial authorities and the continued recognition of native title rights and interests. The qualification is required because the rights and interests asserted at sovereignty carried with them the recognition of public rights of navigation and fishing and, perhaps, the concession of an international right of innocent passage. Those rights were necessarily inconsistent with the continued existence of any right under Aboriginal law or custom to preclude the exercise of those rights. It will be necessary to return to this subject in connection with the claimants' appeal. Other than in this respect, however, there was no *necessary* inconsistency and there is no need to resort to notions of radical title to explain why that is so. It is revealed by consideration of what is meant by the claim of sovereignty.

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**101** *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 487-490 per Jacobs J.

**102** *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 489 per Jacobs J; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 329-330 per Brennan J; *Malcomson v O'Dea* (1863) 10 HLC 593 [11 ER 1155]; *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 177 per Lord Blackburn; *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 170-171.

**103** *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 170.

**104** *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 489 per Jacobs J.

The offshore legal regime

62 There have been many changes in the legal regime that has applied to the area the subject of the claim. Of those changes, it is necessary to say little except in relation to the legislation effecting the offshore constitutional settlement.

63 At federation, the territorial sea off the coast of Australia, recognised by international law, extended three nautical miles from low-water mark[105]. In international law, waters on the landward side of the baseline of the territorial sea form part of Australia's internal waters[106]. For much of the 20th century it was thought that the States had some sovereign or proprietary rights in respect of the territorial sea – the area from low-water mark to three nautical miles out to sea. In the *Seas and Submerged Lands Case*[107] it was held, however, that the boundaries of the former colonies ended at low-water mark and that the colonies had no sovereign or proprietary rights in respect of the territorial sea. Thereafter, the Commonwealth and States arrived at the offshore constitutional settlement that was reflected in, among other Acts, the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) ("the NT Powers Act") and the NT Title Act.

64 By s 5(a) of the NT Powers Act the legislative powers of the Northern Territory Legislative Assembly were extended to the making of

> "all such laws of the Territory as could be made by virtue of those powers if the coastal waters of the Territory, as extending from time to time, were within the limits of the Territory".

By s 4(1) of the NT Title Act (which commenced operation more than 12 months after the NT Powers Act[108]) it was provided that:

> "By force of this Act, but subject to this Act, there are vested in the Territory, upon the date of commencement of this Act, the *same right and title to the property in the sea-bed beneath the coastal waters* of the

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**105** *Bonser v La Macchia* (1969) 122 CLR 177 at 190-192 per Barwick CJ, 201-202 per Kitto J, 209 per Menzies J, 213 per Windeyer J.

**106** Convention on the Territorial Sea and the Contiguous Zone, Art 8.

**107** (1975) 135 CLR 337.

**108** The NT Powers Act commenced operation on 1 January 1982 and the NT Title Act commenced on 14 February 1983.

> Territory, as extending on that date, and *the same rights in respect of the space* (including space occupied by water) *above that sea-bed, as would belong to the Territory if that sea-bed were the sea-bed beneath waters of the sea within the limits of the Territory*." (emphasis added)

Similar legislation was passed with respect to the States[109] and was "designed largely to return to the States the jurisdiction and proprietary rights and title which they had previously believed themselves to have over and in the territorial sea and underlying seabed"[110]. Although the Northern Territory stood in a position different from the States, the terms of the offshore constitutional settlement were extended to it.

65 In September 1985, the *Off-shore Waters (Application of Territory Laws) Act* came into operation. That Act provided that "the laws of the Territory" (which included present and future laws in force in the Territory, whether written or unwritten and as in force from time to time[111]) "have effect in and in relation to the coastal waters of the Territory"[112]. Thereafter, Territory law has applied in the area of the coastal waters of the Territory.

66 In 1990, by Proclamation pursuant to s 7 of the *Seas and Submerged Lands Act*, Australia extended the limit of its territorial sea from three nautical miles to 12 nautical miles. The baselines from which that territorial sea is drawn were proclaimed in February 1983 and included some straight baselines in the area the subject of the claimants' claim. It follows that the area of territorial sea claimed by Australia has changed since Great Britain first acquired the territorial sea in the area in 1824. First, there was the extension that followed from the adoption of straight baselines, then the extension from three nautical miles to 12 nautical miles. As was pointed out earlier, however, all of the claimed area now lies within Australia's territorial sea. Part of the area lies within the territorial limits of the Northern Territory, although on the evidence before him

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**109** *Coastal Waters (State Powers) Act* 1980 (Cth) and *Coastal Waters (State Title) Act* 1980 (Cth).

**110** *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 358.

**111** *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT), s 2(1).

**112** s 3(1)(a).

the primary judge was unable to define precisely the extent of the waters within those limits[113].

67 At or after federation, Australia came to take its place in international affairs and its links with the British Empire changed and dissolved[114]. Those changes did not affect the nature of the sovereignty that was exercised over the territorial sea. From time to time, colonial parliaments, and later the federal Parliament, passed laws regulating various activities in that area. It is not necessary to notice the content of those laws beyond noticing that some laws, like the *Petroleum (Submerged Lands) Act* 1967 (Cth), provide for the granting of very extensive rights in relation to areas of the sea or sea-bed[115]. The enactment of laws regulating activities in the area constituted the assertion of the right to regulate what was done there but it was not submitted that these acts served to extinguish a native title that had existed until then. As is apparent from what has been said, the submission was put at the higher level of contending that native title could not exist in the offshore area.

68 The *Seas and Submerged Lands Act* asserted sovereignty over the territorial sea and the bed and subsoil of the territorial sea[116] and sovereign rights in respect of the continental shelf for the purpose of exploring it and exploiting its natural resources[117]. The former of these assertions was not different in any presently material respect from the sovereignty which was asserted in 1824. The fact that it reflected settled principles of international law found in the Convention on the Territorial Sea and the Contiguous Zone neither adds to nor detracts from that proposition.

69 Some more detailed attention, however, must be paid to the NT Title and NT Powers Acts. As has already been noted, by the NT Powers Act the Territory Legislative Assembly was given power to make all such laws as could be made if the territorial waters were within the limits of the Territory[118]. It was

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**113** *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533 at 558.

**114** *Sue v Hill* (1999) 199 CLR 462.

**115** cf *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

**116** s 6.

**117** s 11.

**118** s 5(a).

empowered, therefore, to enact the *Off-shore Waters (Application of Territory Laws) Act* 1985. The consequence of the enactment of the *Off-shore Waters (Application of Territory Laws) Act* was no more than to apply Territory laws, including unwritten laws, in the area. It was not submitted that this extinguished, or in any way precluded recognition of, native title rights and interests. Chief emphasis was given to the NT Title Act which came into force *after* the NT Powers Act. Again, as has been noted, by that Act "the same right and title to the property in the sea-bed beneath the coastal waters … and the same rights in respect of the space (including space occupied by water) above that sea-bed" was vested in the Territory "as would belong to the Territory if that sea-bed were the sea-bed beneath waters of the sea within the limits of the Territory"[119].

70 It is unnecessary to decide what was the right and title that was vested in the Territory. If it is appropriate to speak of that right and title in the language of the real property lawyer, the right and title thus vested in the Territory was no more than a radical title; it was not full ownership of the sea-bed or space above it. (We need not and do not decide whether it is appropriate to adopt such terms as radical title in this context.) There are several reasons why the right and title that was vested does not amount to full ownership. First, the right and title was vested by an Act of the Parliament which was itself an exercise of the sovereignty which had been asserted by the *Seas and Submerged Lands Act* and earlier by Acts of the Imperial and later the federal executive. It would be inconsistent with the public rights to fish and to navigate that were recognised as qualifying those sovereign rights, for purposes of municipal law, to treat the right and title vested as absolute and unqualified ownership. Further, it would be inconsistent with the international obligations which Australia had undertaken in the Convention on the Territorial Sea and the Contiguous Zone[120] to afford innocent passage to ships of all States through the territorial sea to vest absolute and unqualified ownership in the area in the Territory.

71 Secondly, as the NT Title Act makes plain, the right and title which was vested in the Territory was identified as the same right and title the Territory had over the sea-bed beneath waters of the sea within the limits of the Territory. It was not submitted that the right and title to areas of the latter kind was any greater than radical title to land. It is unnecessary to stay to consider whether it is less than a radical title. If the title thus vested is not larger than a radical title,

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**119** s 4(1).

**120** Section III (Arts 14-17).

that title is not inconsistent with the continued existence of native title rights and interests.

72 Finally, s 4(2) of the NT Title Act expressly made the right and title vested in the Territory subject to "any right or title to the property in the sea-bed … of any other person … subsisting immediately before the date of commencement" of the NT Title Act. Any native title rights and interests in relation to the sea-bed that then existed were, therefore, expressly preserved.

73 Thus far we have dealt with the legal regime that applied to the territorial sea. The Commonwealth made no separate submission about the inter-tidal zone and we need say nothing more about that area.

74 As indicated earlier, the area of the territorial sea has changed over time, first by the adoption in 1983 of different baselines and then, in 1990, by the extension from three to 12 nautical miles. It follows that parts of the area the subject of the primary judge's determination lay outside what were, until those two events, the territorial waters of Australia. Australia's successive assertions of sovereignty over further areas of the sea and sea-bed leads to no different conclusion about whether the primary judge was right to make the determination he did in relation to those further areas.

75 The rights and interests that are in question have been found to be now possessed under traditional laws and customs. When Australia asserted sovereignty over those further areas, it did so in terms which are not different in any relevant way from the kind of assertion that was made in 1824, except that there can be no doubt that, by the time of the later assertions of sovereignty, the right of innocent passage was conceded. Further, nothing in the then operative legislation, Territory or Commonwealth, leads to any different conclusion. The change of baselines occurred before the NT Title Act and the *Off-shore Waters (Application of Territory Laws) Act* came into operation. The extension of sovereignty to 12 nautical miles took place *after* those Acts came into force. Once it is recognised that the NT Title Act vested in the Territory a title to the sea-bed in territorial waters, and the space above it, that was no greater than a radical title, it is clear that nothing in that Act (or for that matter the *Off-shore Waters (Application of Territory Laws) Act*) effected an extinguishment of native title rights and interests.

76 None of the past or present law relating to the territorial sea is inconsistent with the common law of Australia recognising native title rights and interests in relation to the sea or the sea-bed in that area. For the reasons given earlier, the submissions that assert a territorial reach to the common law require some, perhaps considerable, qualification and may to that extent be regarded as flawed.

Even if that were not so, however, questions about the territorial reach of the common law distract attention from the relevant statutory requirements. The requirement, that the native title rights and interests are recognised by the common law, requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom. In the present case, that examination for inconsistency requires consideration of the effect of the various assertions of sovereignty over the area the subject of the claim. Examination reveals no inconsistency with rights and interests of the kind that have been found to exist, but does reveal an inconsistency with the continued existence of any exclusive rights and interests of the kind that were claimed. That being so, the common law will recognise rights and interests which are of the kind the subject of the determination in this matter and it will do so by affording remedies for their enforcement and protection.

The Commonwealth's challenge to a finding of fact

77 The Commonwealth submitted that there was no basis in the evidence for the primary judge's finding that the rights claimed by the claimants continued to exist in the far north-east and eastern parts of the claimed area. It was further submitted that the Full Court erred in concluding that it was open to the primary judge to make findings on "generalised" evidence.

78 The finding which the Commonwealth challenges is a finding of fact and it is a finding which the Full Court concluded should not be disturbed. The Commonwealth's challenge to the finding raises no point of general principle, only a question about the sufficiency of evidence. The finding which the primary judge made must not be misunderstood. As he pointed out in his reasons, some parts of the boundary of the claimed area had been fixed arbitrarily, in particular the western boundary of the claimed area, and although both the eastern boundary and part of the northern boundary were "a reasonable representation"[121] of the limit to which the sea in the area would have been used, the rest of the northern boundary was fixed arbitrarily. Thus, the question for the trial judge was whether the area claimed, defined by those boundaries, extended beyond the area over which native title rights and interests existed. His Honour concluded (he said, as a matter of inference) "that the waters within the outer boundary of the claimed area comprise either the whole *or part* of the sea country of one or other of the several *yuwurrumus* of the Croker Island community" (emphasis

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**121** (1998) 82 FCR 533 at 575.

added)[122]. It was, therefore, a finding consistent with the existence of native title rights and interests over areas lying beyond the boundaries of the claimed area.

79 The finding that the primary judge made depended upon an assessment of all of the evidence that was given. If, as the Commonwealth contended, the only evidence which touched on the far north-east and eastern parts of the claimed area was the evidence of Mr Wardaga, a senior Aboriginal spokesman, it was a finding which depended upon an understanding of that evidence, taken on New Year Island, the most north-easterly island in the claimed area, and which was accompanied by the witness pointing out the areas to which he was referring. As the majority of the Full Court rightly pointed out[123], there can be no doubt that the primary judge was in a much better position to assess this evidence than an appellate court. The Full Court was not persuaded that the primary judge erred in his conclusion. Nor are we.

80 The Commonwealth's appeal (Matter No D7) should be dismissed with costs.

The claimants' appeal

81 At trial, the claimants had contended that they were entitled to larger rights and interests than those which the primary judge later found them to have. As has been noted earlier, contrary to the claimants' submissions, the primary judge found that the claimants' native title rights and interests do not confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others.

82 In their appeal to the Full Court of the Federal Court, the claimants contended that the trial judge had erred, and they sought orders varying the determination to provide that the native title rights and interests included (among others) the right "in accordance with and subject to their traditional laws and customs, to … possess, occupy, use and enjoy the claimed area to the exclusion of all others". The Full Court rejected that contention and dismissed the claimants' appeal.

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**122** (1998) 82 FCR 533 at 575.

**123** *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171 at 234-235 [267]. See also at 315-316 [633]-[640] per Merkel J.

83 In their appeal to this Court, the claimants sought to make good a generally similar contention. Before examining the precise way in which the contention was ultimately formulated, it is necessary to refer, in a little more detail, to what was submitted and what was decided in the courts below.

The anthropologists' report

84 At the trial, the claimants tendered in evidence a report by Dr N Peterson and Dr J Devitt. The report was received in evidence without proof and without objection despite it being a document which was in part intended as evidence of historical and other facts, in part intended as evidence of expert opinions the authors held on certain subjects, and in part a document advocating the claimants' case. Although it was not suggested that the mixing of these disparate elements, without any evident delineation between them, ultimately led to any insuperable difficulty in this case, it is a practice which has obvious difficulties and dangers.

85 In that report, the authors identified the native title rights and interests which were claimed. They were described as:

> "1. Right of members of the *yuwurrumu* to be recognised as the traditional owners of the estate (which includes the sea bed, the water and all life within it), to transmit all the inherited rights, interests and duties to subsequent generations and to exclude or restrict others from entering any area of the estate.
>
> 2. Right of senior *yuwurrumu* members, to speak for and make decisions about all aspects of the estate.
>
> 3. Right of all members of the *yuwurrumu* to free access to the estate and its everyday resources in normal circumstances.
>
> 4. Right of the senior members of the *yuwurrumu* to control the use of and access to the subsistence and other resources, including the ritual resources, of the estate by all people including younger members of the *yuwurrumu* and to engage in the trade and exchange of estate resources.
>
> 5. Right of senior members of the *yuwurrumu* to receive a portion of major catches (eg turtle, dugong, crocodile or big hauls of fish) if they are coresident with the person making the catch.
>
> 6. Right of the senior *yuwurrumu* member(s) to close off areas of the estate on the death of either *yuwurrumu* members or of individuals

in important relationships with *yuwurrumu* members, and to decide when they shall be re-opened to use.

7. Right of senior *yuwurrumu* members to allocate names associated with their estate to their relatives and/or to exchange them with others in order to express, create and consolidate 'company' and other relationships.

8. Right of the senior members of the *yuwurrumu* to speak for and make decisions about the significant places in the estate and to ensure unintended harm is not caused by them, or to them.

9. Right to receive, possess and safeguard the cultural and religious knowledge associated with the estate and the right and duty to pass it on to the younger generation.

10. Right to speak for and make decisions about the estate's resources, and the use of those resources, and the right and duty to safeguard them."

Important elements of those claims included the claimed right to exclude or restrict others from entering any area of the "estate"[124], the claimed right to make decisions about all aspects of the estate, and the claimed right to control the use of and access to (and make decisions about) the subsistence and other resources of the estate.

The primary judge's judgment

86 Although not expressed as a claim to a right of exclusive possession of the claimed area, the rights just mentioned would, if established, have amounted to such a claim when taken as a whole. The primary judge rejected these contentions. He concluded that the evidence established that the community which the claimants represented had "consistently asserted, as a matter of Aboriginal law, the right to be consulted about and to make decisions concerning the use of its sea country"[125]. This claimed right to grant permission, he concluded, was limited, however, to allowing non-members of the claimant groups to use and enjoy the country, not to possess or occupy it.

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**124** "Estate" was defined by the primary judge as "the primary spatial unit in which estate groups have native title rights and interests".

**125** (1998) 82 FCR 533 at 580.

87 Further, and more importantly, his Honour found that[126]:

> "*The claim that by their traditional laws and customs the applicants enjoy exclusive possession, occupation, use and enjoyment of the waters of the claimed area is not one that is supported by the evidence*. At its highest the evidence suggests that as between themselves, the members of each *yuwurrumu* recognise, and defer to, the claims of the other *yuwurrumus*, to the extent that on occasions permission is sought before fishing, hunting or gathering on another clan's sea country and by inference, although the evidence is not strong, other Aboriginal people from country outside the claimed area probably do likewise." (emphasis added)

A little later in his reasons, after considering the effect on the claimed rights and interests of the common law public rights to navigate and to fish, the primary judge concluded[127]:

> "Quite apart from the conclusions just expressed, *the evidence does not establish the existence of a native title right in the applicant community either to the exclusive possession, occupation and use of the waters of the claimed area or to control access to those waters*. What has been established is the existence of traditional laws acknowledged, and traditional customs observed, whereby the applicant community has continuously since prior to any non-Aboriginal intervention used the waters of the claimed area for the purpose of hunting, fishing and gathering to provide for the sustenance of the members of the community and for other purposes associated with the community's ritual and spiritual obligations and practices. Members of the community have also used, and continue to use, the waters for the purpose of passage from place to place and for the preservation of their cultural and spiritual beliefs and practices. As between the several component subgroups which comprise the overall community, the traditional laws and customs of the community require that on occasions permission of the senior members of one subgroup will be required before members of another subgroup or Aboriginals from other areas enter upon to hunt, fish or gather within the waters over which the firstmentioned subgroup enjoys rights." (emphasis added)

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**126** (1998) 82 FCR 533 at 585.

**127** (1998) 82 FCR 533 at 593-594.

88 These findings that the rights claimed were not supported or established by the evidence are findings of fact. They are findings which, as the primary judge pointed out, did not depend upon the conclusions he had reached about the effect of the common law public rights to fish and to navigate in the area claimed. The conclusions about those common law public rights were seen by the primary judge as providing a separate and independent reason for rejecting the claim to rights to possess, occupy, use or enjoy the claimed area to the exclusion of all others. It will be necessary to return to that issue, but for the moment it can be put aside.

89 The findings which the primary judge made about the claims to exclusive possession, occupation, use and enjoyment depended upon his assessment of the oral evidence given by some of the claimants and upon the significance which was to be attached to evidence given of the frequent visits made during the 18th and 19th centuries by fishermen from the port of Macassar (now known as Ujang Pandang) in southern Sulawesi.

90 For four to seven months each year, large numbers of Macassans (sometimes over 1,000 men) came to gather trepang (also known as beche-de-mer or sea cucumber) in the claimed area. Thus before 1824, when British sovereignty was first asserted over any of the claimed area, there had been regular contact with other, non-Aboriginal peoples who sought to and did enter the area and take its resources. The primary judge found that it was not demonstrated that under traditional law and custom such persons were to be excluded. Although there was some suggestion on the hearing of the appeal to this Court that this might be no more than a recognition by the Aboriginal peoples of the area that the Macassan fishermen *could not* be stopped from entering, that is not the way in which the primary judge understood the evidence. He understood the evidence as not revealing any assertion of a *right*, under the relevant traditional laws and customs, to exclude such persons. Only if there had been some asserted right to exclude would questions of capacity to enforce have arisen.

91 The primary judge, having dealt with certain evidence that was given about the need to seek permission before entering the claimed area, concluded that "[i]t would seem however that the binding effect of the traditional requirement to seek permission to go on to another's country is one which applies *only* to Aboriginal people" (emphasis added)[128]. His Honour referred in this

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**128** (1998) 82 FCR 533 at 582.

respect to some oral evidence given by Ms Yarmirr about the seeking of permission to enter the area. In his reasons, he said[129]:

> "When asked by [trial counsel for the claimants] whether *yuwurrumu* members could be prevented from going on to the sea which is part of their own country, Mary Yarmirr said:
>
> > 'No. They won't be stopped because all Aboriginal people respect each other, and we do not trespass into another clan's estate without asking permission.'
>
> The issue was pursued a little later in this manner:
>
> Q. If there is someone on your country without permission, by your law do you have a right to ask them to go, or to leave?
>
> A. I have a law for the other person also – holds the old culture, right. In my law it says that those people are seen to be breaking my law. They must understand my law as I understand their law and respect my law as I respect their law. By doing that I will then ask what is their purpose, why do they break my law, and if it's misunderstanding, they don't understand my law, then we can – I can actually talk to them and say, 'Well, this is my law here and it tells me that the sea country is my *yuwurrumu's* estate and I'm one of the *yuwurrumu* members'. If we come to an agreement I will then say, 'Yes, you can either stay here or you can move away', but I have the rights as a *yuwurrumu* member to speak on behalf of my people, tell them about what our rights are.
>
> Q. If you do not reach an agreement do you have the right to tell them to go?
>
> A. I have a rights under my – according to my traditional law I have the rights to ask them to leave, and if they refuse then I have no other way but to ask the Balanda law to come in, because the Balanda law is their culture, and they will – you know, they will understand more of it; but if it's in regards to my own people, Aboriginal people, they respect who I am, respect my *yuwurrumu*; they will ask permission to enter onto my sea country estate.

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**129** (1998) 82 FCR 533 at 582-583.

> (The term *balanda* is commonly used to refer to 'white man'.)" (footnotes omitted)

92 Counsel for the claimants placed considerable emphasis on this part of the evidence of Ms Yarmirr and submitted that, properly understood, it supported the claim to rights to exclude *all* others (Aboriginal and non-Aboriginal) from the claimed area. Even if this evidence is capable of bearing the meaning for which counsel contended, it is not the only way in which it can be understood. It fell to be considered against the whole of the evidence which was led in relation to this subject. Pointing to another meaning which this particular part of the evidence *could* bear falls well short of demonstrating that the finding made by the primary judge was not open.

93 We were taken to no other evidence that would suggest the primary judge was wrong in his understanding of the evidence. In those circumstances, it is not demonstrated that he should have been persuaded of the factual proposition that lay behind the claimants' contentions that they were entitled under traditional law and custom to exclude, as they chose, anyone and everyone from the claimed area. The Full Court was correct to conclude, as it did, that the claimants failed to demonstrate that the findings made on this subject should be set aside.

94 There is, however, a more fundamental difficulty standing in the way of the claimants' assertion of entitlement to exclusive rights of the kind claimed. This difficulty stems both from the common law public rights to navigate and to fish and from the international right of innocent passage which is recognised by Australia. These are rights which cannot co-exist with rights to exclude from any part of the claimed area all others (even those who seek to exercise those public rights or the right of innocent passage).

95 Recognising that there may be a difficulty about this aspect of the matter, the claimants sought, in this Court, to accommodate the competing rights by acknowledging the existence of the public rights to navigate and to fish and the right of innocent passage and contending that a determination of native title should be made subject to a qualification recognising those rights. In their amended notice of appeal, this qualification was expressed in the following terms:

> "The rights and interests of native title holders referred to in paragraph 5 above are qualified so that such rights and interests may not be exercised so as to impair or impede:

(a) the right of innocent passage in relation to the territorial sea of Australia, as recognised by Article 14 of the Convention on the Territorial Sea and the Contiguous Zone (1958);

(b) the reasonable exercise by the public of the liberty to navigate within the territorial sea, for the purposes permitted by the laws of Australia, but without prejudice to the right of the common law holders to close areas to access by any persons or class of persons in accordance with their traditional laws and customs so long as the effect of such closures does not at any particular time substantially impair or impede the bona fide passage of vessels through the waters of the determination area;

(c) the right of holders of fishing licences, validly granted and currently in force under relevant legislation of the Northern Territory of Australia or the Commonwealth of Australia to enter the waters of the determination area in accordance with and for the purposes of exercising their rights under such licences."

96 It may readily be accepted that neither the public right to navigate, nor the right of innocent passage, require free access to each and every part of the territorial sea. Neither right is infringed, for example, by erecting a pier from the shore to a point well out into the territorial sea even though that pier prevents vessels from using the part of the sea on which it stands. Nevertheless, the tension between, on the one hand, the rights to "occupy, use and enjoy the waters of the determination area to the exclusion of all others" and "to possess" those waters to the exclusion of all others (which the claimants sought in their amended notice of appeal to this Court) and, on the other, the rights of fishing, navigation and free passage is self-evident.

97 Much of the debate on this aspect of the matter proceeded by reference to the metaphor of "fractur[ing] a skeletal principle of our legal system" used by Brennan J in *Mabo [No 2]*[130]. The use of the metaphor cannot, however, be allowed to obscure the underlying principles that are in issue. There are obvious dangers in attempting to argue from the several elements of the metaphor to an understanding of the principles that lead to the result that is expressed by the metaphor. It is, therefore, not profitable to stay to consider what principles of the legal system are, or are not, part of its "skeleton". Rather, attention must be directed to the nature and extent of the inconsistency between the asserted native title rights and interests and the relevant common law principles.

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**130** (1992) 175 CLR 1 at 43.

98 When that is done in the present case, it is seen that there is a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights.

99 The successive assertions of sovereignty over what now are territorial waters, without any further or other act of the executive or legislature, brought with them, and gave to the public, the public rights that have been mentioned. The assertion of sovereignty in 1824, over part of those waters, may have conceded the right of innocent passage to all vessels over those waters, and later assertions of sovereignty over other parts of the waters certainly did. Assertion of sovereignty, on *those* terms, is not consistent with the continuation of a right in the holders of a native title to the area for those holders to say who may enter the area.

100 Although the inconsistency does not arise as a result of the exercise of sovereign power (as is the case where a grant in fee simple extinguishes native title[131]) the inconsistency which exists in this case between the asserted native title rights and the assertion of sovereignty is of no different quality. At its root, the inconsistency lies not just in the competing claims to control who may enter the area but in the expression of that control by the sovereign authority in a way that is antithetical to the continued existence of the asserted exclusive rights.

101 The claimants' appeal (Matter No D9) should be dismissed with costs.

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**131** *Fejo v Northern Territory* (1998) 195 CLR 96 at 128-129 [47]-[48].

102 McHUGH J. These two appeals, one brought by the Commonwealth of Australia and the other by claimants for native title, raise issues concerning native title and the territorial sea, sea-bed and sub-soil. The principal issue in the Commonwealth's appeal is whether, under the *Native Title Act* 1993 (Cth) ("the Act"), native title can be claimed in respect of the sea-bed and its superjacent waters below the low water mark. If it can, the appeal of the claimants raises the issue of whether native title extends to *exclusive* rights, inter alia, to fish, hunt and gather food in respect of the sea and sea-bed below the low water mark.

103 The principal issue in the Commonwealth's appeal raises three sub-issues:

(1) whether, independently of the common law, the Act recognises, as native title, rights and interests over the territorial sea and sea-bed possessed by indigenous people under their traditional laws and customs;

(2) whether the Act recognises native title over the territorial sea and sea-bed only where the common law recognises it;

(3) whether the common law recognises native title over the territorial sea, sea-bed and sub-soil.

104 In my opinion, neither the Act nor the common law recognises native title rights in respect of land and waters below the low water mark of the Australian coast. The Act does not recognise native title unless the common law recognises it. *New South Wales v The Commonwealth*[132], applying *R v Keyn*[133], held that the common law of Australia has no operation below the low water mark. Unfortunate and unjust as it will seem to many, the common law does not, and never did, recognise native title rights and interests in respect of the territorial sea, sea-bed or sub-soil because those rights and interests do not fall within the common law's system of rules, principles and doctrines that it enforces by providing a remedy. It is not enough, as the majority judgment holds in this case, that the existence of rights and interests possessed under traditional laws and customs is not inconsistent with the common law. Recognition is a different concept from consistency or lack of inconsistency.

105 It follows that the appeal by the Commonwealth must succeed, and the appeal by the claimants must be dismissed.

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**132** (1975) 135 CLR 337.

**133** (1876) 2 Ex D 63 at 239; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 368, 378-379, 462-463, 466, 486-487, 491, 501.

The area claimed includes part of the territorial sea

106 The appeals arise from an application lodged with the Registrar of the National Native Title Tribunal in November 1994 for a determination of native title. Representatives of the Mandilarri-Ildugij, Mangalarra, Muran, Gadurra, Minaga, Ngaynjagar and Mayorram peoples ("the claimants") made the application. Its subject area ("the claimed area") was described in general terms as the seas in the Croker Island region of the Northern Territory which adjoin Croker Island and other related islands[134]. It also included the sea-bed and any land or reefs within that area which had not been granted for the benefit of Aboriginal people pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)[135].

107 The claimed area lies between 132° and 133°30' East longitude. The Letters Patent issued to Captain Phillip and publicly read in 1788 had defined the western boundary of New South Wales as 135°E[136]. In 1824, Captain Bremer on behalf of King George IV extended the territorial limits of New South Wales, taking possession of "[t]he North Coast of New Holland or Australia, contained between … 129° and 135° East … with all the Bays, Rivers, Harbours, Creeks, etc, in, and all the Islands laying off"[137]. The Crown in right of the United Kingdom therefore acquired sovereignty over this land mass. In addition, international law gave the Crown sovereignty over so much of the coastal sea as was within three nautical miles of the low water mark, which is the mean of the neap and spring tides.

108 In 1863, by Letters Patent, the territorial limits of South Australia were extended to "so much of [the] Colony of New South Wales as lies to the northward of [26°S] and between [129° and 138°E] *together with the bays and gulfs therein, and all and every the islands adjacent to any part of the mainland* within such limits as aforesaid, with their rights, members, and

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**134** These islands included Manburra (Oxley) Island, Gurrmal (New Year) Island, Gurrbaluj (Lawson) Island, Injuranggarn (McCluer) Island, and Wurrulja (Grant) Island.

**135** The claimed area also included a portion of the mainland extending from De Courcy Head to the commencement of the Cobourg Peninsula Marine Park near Guialung Point. That part of the claim is not relevant for present purposes.

**136** Governor Phillip's Second Commission, 2 April 1787, in Watson (ed), *Historical Records of Australia*, series 1 (1914), vol 1 at 2.

**137** Bremer to Bathurst, 12 November 1824, in Watson (ed), *Historical Records of Australia*, series 3 (1922), vol 5 at 780.

appurtenances"[138]. By s 7 of the *Northern Territory Surrender Act* 1907 (SA), South Australia surrendered the area so described to the Commonwealth, and the Commonwealth accepted that area by enacting the *Northern Territory Acceptance Act* 1910 (Cth) which came into force on 1 January 1911.

109 In November 1990, a Proclamation made under the *Seas and Submerged Lands Act* 1973 (Cth) extended the boundary of the territorial sea to 12 nautical miles[139]. Until then, although Australia had certain sovereign rights over the sea and sea-bed beyond the three nautical mile limit, it did not have sovereignty beyond that limit. While all of the claimed area has fallen within the territorial sea since 20 November 1990, for over 150 years a substantial part of the claimed area was part of the high seas. That area is one over which no nation has sovereignty and over which the common law could not recognise or enforce native title rights and interests. This fact creates an insuperable barrier to much of the claim. Three nautical miles of the claimed area, however, lies within an area over which the Northern Territory has had title and legislative power since 1983[140]. But as will appear, the common law did not operate in this area at any relevant time.

110 In 1975, the decision of this Court in *New South Wales v The Commonwealth*[141] established that no part of the sea below the low water mark was part of the territory of the Northern Territory. As a result, the Commonwealth enacted the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) and the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth) to give to the Northern Territory the rights and powers which many believed that it had before the decision in *New South Wales v The Commonwealth*. It is unnecessary to refer to them at this stage except to say that s 7 of both Acts declared that nothing in either Act extended the territorial limits of the Northern Territory.

The claim of exclusive rights

111 The claimants' application for a determination of native title asserted that they were the traditional owners of the land, sea and sea-bed of the claimed area. They claimed that, in accordance with their traditional law, they passed over and

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**138** South Australia, Parliamentary Paper No 113 of 1863.

**139** *Commonwealth of Australia Gazette*, S297, 13 November 1990.

**140** The *Coastal Waters (Northern Territory Title) Act* 1980 (Cth) came into force in 1983. The *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) came into force in 1982.

**141** (1975) 135 CLR 337.

used the claimed area, held cultural and religious beliefs concerning that area, and hunted, fished and gathered food and materials from that area. The nature of the rights asserted included ownership, occupancy, possession and rights of use. The claimants' enumeration of the nature and incidents of their rights included the following:

- the right to exclusive possession of the waters and land;
- the right to control access of other people to the waters and land;
- the right to prevent or control other people from hunting, fishing or gathering material from the waters and land; and
- the exclusive ownership of the living marine organisms found permanently, or from time to time, within the waters and land.

The Federal Court proceedings

112 The application for determination came before Olney J in the Federal Court[142]. His Honour found that, according to the traditional laws acknowledged and the traditional customs observed by the claimants, they held rights and interests, which the common law of Australia recognised, in relation to the seas and sea-bed of the claimed area[143]. The community had a connection with the claimed area in the nature of a non-exclusive native title right to have free access to the sea and sea-bed of the claimed area for all or any of the following purposes:

"(a) to travel through or within the claimed area;

(b) to fish, hunt and gather for the purpose of satisfying their personal, domestic or non-commercial communal needs, including the purpose of observing traditional, cultural, ritual and spiritual laws and customs;

(c) to visit and protect places which are of cultural and spiritual importance;

(d) to safeguard their cultural and spiritual knowledge."

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**142** *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533.

**143** However, his Honour did not believe that the claimants had established native title in relation to the sub-soil or its resources.

113 Both the Commonwealth and the claimants appealed against the decision of Olney J. Neither party was successful. The Full Court of the Federal Court (Beaumont, von Doussa and Merkel JJ) upheld his Honour's decision on the common law's recognition of the claimants' rights and interests in relation to the sea and sea-bed of the claimed area, although their reasons for doing so did not wholly coincide with those of Olney J[144]. Only Merkel J was of the view that the claimants were entitled to assert more than non-exclusive rights in relation to the claimed area. His Honour would have remitted the matter to Olney J to determine the issue of exclusive rights.

The Act[145]

114 *Mabo v Queensland [No 2]*[146] held that "the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands"[147]. The legislative response[148] to *Mabo [No 2]* was the enactment of the Act. Its preamble emphasises the Court's holding in *Mabo [No 2]*.

115 Section 10 of the Act provides that "[n]ative title is recognised, and protected, in accordance with this Act". Under s 11(1), native title cannot be extinguished contrary to the Act. As this Court pointed out in *Western Australia v The Commonwealth*[149], the effect of s 11(1) is to remove the vulnerability of native title to defeasance at common law by providing a prima facie sterilisation of all acts which would otherwise defeat native title. The

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**144** *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171.

**145** The application for determination of native title was made under the Act as it stood before the *Native Title Amendment Act* 1998 (Cth) came into force. It was common ground that the amendments had no application in this case.

**146** (1992) 175 CLR 1.

**147** (1992) 175 CLR 1 at 15.

**148** In the Second Reading Speech, the Prime Minister described the decision as providing the basis for a new relationship between indigenous and other Australians: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2877.

**149** (1995) 183 CLR 373 at 453.

corollary of that proposition is that the Act alone governs the recognition, protection, extinguishment and impairment of native title[150].

The definition of native title

116 The expression "native title" is defined in s 223 of the Act:

> "(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia."

117 This definition reflects the statement of Brennan J in *Mabo [No 2]*[151] that native title has "its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory". It also represents the legislature's attempt to accommodate the description of native title in Brennan J's judgment in *Mabo [No 2]*[152], reiterated by this Court in *Fejo v Northern Territory*[153]:

> "Native title is neither an institution of the common law nor a form of common law tenure but it is recognised by the common law[154]. There is, therefore, an intersection of traditional laws and customs with the common law."

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**150** (1995) 183 CLR 373 at 453. See also *Fejo v Northern Territory* (1998) 195 CLR 96 at 120 [22].

**151** (1992) 175 CLR 1 at 58.

**152** (1992) 175 CLR 1 at 59.

**153** (1998) 195 CLR 96 at 128 [46].

**154** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 59-61 per Brennan J.

118 In *Mabo [No 2]*, the Court was concerned only with, and its statements of principle are consequently based on, native title rights in relation to land[155]. The inclusion of the term "waters" in s 223(1) of the Act means that the statutory definition goes beyond the matters referred to by Brennan J in *Mabo [No 2]* in formulating the principles for the recognition of native title at common law. Section 253 defines "waters" as including:

> "(a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or
>
> (b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a))."

119 Standing alone, this definition gives no indication of whether waters external to Australia's territory were within the contemplation of the legislature. The inclusion of the term "sea" is not a decisive indicator that the Act extends to the territorial sea. Pursuant to s 6, however, the provisions of the Act extend to:

> "each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act* 1973."

120 Section 253 of the Act declares that "coastal sea" has the meaning given by s 15B(4) of the *Acts Interpretation Act* 1901 (Cth)[156]:

> "(a) in relation to Australia, [it] means:
>
> (i) the territorial sea of Australia; and
>
> (ii) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal Territory;
>
> and includes the airspace over, and the sea-bed and subsoil beneath, any such sea".

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**155** Although the Meriam people's statement of claim included a claim in respect of native title rights of fishing, the merits of this claim were not ultimately decided by the Court. The claimants were nonetheless described by Moynihan J as having "a strong sense of relationship to their Islands and the land and seas of the islands": quoted by Toohey J in (1992) 175 CLR 1 at 191.

**156** Pursuant to s 15B(1)(a) of the *Acts Interpretation Act*, the provisions of every Act have effect in and in relation to the coastal sea of Australia as if the coastal sea were part of Australia, except so far as the contrary intention appears.

121 The present appeals call for a determination of the implications of including the term "waters" in s 223(1) and the nature and incidents of native title claimed in relation thereto.

122 It is clear that the territorial sea is an area where the Act applies if native title, within the meaning of s 223(1), is established. The text of the Act puts it beyond doubt that the Parliament contemplated that native title over the sea-bed and its superjacent waters and airspace *might* be recognised by the common law and thus might be the subject of a determination under the Act. But that does not mean that the Parliament intended to recognise native title over the sea and the sea-bed or that that is the effect of the Act even if the common law did not recognise native title over the territorial sea. Because that is so, the Commonwealth argues that, notwithstanding the asserted extraterritorial application of the Act, the protection of the Act can only be obtained in respect of native title that is "recognised by the common law of Australia"[157] and the common law did not recognise native title over the territorial sea.

The construction of the Act

123 In construing the Act, it is necessary to remember the warning that this Court gave in *North Ganalanja Aboriginal Corporation v Queensland*[158]:

> "Unless the Act is read with an understanding of the novel legal and administrative problems involved in the statutory recognition of native title, its terms may be misconstrued."

124 It is also necessary to keep in mind that, in the Second Reading Speech on the Native Title Bill 1993, the then Prime Minister, Mr Keating, saw *Mabo [No 2]* as giving Australians the opportunity to rectify the consequences of past injustices[159]. The Act should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the "national legacy of unutterable shame"[160] that in the eyes of many has haunted the nation for decades. Where the Act is capable of a construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.

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**157** s 223(1)(c).

**158** (1996) 185 CLR 595 at 614-615.

**159** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2877-2878.

**160** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 104.

125 If the purpose of the Act was to recognise native title in any case where Aboriginal or Torres Strait Island peoples still possessed rights and interests in respect of land or water under *their* traditional laws or customs, the duty of the courts would be to ensure that that purpose was achieved. That would be so even if it meant giving a strained construction[161] to or reading words[162] into the Act. In an extra-judicial speech, Lord Diplock once said that "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed"[163].

126 However, the natural and ordinary meaning of the Act indicates that it is not the purpose of the Act to recognise rights and interests under the traditional laws and customs of the Aboriginal and Torres Strait Island peoples unless the common law recognised those rights and interests when sovereignty over the relevant area was acquired. The reference to "the rights and interests" in s 223(1) is a reference to the particular rights and interests that have been, can be or are the subject of a claim of native title. It is not a reference to rights and interests in the abstract, divorced from a concrete claim that has been, is to be or can be determined. It describes an element of what constitutes native title for all the purposes of the Act including determinations of native title. The definition is applied to concrete controversies. After all, s 225 declares that "[a] ***determination of native title*** is a determination of ... whether native title exists in relation to a particular area" and, if so, who holds the title, the nature and extent of the native title rights and interests in respect of that area, and that of other interests in the area.

127 Before a court can determine that native title exists in respect of any area, therefore, it must be satisfied that "rights and interests" in respect of that area exist and are recognised by Aboriginal and Torres Strait Island societies independently of the Act. Native title is merely the description which the Act, like the common law, gives to those rights and interests. In the words of s 223(1), they are "rights and interests [that] are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders".

128 Thus, when an application is made for a determination of native title, it is the possession or non-possession of those concrete rights that is in issue. But it is

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**161** *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 at 201; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 422.

**162** *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105.

**163** Diplock, "The Courts As Legislators", in Harvey (ed), *The Lawyer and Justice* (1978) 265 at 274.

only when the common law recognises those rights and interests that they answer the description of "native title". Section 223(1)(c) expressly declares that native title or native title rights and interests means rights and interests that "are recognised by the common law of Australia". Consequently, it can only be referring to the concrete rights that are in issue in particular proceedings. It is those particular rights that must be recognised by the common law, whether they exist on the mainland, the external territories, the coastal sea or any waters over which Australia asserts sovereign rights.

129 The reference in s 6 to "waters" over which Australia asserts "sovereign rights" under the *Seas and Submerged Lands Act* is curious. The sovereignty of a state extends only "to a belt of sea adjacent to its coast, described as the territorial sea"[164]. Beyond the territorial sea lie the high seas over which no nation has sovereignty. International law recognises, however, that a nation has rights in respect of its continental shelf even where that shelf extends beyond the boundaries of the territorial sea. In respect of its continental shelf, a nation has "sovereign rights" to exploit the sea-bed and its sub-soil. In 1953, Australia declared that it had sovereign rights over its continental shelf[165]. But it has no sovereignty over the waters or area beyond the territorial sea boundary[166]. Consistent with its international obligations, Australia might declare native title over the sea-bed and sub-soil. But as at present advised, I am not persuaded that, consistently with international law, it could do so over any part of the high seas. If I thought that it was possible to read the Act as declaring that native title existed over the high seas, I think that it would be necessary to read the Act down to be consistent with Australia's obligations in international law.

130 That the Act "extends" to the coastal sea of Australia and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act* does not mean that the Act is declaring that the Aboriginal and Torres Strait Island peoples have rights and interests over those areas. After all, the Act also "extends" to "each external Territory", areas where there may be no such rights or interests. To my mind, the certainty of this conclusion can only be doubted by commencing with the premise – which I have rejected – that the Act *intended* to recognise native title over the territorial sea irrespective of whether the common law recognised it.

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**164** Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, Art 1.

**165** *Commonwealth of Australia Gazette*, G56, 11 September 1953.

**166** Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, Arts 2, 3, 4 and 5; *Re Newfoundland Continental Shelf* [1984] 1 SCR 86 at 95-96.

131 Given the definition in s 223 and despite the declaration in s 6 of the Act, therefore, the natural and ordinary meaning of the Act is that it protects and enhances traditional and customary rights and interests where, but only where, the common law recognises them.

The Parliamentary debates confirm that the application of the Act to the territorial sea depended on the common law

132 It is not only the text of the Act that indicates that the title recognised by the Act coincides with the common law's recognition of native title. Senator Gareth Evans was the Minister in charge of the Native Title Bill ("the Bill") in its passage through the Senate in 1993. More than once, he made statements in the Senate to the effect that native title for the purpose of the Act was to be determined by the courts in accordance with the principles laid down in *Mabo [No 2]*. In attempting to determine the purpose of the Act, his views as to the construction of the Act are of special weight because he probably played a greater role in getting the Bill through the Parliament than any other member of either House. As the Minister in charge of the Bill and the Leader of a minority government in the Senate, his explanations of the Bill's provisions played a crucial role in getting the Bill through that Chamber.

133 In the debate on cl 11[167] of the Bill, Senator Evans explained to the Senate that the definition of native title was based on the principles applied in *Mabo [No 2]* and that whether or not native title existed in respect of an area of land would be determined by those principles[168]. He said[169]:

> "The High Court said that the content of that native title would be a matter for case by case determination, depending on the particular history of the land in question, the connection of individuals with it and all the rest of it. *That is reflected in the definitions of native title that are employed in this legislation.*
>
> *We are not attempting to define with precision the extent and incidence of native title. That will be a matter still for case by case*

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**167** Clause 11 stated: "Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth." This clause became s 12 of the Act. Subsequently, this Court held that its enactment was beyond the power of the Parliament: *Western Australia v The Commonwealth* (1995) 183 CLR 373.

**168** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5097-5099, 5100.

**169** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5097.

> *determination through tribunal processes and so on.* The crucial element of the common law is the fact that native title as such, as a proprietary right capable of being recognised and enjoyed, and excluding other competing forms of proprietary claim, is recognised as part of the common law of the country". (emphasis added)

134 During the debate on the Bill, the Government accepted a package of amendments to the legislation, proposed by an Opposition party, that concerned compensation for the acquisition of native title rights in an offshore place. In accepting the amendments on behalf of the Government, Senator Evans made it clear that it was an open question whether the Bill applied to offshore areas. He said[170]:

> "*Without actually deciding whether there are native title rights offshore* the amendment provides that *if there are any such rights* and they are affected by government acts, and the native titleholders receive compensation, pursuant to clause 49 the compensation is just terms for any loss of their rights." (emphasis added)

135 This statement confirms that the Parliament intended to recognise native title rights and interests in relation to offshore waters only if the courts found that rights offshore were recognised by the common law.

136 The Government's uncertainty as to whether native title could exist over offshore waters is apparent from another statement of Senator Evans[171] that there was "a bit of an oddity in ordinary property law about having rights over water as such". He went on to say[172] that the notion of having rights over the water "as such is one that is a bit hard to get a hold of".

137 Senator Evans had the same uncertainty with respect to native title rights over airspace. Nevertheless, airspace as a potential source of native title was included in the Bill to cover the possibility that native title was capable of recognition in that area. Senator Evans said[173]:

> "Just as land includes water, under the bill, in some contexts, not all, so potentially it includes airspace. What follows from that in terms of whether this is regarded as an interference in native title depends entirely

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**170** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5156.

**171** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5147.

**172** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5147.

**173** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5466.

> on the extent to which native title is determined to include some air space component …
>
> *I do not think we should make any assumptions that there is any air-space component to native title.*" (emphasis added)

138 When asked by another Senator why a reference to airspace was included if it was not intended to have any effect, Senator Evans responded[174]:

> "It is not a matter of including it if we did not intend it to have any effect. Why did we include a reference to airspace if we did not intend it to have any effect? *Because it is a matter for determination by the courts as to whether airspace will be construed as part of this*." (emphasis added)

139 Members participating in the debate on the Bill in the House of Representatives made little reference to native title rights in relation to waters, let alone coastal waters. The debate in that House contained little discussion of specific provisions and their intended effect. In his Second Reading Speech, the Prime Minister assumed that the Bill would regulate the relationship between commercial fishermen, petroleum explorers and Aboriginal and Torres Strait Island peoples in respect of offshore waters[175]. But neither the Prime Minister nor the Minister for Aboriginal and Torres Strait Islander Affairs, Mr Tickner, made any statement that indicates that the Bill was intended to extend native title to offshore areas even if the common law did not recognise native title over such areas.

140 Comments made by the Prime Minister, by the Member for Moore[176] and by a number of Senators indicate that some members of the Parliament assumed that determinations of native title under the Act might include areas such as the coastal sea. But nothing in the Parliamentary debates indicates that the Bill was intended to declare native title over areas which were beyond the operational reach of the common law. To the contrary, the statements of Senator Evans indicate that the Parliament left it to the courts to determine the extent of native title by applying the principles laid down in *Mabo [No 2]*.

141 That being so, it would not be right to construe the Act on the basis that the Parliament intended the Act to recognise native title in the sea and sea-bed

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**174** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5472.

**175** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2881.

**176** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 25 November 1993 at 3730-3734.

below the low water mark even if the common law did not recognise native title in those areas. Even more importantly, if the Act's references to offshore waters conflict with the reference in s 223(1)(c) to recognition of native title by the common law, the statements of Senator Evans explain how that apparent conflict has arisen and how it should be resolved. His statements make it clear that the Parliament was not sure as to the status of native title claims in respect of offshore waters or airspace and that the courts would resolve the uncertainty by applying the principles laid down in *Mabo [No 2]*.

The 1997 amendments

142 The Parliament was also in doubt as to the scope of the Act in 1997 when it was substantially amended. The debates in both the House of Representatives and the Senate on the Native Title Amendment Bill 1997 ("the Amendment Bill") demonstrate that the Parliament did not know whether its legislation would cover the rights and interests in relation to offshore waters that were possessed under traditional laws and customs. The Explanatory Memorandum to the Amendment Bill also asserted that the Act did not preclude the possibility that native title rights and interests may exist in relation to waters, including offshore waters, declaring that "[t]his remains an unresolved issue"[177]. However, the Parliament took no steps to interfere with the power of the courts to determine whether the common law recognised native title rights in offshore areas. Instead the Parliament made amendments to the Act in the event that the common law did recognise such rights[178]. Senator Parer, the Minister for Resources and Energy, said[179] that the Amendment Bill "continues to allow claims to be made over offshore waters because the fundamental legal question of the native title status of offshore waters is yet to be decided".

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**177** Native Title Amendment Bill 1997, Explanatory Memorandum, at 14. The Labor Opposition agreed that the issue of whether native title exists in offshore areas was to be "decided by the High Court in the *Croker Island* case": Native Title Amendment Bill 1997, Opposition Amendments – Explanatory Memorandum, at 18.

**178** Point 8 of the Government's "10 Point Plan" addressed a perceived need for the Government "to regulate and manage surface and subsurface water, off-shore resources and airspace". The Government aimed to put the rights of those with interests under any such regulatory or management regime beyond doubt: Native Title Amendment Bill 1997, Explanatory Memorandum, at 12. See the speech of the Member for the Northern Territory (Mr Dondas) in the House of Representatives: Australia, House of Representatives, *Parliamentary Debates* (Hansard), 1 October 1997 at 8881-8882. See also the speech of the Member for Watson, 20 October 1997 at 9269.

**179** Australia, Senate, *Parliamentary Debates* (Hansard), 27 November 1997 at 9707.

143 In the course of questioning concerning the proposed insertion of Subdiv H[180] of Pt 2, Div 3 of the Act, Senator Minchin, the Special Minister of State and Minister Assisting the Prime Minister, insisted that native title rights were common law rights and that it was for the courts to determine whether native title existed over offshore areas. He said[181]:

> "I repeat that our act preserves the fact of common law; who holds native title, what it consists of, is entirely a matter for the courts of Australia. *It is a common law right.* [The Greens] would be the first to attack us if there were any suggestion that it should be converted to a statutory right and defined. *It is left entirely to the courts to determine whether, how and in what way native title may survive or exist in relation to water, whether onshore or offshore.*" (emphasis added)

In terms of rights over the seas, the Minister said that[182]:

> "We would argue strongly that, *if native title exists offshore*, it can only amount to a coexisting right, given the authority of governments over the seas to manage them on behalf of all of us. We do not believe it is possible to assert a claim for exclusive possession over the seas, but certainly it may be. In relation to the question of whether native title can exist offshore, *we do not know yet* but, if it can, it could not possibly amount to more than a coexisting right." (emphasis added)

144 Although the Government was at pains to stress that the question of native title over offshore areas was a question for the courts, Senator Minchin stated that the Commonwealth's "formal position, as a matter of law, is that native title does not exist offshore"[183].

145 The Opposition also accepted that the issue of native title rights over offshore areas was a matter for the courts. It asserted that the inclusion of Subdiv N[184] in Pt 2, Div 3 of the Act would have a major impact on indigenous

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**180** Subdiv H (now part of the Act) deals with the ability of State and Territory governments to regulate and manage surface and sub-surface water, offshore resources and airspace.

**181** Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1997 at 10171.

**182** Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1997 at 10177.

**183** Australia, Senate, *Parliamentary Debates* (Hansard), 3 December 1997 at 10208.

**184** Subdiv N, now part of the Act, deals with future acts affecting offshore places.

peoples' traditional fishing and shellfish gatherings in the inter-tidal zone area and in offshore places, "if the High Court rules that native title to some extent does exist offshore"[185]. For that reason, the Opposition wanted to ensure that there were minimum standards for notification and consultation with native title claimants about acts carried out offshore[186].

146 Senator Minchin said that he was surprised by the "hyperbole" surrounding the proposed subdivision, because, in his opinion, it simply restated in a separate division the then current provisions in the Act regarding offshore places[187]:

> "Nothing in our scheme at all determines the question of whether or not native title exists offshore. *That is left entirely to the courts*, as I say, by these provisions. It is simply restating that the statutory arrangements should apply to the extent that native title is found to exist offshore." (emphasis added)

147 The Government rejected the Opposition's proposed amendments.

148 As was the case with the Native Title Bill 1993, the debate on the Amendment Bill in the House of Representatives did not discuss at any length the potential recognition of native title rights and interests in coastal waters[188].

149 The overall effect of the debates in both Houses on the Native Title Bill 1993 and the Amendment Bill confirms that it was for the courts to decide whether native title could exist over the land and waters below the low water mark. That decision was to be made in accordance with the principles laid down in *Mabo [No 2]*. The legislation was not conferring[189] a new right of native title, but protecting and enhancing the common law of native title.

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**185** Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1997 at 10185 per Senator Bolkus.

**186** Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1997 at 10186 per Senator Bolkus.

**187** Australia, Senate, *Parliamentary Debates* (Hansard), 2 December 1997 at 10187.

**188** Notable exceptions were the Member for Moore, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1997 at 9466-9467 and the Member for Perth, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 October 1997 at 10132-10133.

**189** cf *Hollier v Registrar of National Native Title Tribunal* (1998) 82 FCR 186 at 192.

The Commonwealth's appeal

150 The Commonwealth's primary contention is that the Full Court of the Federal Court "wrongly construed [the Act] so as to provide the basis for recognition of native title beyond the limits of the Northern Territory". The Commonwealth submits that the Federal Court should have held that no native title exists within that part of the claimed area that is outside the limits of the Northern Territory because:

> "(i) the common law of Australia does not, of its own force, apply outside the said limits;
>
> (ii) no law of the Commonwealth of Australia or of the Northern Territory of Australia provides a basis for the recognition of native title outside the said limits;
>
> (iii) in the absence of a law of the Commonwealth of Australia or a law of the Northern Territory making provision as in sub-paragraph (ii) above, no basis exists for the recognition of native title outside the said limits."

151 Alternatively, the Commonwealth argues that no native title could exist in respect of the claimed area beyond the limit of the coastal waters of the Northern Territory because neither the Commonwealth nor the Territory had radical or other title in relation to the said area. Australia's extension of the territorial sea to 12 nautical miles did not so affect the character or status of that area that it ceased to be regarded for the purposes of the common law as territory external to Australia and governed by international law[190].

The reasoning of the judges in the Federal Court

152 In careful and elaborate judgments, three judges of the Federal Court have rejected the construction that I think is clear upon the face of s 223 and confirmed by the Parliamentary debates. It becomes necessary therefore to examine those reasons and to state why I think they are incorrect.

*(i) Olney J*

153 Olney J acknowledged that the majority in *New South Wales v The Commonwealth*[191] applied the principles established in *Keyn* to Australia. He

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**190** A fourth ground of appeal related to the Court's upholding the trial judge's findings regarding the boundaries of the claim.

**191** (1975) 135 CLR 337.

also referred to the statement of Barwick CJ in *New South Wales v The Commonwealth* that the consequence of the common law not operating outside the realm – which ended at the low water mark – was that "property in and power over the territorial seas could not have come by the common law"[192]. But to Olney J, acceptance of this proposition did not necessarily preclude recognition of the rights and interests asserted by the claimants in this case. This was because native title is now a right defined and protected by statute and should obtain the benefit of that statute's asserted extraterritorial operation.

154 His Honour emphasised that the Act itself disclosed an intention to recognise and protect native title offshore, provided it complied with the requirements of the Act[193]. The inclusion of s 6, the validity of which was not in issue, was indicative of the Parliament's specific intention to recognise native title rights, if proved, in those seas and waters beyond territorial limits. Olney J said:

> "It would be entirely inconsistent with the thrust of the legislation if the requirement expressed in s 223(1)(c) of [the Act] that the rights and interests which constitute native title or native title rights and interests must be rights and interests that are recognised by the common law of Australia were to be construed as imposing a territorial limit in relation to the recognition of native title. In conjunction with the other provisions of s 223, s 223(1)(c) merely identifies the *nature of the rights and interests which are capable of being recognised* as native title rights and interests." (emphasis added)

155 Later, his Honour said:

> "It would be contrary to the clear and plain intention of the Act to recognise and protect native title rights and interests which are shown to exist in relation to the coastal sea of Australia and to waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act* if s 223(1)(c) were to be construed as meaning 'the rights and interests exist in relation to an area of land and waters where the common law of Australia applies'."

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**192** (1975) 135 CLR 337 at 369.

**193** Olney J acknowledged that his emphasis on the application of statute law to the territorial sea was in conflict with s 3(1)(a) of the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT). That section provided that the "written or unwritten" (s 2(1)) laws in force in the Northern Territory had effect in and in relation to the coastal waters out to three nautical miles. The conflict did not, however, dissuade him of the propriety of his approach.

156 These two passages show that his Honour's construction of s 223(1)(c) was influenced, if not dictated, by the provisions of the Act that give it an extraterritorial operation. But, as I have explained, the better view is that these provisions were inserted to deal with the contingency that the courts, in applying the *Mabo [No 2]* principles, would hold that native title can exist in respect of offshore areas. That being so, they provide no ground for reading down s 223(1)(c).

157 His Honour also seems to have treated the "rights and interests" referred to in s 223(1) as abstract conceptions, for he said that they merely identify the *nature* of the rights and interests that are capable of being recognised as native title rights and interests. This statement overlooks the function that s 223, as a definition, performs. That function is to give content to those provisions of the Act that refer to native title. Those provisions are referring to the actual "rights and interests [that] are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders", not the "nature" or "type" of such rights.

158 Moreover, even if one accepted the major premise of his Honour's reasoning – that the "intention of the Act [was] to recognise and protect native title rights and interests which are shown to exist in relation to the coastal sea of Australia" – his conclusion would not follow. As Merkel J pointed out in the Full Federal Court:

> "While it is a *separate question* whether territorial limits on native title might be imposed by the common law, assuming for present purposes that there is such a limitation, in my view if that consequence arises as a result of the conditions stated in *Mabo* not being met in respect of a *particular* area of land or waters that is consistent, rather than inconsistent, with the purpose of s 223(1)." (first emphasis added)

159 Merkel J also disagreed with Olney J's concluding observation that it would be contrary to the intention of the Act to recognise and protect native title rights and interests offshore if s 223(1)(c) were to be construed as limited to areas "where the common law of Australia applies". Merkel J saw the intention of the Act, correctly in my opinion, as being to protect native title rights and interests that *are recognised* by the common law in any particular area of land and waters to which the Act extends. In Merkel J's opinion, the approach of Olney J marginalised what he considered to be the fundamental requirement of the Act, namely recognition of native title by the common law.

*(ii) The Full Federal Court*

(a) Beaumont and von Doussa JJ

160 Beaumont and von Doussa JJ characterised s 223(1) as "a compendious description of native title and native title rights and interests, to be understood against the background of the common law concept of native title as declared by the High Court". In order for native title to exist, there must be communal, group or individual rights and interests in relation to land or waters *where* those rights and interests had the characteristics described in ss 223(1)(a), (b) and (c).

161 Like Olney J, Beaumont and von Doussa JJ thought that, in order to do justice to the intention of the sub-section, one had to look beyond *Mabo [No 2]*, notwithstanding the resemblance that the language of the sub-section bore to the previously quoted passage in Brennan J's judgment. Nevertheless, their Honours recognised the importance of the *Mabo [No 2]* decision in construing the sub-section (as had Olney J). To this end, their Honours were of the view that there were two important aspects of Brennan J's judgment:

1. the summary of the steps in the reasoning that led his Honour to the conclusion that the common law recognised the native title of the Meriam people[194]; and

2. the "other considerations" which Brennan J identified as being important to the recognition of particular rights and interests, such as the need to maintain the skeleton of legal principle[195].

162 Beaumont and von Doussa JJ stated:

> "[T]he better construction of s 223(1)(c) is that it only comprehends the other considerations, and not the major steps in the reasoning of the *Mabo* decision. Of the major steps, the fact of the enactment of [the Act] gives recognition and protection to native title. [The Act] is an expression of legislative intent to recognise and confirm that native title survived the acquisition of sovereignty and constitutes a burden on the radical title of the Crown. Those points no longer remain matters that call for consideration in the definition of native title … *The requirement that the rights and interests not be extinguished is already encompassed in the opening lines of s 223(1).*" (emphasis added)

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**194** (1992) 175 CLR 1 at 69-70.

**195** (1992) 175 CLR 1 at 43, 61.

163 This construction of the paragraph removed the necessity of ascertaining how and when the common law was applied to any particular territorial area of Australia by prerogative act of the Crown or by legislation. To the contrary, in their Honours' opinion the paragraph applied generally to rights and interests asserted in respect of "any area within the territorial scope of [the Act] as stated in s 6". This was because:

> "[The Act] is drawn *on the assumption* that by 1993, in one manner or another, the Crown in the right of the Commonwealth had acquired sovereignty over the whole of the area to which [the Act] would apply. We agree with Olney J ... that s 6, coupled with the recognition of native title accorded by s 10, namely recognition 'in accordance with this Act', supports the proposition that the legislative intent was to provide a statutory basis for recognition offshore." (emphasis added)

164 Their Honours' approach also rendered redundant the need to consider the fact or date of the acquisition of sovereignty. The role that they envisaged for s 223(1)(c) was simply that of ensuring that rights and interests satisfying the statutory definition in ss 223(1)(a) and (b) were those *of a kind* that the common law would recognise. In their opinion, the fundamental requirement was that the native title rights and interests protected by the common law were those possessed under the traditional laws acknowledged and traditional customs observed by the indigenous inhabitants. This simplification overcame complications of proof that would exist if the definition made it necessary to ascertain the date of acquisition of sovereignty of the area in question and the situation prevailing in the claimants' community at that time. Their Honours thought that, if the Commonwealth's proposed construction were accepted, it would entail the failure of the Act to achieve the aim stated in the Explanatory Memorandum to the Bill[196]:

> "To facilitate certainty, the Commonwealth has provided a straightforward mechanism to determine whether or not native title exists and what the rights and interests are that comprise that native title".

165 It will be apparent from what I have already written that I can not accept their Honours' approach to the construction of s 223(1)(c). With great respect, their Honours turned the Act on its head. They did not see the Act as protecting, and in some respects enhancing, rights and interests which the common law recognises, as the text of the Act suggests. In fact, their Honours implicitly rejected the proposition that the Act was a legislative endeavour to protect or enhance a common law conception – the recognition by the common law of certain traditional and customary rights and interests. Instead their Honours saw

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**196** Native Title Bill 1993, Explanatory Memorandum, Part A at 1.

the Act as bringing into existence a new entity that had analogies with the common law conception of native title but was not identical with that conception.

166 As Merkel J pointed out, the approach of Beaumont and von Doussa JJ took the opening words of s 223(1) as implying a legislative confirmation that, as native title had survived the acquisition of sovereignty and constituted a burden on the Crown's title or sovereign rights, the subject matter of the sub-section was those rights and interests that have not been extinguished or abandoned. Merkel J found it difficult to accept that construction. In his Honour's opinion, to regard the introductory words as referring to unextinguished rights or interests would require reading words into the sub-section. It would also mean that the words "rights and interests" had different meanings in different parts of the same sub-section.

167 More importantly, Merkel J said that the approach of their Honours amounted to "a significant change to the conceptual basis for the common law's recognition and protection of native title as a jural right akin to a property right or interest". Its effect was to replace the date of sovereignty criterion (which, in his Honour's view, would arise under s 223(1)(c)) with the requirement that the native title right or interest be possessed as at 1 January 1994[197] by the claimant community in accordance with its traditional laws and customs. Provided it was based on "traditional" use or enjoyment at that date, it could differ substantially in area, nature and content from the native title (if any) in existence at the date of sovereignty. Merkel J was concerned about possible anomalies eventuating from this approach, concluding that:

> "[I]t is unlikely that the legislature would intend to depart so significantly from the conceptual basis for the recognition and protection of native title established by *Mabo*, without clearly expressing its intention to do so. The various decisions on native title in relation to [the Act], the provisions of [the Act] including the preamble, the explanatory memorandum and the second reading speech do not suggest such an intention."

168 In my view, the criticisms by Merkel J of the reasoning of Beaumont and von Doussa JJ were well founded. Their Honours' approach is inconsistent with the declaration of Senator Evans[198] that "the definitions of native title … in this legislation" reflect the statement of principle in *Mabo [No 2]* "that the content of that native title would be a matter for case by case determination, depending on the particular history of the land in question, the connection of individuals with it and all the rest of it".

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**197** The Act came into force on that date.

**198** Australia, Senate, *Parliamentary Debates* (Hansard), 16 December 1993 at 5097.

169 The view of Beaumont and von Doussa JJ also has the curious consequence that logically there must be two forms of native title in Australia – that created by the common law and that created by the Act. Only that created by the Act is protected against defeasibility. But if the Parliament created a new statutory right, why did it need to protect it against extinguishment at common law? That makes no sense. A right created by a law of the Parliament cannot be extinguished at common law.

170 Acceptance of their Honours' construction would also mean that this Court and the parties wasted a good deal of time and effort, in *Western Australia v The Commonwealth*[199], in determining whether native title was extinguished when Western Australia became a colony. If the view of Beaumont and von Doussa JJ was correct, that was an issue that did not arise and could not have arisen.

(b) Merkel J

171 Merkel J did not think that the Act had "extended and enhanced the common law concept of native title", if that meant the Act extended the circumstances in which native title would be recognised. As can be seen from the manner of his disagreement with the approaches of Olney J and Beaumont and von Doussa JJ, his Honour was of the view that the principles established in *Mabo [No 2]* were of primary importance in interpreting the Act. Recognition by the common law was the foundation for recognition under the Act. In other words, the Act intended to recognise native title *that was recognised* by the common law of Australia, not native title that was *capable of* recognition, or *of a kind* recognised by the common law. His Honour thought that the context in which and the purpose for which the Act came into being suggested that the phrase "rights and interests" in s 223(1)(c) was a reference to the rights and interests being claimed *in relation to a particular area* of land and waters.

172 Merkel J could not discern anything in the Act or the Second Reading Speech that suggested that recognition of native title was intended to extend beyond the conditions, stated in *Mabo [No 2]*, for recognition under the common law. However, an "important qualification" was the fact that it was implicit in the Act, and in particular ss 6, 223 and 225, that native title could exist in "waters", notwithstanding that:

- "certain waters, such as the sea, cannot be occupied, possessed or owned in the same way as land"; and

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**199** (1995) 183 CLR 373 at 420-434.

- "the Crown may not have acquired radical title to the 'waters' constituting the territorial sea upon the acquisition of sovereignty in respect of the sea".

173 For his Honour, it remained an essential element of native title that the rights and interests claimed in relation to a particular area of land or waters were rights and interests *recognised* by the common law of Australia. Implicit in this interpretation was an acceptance of the necessity of the common law *applying* in the particular area over which native title rights and interests were asserted. But this construction of s 223(1)(c) did not mean that the paragraph "would have the effect of preventing recognition of native title offshore by reason of *Keyn*". The reasoning that led his Honour to this result was primarily based on the view that the restriction of the operation of the common law to the low water mark no longer applied. In Merkel J's opinion, the territorial sea was now recognised as forming part of the territory of the Commonwealth. Because it fell within the limits of the Commonwealth, the common law necessarily applied in respect of it.

174 Although I agree with the construction that Merkel J placed on s 223, I am unable to agree that the common law of its own force now or ever has applied below the low water mark. Before I discuss why I think that his Honour's view is wrong, it is convenient to discuss the issue of "recognition".

Recognition by the common law

175 As Kirby J pointed out in *Wik Peoples v Queensland*[200], *Mabo [No 2]* did not create a dual system of laws. Rights and interests possessed under the traditional laws or customs of the Aboriginal peoples and Torres Strait Islanders are not *per se* enforceable under the Australian legal system. They are enforceable only to the extent that the common law or statute recognises and gives effect to them[201]. The jurisprudential nature of native title rights and interests was very clearly identified by Kirby J in *Wik* when he said[202]:

> "The theory accepted by this Court in *Mabo [No 2]* was not that the native title of indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such

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**200** (1996) 187 CLR 1 at 214.

**201** (1996) 187 CLR 1 at 214.

**202** (1996) 187 CLR 1 at 237-238.

title was enforceable in Australian courts because the common law in Australia said so[203]."

176 Section 223(1) of the Act does not depart from this jurisprudential basis of native title rights and interests. Paragraphs (a) and (b) focus on establishing that the rights and interests asserted do in fact exist. Paragraph (c) shifts the focus of the inquiry to the common law system from which those rights and interests derive their legitimacy. The stipulation in s 223(1)(c) that the common law must recognise those rights and interests inevitably poses questions as to where, when and in what circumstances the common law will recognise and enforce those rights and interests.

177 In appropriate circumstances, as *Mabo [No 2]* expressly held, the common law of Australia recognises and enforces by appropriate remedies rights and interests, possessed under traditional laws and customs, in respect of areas of *land*. In general terms, it will do so if:

- at the date when the Crown acquired sovereignty over a particular territory, the indigenous inhabitants of the territory possessed those rights or interests in land in the territory "under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants"[204];

- since the acquisition of sovereignty, the indigenous inhabitants and their descendants have continued to enjoy those rights and interests under their traditional laws and customs even if the laws and customs have undergone some change since sovereignty was acquired[205];

- the rights and interests have not been surrendered to or been extinguished by acts of the Crown or abandoned at any stage since sovereignty was acquired[206]; and

- the rights and interests are not "so repugnant to natural justice, equity and good conscience"[207] or so inconsistent with "a skeletal

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**203** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 59, 61.

**204** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 57.

**205** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70.

**206** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70.

**207** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 61.

> principle of our legal system"[208] that the courts will refuse to enforce them.

178 If these conditions are met, the common law will recognise and enforce the particular native title rights and interests claimed in respect of land in a given case. The common law holds that, although on the acquisition of sovereignty, the Crown acquired a radical title to all the land of the territory, it did not acquire that title free of the rights and interests in the land that were possessed by the indigenous inhabitants. In *Mabo [No 2]*, Brennan J explained how recognition of the rights and interests of the indigenous inhabitants was consistent with the doctrine of tenure which is the basis of the land law of England and Australia. His Honour said[209]:

> "By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title) to the land for the reason given by Stephen CJ in *Attorney-General (NSW) v Brown*[210]: there would be no *other* proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants. The doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which do not owe their existence to a Crown grant." (original emphasis)

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**208** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 43.

**209** (1992) 175 CLR 1 at 48-49.

**210** (1847) 1 Legge 312 at 317-318.

Native title rights in respect of the territorial sea or sea-bed

179 However, the common law of this country does not recognise any rights or interests that the indigenous inhabitants possess under their traditional laws and customs in respect of the territorial sea or sea-bed. The common law does not operate outside the realm. The boundary of the realm is the low water mark[211]. Dominion over the territorial sea and sea-bed is the province of the Parliament, not the common law.

180 In *Keyn*[212], a majority of the Court of Crown Cases Reserved held that the Central Criminal Court had no jurisdiction to try a charge of manslaughter brought against the Captain of a foreign ship involved in a collision within three miles of the shore of England. It was an essential step in the reasoning of the Court that the common law did not apply beyond the territorial limits of England and that the sea-bed and waters below the low water mark were not part of the territory of England.

181 *Keyn* cannot be dismissed, as the majority judgment in this case purports to do, by asserting that it was concerned with the jurisdiction of a criminal court[213]. That proposition was accepted by the dissenters in *New South Wales v The Commonwealth*[214]. But the majority rejected it[215]. Consequently, *New South Wales v The Commonwealth* establishes for Australia that no rule of the common law governs or could govern the title to the sea-bed or the superjacent sea below the low water mark[216]. The land below the low water mark is not the subject of the doctrine of tenures and estates, and because this is so, the Crown does not possess radical title to the sea-bed or the superjacent waters[217].

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**211** *R v Keyn* (1876) 2 Ex D 63 at 239; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 368, 378-379, 462-463, 466, 486-487, 491, 501.

**212** (1876) 2 Ex D 63.

**213** Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at [26].

**214** (1975) 135 CLR 337 at 395-396, 426-427.

**215** (1975) 135 CLR 337 at 368, 378-379, 462, 486.

**216** (1975) 135 CLR 337 at 369.

**217** *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 487.

The common law and rights of ownership and possession relating to a place outside the realm (local and transitory actions)

182 The distinction that the common law has made between local and transitory actions[218] also makes it impossible for the common law to recognise and enforce native title rights and interests over the territorial sea or sea-bed. Not only does the common law not operate beyond the realm, it does not allow some rights arising without the realm to be enforced in its courts even though the parties were within the jurisdiction of the common law courts.

183 For historical reasons concerned with common law procedure, the substantive common law refused to provide remedies or recognise rights that concerned or were inextricably connected with the occupation, possession or ownership of places outside the realm. Actions concerning such places were classified as local actions; other actions were classified as transitory actions. The mature common law classified as local actions all actions whose proof depended, wholly or partly, on a fact or facts concerning, or inextricably involved with, the occupation, possession or ownership of a place outside the territory of England. It classified as transitory actions all actions where proof of a fact concerning a place outside England was neither an essential element of the action nor inextricably associated with the occupation, possession or ownership of such a place[219].

184 The need for these classifications arose from the early common law's insistence that issues of fact could only be determined by juries drawn from the particular town or village where the facts of the case occurred, jurors in those days being in the position of witnesses as well as judges. Common law pleadings had to state truly the venue of every material fact in issue upon which a party – plaintiff or defendant – relied[220]. If the pleadings showed that the issues arose in different venues, they had to be tried by juries drawn from the respective venues.

185 Eventually, jurors ceased to be persons who had some prior knowledge of the case and the parties. When that happened, the common law came to distinguish between those cases where proof of possession or ownership of a place, or a fact inextricably associated with it, was material (local actions) and

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**218** Stephen, *Principles of Pleading*, 6th ed (1860) at 224-225; *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 619, 623, 631-632.

**219** Stephen, *Principles of Pleading*, 6th ed (1860) at 224-225; *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 618-619, 623, 631-632.

**220** *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 617.

those where it was not (transitory actions). Where proof of an issue concerned occupation, possession or ownership of a place or was inextricably linked with it, the venue had to be truly stated in the pleading. Any variance between the pleading and the evidence on the issue meant that the party had failed to prove his or her case[221]. If the venue was not material, the pleader could fictitiously aver that the fact occurred within the county where the case was tried and the other party was not allowed to deny it[222].

186 Where the venue was material but was outside the realm, no jury could be summoned from that venue. The logical consequence was that no common law court could try the action. Sixteenth-century lawyers ingeniously solved this problem of venue by inventing a fiction. The plaintiff could aver that a fact occurred in a foreign place but add an averment that the place was a place in England, which was subject to the court's jurisdiction[223]. Although the latter averment was fictitious, the defendant was not allowed to challenge it. However, as Morse has pointed out, this "procedural dodge" was only available in respect of transitory actions. It was not available in local actions, where the laying of the venue remained a strict requirement[224].

187 Thus in *Skinner v The East-India Company*[225], Skinner alleged that in a foreign place the defendant had caused injury to his property and person. The Lord Chief Justice of the King's Bench reported to the House of Lords that all the Judges were of the opinion that[226] the taking of Skinner's ship and goods and the assaulting of his person were justiciable in the ordinary courts at Westminster. But his claim for dispossessing him of his house and island "was not relievable in any ordinary court of law"[227].

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**221** *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 617-618.

**222** *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 618; Morse, *Torts in Private International Law* (1978) at 8.

**223** *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 618-619.

**224** Morse, *Torts in Private International Law* (1978) at 9.

**225** (1666) 6 St Tr 710.

**226** (1666) 6 St Tr 710 at 719.

**227** See also the judgment of De Grey CJ in *The Mayor of Berwick v Ewart* (1776) 2 Black W 1068 at 1071 [96 ER 629 at 630] ("In real actions the process always goes into the county where the lands lie; in personal ones, sequitur forum rei");

(Footnote continues on next page)

188 In *Mostyn v Fabrigas*[228], the plaintiff brought an action for assault and false imprisonment. The defendant pleaded that, because the assault for which the action was brought occurred in Minorca, out of the realm of England, it was not cognisable by the King's Courts. In giving judgment, Lord Mansfield said[229] "all actions of a transitory nature that arise abroad may be laid as happening in an English county". But he also recognised[230] that "there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise". An example was a case "where the question was a matter of title only, and not of damages".

189 In *British South Africa Company v Companhia de Mocambique*[231], the House of Lords approved the distinction between local and transitory actions in respect of events occurring without the realm. The House held that an action for damages for trespass to foreign land could not be brought in an English court. Lord Herschell LC said[232] that "the grounds upon which the Courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical". Consequently, "the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before"[233].

190 Where proof of the place was a material fact in a civil action and the plaintiff had pleaded the fact, the defendant could demur that there was no cause of action. If the fact was not pleaded, but proved in evidence by the defendant under the plea of not guilty, the plaintiff would be non-suited[234].

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*Doulson v Matthews* (1792) 4 TR 503 at 504 [100 ER 1143 at 1144]; *Mayor of London v Cox* (1867) LR 2 (HL) 239 at 261 per Willes J.

**228** (1774) 1 Cowp 161 [98 ER 1021]. See also *Pisani v Lawson* (1839) 6 Bing (NC) 90 [133 ER 35], in which it was held that a foreigner could maintain an action in England, against an English defendant, for a libel published in England. See the judgment of Tindal CJ at 95 [133 ER 35 at 37].

**229** (1774) 1 Cowp 161 at 177 [98 ER 1021 at 1030].

**230** (1774) 1 Cowp 161 at 176 [98 ER 1021 at 1030].

**231** [1893] AC 602.

**232** [1893] AC 602 at 629.

**233** [1893] AC 602 at 629.

**234** *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 632; cf at 621-622.

191 In criminal cases, the procedure was no doubt dependent on the form of the indictment. In *Keyn*[235], for example, the venue was laid in the Central Criminal Court. The indictment contained two counts, one of which alleged a felonious killing and slaying "upon the high seas", and it was upon this count that the accused was convicted. The other count omitted these words[236]. The accused did not demur to the count upon which he was convicted. But at the end of the evidence for the Crown, he took the point that the Court had no jurisdiction.

192 The failure to demur is understandable. As an alternative basis of jurisdiction, the Crown alleged that the crime had occurred on a British ship because the deceased was a passenger on such a ship. If the crime had occurred on a British ship, then, as numerous authorities had decided, the offence occurred within the territory and realm of England even though it occurred on "the high seas"[237]. This alternative argument of the Crown was rejected because a majority of the judges held that the negligence that resulted in the death of the passenger occurred on a foreign ship. Until all the evidence was adduced, however, it was not possible to say that the Court had no jurisdiction merely because the indictment laid the crime on "the high seas".

193 The common law's classification of actions as either local or transitory shows that it would not have recognised a claim of native title over the territorial sea or sea-bed. If a Torres Strait Islander holding the right, under traditional law, to fish in the territorial sea was forcibly ejected from the area *in 1825*[238], no action could have been brought for interference with the right to fish in that area (a local action). Such an action would require proof of ownership over an area to which the common law did not extend and where it refused to enforce or recognise rights[239]. As Lord Herschell LC pointed out in *British South Africa Company v Companhia de Mocambique*[240], at common law "in respect of a trespass to land situate abroad there was no right of action, for an alleged right which the Courts would neither recognise nor enforce did not constitute any right at all in point of law". It could make no difference in principle that the right

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**235** (1876) 2 Ex D 63.

**236** (1876) 2 Ex D 63 at 99.

**237** (1876) 2 Ex D 63 at 101.

**238** The year after the Imperial Crown took possession of the area now constituting the Northern Territory.

**239** *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 619-620, 628-629.

**240** [1893] AC 602 at 628-629.

concerned an interest in the territorial sea instead of an interest in land in a foreign place.

194 It may be that in 1825 a native title holder ejected from the territorial sea might have brought an action for assault (a transitory action) in the common law courts[241]. Given that the venue fiction, to which I have referred, resulted in a foreign transitory action "happening in an English county"[242], it was inevitable that the early common law would apply its own rules and principles in determining whether the plaintiff was entitled to a remedy in that action. As Morse has pointed out, the fiction of laying the venue within the jurisdiction of the English courts operated to "naturalise" the foreign act in England, so that English law would automatically be applied[243]. Courts did not apply the law of the foreign place, and the rules of private international law were not created until the middle of the 19th century. Morse wrote[244]:

> "Without exception no English case until *The Halley* in 1867 presented a situation in which a liability existed under the *lex loci delicti commissi* which did not exist under English law. Accordingly the early English cases were only concerned with whether the *lex loci delicti* supplied a 'justification' for the defendant's act, it being clear that liability existed under English law. *Before 1867, therefore, it is suggested that English courts applied English law to torts committed abroad subject to the possibility of justification by the lex loci delicti* and that this approach stemmed from a characteristic reliance on rules of jurisdiction as opposed to overt considerations affecting choice of law." (emphasis added)

195 That is why in *Fennings v Lord Grenville*[245], to which the majority judgment refers[246], there was no demurrer to an action of trover brought in respect of the taking of a whale caught off the coast of the Galapagos Islands. Nor was there any objection to the jurisdiction of the Court of Common Pleas to hear the cause. No doubt the venue was laid in England, and the Court of Common Pleas could – as it in fact did – apply the English law of trover.

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**241** *British South Africa Company v Companhia de Mocambique* [1893] AC 602 at 619-620.

**242** *Mostyn v Fabrigas* (1774) 1 Cowp 161 at 177 [98 ER 1021 at 1030].

**243** Morse, *Torts in Private International Law* (1978) at 9.

**244** Morse, *Torts in Private International Law* (1978) at 9 (footnotes omitted).

**245** (1808) 1 Taunt 241 [127 ER 825].

**246** Reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at [31] fn 44.

196 So in 1825, a native title holder under traditional law might have brought an action in the common law courts for assault occurring on the territorial sea. Such a person might also have brought an action for trover if the defendant had taken fish that the native title holder had caught. But that was because the common law worked on the fiction that the assault or taking had occurred within the realm. The success or failure of either action did not depend on the common law recognising offshore rights or interests possessed under traditional law or custom.

Maritime law and the regulation of matters and things occurring below the low water mark

197 Further proof that the common law did not and does not recognise native title rights and interests over the territorial sea and sea-bed is shown by the need to develop a separate body of law – Admiralty or maritime law – to deal with some offshore disputes. Maritime law is the law developed and administered in the Admiralty Court in exercising both its original jurisdiction and the jurisdiction derived from statute[247]. Smith traced the origins of the Admiralty jurisdiction back to the reign of Edward I[248]. His examination led him to conclude that the rise of Admiralty or maritime law was in no small degree attributable to the inelasticity of the common law – the processes of common law courts originally depending on venue, and not extending to matters happening at sea[249]. The general inability of the common law to regulate matters, things and events occurring on the waters below the low water mark led to the development of Admiralty law.

198 Initially, the function of the Admiralty courts was to keep the King's peace upon the seas and to punish the crime of piracy. However, the jurisdiction of the Admirals soon extended to civil cases and encroached upon the jurisdiction of the common law courts[250]. All encroachments upon that jurisdiction were sturdily resisted and prevented by Acts of the Parliament. The controversy that developed between them led to two statutes being passed in the 14th century[251]. These statutes restricted the Admirals' jurisdiction to things done upon the sea

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**247** *Halsbury's Laws of England*, 4th ed (2001 reissue), vol 1(1), par 303.

**248** Smith, *A Summary of the Law and Practice in Admiralty*, 3rd ed (1885) at 3.

**249** Smith, *A Summary of the Law and Practice in Admiralty*, 3rd ed (1885) at 3.

**250** Marsden (ed), *Select Pleas in the Court of Admiralty, Vol 1* (Selden Society, vol 6, 1892) at xiv-xv.

**251** 13 Ric II st 1 c 5; 15 Ric II c 3.

and in the great rivers beneath the bridges. But the procedures of the common law courts limited their jurisdiction, and the Admiralty courts obtained exclusive authority over a number of matters. They included[252]:

1. all torts committed on the high seas;

2. all suits of salvage;

3. all suits of possession concerning ships;

4. all cases of hypothecation; and

5. all suits for seamen's wages.

199 According to Smith, the ordinary cases in respect of which the authority of the Admiralty division was exercised, at the time he was writing, were actions for[253]:

- possession of a ship
- damage to a ship or her cargo
- seamen's wages
- salvage
- necessaries supplied to a ship
- bottomry and respondentia
- claims by a mortgagee
- pilotage and towage
- restoring goods taken by pirates
- assaults or batteries committed on the high seas.

200 Although maritime law developed in a separate court in England and was a body of law separate from the common law, its development was nevertheless

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**252** Smith, *A Summary of the Law and Practice in Admiralty*, 3rd ed (1885) at 4.

**253** Smith, *A Summary of the Law and Practice in Admiralty*, 3rd ed (1885) at 10.

related to the law being developed in other courts. The merger in 1875[254] of the High Court of Admiralty with the High Court of Justice fostered the development of common concepts between the common law courts and the Admiralty Court. Since the mid-19th century, the development of English maritime law "has continued to be greatly influenced by changes in concepts of the common law, and to regard it as constituting today a system of law entirely separate from the general law may lead to error"[255].

201 However, maritime law remains a body of law quite different from that of the common law. A striking illustration of the difference between the two systems is the law of contributory negligence. At common law, the contributory negligence of the plaintiff is a complete defence to an action for negligence. In contrast, from an early period maritime law apportioned damages in cases of collisions on the high seas by reference to each party's responsibility for the damage[256]. This rule was extended to all collisions between vessels by s 25(9) of the *Supreme Court of Judicature Act* 1873 (UK). Another 70 years passed before statute law brought the common law into line with maritime law[257].

202 The existence of maritime law as a body of law regulating matters occurring on the seas and in the great rivers beneath the bridges shows how impossible it is to maintain the proposition that the common law recognises native title rights over the territorial sea and sea-bed.

Native title rights and the rules of private international law

203 The common law rules of private international law are further evidence that the common law does not recognise native title rights over the territorial sea, sea-bed or sub-soil. Where foreign law confers rights in such matters as contracts, personal property, marriage and succession, the common law, applying its rules of private international law, will usually enforce those rights. But the common law does not itself recognise those rights. It does not permit its judges to ascertain the state of the foreign law by judicial notice. It treats foreign laws as matters of fact and requires them to be proved by evidence. From at least 1718 when *Fremoult v Dedire*[258] was decided, the common law would take

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**254** *Supreme Court of Judicature Act* 1873 (UK), s 3, commencing on 1 November 1875: *Supreme Court of Judicature (Commencement) Act* 1874 (UK), s 2.

**255** *Halsbury's Laws of England*, 4th ed (2001 reissue), vol 1(1), par 303.

**256** See, for example, *Admiralty Commissioners v SS Volute* [1922] 1 AC 129.

**257** *Law Reform (Contributory Negligence) Act* 1945 (UK).

**258** (1718) 1 P Wms 429 [24 ER 458].

notice of foreign rules of law only when they were proved by a qualified witness who could give evidence as to the existence and content of the foreign law. In *Fremoult*[259], Lord Parker LC expressly said that "without which proofs our courts cannot take notice of foreign laws". The need to prove the state of foreign law was settled once and for all by Lord Mansfield in *Mostyn v Fabrigas*[260] when he said:

> "The way of knowing foreign laws is, by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is."

204 Moreover, to the extent that the common law enforces rights under foreign laws, it enforces the law of another sovereign. Any title rights and interests possessed by Aboriginal or Torres Strait Island peoples under traditional laws and customs are possessed under the sovereignty of the Crown. Upon the Crown acquiring sovereignty over the territory of Australia, Aboriginal persons "became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided"[261]. The Aboriginal and Torres Strait Island peoples do not have any residual sovereignty over the territory of Australia or its territorial sea. Sovereignty over the territorial sea is attached to the nation that has sovereignty over the land that adjoins the territorial sea. In former times, the sovereign was the Crown in right of the United Kingdom. Now, it is the Crown in right of Australia. The common law recognises pre-sovereignty rights and interests possessed under traditional law only because it permits those rights and interests to burden the radical title of the Crown *to the land* over which it has acquired sovereignty.

205 Sadly from the claimants' point of view, without the recognition and backing of the common law, rights and interests possessed under traditional laws are unenforceable in the Australian legal system. As six members of this Court pointed out in *Fejo v Northern Territory*[262]:

> "The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title." (original emphasis)

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**259** (1718) 1 P Wms 429 at 431 [24 ER 458 at 459].

**260** (1774) 1 Cowp 161 at 174 [98 ER 1021 at 1028].

**261** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 38.

**262** (1998) 195 CLR 96 at 128 [46].

206 The fact that in some cases the common law will enforce rights arising under another legal system, therefore, does not help the claimants. As Kirby J pointed out in *Wik*[263], the native title rights and interests of indigenous Australians are not "enforceable of [their] own power or by legal techniques *akin to the recognition of foreign law*" (emphasis added).

207 Furthermore, under the common law rules of private international law or choice of law, ownership, possession or occupation of land depends on the *lex situs*. In *Lewis v Balshaw*[264], Rich, Dixon, Evatt and McTiernan JJ said that "no law but the *lex situs* can govern the title to land". Land is an immovable. Rights and liabilities in respect of land are governed by the legal system operating in the country where the land is situated. The sea-bed is also an immovable and, in so far as there can be "title" to the superjacent sea independently of the sea-bed, the sea must be regarded as an immovable. However, the common law can not be the *lex situs* of the sea-bed, the sub-soil or the waters of the territorial sea. It does not operate below the low water mark. Indeed its doctrine of tenures – which is the jurisprudential foundation of the recognition of native title – does not operate below the low water mark, as Jacobs J pointed out in *New South Wales v The Commonwealth*[265].

208 If the common law will not enforce native title rights and interests, in accordance with the *Mabo [No 2]* principles, they cannot be enforced in the common law courts. Consequently, they are not recognised by the common law.

The arguments of the claimants

209 The claimants and the interveners supporting them argued that the common law would enforce the rights and interests of the Aboriginal and Torres Strait Island peoples in the territorial sea and sea-bed. The claimants submitted that under the common law the real question was whether native title rights over offshore places, derived from traditional laws and customs, survived the acquisition of sovereignty. But their arguments failed to acknowledge that it is not the acquisition of sovereignty over a territory that leads to the recognition of native title rights. It is the bringing of the common law to the territory. The rights and interests of indigenous people in respect of land survive the acquisition of sovereignty because the common law – when it is brought to the territory – burdens the radical title of the Crown with those rights and interests. While that burden exists, the common law permits any right or interest, possessed under the

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**263** (1996) 187 CLR 1 at 237-238.

**264** (1935) 54 CLR 188 at 195.

**265** (1975) 135 CLR 337 at 487.

traditional laws of the indigenous people, to be enforced in the common law courts. The burden ceases when the Crown disposes of an interest in its radical title in a manner that is inconsistent with the enforcement of the native title right or interest.

210 However, the acquisition of sovereignty does not bring the common law to the territorial sea. When international law finally recognised the three nautical mile territorial sea as within the sovereignty of the coastal state and consequently gave Great Britain sovereignty over its territorial sea, it had no effect on the common law. The early common lawyers accepted that the sovereign had proprietary rights in the sea-bed and superjacent waters, subject to public rights of fishing and navigation[266]. They saw the Crown's title as derived from the prerogative and as being a full beneficial, and not merely a radical, title to the sea-bed. Support for the view that the Crown had a prerogative right to the sea-bed can even be found in some cases decided after *Keyn*[267]. As late as 1975, Jacobs J thought the cases still justified this proposition[268]. But in *New South Wales v The Commonwealth*[269], Barwick CJ, McTiernan and Mason JJ rejected it. As previously mentioned, Barwick CJ said[270] that "property in and power over the territorial seas could not have come by the common law".

211 The judgment of Murphy J in *New South Wales v The Commonwealth* is not so clear but the better view is that his Honour also rejected the proposition that the Crown had any proprietary rights in respect of the territorial sea and sea-bed. His Honour referred[271] to the contentions of the Australian States, one of which was that "the Crown in right of the colony owned the seabed and sub-soil of the territorial sea". Murphy J said[272] that a case decided by the Supreme Court of the United States "showed that the contentions of the States of the United States were groundless, and its reasoning is applicable here".

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**266** See the early cases referred to by Gibbs J in *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 392-395.

**267** See the cases referred to by Gibbs J in *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 397-400.

**268** *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 487.

**269** (1975) 135 CLR 337 at 369, 378-379, 462-463.

**270** (1975) 135 CLR 337 at 369.

**271** (1975) 135 CLR 337 at 504.

**272** (1975) 135 CLR 337 at 506. The decision of the United States Supreme Court cited by Murphy J was *United States v Maine* 420 US 515 (1975).

212 Even if the view of the dissenting judges in *New South Wales v The Commonwealth* had prevailed, and the Crown had title to the territorial sea and the sea-bed by virtue of the common law, it is difficult to see how any claim of native title could have succeeded. Under the old learning, the title of the Crown in the sea-bed of the coastal waters was a full beneficial title and not merely a radical title. Radical title was the device that the common law adopted to reconcile the theory of tenure and native title when the Crown acquired sovereignty of a settled country. It was the invention of 19th-century judges confronted with the reality of indigenous persons occupying land over which – according to the orthodox common law view – they had no rights against the Crown. So the judges invented the notion of a radical title burdened with the rights and interests that indigenous people possessed under their traditional laws and customs. Radical title in a native title setting serves the same purpose as the fiction of the grant of an estate does in the case of the fee simple in England[273]. If the Crown claims title to land, that fiction requires the Crown to prove its title. Historically it did so by an inquest of office or an information of intrusion[274].

213 By contrast, in respect of the foreshores and the beds of tidal rivers and coastal waters (when the Crown was believed to have title to the beds of the coastal waters), the common law acted on the presumption that the Crown had a full beneficial title to this land by virtue of the prerogative[275]. There was no room for the fiction of the lost grant. The Crown did not have to prove its title. It was presumed. Any person claiming title to the foreshores, to the beds of tidal rivers or to coastal waters in opposition to the Crown had to prove a prior grant from the Crown[276]. There was not and could not be radical title in the sea or sea-bed which native title rights and interests could burden. The Crown title was absolute and untrammelled.

214 Given the majority's rejection, in *New South Wales v The Commonwealth*, of the proposition that the Crown had title to the territorial sea and sea-bed, the position must be that, when what became the Northern Territory was acquired by the Imperial Crown in 1824, dominion over its territorial sea became vested in

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**273** *Attorney-General v Brown* (1847) 1 Legge 312 at 318; *Attorney-General of Ontario v Mercer* (1883) 8 App Cas 767 at 771-772; cf Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820) at 211.

**274** *Doe dem Wilson v Terry* (1849) 1 Legge 505 at 508-509; *Bristow v Cormican* (1878) 3 App Cas 641 at 652-653, 658-659, 667; McNeil, *Common Law Aboriginal Title* (1989) at 97-98.

**275** McNeil, *Common Law Aboriginal Title* (1989) at 103-104.

**276** McNeil, *Common Law Aboriginal Title* (1989) at 104.

the Imperial Crown. That dominion entitled the Imperial Crown – through the Crown-in-Parliament – to enact laws with respect to the territorial sea. But it did not bring the common law to the territorial sea. Nor did the colonies acquire any proprietary rights over the territorial sea. The colonies were not international persons[277]. They did not acquire ownership of the sea-bed or the superjacent waters from the low water mark to the three nautical mile limit[278]. Only nation states can perform international obligations[279]. Only nation states can have sovereignty over the territorial seas adjacent to their land masses.

215 The United States Supreme Court has taken the same view of the ownership of the sea-bed and the superjacent waters in the territorial sea adjoining the coast of the then United States colonies[280]. For more than 50 years the Supreme Court has consistently taken the view that the territorial sea is a national and not a State concern[281]. The Court has rejected the view that the States have any common law rights in respect of the territorial sea. The Federal Court of Appeals for the Ninth Circuit has also held that Aboriginal native title holders have no rights over the territorial sea, sea-bed or sub-soil[282].

216 Without the intervention of federal Parliament, no one can acquire a legal right in relation to the territorial sea, sea-bed and sub-soil that the common law courts can enforce. It is erroneous to suggest, as the claimants do, that sovereignty in the territorial sea carries with it judicial power to protect and enforce private rights and interests in respect of the territorial sea and sea-bed. As I have explained, the Aboriginal and Torres Strait Island peoples have no sovereignty over the seas; nor are their rights and interests inherently enforceable in the common law courts. Nor does international law recognise them as being a burden on the sovereignty that a coastal state has over its territorial sea.

217 As Mason J pointed out in *New South Wales v The Commonwealth*[283], "the territorial sea is essentially a conception having its origins in and owing its

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**277** *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 373, 469-470.

**278** *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 369.

**279** *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 361.

**280** *United States v California* 332 US 19 (1947).

**281** *United States v California* 332 US 19 (1947); *United States v Louisiana* 339 US 699 (1950); *United States v Texas* 339 US 707 at 718 (1950); *United States v Maine* 420 US 515 at 522 (1975).

**282** *Native Village of Eyak v Trawler Diane Marie Inc* 154 F 3d 1090 (9th Cir 1998).

**283** (1975) 135 CLR 337 at 468.

elaboration to international law". His Honour also pointed out[284] that "the territorial rights now conceded by international law to the coastal state in the solum of territorial waters stamp it with the character of territory that is different from the land territory of the coastal state". That the sovereignty over the territorial sea is different from the sovereignty of the coastal state is demonstrated by the obligation to permit the innocent passage of foreign vessels through the territorial sea adjoining that coast[285]. The sovereignty that the coastal state exercises over the territorial sea is also subject to the developing international law. As international law changes, so does the content of the sovereignty of the coastal state over its territorial sea.

International law and the territory of Australia

218 As I have already indicated, Merkel J held in the Full Court of the Federal Court that, by reason of 20th-century developments in international law, the territory of Australia now includes the territorial sea. Consequently, the common law operates over the territorial sea and recognises native title rights and interests over the territorial sea and sea-bed. But it is impossible to reconcile this proposition with *New South Wales v The Commonwealth*[286] where this Court held that the common law did not extend to the territorial sea. That case also held that the realm of the States – and therefore the Northern Territory – did not extend below the low water mark. Nothing has occurred since 1975 to alter those views.

219 His Honour's view has the surprising consequence that, independently of Commonwealth legislation, the common law extends beyond the territorial limits of the States and Territories as specified in the instruments that define their boundaries[287]. On his Honour's view, the common law would extend beyond even the three nautical mile area over which the States were given powers as the result of the constitutional settlement that took place in 1980 after the decision in *New South Wales v The Commonwealth*[288]. That is because since November 1990, the territorial sea extends to 12 nautical miles from the coast of Australia.

220 Merkel J thought that the boundaries of Australia were extended and the common law applied to the territorial sea when Australia asserted its claim of

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**284** (1975) 135 CLR 337 at 466.

**285** Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, Arts 14-17.

**286** (1975) 135 CLR 337.

**287** *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 459.

**288** (1975) 135 CLR 337.

sovereignty at the League of Nations Conference in 1930. His Honour was mistaken. At the Conference, Australia made no such assertion. It merely asserted in a memorandum to the Preparatory Committee of Experts that Australia "accepts the proposition that a State possesses rights of sovereignty in the generally accepted sense of the term over the belt of waters around its coast generally described as territorial waters"[289].

221 But even if Australia had asserted sovereignty at that date, that would not have advanced the claimants' application. As previously mentioned, a nation's assertion of sovereignty over the territorial sea does not extend its territory. Under international law, England had sovereignty over its territorial sea in 1876 when *Keyn*[290] was decided. Nevertheless, that case held that the realm of England and the reach of the common law ended at the low water mark. Only legislation could extend the law of England to the territorial sea. In *Re Offshore Mineral Rights of British Columbia*[291], the Supreme Court of Canada declared that in England "even after the enactment of the *Territorial Waters Jurisdiction Act* [1878 (Imp)] the majority opinion in [*Keyn*] that the territory of England ends at low-water mark was undisturbed". Similarly, only legislation could apply the common law to the territorial sea of Australia. The view of Merkel J also overlooks or at all events does not deal with the fact that until November 1990 part of the claimed area was on the high seas over which no nation has sovereignty.

222 Furthermore, on his Honour's view, there was a gap of 106 years between the acquisition of the territory of the Northern Territory in 1824 and the application of the common law to the territorial sea in 1930.

223 When the Crown acquires sovereignty over land, the common law operates to recognise the rights and interests in that land possessed under the traditional laws and customs of the indigenous population and to burden the Crown's radical title. But the common law cannot recognise rights and interests under traditional law when, at the date of acquiring sovereignty, it did not operate over the area where the rights and interests are now asserted. As previously mentioned, six members of this Court pointed out in *Fejo v Northern Territory*[292]:

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**289** Memorandum of the Commonwealth Government, 1929, in Charteris, *Chapters on International Law* (1940) at 98-100.

**290** (1876) 2 Ex D 63.

**291** [1967] SCR 792 at 805.

**292** (1998) 195 CLR 96 at 128 [46].

> "The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title." (original emphasis)

224 The consequence of the view of Merkel J is that the common law recognises native title rights over Australia's territorial sea from at least 1930 even if those rights did not exist under traditional laws in 1824. This is inconsistent with *Mabo [No 2]* principles which require that the rights and interests be held when sovereignty was acquired and continuously maintained to the time of enforcement in the common law courts.

225 In my opinion, Merkel J erred in holding that, independently of federal legislation, the common law now extends to the territorial sea.

Subsequent legislation and the recognition of native title below the low water mark

226 In 1980, as the result of the decision of this Court in *New South Wales v The Commonwealth*[293], the Parliament enacted the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) ("the Northern Territory Powers Act") and the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth) ("the Northern Territory Title Act").

227 The Northern Territory Powers Act commenced on 1 January 1982. That Act and similar legislation in respect to the States were enacted to give the States and Territories powers over the territorial sea out to three nautical miles. That was the then outer boundary of the territorial sea. Section 5 of that Act gave the Northern Territory the same powers over these waters as it exercised within its territorial limits. That section also gave the Territory legislative power in respect of a limited number of subjects in respect of an area which extended beyond the three nautical mile limit of the territorial sea. Section 6 declared that nothing in the Act affected the status of the territorial sea of Australia under international law. It also declared that the Act did not affect the rights and duties of the Commonwealth in relation to various matters. They included "the provisions of the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage of ships". Section 7 of the Act declared that nothing in the Act should be taken to have extended the limits of the Northern Territory.

228 The Northern Territory Title Act commenced on 14 February 1983. Its purpose was to vest title over the seas and sea-bed in the Northern Territory, subject to rights or title "subsisting immediately before" the commencement of that Act. Section 4 is the critical section. It provided:

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**293** (1975) 135 CLR 337.

> "(1) By force of this Act, but subject to this Act, there are vested in the Territory, upon the date of commencement of this Act, the same right and title to the property in the sea-bed beneath the coastal waters of the Territory, as extending on that date, and the same rights in respect of the space (including space occupied by water) above that sea-bed, as would belong to the Territory if that sea-bed were the sea-bed beneath waters of the sea within the limits of the Territory.
>
> (2) The rights and title vested in the Territory under sub-section (1) are vested subject to –
>
> (a) any right or title to the property in the sea-bed beneath the coastal waters of the Territory of any other person (including the Commonwealth) *subsisting immediately before the date of commencement of this Act*, other than any such right or title of the Commonwealth that may have subsisted by reason only of the sovereignty referred to in the *Seas and Submerged Lands Act* 1973". (emphasis added)

Sections 4(2)(b) and (c) declared that the Territory's title over the sea-bed and the space above the sea-bed were subject to the rights of the Commonwealth in respect of uses such as navigation, communications, defence, quarantine and pipelines.

229 Section 4 cannot be read as preserving native title rights. Section 4(2)(a) preserves only those rights or titles that subsisted immediately before 14 February 1983, the date on which the Northern Territory Title Act commenced. Having regard to the title vested in the Northern Territory by s 4(1), it is a curious feature of s 4(2) that it preserves only the right or title to the property "in the sea-bed".

230 Immediately before the commencement of the Northern Territory Title Act, the common law did not recognise any rights under traditional laws over the territorial sea. Nor did any statute then recognise native title rights in that area. Moreover, as I have pointed out, the rights that were preserved were rights to the property "in the sea-bed". There was no preservation of rights or titles in the space above the sea-bed. If s 4(1) had not mentioned the "space (including space occupied by water) above that sea-bed", it would have been proper to read the reference to property in the sea-bed in s 4(2)(a) as preserving rights in respect of the space and water above the sea-bed. But the omission of these words in s 4(2)(a) must have been deliberate.

231 Five years after the enactment by the Commonwealth of the Northern Territory Powers and Title legislation, the Northern Territory enacted the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT). By this enactment

the Northern Territory applied the written and unwritten laws in force in the Territory over its coastal waters. Although, as a result of this enactment, the common law has applied to so much of the territorial sea as falls within three nautical miles from the coast of the Northern Territory, it does not have the effect of preserving native title rights. The moment when the common law would recognise those rights – the bringing of the common law upon the acquisition of sovereignty – had long passed when the *Off-shore Waters (Application of Territory Laws) Act* extended the common law to the then territorial sea off the Northern Territory coastline.

Lack of inconsistency and recognition

232 The majority judgment in the present case holds that the common law recognises native title over the territorial sea because there is no inconsistency between a claim of native title over the territorial sea and the common law. If that proposition is correct, it would logically follow that the common law recognises native title rights even in respect of the high seas. However, lack of inconsistency between the common law and native title rights and interests is not equivalent to the common law recognising those rights and interests. With great respect to the majority judgment, the terms of s 223(1)(c) of the Act are not satisfied by showing that a claim of native title over the territorial sea is not inconsistent with any principle, rule or doctrine of the common law.

Conclusion

233 The *Native Title Act* 1993 is so framed that no claim of native title can succeed over any area – land or water – unless the common law would have recognised native title rights and interests at the time that the Imperial Crown acquired sovereignty over that area. The Parliamentary debates show that this was the deliberate choice of those who enacted the Act and its 1998 amendments.

234 Sovereignty over what is now the Northern Territory was acquired in 1824, and the common law applied from that date. Unfortunately for the claimants, the common law did not then, and of its own force does not now, operate over the territorial sea. When the Imperial Crown acquired sovereignty, the common law could not enforce rights and interests over the territorial sea, possessed under traditional law. Those rights and interests were not recognisable by the common law, for the common law recognised no property in the territorial sea, sea-bed or sub-soil. Despite the enactment of the *Coastal Waters (Northern Territory Powers) Act* 1980, the *Coastal Waters (Northern Territory Title) Act* 1980 and the *Off-shore Waters (Application of Territory Laws) Act* 1985, the better view of that legislation is that even now the common law itself does not recognise any property in the territorial sea, sea-bed or sub-soil. Certainly, that legislation does not have the effect that the common law recognises rights over the territorial sea beyond three nautical miles from the coast of the Northern Territory. And even if the common law now recognises rights in part of the

territorial sea, it did not do so in 1824 when the Imperial Crown acquired sovereignty over what is now the Northern Territory.

235 In *Mabo [No 2]*, this Court did what it could to correct the injustice that had been done to the Aboriginal and Torres Strait Island peoples in dispossessing them of their rights and interests in the land. Acting on common law principles, long recognised in other jurisdictions, the Court was able to reject the then orthodox view in Australia that the traditional laws and customs of the indigenous people gave them no enforceable land rights. But in my opinion it is not open to this Court to hold that the common law recognises native title rights over the territorial sea, sea-bed and sub-soil. Consistently with fundamental common law principle, the Court cannot legitimately declare that the common law no longer ends at the limits of the realm but operates over the territorial sea and perhaps even over the high seas. Nor can the Court legitimately declare that the common law will enforce native title rights over the territorial sea. To do so would be "to fracture a skeletal principle of our legal system"[294] – that the common law does not operate below the low water mark. By statute, the federal Parliament may declare that the common law operates below the low water mark. Even then, any rights and obligations thus established are not truly common law rights and obligations. They are statutory rights and obligations whose substance is identified by reference to common law rules and principles.

236 The courts – including this Court – have no authority to "provide a solvent"[295] for every social, political or economic problem or wrong. As Gaudron J and I pointed out in *Breen v Williams*[296]:

> "In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature."

237 If the law of Australia is to recognise and enforce the exclusive rights and interests in the territorial sea and sea-bed that the Aboriginal and Torres Strait Island peoples possess under their traditional laws, it must be done by an enactment of the federal Parliament. In my opinion, this Court has no authority to recognise and enforce those rights and interests.

238 The appeal of the Commonwealth must be allowed, and the appeal of the claimants must be dismissed.

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**294** *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 43 per Brennan J.

**295** *Tucker v US Dept of Commerce* 958 F 2d 1411 at 1413 (7th Cir 1992) per Posner J.

**296** (1996) 186 CLR 71 at 115.

239 KIRBY J. These two appeals require consideration of the native title rights and interests of certain Aboriginal Australians in relation to waters. In the course of that consideration important questions arise concerning (1) the proper approach to the expression of the common law in a context now largely shaped by statute; and (2) the available sources of the common law where the question to be solved is special to the operation of Australia's legal system as it affects the indigenous peoples of the nation.

Adjustment of the law following *Mabo [No 2]*

240 Before the decision of this Court in *Mabo v Queensland [No 2]*[297], rights and interests, such as those claimed in this matter, were not recognised or enforced by the common law of Australia. In that decision, the common law was re-expressed. It was held that, under certain conditions, it would recognise and enforce such rights and interests. As a consequence, for nearly a decade, the Australian legal system has been adjusting to new legal principles[298].

241 In part, this adjustment has been effected by legislation[299]. In part, it has been effected by further judicial decisions[300]. The process of elucidation of the law is continuing[301]. The process involves both the construction of the provisions of applicable legislation (most of it enacted since *Mabo [No 2]*) and the extension, by analogical reasoning into new factual and legal situations, of the basic principles stated in *Mabo [No 2]*[302].

242 It was to be expected that such a significant change in legal doctrine would give rise to many doubts and uncertainties, especially during the early

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**297** (1992) 175 CLR 1.

**298** *Wik Peoples v Queensland* (1996) 187 CLR 1 at 205-207.

**299** Especially *Native Title Act* 1993 (Cth): *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373. State and Territory laws have also been enacted, eg *Validation of Titles and Actions Act* 1994 (NT).

**300** Especially *Wik* (1996) 187 CLR 1; *Fejo v Northern Territory* (1998) 195 CLR 96; *Yanner v Eaton* (1999) 201 CLR 351.

**301** This Court has reserved its decisions in the appeals from *Western Australia v Ward* (2000) 99 FCR 316 and *Anderson v Wilson* (2000) 97 FCR 453.

**302** As in *Wik* (1996) 187 CLR 1 (pastoral leases under Queensland law); *Fejo* (1998) 195 CLR 96 (fee simple land); and *Yanner* (1999) 201 CLR 351 (right to hunt crocodiles).

stages of clarification and elucidation[303]. This was especially so because the altered principle affects interests that are important to those who claim them, such as the possession, occupation, use and enjoyment of, or other entitlements in land, water and other resources. However, there is no gulf between the common law and the provisions of the main legislation enacted following *Mabo [No 2]*. Amongst the "key concepts" provided by s 223 of the *Native Title Act* 1993 (Cth) ("the Act") are definitions of "native title" and "native title rights and interests" as those expressions are used throughout the Act. The definitions envisage a tripartite requirement for the establishment of native title under the Act[304]. The rights and interests in question must be possessed under the relevant traditional laws and customs of the indigenous peoples affected; those peoples, by law and custom, must have a connection with the place in which the rights and interests are said to exist; and the rights and interests must be "recognised by the common law of Australia"[305].

243 Accordingly, although the Act establishes its own legal regime, it is not one divorced from the reformulated common law that existed immediately before its passage. The rights and interests upheld by the Act must be of a kind that the common law of Australia will recognise[306]. Whilst the Act is therefore the starting point of legal analysis, the key definitions within it take one back to the fundamental concepts of the common law. The Aboriginal rights and interests given legal force by the Act build upon, and to the extent of the requirement of recognition, depend upon, the principles of the common law as stated in *Mabo [No 2]*.

244 During the colonial period of Australia's history, and after federation but before *Mabo [No 2]*, the common law, inherited from England to the extent that it was applicable at the date of reception after settlement, drew a relatively clear distinction between the law applicable to land and the law applicable to the sea. It did so for the purpose of the enjoyment of rights and interests which the law

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**303** The intended operation of the *Native Title Act* has given rise to differences of opinion: eg *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.

**304** Section 223(1) is set out in the reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ at [8] ("the joint reasons"); see also reasons of McHugh J at [116]; reasons of Callinan J at [340].

**305** The Act, s 223(1)(c); see also sub-ss (1)(a), (1)(b).

**306** The novelty of some of the concepts inherent in the rules of indigenous societies presents ongoing difficulties for interaction of the two legal systems but these must be overcome in a principled fashion: Strelein, "Conceptualising Native Title", (2001) 23 *Sydney Law Review* 95 at 97.

would enforce. One of the many problems now presented by the intersection of the common law of Australia and the traditional laws and customs of Australia's indigenous peoples is that no such distinction was drawn by indigenous law and custom. At least, it was not so drawn under the laws and customs of the Aboriginal clan groups on whose behalf the claim, the subject of the determination under the Act in issue in these proceedings, was made.

245 Whereas before and at the time of the establishment of the Australian settlements, the common law of England had generally recognised a difference between land and tidal waters to the low water mark and the seas beyond that point[307], the evidence accepted in the present proceedings made it clear that the claimants, within their own society, laws and customs, drew no such distinction. Of communities such as theirs it has been truly said that they "do not observe this 'cultural distinction between land and sea', constructing land and sea property into a seamless web of cultural landscape"[308].

246 These appeals require a resolution of this difference of approach. They necessitate a statement by this Court of the principle to be applied in resolving such differences in this matter, and, hence in other matters like it.

The Commonwealth's appeal, the common law and the Act

247 *Basis of the appeal*: The findings of the primary judge (Olney J)[309], responding to the claim made under the Act, make it plain that the indigenous claimants had a clear concept of their sea country. The findings of connection, by law and customs, were not relevantly challenged in the appeals to this Court. So far as the claimants were concerned, the sea of the determination area was an undifferentiated part of the entirety of their "country"[310]. Neither the common law nor the Act impinges upon or modifies this conception, viewed from within its own paradigm.

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**307** *R v Keyn* (1876) 2 Ex D 63; see also *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 371, 378, 467-468, 484.

**308** Sharp, "Reimagining Sea Space: from Grotius to Mabo", in Peterson and Rigsby (eds), *Customary Marine Tenure in Australia*, (1998) 47 at 49.

**309** *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533.

**310** The land adjacent to the sea, including areas of the Australian mainland and islands occupied by the claimants, was the subject of a grant under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth), Sched 1. The boundary of this land was the mean low water mark established by the tides.

248 However, the first question to be resolved is whether the Act, and to the extent that it is thereby incorporated, the common law of Australia, permit or require the recognition of the rights and interests which the claimants assert over their sea country. That is the question at the heart of the Commonwealth's appeal. The various ways in which the Commonwealth sought to suggest that the common law could not, or did not, recognise native title rights and interests over, or in relation to, such sea country including rights of fishing there, are explained in the joint reasons[311], by McHugh J[312] and by Callinan J[313]. I will not repeat that exposition.

249 In resolving questions for the determination of native title rights and interests, it is always necessary to focus first on the Act itself. Whilst the common law provides the background against which the Act operates[314], and is referred to in the Act[315], the Act itself must be construed according to its terms, taken as a whole[316] and having regard to its beneficial purpose[317]. Such an approach recognises that the Act is not confined to a codification of the common law[318] but has given rise to an extensive scheme of recognition and protection (and extinguishment and impairment) that may operate to change the common law[319]. It also supplements and reinforces the common law[320].

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**311** Joint reasons at [21]-[23].

**312** Reasons of McHugh J at [103]-[104], [150]-[151].

**313** Reasons of Callinan J at [350].

**314** *North Ganalanja Aboriginal Corporation* (1996) 185 CLR 595 at 613.

**315** The Act, s 223(1)(c).

**316** eg the Act, s 213. See *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]; 181 ALR 307 at 319; *Victorian WorkCover Authority v Esso Australia Ltd* [2001] HCA 53 at [63].

**317** See *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433 per Gibbs CJ.

**318** See eg Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2879; Explanatory Memorandum to Native Title Bill 1993, Pt B, cl 208 (now s 223).

**319** *Native Title Act Case* (1995) 183 CLR 373 at 452.

**320** The Act, Preamble, s 3; see also *Wik* (1996) 187 CLR 1 at 214.

250 *The Act's application to sea country*: That the Act expressly contemplated, and allowed for, the recognition of "native title" and "native title rights and interests" in respect of the sea country of persons such as the claimants is shown by the definition contained in s 223. In the introductory words of s 223(1) it is made plain that the rights and interests that will be recognised are not only rights and interests in relation to land but also "in relation to ... waters". The Act's potential application to sea country is reinforced by the express mention, within the general definition, of the "connection" which the claimant Aboriginal peoples or Torres Strait Islanders have "with the land *or waters*". It is still further reinforced by the mention in s 223(2) of the fact that the "rights and interests" referred to in s 223(1) include "fishing", an activity necessarily engaged in, or on, or close to, *waters*[321].

251 It is within common knowledge, of which this Court may take notice, that a very high proportion of Australia's Aboriginal peoples (like the non-indigenous population) live within a few kilometres of Australia's enormous coastline[322]. Virtually all Torres Strait Islanders to whom s 223(1) of the Act applies would, in their original habitat, be in a similar position. Accordingly, the language, operation and apparent purposes of these "key concepts" of the Act contradict a notion that the Act was merely repeating, or blindly and unquestioningly reflecting, pre-existing English, Imperial, colonial or early Australian differentiations between land and sea for legal purposes. There are too many references to water and water rights for that to be so[323]. Thus, s 253 defines "waters" as including:

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**321** See also the Act, s 225.

**322** Bergin, "International Law and Indigenous Marine Rights: The Evolving Framework", (1993) 10 *Environmental and Planning Law Journal* 438 at 438. The author states that 50 per cent of Australia's Aboriginal population live within 20 km of the coast.

**323** A non-exhaustive sample of the sections of the Act in which reference is made to waters, fishing or offshore activities, aside from those mentioned in these reasons, includes ss 14, 15, 17, 19, 21, 29, 30, 33, 38, 39, 62, 66, 108, 184, 186, 191, 193, 198, 199, 211, 212, 226, 228, 229, 230, 233, 237, 238, 240, 245, 246, 253. These provisions show that rights in relation to land *and waters* permeate the language of the Act. They are woven through the entire provisions of the Act and are not peripheral to its operation. Relevant sections of the Act which were amended or inserted by the *Native Title Amendment Act* 1998 (Cth), although not applicable to these appeals, show that the reference to waters, fishing and offshore activities continued: see ss 21, 22B, 22EA, 22H, 23B, 23C, 23DA, 23G, 23HA, 23JA, 24AA, 24BB, 24CB, 24CD, 24CK, 24CL, 24DB, 24DD, 24DE, 24DI, 24DJ, 24EA, 24EB, 24GA, 24GB, 24GD, 24ID, 24JA, 24JB, 24KA, 24LA, 24MA, 24MB, 24MD, 24NA, 26A, 28, 29, 30, 33, 38, 39, 43A, 44C, 47A, 47B, 51A, 66A,

(Footnote continues on next page)

"(a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or

(b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in paragraph (a))."

252 This definition is not limited to inland waters and those within Australia's baselines. Section 6 of the Act expressly extends the Act in the following way:

"This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*."

"Coastal sea", defined by the *Acts Interpretation Act* 1901 (Cth)[324], means the territorial sea of Australia. At the time of enactment of the Act, Australia's territorial sea extended to 12 nautical miles from the relevant baselines[325].

253 To the full extent that the language of the Act permits, this Court should give effect to the purposes of the Parliament expressed or implied in the foregoing provisions. This is the modern "purposive" approach to the construction of statutes[326] that has been accepted by this Court and applied in countless recent decisions. It is the approach which I would adopt here – and specifically in giving meaning to the third element of the statutory definition of rights and interests that will be recognised under the Act, namely that they are "recognised by the common law of Australia"[327]. It was not suggested by anyone

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78, 83A, 84, 86A, 190A, 190B, 190D, 202, 202A, 203AA, 232A, 232B, 232C, 249C, 251A, 251D.

**324** s 15B(4).

**325** By Proclamation in 1990, Australia asserted sovereignty "in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil": *Seas and Submerged Lands Act* 1973 (Cth), ss 6, 10; *Commonwealth of Australia Gazette*, S297, 13 November 1990; see also *Coastal Waters (Northern Territory Title) Act* 1980 (Cth), s 4; *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth), s 4; *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT), s 3.

**326** *Bropho v Western Australia* (1990) 171 CLR 1 at 20 where the influential opinion of McHugh JA (dissenting in the result) in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 was approved.

**327** The Act, s 223(1)(c).

that the Act, either generally or in this particular respect, was invalid as being beyond the Commonwealth's legislative powers. With respect to legislation concerning the sea areas in question in these appeals, and the claims by indigenous peoples in relation to them singled out by reference to the claimants' race, and external to the Australian mainland, ample constitutional power existed for the Parliament to make the law that it did, in the terms that it adopted[328].

254 *Proper construction of s 223(1)(c)*: By the Act, the Federal Parliament obviously set out to protect and uphold the rights and interests of Australia's indigenous peoples[329]. To some extent it also supplemented those rights and interests[330]. In so far as the laws and customs of such indigenous peoples reflected rights and interests in connection with offshore "waters", it would, in my view, defy the terms and purposes of s 223 of the Act to permit notions of the common law that pre-existed the Act to negative the postulate of the existence of rights and interests in, or in connection with, waters, upon the basis of which the Act is so clearly drawn.

255 It is a common mistake to take words or phrases in a statutory provision out of context and to subject them to textual analysis divorced from their setting. Such an approach should not be taken with any Act of Parliament. Least of all should it be taken with an Act, necessarily including many novel concepts, designed to effect the adjustment of the Australian legal system to the recognition of the rights and interests of the indigenous peoples of Australia "in connection with" both "land" and "waters".

256 Of course, the Parliament could have confined the Act to apply only to "land" (inviting argument over what that concept would mean in this context)[331]. However, it did not do so. It would be a serious error of interpretation to uphold the Commonwealth's primary submission, which attempted to utilise par (c) of s 223(1) of the Act, in effect, to erase the broader statutory context with its many express references to rights and interests in connection with "waters" and in relation to "fishing"[332]. The Commonwealth's proposition is simply not

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**328** *Native Title Act Case* (1995) 183 CLR 373.

**329** The Act, ss 3(a), 10, 11(1); *Native Title Act Case* (1995) 183 CLR 373 at 453; *Wik* (1996) 187 CLR 1 at 214.

**330** The Act, Preamble; cf reasons of Callinan J at [340].

**331** See eg *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 210-211, 215; cf *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1 at 11-12 [36]-[39]; *Risk v Northern Territory* (2000) 105 FCR 109 at 124 [39]; cf at 133-134 [70]-[80] per Merkel J.

**332** See at [251], n 323 in these reasons.

compatible with the assumptions which s 223 of the Act reflects and which were then enacted by the Parliament. It is not compatible with the achievement of the Act's purposes derived from its language. An acceptance of these facts obliges the attribution to the phrase "recognised by the common law of Australia"[333], in this context, of a meaning different from that which might have been ascribed to such expression taken in isolation prior to *Mabo [No 2]* or to the expression "recognised by the common law" or "recognised by the common law of England" at a different time or in a different context.

257 There is a further reason that reinforces this conclusion. The common law of Australia may not defy, or conflict with, the Constitution[334]. Neither may it be inconsistent with valid federal legislation[335]. The common law adapts itself to the Constitution and to such legislation[336]. The residue of the common law may be re-expressed, deleting any former parts that cannot stand with the constitutional or legislative provisions or the assumptions inherent in them. So much follows, if from nothing else, from the requirement of the Constitution that there is but one law applicable to, and binding upon, all the people of Australia. The content of that law may occasionally be in doubt. It may sometimes require the application of legal reasoning to discover the rule to be observed and to exclude laws that are invalid. But, ultimately, a single governing law is discoverable and enforceable, if necessary in this Court.

258 I do not read the words "recognised by the common law" as abdicating the powers and stated objects of the legislation to protect and uphold native title rights and interests. I interpret this phrase as incorporating the ongoing

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**333** The Act, s 223(1)(c).

**334** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567; see also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141-143, 153-155; *Lipohar v The Queen* (1999) 200 CLR 485 at 509-510 [57], 557 [180], 575 [235]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1116 [34], 1122 [66]-[71], 1134 [137]; 172 ALR 625 at 635-636, 643-644, 661.

**335** *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 324 [97]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 92 [112]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 66 [60]; 176 ALR 219 at 238; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 928 [212]; 179 ALR 238 at 291; *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1038 [231]; 180 ALR 145 at 209.

**336** eg *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25 [80], 46-47 [129]-[130]; cf *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12; *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570-572.

relationship between the common law and the Act, grounded on the propositions advanced by *Mabo [No 2]*, and acknowledging that those propositions need to expand and develop when applied to different customary title. This beneficial construction is in keeping with the purpose which the Act was intended to serve[337]. Thus pars (a) and (b) of s 223(1) pick up the common law incidents of recognition described by this Court in *Mabo [No 2]*. Paragraph (c) then ties the sui generis and fragile customary title rights to the relative security of the common law, as re-expressed in *Mabo [No 2]* and as advanced and developed by the common law method, in subsequent cases. The only limitations on recognition of native title rights and interests, that pass the tests of pars (a) and (b), to be read into par (c) are those stated in *Mabo [No 2]*: namely that native title could not be recognised when to do so would "fracture a skeletal principle of our legal system"[338]; or where to do so would be repugnant to the rules of natural justice, equity and good conscience[339]. To apply, as McHugh J does, a meaning to s 223(1)(c) which makes recognition of native title contingent on applications of the common law stated before *Mabo [No 2]* and divorced from the language and purposes of the Act would, with respect, amount to rejecting the fundamental premise of that decision. This was to recognise that, by virtue of its prior existence, the origin of native title existed in customary law rather than the common law and native title does not therefore need to fit into common law categories in order to be recognised and enforced[340].

259 It follows that the recognition of native title "by the common law" is shaped, and, if necessary, extended, by the Act's application to sea waters. Within the terms of s 223 of the Act, these considerations therefore provide a complete answer to the Commonwealth's primary proposition that, of its nature, the common law of Australia could not recognise rights and interests of the kind claimed by the claimants over their sea country. Thus, s 223(1)(c) cannot, in its context, be read as implying a geographical restriction on the recognition of native title. If the reach of the common law is so limited (which may be doubted after the assertion of sovereignty in the area in 1990 and the ability of the common law, as declared by municipal courts, to extend with it[341]) it must

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**337** *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433 per Gibbs CJ.

**338** (1992) 175 CLR 1 at 43, see also at 29; *Fejo* (1998) 195 CLR 96 at 150 [104].

**339** (1992) 175 CLR 1 at 61.

**340** (1992) 175 CLR 1 at 58-59; *Native Title Act Case* (1995) 183 CLR 373 at 452; *Fejo* (1998) 195 CLR 96 at 128 [46]; *Yanner* (1999) 201 CLR 351 at 384-385 [76].

**341** This assertion affects part of the Court's exposition in the *Seas and Submerged Lands Case* (1975) 135 CLR 337; cf *Mabo [No 2]* (1992) 175 CLR 1 at 32 per Brennan J: "Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step

(Footnote continues on next page)

nevertheless give way to the application of the Act to such areas of the seas[342]. It is therefore unnecessary for me to consider the additional analysis offered by the joint reasons to demonstrate, by reference to the suggested sources of the common law upon which the Commonwealth relied, that the propositions advanced by it were unacceptably wide. I would reserve my opinion on that analysis. I prefer to start with the legislation and to give the critical words in it a meaning that is apt to the statutory context and appropriate to carry into effect an obvious purpose of the Act[343].

260 I cannot agree, with respect, with the opinions of McHugh J and Callinan J that the multifarious references to "water" and "fishing" in the Act are an instance of a legislative assumption not fulfilled when tested against accurate legal analysis[344]. The mere fact that rights of indigenous peoples in Australia in relation to the sea were not expressly mentioned in *Mabo [No 2]* is not determinative of the rights of the present parties[345]. This Court was there responding to the claim before it, which related to land. Nothing was said in *Mabo [No 2]* that excludes recognition and protection of rights in, or in relation to, "waters" and "fishing" if, conceptually, they give rise to a claim analogous to that presented with respect to land.

261 Nor do I find it useful to explore the subjective attitudes and intentions of those in Parliament at the time of the enactment of the Act[346]. The purpose of a legislature must be ascertained objectively from the language of the legislation that it enacts[347]. The text of the statute, not opinions recorded in Hansard, represents the ultimate source for resolving the territorial and substantive operation of the Act[348]. The Act is clearly expressed to extend to Australia's territorial waters. The purpose of the Parliament was also stated emphatically in the Preamble to the Act, namely:

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with international law in order to provide the body of law to apply in … territory newly acquired by the Crown"; cf reasons of McHugh J at [221].

**342** Esp the Act, s 6.

**343** See also the impact of the *Racial Discrimination Act* 1975 (Cth) on the common law: *Native Title Act Case* (1995) 183 CLR 373 at 484.

**344** Reasons of McHugh J at [128]-[131]; reasons of Callinan J at [365].

**345** The Act, Preamble, ss 3(a), 10, 11(1); cf reasons of Callinan J at [340], [365].

**346** cf reasons of McHugh J at [132]-[141].

**347** *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

**348** *Byrnes v The Queen* (1999) 199 CLR 1 at 34 [80].

> "(a) to rectify the consequences of past injustices by the special measures contained in this Act … for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
>
> (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.
>
> …
>
> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented."

262 One of the dangers of talking, as courts often do, of parliamentary "intention" is that use of this fiction slips all too easily into a search for the "intention" of the Minister, the Government or the Members of Parliament who spoke on the Bill that became the law in question. This is why, at a time when there is much greater latitude in the examination of the record of parliamentary debates, it would be preferable for courts to drop altogether the fiction of parliamentary "intention". I do not use it. The more objective word "purpose" reminds the searcher that the object of the inquiry is something other than the subjective intentions (if any) of the legislators. A court seeks to ascertain the purpose of the law, ultimately derived objectively from the language in which the law is expressed.

263 The realities of indigenous life in an island country, such as Australia, with a huge coastline and many offshore islands, rendered it virtually unthinkable that the new legislation, in the form of the Act, would ignore completely such an important part of the reality of the traditional laws and customs of the people whose rights and interests the Act was designed to protect. The only way in which the Act could be reconciled with the Commonwealth's basic proposition would be to assume that the "waters" and "fishing" to which it referred were confined to internal waterways in which most parts of Australia are, alas, comparatively deficient. Unsurprisingly, there is no indication in the statutory language that such was the Parliament's purpose. Nor should this Court attribute to the Parliament such a narrow, discriminatory and unjust objective that would benefit only some inland indigenous peoples and exclude the rights of the majority of Aboriginals and Torres Strait Islanders living at, or near, the coastline and maintaining a traditional connection to the waters and seas beyond. Clearly, the Act's purpose was to operate consistently, as well as beneficially, throughout the nation.

264 In several international reports[349] and municipal decisions[350] concerned with the legal entitlements of indigenous peoples, rights and interests have been asserted, and in some cases upheld, in relation to waters and fishing. Cases in a number of jurisdictions illustrate, to a point that puts the matter beyond argument, that in this field of discourse, an important dimension in affirming and protecting indigenous rights is the assumption that claims in relation to waters and fishing can be recognised[351]. In the case of most indigenous peoples living near the sea, or on offshore islands, such aspects of life as use of their sea country and access to fishing in it are essential to their economic viability, the preservation of their culture and language; indeed to their food supply and even their continued existence as a people.

265 *Conclusion on Commonwealth's appeal*: Therefore, having regard to the ultimate purposes that lay behind the *Mabo [No 2]* decision and the subsequent enactment of the Act (including to remove the discrimination against the indigenous peoples of Australia which the law had previously condoned and which this Court found to be unjustifiable) this Court should be extremely slow to reintroduce a discriminatory legal rule in the form of an artificial exclusion of entitlements to native title where such entitlements can be proved to exist in relation to "waters" and "fishing" within Australia's territorial sea. Especially should this outcome be avoided where it is obvious from the terms of the Act that the Parliament proceeded upon precisely the opposite footing.

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**349** See eg United Nations Commission on Human Rights, Report of the Special Rapporteur, *Indigenous Peoples and Their Relationship to Land* (30 June 2000), UN Doc E/CN.4/Sub.2/2000/25 ("Report of the Special Rapporteur").

**350** See eg *Mason v Tritton* (1994) 34 NSWLR 572; *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 at 147, 157-158; *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285; *Inupiat Community of Arctic Slope v United States* 548 F Supp 182 (1982); affd 746 F 2d 570 (1984); cert denied 474 US 820 (1985); *People of Village of Gambell v Hodel* 869 F 2d 1273 (1989).

**351** *Kauwaeranga* reported at (1984) 14 *Victoria University of Wellington Law Review* 227 (Native Land Court of New Zealand, 3 December 1870); *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 at 686-692; *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 655; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 at 306; *Jack v The Queen* [1980] 1 SCR 294; *R v Sparrow* [1990] 1 SCR 1075 at 1116; *R v Gladstone* [1996] 2 SCR 723; *People of Village of Gambell v Babbitt* 999 F 2d 403 (1993).

266 I agree with the analysis of the joint reasons[352] in respect of the Commonwealth's subsidiary argument, challenging a particular finding of fact in relation to the north-eastern and eastern portions of the claimed area. Because that finding was heavily dependent on the primary judge's impressions of the evidence[353], and was not shown to have been erroneous[354], it should not be disturbed. It follows that the Commonwealth's appeal should be dismissed with costs.

The claimants' appeal and the power of exclusion

267 *Original claims*: The issues in the claimants' appeal related to their claims (subject to qualifications later to be mentioned):

> "(a) To occupy, use and enjoy the seas and seabed within the determination area *to the exclusion of all others*;
>
> (b) To possess the seabed and seas and airspace above the seas of the determination area *to the exclusion of all others*"[355].

268 *Modified claims*: The claimants subsequently re-expressed their claims to allow for a lesser degree of exclusivity, or "qualified exclusivity", in the seas, sea-bed and airspace above the seas within the determination area. The modifications accepted that their rights could not be exercised so as to:

> (1) impede the right of innocent passage recognised by international law; or
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> (2) unreasonably interfere with, or restrict, the liberty of the public to navigate, as permitted by the laws of Australia, within the territorial sea; or

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**352** Joint reasons at [77]-[79].

**353** *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322-324 [72]-[75]; 160 ALR 588 at 609-610.

**354** cf *CJD v VAJ* (1998) 197 CLR 172 at 230-231 [186]; *Lowndes v The Queen* (1999) 195 CLR 665 at 678 [35].

**355** Emphasis added. For a description of the practical rights and interests claimed in the sea country, which translate into a legal right to exclude others from accessing the determination area, see the report by Dr N Peterson and Dr J Devitt ("the anthropologists' report") reproduced at joint reasons at [85].

(3) conflict with the rights of holders of fishing licences granted under federal or Northern Territory law to enter the waters of the determination area for the purposes of exercising their rights under such licences.

269 These qualifications were, in turn, further modified by an assertion that the right of navigation was subject to the entitlement of the claimants:

> "to close areas to access by any persons or class of persons in accordance with their traditional laws and customs so long as the effect of such closures does not at any particular time substantially impede or curtail the bona fide passage of vehicles through the waters of the determination area".

So far as the holders of fishing licences were concerned, the exercise of their rights was to be "to the extent that that may validly occur without the prior consent of the [native title] holders".

270 *Primary judge's determination*: The foregoing qualifications on the claimants' asserted "rights and interests" are consistent with the holding of the primary judge that the claimants' native title rights and interests did not "confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area *to the exclusion of all others*"[356], so far as his Honour rested his finding on the paramountcy of the rights of passage and navigation and of pre-existing statutory fishing licences. I will deal with each of these non-exclusive rights in turn.

271 The claimants go further than the primary judge in seeking "qualified exclusive" native title rights and interests, which can be exercised to exclude persons from accessing the area for other purposes, including, relevantly, those seeking to exercise public fishing rights or other rights to extract resources from the determination area. The key issue presented by the claimants' appeal therefore concerns whether a qualified power of exclusion (that is, a power to exclude persons entering the determination area for some purposes but not for others) is recognised by the law. This question must be resolved in accordance with the Act and the basis for recognition (and non-recognition) by the common law provided by the Act. A necessary influence will be the acknowledgment that, where possible, the question must be resolved in favour of full recognition

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**356** See par 3 of the proposed determination in *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at 602 (emphasis added). See par 4 of the final determination: *Mary Yarmirr v Northern Territory* [1998] FCA 1185 (4 September 1998) per Olney J.

of an existing customary right[357]. A further influence will be the consideration of any relevant international human rights norms which protect indigenous peoples against a discriminatory legal denial of their rights and interests. But recognition will not be accorded where to do so would be incompatible with a basic principle of the common law.

272 *International right of innocent passage*: The first basis upon which the primary judge rejected the claimants' assertion of the power of exclusion was that such a claim was inconsistent with the right of innocent passage under international law. The right of innocent passage through the territorial sea of Australia is recognised in conventional[358] and customary international law[359]. It has been incorporated in Australian legislation and preserved in Australia's decision to extend its territorial sea from three nautical miles to 12 nautical miles[360]. That extension was expressly stated to be subject to the right of ships of all nations to innocent passage through the territorial sea[361]. Thus, whilst there is potential for proprietary interests to be created by the Commonwealth in the sea-bed in its exercise of territorial sovereignty[362], these interests would appear to be subject to the right of innocent passage. The power of the common law to recognise such an interest is likewise so limited. The right of innocent passage allows ships of all states to navigate expeditiously and continuously in order to traverse the sea and to proceed in like manner to or from internal waters. Such a

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**357** *Mabo [No 2]* (1992) 175 CLR 1 at 51.

**358** Convention on the Territorial Sea and the Contiguous Zone, opened for signature 29 April 1958, 516 UNTS 205; 1963 Australia Treaty Series No 12 (entered into force 10 September 1964), Art 14; United Nations Convention on the Law of the Sea, opened for signature 10 December 1982; 1994 Australia Treaty Series No 31; 21 ILM 1261 (entered into force 16 November 1994), Arts 17-26, see *Seas and Submerged Lands Act*, Schedule.

**359** See eg O'Connell and Shearer, *The International Law of the Sea*, (1982), vol 1 at 25; Colombos, *The International Law of the Sea*, 6th revised ed (1967) at 25, 88; Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 614 [198]; Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea*, (1990) at 10-15.

**360** Given effect by Proclamation, *Commonwealth of Australia Gazette*, S297, 13 November 1990, made pursuant to *Seas and Submerged Lands Act*, s 7.

**361** Opeskin and Rothwell, "Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles", (1991) 22 *Ocean Development and International Law* 395 at 396-397.

**362** *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 469 per Mason J.

right is prima facie inconsistent with a right of native title holders to exclude *all persons* from large areas of the title holders' sea country.

273 It was therefore correct for the claimants to concede that any native title right to sea country must be subject to the foregoing rule of international law. It remains for this Court to ascertain what, if any, scope remains for the recognition of a "qualified exclusive" native title right[363]. Considerations in favour of recognition, coupled with the demonstrated capability of the common law to recognise exclusive interests in territorial sea waters subject to the international principle[364], lead inevitably to a conclusion that a general right of passage through an area of sea does not necessarily defeat all other legal rights within that area to control access and exclude others.

274 As a matter of practicality, a right to exclude persons from entering waters can be exercised for some purposes and not for others. For persons entering the waters "innocently", for the prescribed purposes of accessing internal waters and land, the rights of native title holders must give way. But just as a coastal nation may take steps to prevent passage which is not innocent[365], so too holders of a recognised native title could do so without doing any offence to the international rule. Innocent passage is defined by reference to its objectives. It is conceivable that persons acting outside of these objectives (the most obvious example being to access fishing and other natural resources in the determination area) could be obliged to seek permission from native title holders, just as they are now subject to lawful regulation by the littoral state.

275 Obviously, the intersection between the right of innocent passage and the native title right will be related to the size of the determination area. It is necessary to consider two principles when judging the breadth of a native title claim over waters. First, the larger an area of sea country, the greater the need to accede to the right of innocent passage[366]. It is also conceivable that in some cases, areas of sea country, although existing in the territorial sea, will be so narrow and defined that the right of innocent passage would not be disturbed by the enforcement of exclusive native title rights and thus would not be applicable. The present determination related to five estate claims which existed across land

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**363** The Act, s 223.

**364** See my reasons below at [288], n 409.

**365** United Nations Convention on the Law of the Sea, Art 25; Schneider, "Something Old, Something New: Some Thoughts on Grotius and the Marine Environment", (1977) 18 *Virginia Journal of International Law* 147 at 157.

**366** For a description of important sea-lanes (and their distance from Australia), see Buchholz, *Law of the Sea Zones in the Pacific Ocean*, (1987).

and sea. In the Full Court, Merkel J noted the advantages of delineating the separate estates of the determination area and particular parts requiring closure on sacred or ritual grounds (whether temporary or permanent), in order to respond to their apprehended interference with, amongst other rights, the right of innocent passage[367]. I agree with his Honour's remarks in that regard.

276 Secondly, the breadth of the determination area may, in a given case, extend beyond the territorial sea, bearing in mind the inevitable setting of boundaries in traditional customary laws without reference to conventional concepts of sovereignty and jurisdiction (in the present case using the reference points of "the horizon" or the deeper waters of the "*balu*" and "*birrina*"[368]). The present claim, lodged in 1994[369], is to be treated as existing within Australia's territorial waters, as proclaimed in 1990. If a native title claim extended to the high seas (beyond 12 nautical miles and outside the Act's operation), relying on Australia's interests in its continental shelf[370], a determination of native title would enliven an additional norm of international law. That norm generally upholds access to the open sea as part of the common heritage of humanity[371].

277 As the high seas are not, as such, part of the territory of any state, no state, as a rule, has a right to exercise its jurisdiction or powers over parts of the high

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**367** *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 301 [573], 321 [659].

**368** The claimants' evidence supported the proposition that they "'have traditionally thought of the sea to the horizon as being under their control' [and] that the estates extend seawards 'as far as the naked eye can see' [or] 'as far as the eyes could carry'".

**369** The application was lodged with the Registrar of the National Native Title Tribunal on 22 November 1994 and accepted on 26 May 1995.

**370** United Nations Convention on the Law of the Sea, Pt VI: *Seas and Submerged Lands Act*, Schedule; see also Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 723 [280]-[281]; *North Sea Continental Shelf Cases* [1969] ICJ Rep 3 at 51 [95]; *Case Concerning the Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13 at 39 [45]; see also the claimed area in *People of Village of Gambell v Hodel* 869 F 2d 1273 (1989); *People of Village of Gambell v Babbitt* 999 F 2d 403 (1993).

**371** Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 756 [306]; Anand, *Origin and Development of the Law of the Sea*, (1983) at 194-205; O'Connell and Shearer, *The International Law of the Sea*, (1984), vol 2 at 795; Ogley, *Internationalizing the Seabed*, (1984) at 42; cf Goldwin, "Common Sense vs 'The Common Heritage'", in Oxman et al (eds), *Law of the Sea*, (1983) 59.

seas[372]. Various reasons have been given for this treatment of the open sea in international law as different from land and from seas connected territorially to land. The reasons have included the fact that, of their nature, the high seas are not as susceptible as land and territorial waters are to "appropriation" and "divisibility"[373]. Furthermore, the high seas separate nation states so that international peace and security depend, in part, upon a high measure of freedom of movement and upon common use of the open sea[374]. In recent times, the notion that the high seas are part of the common heritage of humanity has come to replace earlier notions based upon Imperial or mercantile interests[375]. Claims upon the high seas may now be viewed as analogous to other interests regarded as part of the common heritage of humanity, such as the Moon and outer

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**372** Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 727 [284]; United Nations Convention on the Law of the Sea, Art 87.

**373** Anand, *Legal Regime Of The Sea-Bed And The Developing Countries*, (1976) at 212; O'Connell and Shearer, *The International Law of the Sea*, (1982), vol 1 at 25; Ballah, "The Universality of the 1982 UN Convention on the Law of the Sea: Common Heritage or Common Burden?", in Al-Nauimi and Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, (1995) 339 at 340.

**374** Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 636 [211]; Dixon and McCorquodale, *Cases and Materials on International Law*, 3rd ed (2000) at 413.

**375** Schneider, "Something Old, Something New: Some Thoughts on Grotius and the Marine Environment", (1977) 18 *Virginia Journal of International Law* 147; cf Tuck, *The Rights of War and Peace*, (1999) at 107.

space[376], the Antarctic[377] and the human genome[378]. This international norm is more comprehensive than the right of innocent passage and presents greater scope for conflict with any native title rights and interests in the high seas. However, that potential problem is not relevant to the claims in this appeal. Those claims relate exclusively to waters within Australia's legal control. Accordingly, this potential source of extinguishment may be disregarded.

278 *Common law right of navigation*: The second qualification conceded by the claimants relates to the common law right of the public to navigate in tidal waters. This is analogous to the international right of innocent passage. It is founded on the same principles of freedom of movement and access. The common law right includes a right to pass and repass over the water and includes a right of anchorage, mooring and grounding where necessary in the ordinary course of navigation[379]. It prevails over exclusive fishing rights when the two conflict[380]. It can be described as a foundational principle of the common law[381]. It can only be modified by statute. No right of a private person, however long enjoyed, can extinguish it[382].

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**376** Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, opened for signature 27 January 1967, 610 UNTS 205; 1967 Australia Treaty Series No 24; 6 ILM 386 (entered into force 10 October 1967): Jennings and Watts (eds), *Oppenheim's International Law*, 9th ed (1992), vol 1 at 827 [362], 837 [368]; Shearer, *Starke's International Law*, 11th ed (1994) at 165.

**377** The Antarctic Treaty, opened for signature 1 December 1959, 402 UNTS 71; 1961 Australia Treaty Series No 12 (entered into force 23 June 1961); see also Protocol on Environmental Protection to the Antarctic Treaty, opened for signature 4 October 1991, 1998 Australia Treaty Series No 6; 30 ILM 1455 (entered into force 14 January 1998); Shearer, *Starke's International Law*, 11th ed (1994) at 151.

**378** UNESCO Universal Declaration on the Human Genome and Human Rights 1997, endorsed GA Res 53/152 (9 December 1998), (1999) 6 IHRR 886, Art 1; Knoppers, "Genetic Benefit Sharing", (2000) 290 *Science* 49.

**379** *Gann v The Free Fishers of Whitstable* (1865) 11 HLC 192 at 208-210, 221-222 [11 ER 1305 at 1312, 1317]; *Iveagh v Martin* [1961] 1 QB 232 at 272-273.

**380** eg *The Mayor of Colchester v Brooke* (1845) 7 QB 339 at 374 [115 ER 518 at 531].

**381** cf *Mabo [No 2]* (1992) 175 CLR 1 at 29, 43.

**382** *Vooght v Winch* (1819) 2 B & Ald 662 [106 ER 507]; see also *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 297 [549] per Merkel J.

279 The claimants' concession of the public's right to navigate in areas of sea country respects this foundational principle of the common law. From the perspective of the claimants, it is clear that the elements of exclusivity within traditional laws and customs may continue, even when their exercise is restricted so as not unreasonably to interfere with the general right of the public to navigate. There was much evidence to support this proposition in the present case. The description of the claimants' originally asserted rights[383] indicates that no claimed right is inconsistent with the public's right to navigate, save for the right "of the senior *yuwurrumu* member(s) to close off areas of the estate on the death of either *yuwurrumu* members or of individuals in important relationships with *yuwurrumu* members, and to decide when they shall be re-opened to use". The claimants now seek the right to close certain areas to access in accordance with traditional laws and customs, so long as bona fide sea traffic is not "at any particular time substantially impede[d]". Such a right is not unfamiliar to the common law[384].

280 In their submissions, the claimants have identified ways in which exclusive rights of possession in the sea can coexist with the public right to navigate. For example, the creation of oyster beds or leases of the sea-bed permit exclusive possessory rights in the sea[385]. Although in Australia such cases consist of statutory, rather than common law, rights, they demonstrate important, and practical, ways in which the right of navigation may coexist with underlying exclusive interests in the sea.

281 A recognition of a public right of access would be unsurprising in relation to certain (exclusive) common law land tenures[386]. It should not be prevented from operating in relation to the sea. If, as has been accepted by the majority of this Court, the Act and the common law recognise native title rights and interests to the sea, it would be incongruous for the general right of navigation to operate as a blanket refutation of such recognition, where the incidents of traditional law and custom and connection to the sea otherwise demonstrate "exclusive" elements in particular native title rights and interests. It is for the courts to recognise "exclusive" rights if they are found to exist as a matter of fact. The common law public right to navigate does not, as a matter of law, extinguish all

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**383** See the anthropologists' report, reproduced in the joint reasons at [85].

**384** See below in relation to the interest in an exclusive fishery at [288].

**385** eg *Fisheries Ordinance* 1965 (NT), s 26; *Pearling and Pearl Culture Ordinance* 1964 (NT), s 56.

**386** See *Anderson v Wilson* (2000) 97 FCR 453 at 463, citing the concept of relativity of titles upheld in *Allen v Roughley* (1955) 94 CLR 98.

otherwise exclusive elements of native title, where as a matter of fact these continue to exist[387].

282 The common law right to navigate is different in character and strength from the common law right to fish. The latter ceases to exist in areas where there are proprietary rights[388]. It may also be limited by statute[389]. Whilst the public right to navigate is based on the principle of freedom of movement across waters, the principle behind the public right to fish is based on the (now unscientific) notion that uncontrolled catching of fish in sea areas cannot diminish the stock. The claimants do not concede the right of others to fish in the determination area except in accordance with licences granted under valid legislation. As will be shown later in my reasons[390], I agree with Merkel J that, in an area of pre-existing native title, the common law right of the public to fish may operate subject to, and be defeated by, the underlying native title rights and interests in the claimants' sea country.

283 *Statutory fishing licences*: The claimants' third qualification relates to the exercise of rights of holders of fishing licences, validly granted under statute, to enter the waters of the determination area[391]. These licences are granted for a specific time and may be subject to conditions in respect of particular areas, species, quantities and fishing methods. Such a grant is greater than, and distinguishable from, the public's common law right to fish[392]. In Australian land law, it is recognised that a statutory grant of a licence for certain purposes does not necessarily detract from the "exclusive" nature of freehold title to the same area[393]. I see no reason of principle or policy why such a grant of non-exclusive fishing licences is inconsistent with the continued right of the claimants to enjoy a residue of exclusive elements of their native title rights and interests. Indeed,

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**387** See *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 301 [573] per Merkel J.

**388** *Neill v Duke of Devonshire* (1882) 8 App Cas 135 at 177.

**389** *Bonser v La Macchia* (1969) 122 CLR 177 at 212; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330.

**390** See my reasons below at [288]-[290].

**391** See *Fisheries Act* 1988 (NT); see also *Validation of Titles and Actions Act* 1994 (NT).

**392** *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 334-335.

**393** See eg the grant of mining tenements on private land in *Mining Act* 1978 (WA), ss 27-39.

consistently with the principles accepted by the majority of this Court in *Wik*[394], whilst the specific rights of the licence holders prevail over the traditional entitlement of the claimants to control access to, and use of, the resources of their sea country, the underlying elements of native title are not extinguished. The two may coexist. If they can coexist in law in the vastness of pastoral leases of outback Queensland, I fail to see why they cannot coexist in law in the vastness of a given sea country.

284 The comprehensive scheme of Commonwealth and Northern Territory fishing regulation, including that in place prior to the current *Fisheries Act* 1988 (NT)[395], contains a prohibition on commercial fishing without a licence. In the Full Court, Merkel J[396] correctly reasoned that native title rights to an exclusive fishery are not necessarily extinguished by such a "conditional prohibition" as a matter of law[397]. This is because the continued existence of native title rights and interests, even those supporting a power to exclude for certain purposes, is not inconsistent with regulation which is directed to the *way* in which native title rights may be exercised in the particular land and waters, without severing any connection upon which the native title rights and interests are based.

The qualified power to exclude

285 *Three accepted qualifications*: It follows that the above three qualifications do not extinguish otherwise exclusive native title rights and interests. As the claimants submitted, rights of passage and navigation and rights of fishing under statutory licences are all rights "defined and limited by purpose". Although extensive, such purposes do not by any means cover *all* the potential activities and uses of the claimed waters. A power to exclude, for example, persons who move through the waters of the determination area in order to fish without licence, to conduct tourist activities or to extract natural resources without the consent of the native title holders remains a very significant power. Such a power is currently exercisable by the Northern Territory (up to three nautical miles) and the Commonwealth, subject to the recognition of pre-existing

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**394** (1996) 187 CLR 1.

**395** Fishing was regulated in the determination area by South Australian legislation as early as 1872: see (1999) 101 FCR 171 at 332 [702]. Nothing turns on the differences in the terms of the legislation enacted since that time.

**396** (1999) 101 FCR 171 at 338 [730].

**397** *Yanner* (1999) 201 CLR 351 at 372-373 [37]-[38]; *Mason v Tritton* (1994) 34 NSWLR 572 at 592-593; the Act, s 211.

exclusive native title rights in the determination area[398]. The rights which the claimants assert in these proceedings are similar. Viewed apart, they appear completely reasonable. But does the law recognise and uphold them? The other members of this Court think not. I disagree.

286 *A proprietary right*: The claimants assert "qualified exclusive" native title rights and interests to waters, as that term includes the sea, sea-bed or subsoil beneath the sea and airspace over the sea[399]. Following *Yanner*[400], such a right is proprietary in nature, in the sense that the right to exclude others from, and to control access to, a resource produces a proprietary relationship. The common law has recognised a proprietary community title. It has done so in the face of significant difficulties of proof of boundaries, of membership of the community and of representatives of the community[401]. So much is as clear for the sea as for the land[402]. Modern approaches to the concept of property, embraced by the common law and this Court[403], acknowledge this possibility. I agree with Merkel J[404] that the former uncertainty as to the ability of the Crown to assert proprietary rights in the sea-bed of the territorial sea, expressed outside of the context of the special status of native title under the common law and the Act[405], does not defeat this proposition.

287 If the Aboriginal laws and customs observed by the claimants establish otherwise a traditional entitlement to the exclusion of others to control the access

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**398** *Coastal Waters (Northern Territory Title) Act* 1980 (Cth), s 4; *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth), s 4; *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT), s 3; Cullen, *Australian Federalism Offshore*, 2nd ed (1988); see also *Validation of Titles and Actions Act* 1994 (NT).

**399** The Act, s 253.

**400** (1999) 201 CLR 351 at 366-367 [18]-[21], citing Gray, "Property in Thin Air", (1991) *Cambridge Law Journal* 252 at 299.

**401** *Mabo [No 2]* (1992) 175 CLR 1 at 51-52.

**402** *Mason v Tritton* (1994) 34 NSWLR 572 at 581-582; see also the Act, ss 223, 225.

**403** Gray, "Property in Thin Air", (1991) *Cambridge Law Journal* 252 at 299; see also joint reasons at [13].

**404** (1999) 101 FCR 171 at 287 [505].

**405** eg *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 174; *Seas and Submerged Lands Case* (1975) 135 CLR 337 at 367-368, 465; cf at 397-400, 433, 487.

of other persons to their sea country, and to fish in their sea country, such an entitlement is proprietary in nature. In *Mabo [No 2]*, this Court made it clear that concepts such as "alienability" are not relevant in the context of a proprietary native title right[406]. Nor should strict concepts of occupation and possession, in the sense that they are confined to an unbroken physical presence, be imported for the determination of native title rights[407]. Such an approach is inappropriate for a native title determination in respect of land; but even more so in respect of waters[408].

288 Even in England it has not proved beyond the capacity of the common law to recognise proprietary interests of the kind that the claimants propound. One instance of the ability to recognise proprietary interests in the sea (without proof of physical occupation) is the recognition of an exclusive (or "several") fishery, that is, an exclusive right of fishing in a given place, either with or without the property in the subsoil[409]. Such an "exclusive" right is qualified by the competing rights of others to exercise freedom of movement. The rights contained in the exclusive fishery entitle the owner to exclude others from accessing the resources of the fishery[410], thereby taking priority over the common law right to fish.

289 Questions have arisen as to the ability of the common law of Australia to recognise rights akin to an exclusive fishery. It has been asserted that such rights must pre-exist the Magna Carta, which expressly prevented recognition of exclusive fisheries not based on prior "custom or prescription" or Crown grant[411]. In *Attorney-General for British Columbia v Attorney-General for Canada*[412] it

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**406** (1992) 175 CLR 1 at 51.

**407** See McHugh, "Proving Aboriginal Title", (2001) *New Zealand Law Journal* 303 at 306-307.

**408** The Act, ss 223, 225; see my reasons below at [295].

**409** See Hall, "Rights of the Crown in the Sea-shore", in Moore (ed), *A History of the Foreshore*, (1888) 667 at 719. The Appendix to that volume lists the numerous exclusive fisheries which at that time continued to exist in England. A more recent example of common law recognition in England (to an exclusive fishery in waters seaward of the low water mark) is provided by *Loose v Castleton* (1978) 41 P&CR 19.

**410** *Halsbury's Laws of England*, 4th ed, vol 18, pars 609, 615-617.

**411** Lord Hale, *De Jure Maris*, Ch 5; *Neill v Duke of Devonshire* (1882) 8 App Cas 135.

**412** [1914] AC 153 at 170-171 per Viscount Haldane LC.

was stated that "proof of the existence and enjoyment of [exclusive rights of fishing] has of necessity gone further back than the date of Magna Charta". However, the subsequent holding that "no such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta"[413] has no application in this Court. It was recognised in *Mabo [No 2]* that customary title pre-existed the acquisition of sovereignty in 1824. Moreover, the necessary date of inquiry as to the existence of rights analogous to exclusive fishing rights is Australia's reception of the Magna Carta rather than its making in 1215[414]. As the claimants have proved their continual connection with the waters of the determination area since sovereignty, in accordance with the common law and the Act, they sufficiently discharge proof of an exclusive fishery by prescription or custom, if the power to exclude others from the area is proved as an incident of their customary title.

290 I therefore agree with Merkel J that there is scope for the survival of a native title right, equivalent to a pre-existing exclusive fishery, established in accordance with the traditional laws and customs of the indigenous peoples[415]. In this situation, the general right of the public to fish, although recognised by the common law, is subservient to a right akin to an exclusive fishing right, founded on native title and recognised by the Act and the common law. I do not find that there is a "fundamental inconsistency"[416] between the two. This is because the common law has historically been capable of sustaining exclusive rights in the sea. Where it does so, public rights of navigation continue but public rights of fishing are no longer exercisable. The conflict between titles[417] is between native title containing a right to exclude access for certain purposes and a general public title to fish, the latter being inherently subject to rights in exclusive fisheries and rights conferred by legislation.

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**413** [1914] AC 153 at 171; cf *Malcomson v O'Dea* (1863) 10 HLC 593 [11 ER 1155]; *Neill v Duke of Devonshire* (1882) 8 App Cas 135 where private rights of fishing in tidal waters in Ireland (a territory acquired by conquest) were upheld on the basis of evidence which predated Magna Carta and were accepted as likely to have originated in Irish law before the acquisition of English sovereignty.

**414** In respect of the determination area, this date represents the reception of the common law, or the enactment of 9 Geo IV c 83 (25 July 1828).

**415** (1999) 101 FCR 171 at 302 [576], 304 [586], 305 [592], 314-315 [629]-[632].

**416** cf joint reasons at [98].

**417** *Wik* (1996) 187 CLR 1 at 235.

291 To extinguish legal rights, legislation said to have that effect must be completely clear[418]. The same must be true in relation to a rule of the common law. If the common law is ambiguous and coexistence of rights is possible, extinguishment of the rights of some, but not others, will not have been clearly demonstrated. The rights will survive.

292 *The use of international principles*: In resolving the problem of legal recognition of continuing exclusive elements of native title in the sea (where exclusive enjoyment can be proved as a fact to exist) there are new sources to inform the content of the common law of Australia, including as that expression is used in the Act. Those sources assist in the resolution of ambiguous provisions in Australian legislation or gaps in the common law of Australia[419]. While it has been demonstrated that the common law, inherited from England, is capable, in certain circumstances, of recognising exclusive rights in the sea, I regard international principles as an even more persuasive source in a decision about whether certain exclusive rights in the determination area may be recognised by the common law in the present context.

293 A critical step in the reasoning of Brennan J in *Mabo [No 2]*, with whom Mason CJ and McHugh J agreed, was the one that ultimately sustained the move by this Court to a new principle of the common law of Australia in respect of native title. This was explained in the following oft-cited passage of Brennan J's reasons[420]:

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**418** *Mabo [No 2]* (1992) 175 CLR 1 at 64; *Wik* (1996) 187 CLR 1 at 130, 154-155, 185-186, 242-243.

**419** In my view, they are also available to resolve ambiguities in the Constitution itself: *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-661; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418 [166]; *Cabal v United Mexican States (No 2)* 181 ALR 169 at 172 [9], n 12; cf Mason, "The Role of the Judiciary in Developing Human Rights in Australian Law", in Kinley (ed), *Human Rights in Australian Law*, (1998) 26 at 43-44.

**420** (1992) 175 CLR 1 at 42 (footnote omitted). For comment see Mason, "International Law as a Source of Domestic Law", in Opeskin and Rothwell (eds), *International Law and Australian Federalism*, (1997) 210 at 222; Mason, "The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown", (1997) 46 *International and Comparative Law Quarterly* 812 at 813, 829; Walker, "Treaties and the Internationalisation of Australian Law", in Saunders (ed), *Courts of Final Jurisdiction*, (1996) 204 at 212 referring also to *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569.

> "Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule".

294 Expositions of international law, concerned with fundamental human rights, repeatedly stress the impermissibility of discrimination and unequal treatment of people on the grounds of their race[421]. This norm has particular relevance to Australian law both because Australia is a party to the International Convention on the Elimination of All Forms of Racial Discrimination[422] and because the Federal Parliament has enacted a law to give effect to the requirements of that Convention[423].

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**421** See eg the opinion of Judge Tanaka in *South West Africa Cases (Second Phase)* [1966] ICJ Rep 3 at 293 considered in *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 418-419 [167]. See also Bayefsky, "The Principle of Equality or Non-Discrimination in International Law", (1990) 11 *Human Rights Law Journal* 1 at 8; McKean, "The Meaning of Discrimination in International and Municipal Law", (1970) *British Year Book of International Law* 177 at 180.

**422** Opened for signature 7 March 1966, 660 UNTS 195; 1975 Australia Treaty Series No 40; 5 ILM 352 (entered into force 4 January 1969; Australia's accession 30 October 1975); Triggs, "Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act* 1998 (Cth)", (1999) 23 *Melbourne University Law Review* 372 at 373-375. See also the provisions of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171; 1980 Australia Treaty Series No 23; 6 ILM 368 (entered into force 23 March 1976; Australia's accession 13 November 1980), Arts 2, 27.

**423** *Racial Discrimination Act* 1975 (Cth): Mason, "The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown", (1997) 46 *International and Comparative Law Quarterly* 812 at 818-819.

295 The importance of preserving and protecting the traditional society and culture of indigenous peoples, in terms of the activities essential to their way of life, has been recognised by several international bodies[424]. This is why, in practical terms, the maintenance of the rights of indigenous peoples often necessitates effective protection of their land and resources extending to their traditional economic activities, such as hunting, fishing, trapping and so on[425]. Such norms recognise that it is not enough merely to allow indigenous peoples to carry out their traditional economic activities without legal protection for their exercise of control and decision-making in relation to developments (including the use of natural resources, management and conservation measures) that may otherwise diminish or destroy those activities. It is also why those who expound the application of international human rights law in this context repeatedly emphasise that the principle of non-discrimination must include a recognition that the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do[426]. They do this lest, by being frozen and completely unchangeable, they are rendered irrelevant and consequently atrophy and disappear.

296 In short, to take a view of the common law of Australia, including as it is given recognition and protection under the Act, that would confine the native title rights of indigenous peoples solely to those enjoyed by their forebears before European settlement of Australia could itself amount to imposing on them an unjust and discriminatory burden not imposed by the common law on other Australians. If it were proved, for example, that persons such as the claimants did indeed, by their own laws and customs, enjoy over a claimed area rights and interests exclusive of others, it would be discriminatory against them to deny

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**424** eg *Ivan Kitok v Sweden*, Report of the United Nations Human Rights Committee, UN Doc CCPR/C/33/D/197/1985 (1988) (Communication No 197/1985); *Ominayak v Canada*, Report of the United Nations Human Rights Committee, UN Doc A/45/40 (1990) vol 2.1 (Communication No 167/1984); *Mahuika v New Zealand*, Report of the United Nations Human Rights Committee, UN Doc CCPR/C/70/D/547/1993 (2000) (Communication No 547/1993), par 9.4; see also United Nations Commission on Human Rights, Report of the Working Group on Indigenous Populations, Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1993/29/Annex I (23 August 1993), Arts 7, 12, 13, 19, 25, 26, 27.

**425** Report of the Special Rapporteur, par 82.

**426** See *Mabo [No 2]* (1992) 175 CLR 1 at 70, 110, 192; *Länsman v Finland*, Report of the United Nations Human Rights Committee, UN Doc CCPR/C/52/D/511/1992 (1994) (Communication No 511/1992), par 9.3.

recognition of exactly the same entitlements in respect of *their* rights and interests in land or waters as other Australians would enjoy in respect of *their* rights and interests. On the face of things, once recognition of indigenous rights and interests is accepted in principle, the common law accepts the indigenous rules to be applicable so far as it can. If it does not, there needs to be a very good legal reason to justify denying such recognition, given that the denial necessarily involves discrimination against vulnerable persons defined in terms of their race.

297 In giving expression to the common law of Australia, to the extent that, in the present context, it is given effect by the Act, it is no longer sufficient, or even necessarily relevant, in my respectful opinion, to refer to English sources of law; still less to be constrained by that law. The recognition of the rights to land and to waters and fishing resources of indigenous peoples is now an international question. It is one that concerns, but is not confined to, the several nations settled at one time under the British Crown[427]. It is therefore at least as relevant (and will sometimes be more helpful) to have regard to the requirements of international law as a "legitimate and important influence on the development of the common law"[428] as it is to consider the old cases expounding the common law of England.

298 *Limits of applicability of English law*: At least after the Norman Conquest, English law did not have to solve the many special problems now presented to Australia's legal system by the intersection of an established written legal system of immigrant settlers and their successors, on the one hand, and the unwritten laws and customs of the pre-existing indigenous peoples, on the other. English law did not have to attempt to reconcile notions of individual and communal rights[429]. It did not have to accommodate feudal ideas of tenure with concepts based on a spiritual connection with a given "country", comprising both land and sea. It did not have to adjust the universal conception of a single legal sovereignty to a new legal idea affording special recognition to the legal claims of indigenous peoples both because their claims relate to rights and interests that preceded settlement and because their recognition is essential to reverse previously uncompensated dispossession.

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**427** Report of the Special Rapporteur, pars 36-38, 46. The Special Rapporteur pointed out (at par 35) that similar questions have arisen in West Irian, the Philippines, Thailand, Central and South America and India in relation to indigenous peoples. Analogous questions arose in the 1930s before the Permanent Court of International Justice: see *Minority Schools in Albania* (1935) PCIJ Ser A/B No 64; (1935) 3 World Court Reports 484.

**428** *Mabo [No 2]* (1992) 175 CLR 1 at 42.

**429** Strelein, "Conceptualising Native Title", (2001) 23 *Sydney Law Review* 95 at 97.

299 It is because the common law of England developed in circumstances that were so profoundly different from those in which courts in Australia now find themselves, that great care must be taken when our courts are invited simply to pick up and apply to contemporary Australian legal conditions the rules and assumptions expressed by English law for circumstances so distinct. It is for this reason that, in this legal context in Australia, the influence of international law, especially when it declares the existence of universal human rights[430], must be given special attention. Such international law will take Australian courts to principles of universal application. Those principles are less likely to be affected by accidents of legal history that occurred on the other side of the world and long ago in completely different social and legal conditions.

300 *Conclusion*: The common law as re-expressed in *Mabo [No 2]* and incorporated in the Act, and as informed by norms of international law and supported by the analogy to exclusive fisheries, is able to recognise certain exclusive rights in relation to the sea. When the norms of international law are invoked, they forbid the existence of exclusive title in the high seas – which are part of the common heritage of humanity. But no such claim is made here. They also forbid extinguishment of title on the basis of rules which discriminate against people on racial grounds. This is the point that *Mabo [No 2]* teaches. It is applicable to the claimants' sea country here as it was to land country in *Mabo [No 2]* and in *Wik*.

The findings of the primary judge: non-exclusive possession

301 *The evidentiary finding*: In the present case, the primary judge did not contemplate that exclusive elements of possession, occupation, use and enjoyment of the seas of the determination area were capable of coexistence with other, non-exclusive, rights. His was an all or nothing approach. This, along with the assumption that occupation and possession were impossible in relation to the sea, led him to the finding that the claimants had only non-exclusive native title rights and interests to be exercised for non-commercial fishing, hunting and gathering and for observing and protecting cultural, ritual and spiritual laws and customs. His Honour did not accept that non-exclusive rights, recognised by legislation, common law and international law, could coexist with demonstrated exclusive elements of native title. The true relationship between the different rights and interests was therefore not explored.

302 Findings of a primary judge should not be disturbed by an appellate court, unless an appellant is able to demonstrate error. Where the assessment of oral evidence is involved, the appellant must show, relevantly, that the primary judge

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**430** *Mabo [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

has failed to use, or palpably misused, his or her advantage in arriving at the particular result[431]. In the Full Court, Merkel J, in dissent, held that the primary judge had erred in law by failing to ascertain the nature and incidents of native title according to the different dates at which sovereignty was acquired with respect to the particular areas within the determination area[432]. His Honour was also critical of the primary judge's failure to recognise the possibility of exclusive uses of parts of the determination area[433]. He also criticised the primary judge's reasons for failing to draw a clear distinction between the acknowledgment and observance of laws and customs by the Aboriginal people and their enforcement against others[434]. Enforcement of laws and customs against others is clearly not determinative of a genuine connection between indigenous peoples and their sea country. Nor is the acknowledgment of such laws and customs by non-Aboriginal people crucial in that respect. Whilst Merkel J found it unnecessary to decide whether such reasoning had led the primary judge into legal error, I find such a conclusion inescapable.

303 *Problems with the finding*: The first problem with the findings of the primary judge was an underlying assumption, evident in his reasons, that, without fulfilling conventional definitions of occupation and possession, which he saw as unachievable in relation to the sea, the claimants could have no exclusive proprietary rights to the sea. He said[435]:

> "The very nature of the sea renders it inappropriate to attempt to strictly apply concepts such as possession and occupation which are readily capable of being understood in relation to land. There is a clear distinction between possession and occupation on the one hand and use and enjoyment on the other. The claimed right of senior clan members to grant permission is limited to allowing non-members to use and enjoy the country, not to possess or occupy it."

304 I agree that concepts of "occupation" and "possession" are, in some ways, ill-suited to a description of a relationship between persons and the sea. However, the claimants' argument that their traditional laws and customs do

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**431** *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq*) (1999) 73 ALJR 306 at 307 [3]; 160 ALR 588 at 589.

**432** (1999) 101 FCR 171 at 319-321 [650]-[651], [657].

**433** (1999) 101 FCR 171 at 322-323 [665].

**434** (1999) 101 FCR 171 at 326 [677].

**435** (1998) 82 FCR 533 at 580.

recognise a form of "occupation" and "possession" of the waters has obvious factual merit. The latter is demonstrated by their consistent reference to the determination area as "my country" or "Mandilarri-Ildugij country"[436]. When questioned about ownership, Mary Yarmirr responded: "It's always the *yuwurrumu*, *yuwurrumu* clan that owns that particular estate."[437] Unlike the primary judge and the majority in the Full Court, I would not regard such views of possession and ownership, although expressed from within a different legal culture from our own, as irrelevant[438]. Such concepts, accepted by traditional law and custom, are an integral part of the "socially constituted fact" that the majority of this Court in *Yanner*[439] upheld as an indication of native title rights and interests. Indeed, such concepts appear far more relevant than physical possession of the area which, of its nature, was not capable of being "occupied", as non-indigenous perspectives understand that term. Remote areas, such as mountain regions or deserts, may be equally "empty" or "uninhabited" according to common European thought. Yet in looking at the history of colonisation, including as it affected Australia, it is not coincidental that such remote areas continue to be "occupied" by indigenous peoples, living according to indigenous customary laws[440]. His Honour's error was therefore to prefer an unduly narrow classification of "use and enjoyment", distinguished from occupation and possession, to fit the demonstrated "connection"[441] that the claimants had with the waters of the determination area. In giving flesh to these concepts in this context, a more useful focus is on the rights that the native title claimants assert based on their own understandings of occupation, possession, use and enjoyment of their sea country. This is the approach envisaged by *Mabo [No 2]*. It is not completely alien to notions known to the common law. The very claims to sovereignty in the Crown, made respectively by Captains Cook and Phillip, over the land mass of a huge continent, had a similar metaphorical quality, excluding all other claims to sovereignty. But they had undoubted legal consequences which our courts uphold.

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**436** Mandilarri-Ildugij is one of the clans in the area. Others are the Mangalara, Murran, Gadura-Minaga and Ngaynjaharr clans.

**437** The *yuwurrumu* are described in the joint reasons at [3].

**438** cf *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at 576-577; *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 321 [659].

**439** (1999) 201 CLR 351 at 372-373 [37]-[38].

**440** *Native Title Act Case* (1995) 183 CLR 373 at 431-432.

**441** The Act, s 223(1)(b).

305 Secondly, in approaching the question of the standard of exclusion required to establish a proprietary title in the sea, as that of exclusion "of all others", the primary judge failed to acknowledge the capacity of the common law to recognise a proprietary title in the sea which is concurrently subject to other rights. This amounted to a failure to accord full weight to the requirements of s 225 of the Act[442], which avoids a rigid delineation between a power to enjoy native title rights to the exclusion of all others or to the exclusion of none at all. The determination should rather have been focused on the nature and extent of native title rights and interests and any other interests in the determination area, and the relationship between the two, taking into account the principles of recognition and protection (and impairment and extinguishment) contained in the Act.

306 It was established that the determination area in the present case was subject to non-exclusive fishing licences (as well as rights of access based on international and common law principles of freedom of navigation). Accordingly, a determination of possession to the exclusion "of all others" in an absolute sense, under s 225(b)(ii), was impossible. The proper focus, required by s 225 of the Act, was thus upon the relationship between the claimants' asserted rights and interests under par (b)(iii) and the nature and extent of any other interest in relation to the land or waters that may affect such rights under par (b)(iv). In rejecting the possibility of a power of exclusion subject to some rights but not others, the primary judge did not allow for a determination in accordance with this section. In this, with respect, his Honour also took an unnecessarily narrow view.

307 Thirdly, native title accords recognition to rights and interests based on the claimants' connection with land and waters, as recognised by their traditional laws and customs. Such connection must have survived the acquisition of sovereignty. It is the traditional connection arising from the acknowledgment of laws and customs by the indigenous community, and not recognition or acceptance by *others* of the connection, which is the source of native title[443]. Nevertheless, in *Mabo [No 2]*, it was held that a proprietary native title interest may be recognised by the common law where exclusive possession or occupation had been "assert[ed] effectively"[444]. It is therefore necessary to consider the findings of the primary judge in respect of the rights asserted by the claimants against non-Aboriginal people, namely the visiting fishermen from Sulawesi, described as the Macassans, and the *balanda* or "white man", after the Europeans and their descendants arrived in the area.

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**442** Reproduced in joint reasons at [8]; reasons of Callinan J at [342].

**443** *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 248 [319] per Merkel J.

**444** (1992) 175 CLR 1 at 51.

308 *Response to the Macassans and the balanda*: There was evidence, described in the joint reasons in this Court[445], that demonstrated that the forebears of the claimants asserted exclusive possession of the sea country against other Aboriginal peoples. A right to exclude was also asserted against the Macassans. Thus, the primary judge found that, in the times before contact with the *balanda*, the Macassans sought and received permission to take trepang from the waters around the islands[446]. I agree with Merkel J that it is unclear, from the primary judge's treatment of this evidence, whether the Macassans' repeated presence in the area was based on permission in foreshore areas and so limited in outlying areas that it could be analogised as akin to a right of navigation[447]. The evidence demonstrated that rights of control of access as between other Aboriginal groups (including other clans) continue to be asserted and respected to the present day.

309 In relation to the *balanda*, the evidence fell short of demonstrating that no attempt was made to control their access to the area. In assessing such attempts, the trial judge was charged with the difficult task of giving recognition to "highly fact specific" rights[448]. A failure to appreciate the unique requirements of the determination of the nature and extent of native title and its relationship with the rights of others may lead to error. For example, the present content of native title, although substantially based on traditional connection with the land or waters, may incorporate activities and practices which are the modern form of exercise of traditional laws and customs[449]. The primary judge's approach in the present case may be criticised in this regard[450]. Limitations on how a right to exclude may be "asserted effectively" by Aboriginal claimants must also be appreciated. Thus, for example, continual assertion of rights to be consulted in decisions concerning access to, and use of, the claimants' country may be the

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**445** Joint reasons at [86]-[91].

**446** *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at 588; *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 324-325 [672].

**447** (1999) 101 FCR 171 at 325 [675].

**448** (1999) 101 FCR 171 at 184 [16]; see also *Yanner* (1999) 201 CLR 351 at 396 [109].

**449** *Mabo [No 2]* (1992) 175 CLR 1 at 70, 110, 192; see McHugh, "Proving Aboriginal Title", (2001) *New Zealand Law Journal* 303 at 305.

**450** (1999) 101 FCR 171 at 320-321 [657] per Merkel J, noting possible error in the primary judge's preoccupation with unchanging traditional aspects of laws and customs, rather than a broader focus on any loss of traditional connection.

highest feasible level of assertion of control by a fishing-based society against Europeans where the latter were possessed of superior arms and legal power. In such circumstances, I agree with Merkel J that it would not be reasonable for a court to place undue weight on methods of *enforcement* of Aboriginal rights against non-Aboriginal persons[451]. How, it might be asked, were the forebears of the claimants expected to assert and uphold their rights to their sea country when the *balanda* enjoyed indisputable superiority of weapons and, until *Mabo [No 2]*, incontestable superiority of legal rights? A proper approach is rather to ask whether native title rights and interests survived in fact, what their relationship was with other rights and interests and how such rights were "asserted" in that context[452].

310 In determining the relationship between the rights and interests of native title claimants and others in the determination area, a focus on the relative powers of having and controlling access is essential. The primary judge attempted to make findings in relation to the claimed right of *yuwurrumu* members to make decisions about oil exploration, tourism and commercial fishing within the determination area. There was evidence, which the primary judge expressly accepted, that rights to make decisions about the sea country had been asserted "on numerous occasions". In relation to the testimony of Mary Yarmirr, questions about the potentiality of a petroleum company planning to drill for oil in the sea area resulted in the following exchange:

> "A. In respect to my law and my culture, as I have respect for another culture, I'd ask them to come towards us and ask permission.
>
> Q. All right. And if they asked permission, what rights would you have by your law in the way that you responded to their request?
>
> A. As a *yuwurrumu* holder, I would then sit down and negotiate and come to a settlement.
>
> Q. Would you be able to say by your law 'no' to them?
>
> A. Yes, I have done that on numerous occasions. … In respect to oil exploration at Somerville Bay.
>
> Q. And what has happened on those occasions?
>
> A. On those occasions, because they identified where they'd like to explore and it was on some of our sacred areas, we said to them

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**451** (1999) 101 FCR 171 at 255-256 [345], 325 [673].

**452** The Act, s 225.

> due to respecting our old traditional law and our culture we'd ask you to reconsider, maybe looking at another area to avoid those sacred areas, which they did."

311 The primary judge was not satisfied that the interaction between the oil companies and the claimants had been explored sufficiently. His findings in relation to that evidence were therefore limited. Nevertheless, that evidence was accompanied by evidence of rights of access asserted against tourism and commercial interests. One instance was evidence relating to a tourist business bringing fishing parties to the area, of which it was said by Mary Yarmirr:

> "A. Under my traditional law I have the rights. I'd ask people who are interested to come and negotiate with the *yuwurrumu* members. By doing that I am not breaking my traditional law but making sure that the other parties respect my law, because it is my sea country that they are interested in.
>
> Q. By your law would they be able to do that, that is, fish in your waters, without your permission?
>
> A By my law, that is offending me and my people. We are peaceful people. We don't like to make trouble, but if people are interested in our area we ask them to come and to negotiate with us."

312 The trial judge also accepted evidence in relation to rights asserted against a government proposal to create a marine park; and that permission was sought and given in relation to a pearling operation. He subsequently held that[453]:

> "the applicant community has consistently asserted, as a matter of Aboriginal law, the right to be consulted about and to make decisions concerning the use of its sea country".

313 In finding the existence of such a right, the primary judge endeavoured to draw a distinction between a right to be consulted and make decisions and a right to actually control the use of and access to the area[454]. I see no basis for this distinction in law. A right to be "consulted" would be empty without an underlying proprietary basis[455]. Where one has no power to give or refuse permission based on actual control, it is difficult for consultation to be anything but a charade. If the claimants have demonstrated effective assertion of their rights, the Act requires such rights to be recognised and protected.

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**453** (1998) 82 FCR 533 at 580.

**454** (1998) 82 FCR 533 at 580.

**455** cf *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533 at 589.

314 *Places of spiritual significance*: The primary judge also erred in his approach to the recognised right to protect places of importance. Again, his Honour recognised the existence of such a right without recognition of actual control of access to and use of such areas. In referring to spiritually "dangerous" areas of the claimed area, his Honour found[456]:

> "The evidence establishes beyond doubt that according to the traditional laws and customs of the several *yuwurrumu* which comprise the Croker Island community, *yuwurrumu* members have rights and obligations in relation to sites within the claimed area which they are required to protect from unauthorised and inappropriate use."

315 "Unauthorised and inappropriate use" of sites in the determination area can be perpetrated by non-Aboriginal, just as by Aboriginal, peoples. According to traditional laws and customs, where such areas are not respected, sickness, cyclones, intense rain or waterspouts may be visited on the area. How such rights of protection may be enforced, without underlying rights to control access and use of such areas, was not addressed by the primary judge. His approach was to recognise the obligations on the claimants of their own laws and customs in the sacred areas without recognising and protecting their ability to oversee the use of such areas in accordance with such laws and customs.

316 *Conclusion: overly narrow approach*: It follows in my view that the claimants (the appellants in the second appeal) have shown that the primary judge erred in the approach that he adopted to the determination of the existence of exclusive native title rights and interests, subject to qualifications, over their sea country. He applied an incorrect legal standard, one that was, with respect to him, unduly narrow. His approach overlooked the flexible principle declared by this Court in *Mabo [No 2]*, applied in *Wik*, and carried into s 223(1) of the Act. Having adopted an incorrect legal standard, it was unsurprising that the primary judge reached an erroneous conclusion when he applied that standard to the evidence. To posit an obligation of the poorly armed forebears of the claimants to assert against the *balanda* (and for that matter the Macassans) a right of physical expulsion, in order to uphold their native title over their sea country, otherwise surviving in fact, which the Act would enforce, is to define the problem in terms of a desired outcome that would always be unfavourable to the rights of persons such as the claimants.

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**456** (1998) 82 FCR 533 at 589.

317 Viewing the common law from its usual standpoint of reasonableness[457], and construing the Act in light of the strong rule of international law forbidding discrimination against people's legal rights by reference to their race, I do not agree that such an unreasonable and discriminatory rule is what Australian law requires.

Recognition of the new legal paradigm

318 *New source for a special body of law*: I leave these appeals with a final observation. The decision in *Mabo [No 2]* represented a partial change in the exposition of the sources of Australia's common law. The essential justification for the alteration of the long-standing pre-existing law affecting native title was a perceived consequence of the principles of international human rights law, as those principles informed the content of the common law of Australia. To press on with a blind adherence only to the adapted rules of the common law of England is not only inconsistent with the essential legal foundation for the step which this Court took in *Mabo [No 2]* as the basis for the new legal reasoning concerning native title. It is also incompatible with the independence and self-respect that should today be reflected in the exposition by this Court of the common law of Australia, at least where that law is concerned with vital and peculiar problems of a special Australian character[458]. The rights of the indigenous peoples of Australia are of that kind.

319 This conclusion does not represent a revolutionary severance of Australian law from its past foundations. On the contrary, as Brennan J recognised in *Mabo [No 2]*[459], it simply constitutes a supplementation and development of the legal

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**457** *Emmens v Pottle* (1885) 16 QBD 354 at 357-358; *Donoghue v Stevenson* [1932] AC 562 at 608-609; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 519; *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82 per Lord Steyn.

**458** The alternative, but hardly satisfactory, solution is to attempt to build, by analogy, on the way in which English law early in the seventeenth century adjusted the rules of the common law and statute law of England for application to the indigenous people of Ireland: *Case of Gavelkind* (1606) Davis 49 [80 ER 535] noted McPherson, "The Mystery of Anonymous (1722)", (2001) 75 *Australian Law Journal* 169 at 180. Or the way in which, more recently, it has dealt with interests in the nature of exclusive fisheries; see my reasons at [289], n 413.

**459** (1992) 175 CLR 1 at 42. A somewhat analogous development is now occurring in the law of the United Kingdom itself, under the stimulus of the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11, ETS No 5 (entered into force 1 November 1998) (known as the European Convention on Human Rights). It preceded the passage of the *Human Rights Act*

(Footnote continues on next page)

sources appropriate to the performance of the judicial function in addressing contemporary problems which the law of Australia must solve. Those problems include, not least, the law on the native title of Australia's Aboriginal and Torres Strait Islander peoples as now effected by the Act.

320 *The conclusion that I favour*: The result that I favour in this case is scarcely a surprising one. Indeed, it appears a reasonable and just one. In the remote and sparsely inhabited north of Australia is a group of Aboriginal Australians living according to their own traditions. Within that group, as the primary judge accepted, they observe their traditional laws and customs as their forebears have done for untold centuries before Australia's modern legal system arrived. They have a "sea country" and claim to possess it exclusively for the group. They rely on, and extract, resources from the sea and accord particular areas spiritual respect. The sea is essential to their survival as a group. In earlier times, they could not fight off the "white man" with his superior arms; but now the "white man's" laws have changed to give them, under certain conditions, the superior arms of legal protection. They yield their rights in their "sea country" to rights to navigation, in and through the area, allowed under international and Australian law, and to licensed fishing, allowed under statute. But, otherwise, they assert a present right under their own laws and customs, now protected by the "white man's" law, to insist on effective consultation and a power of veto over other fishing, tourism, resource exploration and like activities within their sea country because it is theirs and is now protected by Australian law. If that right is upheld, it will have obvious economic consequences for them to determine – just as the rights of other Australians, in their title holdings, afford them entitlements that they may exercise and exploit or withhold as they decide. The situation of this group of indigenous Australians appears to be precisely that for which *Mabo [No 2]* was decided and the Act enacted. The opinion to the contrary is unduly narrow. It should be reversed.

Orders

321 The Commonwealth's appeal should be dismissed with costs. The claimants' appeal should be allowed with costs. The orders of the Full Court of the Federal Court of Australia should be set aside. In place of those orders, I would order that the judgment of the primary judge be set aside and the

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1998 (UK): *R v Broadcasting Standards Commission; Ex parte British Broadcasting Corporation* [2000] 3 WLR 1327 at 1333-1334 [17] per Lord Woolf MR; [2000] 3 All ER 989 at 995-996; Holdsworth, "The Relation of English Law to International Law", in Goodhart and Hanbury (eds), *Essays in Law and History*, (1946) 260 at 265-266 noted in *The Commonwealth v Yarmirr* (1999) 101 FCR 171 at 273 [431].

claimants' proceedings remitted for reconsideration conformably with these reasons.

322 CALLINAN J. In these appeals from the Full Court of the Federal Court of Australia, this Court is called upon to decide whether various indigenous Australian peoples have native title rights with respect to the waters in, and off the coast of, the Northern Territory.

Native title

323 In *Mabo v Queensland [No 2]*[460] ("*Mabo*"), the Court held that the peoples of the Murray Islands had native title rights to the unalienated land of the Islands which entitled them, as against the whole world, to possession, occupation, and use and enjoyment of that land. The evidence in that case was directed to the land uses, practices and traditions of those peoples which may, or may not have been unique to them. The parties to the case in the High Court were the island peoples or their representatives, and the State of Queensland. Neither pastoralists, miners nor others holding, using, occupying or exploiting the surface or sub-surface of land on the mainland of Australia, or the airspace above it presented arguments with respect to the availability of native title on the mainland of Australia. There is no doubt, however, that the decision of the Court was intended to and did apply to the mainland[461].

324 The response of the Federal Parliament to the decision was to enact the *Native Title Act* 1993 (Cth) ("the Act") which acknowledged that native title could (if not validly extinguished) exist in any part of the Commonwealth. It is to that Act that the Court must look, therefore, in deciding these appeals, although, as will appear, concepts and expressions giving effect to them, almost certainly have their source in some of the reasons for judgment in *Mabo*, especially those of Brennan J. One of the principal purposes of the Act is to provide a special procedure for the just and proper ascertainment of native title rights and interests and their protection. The Act does not, as I read it, seek to invent or create any native title, or alter the rights and interests which it may embrace in any particular case[462].

325 The issues in this case were comparatively narrow ones. Questions whether, for example, in order to establish rights over water it may as a practical (as well as a legal) matter be necessary to demonstrate first a right or interest in land giving access to, and enabling the exploitation and navigation of the waters; and whether rights claimed may only be enjoyed in the same way as they have

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**460** (1992) 175 CLR 1.

**461** (1992) 175 CLR 1, eg at 58-59 per Brennan J (Mason CJ and McHugh J concurring), 110 per Deane and Gaudron JJ.

**462** *Yanner v Eaton* (1999) 201 CLR 351 at 378 [57], 410-411 [158].

traditionally been enjoyed or practised, were not raised. Nor is it necessary to decide whether, as contemplated by Brennan J in *Mabo*[463], in order to maintain a right or interest susceptible to recognition by the common law, the claimants were bound to show that such right or interest was one that had regularly been *effectively* asserted in a way that was not repugnant to the common law. And, finally, it should be pointed out that there was no controversy between the parties that the claimants enjoyed rights (as opposed to the nature and extent of them) over the waters of the Northern Territory.

326 The judgments in *Mabo* are replete with references to rights and interests in land. In his judgment, Brennan J explained[464]:

> "The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants."

There is no reference in *Mabo* to the recognition of native title in or in respect of the sea, and this is so notwithstanding that the Meriam people are described in the judgment as island people who "have a strong sense of relationship to their Islands and the land and seas of the islands"[465].

327 Olney J, who heard this case at first instance[466], made the following determinations[467], applying the Act in the form that it bore before its amendment in 1998[468]:

> "(i) The applicants are entitled to bring this proceeding as representing the Aboriginal peoples identified as the *yuwurrumu* members of the Mandilarri-Ildugij, the Mangalara, the Murran, the Gadura-Minaga, and the Ngaynjaharr clans. The peoples on whose behalf the proceeding is brought are a recognisable community of Aboriginal peoples (the Croker Island community) who are the descendants of

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**463** (1992) 175 CLR 1 at 51.

**464** (1992) 175 CLR 1 at 57.

**465** (1992) 175 CLR 1 at 191 per Toohey J.

**466** *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533.

**467** (1998) 82 FCR 533 at 601-602.

**468** It is common ground that the amending Act of 1998 had no application to this claim.

the indigenous inhabitants of the islands and mainland within and adjacent to the area in respect of which a native title determination is sought.

(ii) Under the traditional laws acknowledged and the traditional customs observed by the Croker Island community, the community has rights and interests which are recognised by the common law of Australia in relation to the seas and sea-bed of the claimed area by which rights and interests the community has a connection with the sea and sea-bed. (The word '*sea*' is used to refer to the water which washes the shores of the relevant land masses as distinct from '*waters*', a term defined in the *Native Title Act* to include the sea-bed and subsoil). The applicants have not established native title in relation to the subsoil or its resources.

(iii) In accordance with and subject to their traditional laws and traditional customs and subject to all valid laws of the Commonwealth and the Northern Territory and to the rights of the lessee under Crown Term Lease No 1034 the members of the Croker Island community have a non-exclusive native title right to have free access to the sea and sea-bed of the claimed area for all or any of the following purposes:

(a) to travel through or within the claimed area;

(b) to fish, hunt and gather for the purpose of satisfying their personal, domestic or non-commercial communal needs, including the purpose of observing traditional, cultural, ritual and spiritual laws and customs;

(c) to visit and protect places which are of cultural and spiritual importance;

(d) to safeguard their cultural and spiritual knowledge."

328 The claimed area was defined by maps attached to the application for determination. It included the seas and extended to land or reefs within the proposed boundaries (save for land or reefs granted for the benefit of Aboriginal people pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth)). Croker Island and other islands within the claimed area had been so granted in 1980 and were therefore not within the claim. The primary judge found that the waters and sea-bed of Mission Bay (which were also claimed) formed part of the Northern Territory[469]. These and the waters and bed of the

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**469** (1998) 82 FCR 533 at 557-558.

inter-tidal zone I will refer to as the internal waters. The other waters will be referred to as the territorial sea.

329 All parties appealed to the Full Court of the Federal Court. The grounds of appeal of the Commonwealth were, in summary, as follows:

(i) the trial judge wrongly construed the Act so as to provide for the recognition of native title beyond the limits of the Northern Territory;

(ii) there was no basis for the recognition of native title beyond the limits of the Northern Territory, because the common law did not apply outside such limits; and no law provided for its recognition there;

(iii) the native title rights specified in the determination were already exercisable under other public rights – that is, the public right of fishing and navigation at common law; and that these rights were not capable of separate recognition;

(iv) (alternatively) there was no evidence, or no sufficient evidence, of traditional or other occupation or use of certain areas to the north and north-east of New Year Island to warrant a finding that native title existed in that particular area.

The claimant groups' appeal attacked a number of the conclusions of the trial judge: his Honour erred, they contended, in finding that their native title rights and interests were not held to the exclusion of all others. It was also contended by them that his Honour should have determined that their native title rights extended to a right to fish, hunt and gather for the purposes of trade; a right to exploit and control access to, and the exploitation of, resources in the sea, sea-bed and sub-soil; a right to exclude persons seeking to explore or mine for minerals pursuant to a law of the Commonwealth or Northern Territory; and a right to exclude persons generally. Further, they submitted, their traditional laws and customs should have been held to "bind" others.

330 The Full Court (Beaumont and von Doussa JJ; Merkel J dissenting) dismissed all of the appeals[470]. In substance, Beaumont and von Doussa JJ agreed with the reasoning, as well as the conclusions of Olney J. Merkel J would have allowed the claimants' appeal and remitted the proceedings to the primary judge for further hearing.

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**470** *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171.

The appeal to this Court

331 Again, the parties have appealed, the Commonwealth on the following grounds:

"1. The Full Court erred in that it wrongly construed the *Native Title Act* 1993 (Cth) so as to provide the basis for recognition of native title beyond the limits of the Northern Territory.

2. The Full Court erred in that it ought to have held that no native title exists within that part of the claimed area which is outside the limits of the Northern Territory of Australia for the reasons that:

(i) the common law of Australia does not, of its own force, apply outside the said limits;

(ii) no law of the Commonwealth of Australia or of the Northern Territory of Australia provides a basis for the recognition of native title outside the said limits;

(iii) in the absence of a law of the Commonwealth of Australia or a law of the Northern Territory making provision as in sub-paragraph (ii) above, no basis exists for the recognition of native title outside the said limits.

3. In the alternative to 2 above, the Full Court erred in that it ought to have held that no native title exists in that part of the claimed area which lies beyond the seaward limit of the coastal waters of the Northern Territory of Australia as defined by the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) for the reasons set out in paragraph 2(i), (ii) and (iii) above and for the further reasons that:

(i) neither the Commonwealth nor the Northern Territory has radical or other title in or to the said area; and

(ii) the extension by Australia of its territorial sea to 12 nautical miles did not so affect the legal character or status of that area that it ceased to be regarded for the purposes of the common law as territory external to Australia and governed by international law subject only to the valid exercise of legislative power by the Commonwealth, the states and the territories.

4. In the absence of any, or any sufficient, evidence of traditional or other occupation or use by the First Respondents, the learned trial

judge erred in determining that native title exists to the east of a line that is drawn as follows:

(i) start from a point on the boundary line of the claimed area located due north of the eastern most point on New Year Island;

(ii) proceed south to the eastern most point of New Year Island;

(iii) proceed to the eastern most point of McCluer Island at the low water mark; and

(iv) finally proceed to De Courcy Head;

and the Full Court erred in failing to determine that the trial judge had so erred and in failing to amend the determination of the learned trial judge accordingly."

332 The claimants' grounds of appeal are as follows:

"(1) The majority in the Full Court of the Federal Court erred in failing to hold that, under the traditional laws and customs acknowledged and observed by them,

(a) the native title holders had a significant spiritual connexion with the waters and sea-bed in the claim area;

(b) the native title holders had spiritual responsibility for the whole of the waters and sea-bed of the claim area;

(c) in discharge of that responsibility, the native title holders are entitled to require that people and vessels stay outside particular areas at particular times determined in accordance with their traditional laws and customs;

(d) the native title holders have an exclusive right to fish, hunt and gather in the claim area;

(e) the native title holders have a right to possess, occupy, use and enjoy the claim area generally to the exclusion of all others;

(f) the native title holders have a right to control the use and enjoyment of the resources of the claim area and to protect their own rights in relation to those resources;

subject to

(g) the exercise of native title rights and interests by other Aboriginal peoples in accordance with traditional laws and customs, and

(h) other non-native title rights and interests identified in the determination.

(2) The majority in the Full Court erred in failing to hold that –

(a) the public right to fish did not –

(i) preclude the recognition of exclusive rights of fishing, hunting and gathering held by native title holders, nor

(ii) prevail over any such inconsistent rights of native title holders;

(b) any public right of navigation in relation to the claim area –

(i) did not preclude the recognition of native title rights and interests to use and enjoy the claim area to the exclusion of all others, but

(ii) could prevail over such native title rights and interests to the extent of any inconsistency;

(c) the right of innocent passage –

(i) did not preclude the recognition of native title rights and interests to enjoy and use the claim area to the exclusion of all others, but

(ii) could prevail over such native title rights and interests to the extent of any inconsistency.

(3) (a) The majority in the Full Court, having held that, to constitute native title right and interests, s 223 of the *Native Title Act* required only that the rights and interests be those currently possessed under traditional laws acknowledged and traditional customs observed; and

(b) the trial judge having found that traditional laws and customs required that persons other than members of the particular estate group of native title holders required permission of a senior member of the estate group to use and enjoy the sea-country of the estate group,

the majority in the Full Court erred in failing to hold that the trial judge erred in holding that

(c) traditional law and custom did not extend to the exclusive control of the use and enjoyment of the claim area because it could not have binding effect on non-Aboriginal people.

(4) The Full Court erred in –

(a) holding that the application extended to the waters which overlay the shores of the land and islands from time to time between the low and high water marks (the inter-tidal zone); and

(b) failing to hold that the application did not extend to such waters because the column of air or waters from time to time over the inter-tidal zone was included in the fee simple estate granted to the Ninth Respondent (the Land Trust) under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (which included the inter-tidal zone) and was in terms excluded from the application under the *Native Title Act* 1993 (Cth)."

History

333 Great Britain acquired sovereignty over the lands of the Northern Territory in 1824 when Captain Bremer took possession of the continent from longitude 135ºE to longitude 129ºE. The commission issued to Governor Darling on 20 December 1825 defined the territory of New South Wales as extending to 129ºE. At that time, the colony of New South Wales reached to the low water mark, that is to say the mean low water mark of the neap and spring tides.

334 The boundaries of the Northern Territory were defined by Letters Patent dated 6 July 1863 by which the territory, which now constitutes the Northern Territory, was annexed to South Australia. It was expressed to include "bays and gulfs" and was surrendered to, and accepted by, the Commonwealth on 1 January 1911 by the *Northern Territory Acceptance Act* 1910 (Cth).

335 On the acquisition by Great Britain of sovereignty over the land mass constituting the Northern Territory in 1824, it also acquired sovereignty over the territorial sea extending to three nautical miles from the low water mark between the same coordinates. This occurred by the operation of international law to which the common law gave recognition: no executive or legislative act was required to achieve it. At Federation or immediately thereafter, sovereignty over

the territorial sea passed to the Commonwealth by the same process, the effective reception of international law[471]. By Federation, the State of South Australia and, subsequently, the Northern Territory did not have any sovereign powers over any part of the territorial sea. These were only acquired as a result of an exercise of sovereignty by the Commonwealth in 1980 by legislation in favour of the Northern Territory and to which I will later refer[472].

336 Some changes to the boundaries of the territorial sea were made by the Proclamation of straight baselines in 1983 and the extension, by Proclamation, of the territorial sea in 1990 to a line twelve nautical miles from the low water mark. By the time that these proceedings were commenced, the whole of the claimed area beyond the inter-tidal area was clearly within Australia's territorial sea and internal waters.

337 It was established at first instance that the claimants did not, historically, enjoy exclusive possession, occupation and enjoyment of any of the waters the subject of the claim[473]. The claimed area was an important place of resort and activity for Macassans, who travelled in their praus to exploit the produce of the waters from as early as 1720. Dutch mariners freely navigated them from as early as the first half of the seventeenth century[474]. These matters have significance in more than one respect. They show that people other than the claimants have freely resorted to and enjoyed the benefits and resources of the claimed area. They show that it is unlikely that either the indigenous peoples or others have had the inclination or, indeed, the capacity, to exclude anyone else from the area. They may also provide further evidence of a universal acceptance that, historically, no one has owned or been able to assert effective ownership for any sustained period of the seas. They may demonstrate as well a settled recognition of the futility of seeking to apply to the seas the same laws (such as proprietorial laws of exclusion) and curial processes as apply, and may effectively be invoked on, or in respect of land.

338 It should also be pointed out that it was accepted on both sides that the claimants had never sought in any way to exploit any minerals or other valuable resources that might lie beneath the sea-bed. They were never, in short, of any

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**471** See *New South Wales v The Commonwealth* ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 368-369 per Barwick CJ, 378 per McTiernan J, 465-466 per Mason J.

**472** *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth); *Coastal Waters (Northern Territory Title) Act* 1980 (Cth).

**473** (1998) 82 FCR 533 at 585.

**474** (1998) 82 FCR 533 at 558-559.

interest to them and their pursuit never formed part of any particular custom or practice such as could give rise to a native title right or interest in them, or any right to deny others access to them.

The Act

339 Section 6 contemplates the possibility of the application of the Act to "the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act* 1973". "Coastal sea" is relevantly defined by s 15B(4) of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") to mean the territorial sea of Australia and the sea on the landward side of the territorial sea of Australia and not within the limits of a State or internal territory. Section 6 of the *Seas and Submerged Lands Act* 1973 (Cth) provides that "the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth". Section 7 of the *Seas and Submerged Lands Act*, in its original form, empowered the Governor-General to declare by Proclamation, not inconsistently with Section II of Part I of the Convention on the Territorial Sea and the Contiguous Zone done at Geneva on 29 April 1958, the limits of the whole or any part of the territorial sea of Australia. The *Seas and Submerged Lands Act* was amended in 1994 to give effect to the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982[475]. Section 11 of the *Seas and Submerged Lands Act* declared and enacted that the sovereign rights of Australia as a coastal state in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in, and exercisable by the Crown in right of the Commonwealth.

340 I have referred to the "possibility" of native title in respect of the seas. I put the matter that way for the reasons advanced by McHugh J[476] and for these reasons. Although the preamble to the Act refers to the supplementation of the rights and interests of native title holders under the common law, the Act is not designed to and does not create native title. Its purpose is the "recognition and protection of native title"[477]. For it to be recognised and protected by the common law it must have existed and exist when the common law is called in aid of it, and must have done so when the common law was brought to the area in contention. The Act does not require that the common law remedy any deficiencies in, or clarify ambiguities about the title or rights asserted. Native

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**475** *Maritime Legislation Amendment Act* 1994 (Cth).

**476** See reasons of McHugh J at [122]-[131].

**477** Section 3(a) of the Act.

title rights or interests must stand on their own feet and be capable of effective enforcement within the community enjoying them[478]. The Act, as well as providing a means of protection and enforcement of native title rights or interests, frequently adopts expressions used by the Justices of the Court in the majority in *Mabo* and seeks to give effect to the concept of native title as articulated in them. I would not infer from the language and structure of the Act an intention to create native title rights in respect of an area where, or of a kind of which, none had existed before. Any indication to the contrary to be found in s 6 of the Act must give way to these considerations, and in particular to s 223 of the Act which relevantly states the criteria to be satisfied for a determination of native title:

> "(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.
>
> (2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests."

341 The section is not without its ambiguities but it seems to me that for a determination to be made a number of questions both implicit and explicit in the section require affirmative answers. Are the rights and interests asserted, possessed under the traditional laws of the claimants? Are those laws acknowledged, that is to say, reasonably clearly identified and accepted by the claimants? Are the rights and interests claimed possessed under the traditional customs observed by the peoples concerned? (The statutory language to which I have referred is a restatement, practically verbatim, of a passage from the judgment of Brennan J in *Mabo*[479].) Is there a connexion, which I take to mean a

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**478** *Mabo* (1992) 175 CLR 1 at 51, 61 per Brennan J.

**479** (1992) 175 CLR 1 at 58.

current linkage[480], between the claimants, their particular laws and customs and an ascertainable area of land or water? And, will the common law of Australia recognise rights and interests of the kind claimed?

342 In these appeals attention was, rightly, very much focussed upon the last of those questions and little need be said about the others. It should, however, be emphasised that it is important to keep in mind that the rights and interests need to be related to particular land or waters, that is, ascertainable and defined areas of land and waters. Little could be more conducive to conflict than an absence of definition as to the expanse of land or water in contention. That a reasonably high degree of precision in this, and other respects is required appears from s 225 which provides as follows:

> "A ***determination of native title*** is a determination of the following:
>
> (a) whether native title exists in relation to a *particular area of land or waters*;
>
> (b) if it exists:
>
> (i) who holds it; and
>
> (ii) whether the native title rights and interests confer possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others; and
>
> (iii) those native title rights and interests that the maker of the determination considers to be of importance; and
>
> (iv) in any case – the nature and extent of any other interest in relation to the land or waters that may affect the native title rights and interests." (emphasis added)

343 The common law will not protect or enforce indigenous laws and customs which are "repugnant to natural justice, equity and good conscience"[481]. Recognition will be denied, if, to do so, would be "to fracture a skeletal principle of our legal system"[482]. The particular rights and interests must be such that the common law, however flexible it, and its application may be, is capable of

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**480** cf *Mabo* (1992) 175 CLR 1 at 59-60 per Brennan J. See also at 110 per Deane and Gaudron JJ.

**481** *Mabo* (1992) 175 CLR 1 at 61 per Brennan J.

**482** *Mabo* (1992) 175 CLR 1 at 43 per Brennan J.

recognising and enforcing them. There was, with one qualification only, no suggestion that the rights and interests claimed here infringed any of these principles. That qualification, which I will put aside for present purposes, relates to the concept of the enjoyment of rights in common with public rights. I will also put aside for the present, rights and interests claimed in respect of the waters and seas within the inter-tidal zone and the bays and entrances forming part of the Northern Territory and deal with the waters over which the Commonwealth has sovereign power, the territorial sea.

344 The territorial sea of Australia now commences at the low water mark (as defined) and extends twelve nautical miles beyond it[483].

345 Following the *Seas and Submerged Lands Case*[484], the Commonwealth, the States and the Northern Territory made a constitutional settlement which was put into effect, relevantly by the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) ("the NT Powers Act") and the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth) ("the NT Title Act"). In 1985 the Northern Territory enacted the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT), to apply its statutes and common law to the territorial sea, sea-bed and soils within three nautical miles of the low tide line[485].

346 By s 5(a) of the NT Powers Act the Northern Territory Legislative Assembly was empowered to make:

> "all such laws of the Territory as could be made by virtue of those powers if the coastal waters of the Territory, as extending from time to time, were within the limits of the Territory, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the coastal waters of the Territory".

347 Section 4(1) of the NT Title Act provided that:

> "By force of this Act, but subject to this Act, there are vested in the Territory, upon the date of commencement of this Act, the same right and title to the property in the sea-bed beneath the coastal waters of the Territory, as extending on that date, and the same rights in respect of the space (including space occupied by water) above that sea-bed, as would

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**483** Until 1990, the territorial sea terminated three nautical miles from the low water mark.

**484** (1975) 135 CLR 337.

**485** Section 3(1).

belong to the Territory if that sea-bed were the sea-bed beneath waters of the sea within the limits of the Territory."

348 The body of legislation to which I have referred was "designed largely to return to the States [and, for present purposes, the Territory] the jurisdiction and proprietary rights and title which they had previously believed themselves to have over and in the territorial sea and underlying seabed"[486].

349 The purpose of the *Seas and Submerged Lands Act* was the assertion by the Commonwealth of its rights over and in respect of the territorial sea, the sea-bed and its sub-soil. It was, in effect, a statutory declaration by the Commonwealth of what had occurred progressively on the taking of possession by Great Britain of the continent, and the nation's accession to that on Federation. By s 4(2) of the NT Title Act "any right or title to the property in the sea-bed … of any other person … subsisting immediately before the date of commencement of this Act, other than any such right or title of the Commonwealth that may have subsisted by reason only of the sovereignty referred to in the *Seas and Submerged Lands Act* 1973" was preserved.

350 The first submission of the Commonwealth involved these steps: that native title was to be engrafted upon, indeed, could only exist as a burden upon a radical title in the Crown; that there could therefore be no native title unless there were an underlying radical title; that here no such radical title existed (absent express sovereign grant or appropriation of it) because radical title could only otherwise be acquired if and when the common law applied in respect of the area over which it was asserted; and that, because the common law never ran on and over the seas (including territorial waters) no radical title in the Crown ever arose in respect of them. There was, however, an alternative submission which, in my opinion, is more persuasive. It is that unless and until sovereignty is exercised over the territorial sea, relevantly here by the conferring of rights, interests and titles in respect of it, there is and can be no title or possessory right in respect of it, and what lies above or below it[487]. The issue that the argument presents is not whether native title depends upon the existence of underlying prior radical title, but simply whether until sovereign assertion and the exercise of sovereign power to define and confer rights and interests including titles, there can be any title or proprietary or personal rights or interests of any kind in the territorial sea.

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**486** *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 358.

**487** By Proclamation of 9 November 1990, Australia's territorial sea was extended to twelve nautical miles pursuant to s 7 of the *Seas and Submerged Lands Act*.

The common law and the territorial sea

351 Although the ultimate question in *R v Keyn*[488] was whether the Central Criminal Court had jurisdiction to try the foreign captain of a foreign ship, which had, within three miles of the shore of England run down a British ship, in consequence of which a passenger on the latter died, there were much broader and important matters decided by the case. The issues were viewed at the time to be of such importance that thirteen judges sitting as the Court for Crown Cases Reserved were assembled to decide them. Seven members of the Court (Cockburn CJ, Kelly CB, Bramwell JA, Lush and Field JJ, Sir Robert Phillimore and Pollock B) decided that the Central Criminal Court had no jurisdiction to try the accused for the offence. Six members of the Court (Lord Coleridge CJ, Brett and Amphlett JJA, Grove, Denman and Lindley JJ) dissented. All members of the Court, however, thought it necessary to trace the history of the exercise of jurisdiction by the courts of the realm over the high seas and to examine what powers and rights were asserted and able to be asserted in respect of them. And indeed, the judgments of Sir Robert Phillimore and Cockburn CJ contain a comprehensive review of the writings of the most eminent publicists and commentators of the civil and common law jurisdictions on the rights and obligations of all nations with respect to the seas and laws applying to them.

352 Whether the claim that Britannia rules the waves was an overly ambitious one or not, the fact is, as *Keyn* decides, Britannia never owned them, or what lay beneath them.

353 Sir Robert Phillimore said this[489]:

> "There appears to be no sufficient authority for saying that the high sea was ever considered to be within the realm, and, notwithstanding what is said by Hale in his treatises *de Jure Maris* and *Pleas of the Crown*, there is a total absence of precedents since the reign of Edward III, if indeed any existed then, to support the doctrine that the realm of England extends beyond the limits of counties."

354 Later his Lordship said this[490]:

> "Whatever may have been the claims asserted by nations in times past – and perhaps no nation has been more extravagant than England in this matter – it is at the present time an unquestionable proposition of

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**488** (1876) 2 Ex D 63.

**489** (1876) 2 Ex D 63 at 67.

**490** (1876) 2 Ex D 63 at 70.

> international jurisprudence, that the high seas are of right navigable by the ships of all states. Whether the reasons upon which this liberty of navigation rests be, as some jurists say, that the open sea is incapable of continuous occupation and insusceptible of permanent appropriation, or, as other jurists say, that the use of it is inexhaustible, and, therefore, common to all mankind; or, whether it rests upon both these, or upon other reasons also, it is unnecessary to inquire. This liberty of navigation is a fact recognised by all civilized states."

355 Kelly CB agreed with Sir Robert Phillimore and added this[491]:

> "I … observe expressly and emphatically that … the high seas, that is to say, all the whole seas of the world below low-water mark, are open to the whole world, and that the ships of every nation are free to navigate them".

356 Not only England but also other nations had from time to time made proprietary claims in respect of the seas. Cockburn CJ pointed out that Venice laid claim to the Adriatic, Genoa to the Ligurian Sea, and Denmark to a portion of the North Sea[492]. Portugal claimed to bar the ocean route to India and the Indian Seas to the rest of the world, while Spain made the like assertion with reference to the West[493]. Cockburn CJ described these as "vain and extravagant pretensions [which had] long since given way to the influence of reason and common sense"[494]. He said that "[n]o one would now dream of asserting that the sovereign of these realms has any greater right over the surrounding seas than the sovereigns on the opposite shores"[495]. Of the so-called doctrine of the narrow seas (an old claim by England to the four seas that washed the coast of England) Cockburn CJ said that he was unable to comprehend how the doctrine could be confined to a particular offshore zone[496]:

> "If the argument [that the realm of England extended over the 'narrow seas'] is good for anything, it must apply to the whole of the surrounding seas."

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**491** (1876) 2 Ex D 63 at 151.

**492** (1876) 2 Ex D 63 at 174-175.

**493** (1876) 2 Ex D 63 at 174-175.

**494** (1876) 2 Ex D 63 at 175.

**495** (1876) 2 Ex D 63 at 175.

**496** (1876) 2 Ex D 63 at 176.

357 The only other reference that I would make to *Keyn* is to a passage in the judgment of Lush J, who, after agreeing with Cockburn CJ added this[497]:

> "I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, *not the dominion of the common law*. That extends no further than the limits of the realm." (emphasis added)

358 The reasoning of the majority in *Keyn* was not immediately universally accepted. For instance, the first edition of Halsbury's *The Laws of England* noted the case[498], but stated that "[t]he soil of the sea … is claimed as the property of the Crown although outside the realm"[499].

359 Over time, however, *Keyn* came to be accepted as standing for the proposition that the Crown had no ownership of territory beyond the low water mark, absent an exercise of sovereign power in that regard, over, but confined to the territorial sea, which was, historically, the waters within theoretical range of a cannon shot[500], three nautical miles from the low water mark.

360 Doubts, if any, as to what *Keyn* decided and its application in this country were put to rest in the *Seas and Submerged Lands Case*[501], in which a majority of this Court (Barwick CJ, McTiernan, Mason, Jacobs and Murphy JJ) clearly affirmed it and adopted the reasoning of the majority in it.

361 Barwick CJ stated that any colonial claims to property in, or rights over the territorial sea were unsustainable[502]:

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**497** (1876) 2 Ex D 63 at 238-239.

**498** Volume 28 at 360.

**499** See also *Gammell v Commissioners of Woods and Forests* (1859) 3 Macq 419; *Lord Advocate v Wemyss* [1900] AC 48 at 66; *Secretary of State for India v Chelikani Rama Rao* (1916) 43 LR Ind App 192.

**500** See *Keyn* (1876) 2 Ex D 63 at 177-178 per Cockburn CJ.

**501** (1975) 135 CLR 337.

**502** (1975) 135 CLR 337 at 368-369.

> "No power over Imperial territorial waters was granted expressly or impliedly. The colonists inherited the common law: but it operated only in the realm which ended at low-water mark. This was decided in *Reg v Keyn*[503], a decision with which I respectfully agree. See also *Harris v Owners of Franconia*[504] and *Blackpool Pier Co Ltd v Fylde Union*[505]. Thus, property in and power over the territorial seas could not have come by the common law."

362 Mason J referred to the cases in which different opinions had been expressed from those of the majority in *Keyn* and then said this[506]:

> "To the extent to which these observations are at variance with what was decided in *Keyn's Case* they do not in my opinion accurately reflect the law as it stood in 1900. They carry overtones of the ancient doctrine, enunciated by Selden and Hale, that the narrow seas were within the territorial sovereignty of the King, a doctrine which was then obsolete. They fail to acknowledge, as did the majority in *Keyn's Case*, that the territorial sea is a distinct concept which owes its origin, development and elaboration to international law and that it has been incorporated into British municipal law not as a supplement to the old notion of territorial sovereignty, but quite independently of it."

363 One other observation by Mason J in the *Seas and Submerged Lands Case* should be noted[507]:

> "Once it is accepted that *the boundaries of the Colonies terminated at low-water mark* there is in my opinion no reason why the Commonwealth's power to make laws with respect to 'external affairs' (s 51(xxix)) should not be regarded as conferring upon it a plenary power

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**503** (1876) 2 Ex D 63.

**504** (1877) 2 CPD 173.

**505** (1877) 36 LT (NS) 251.

**506** (1975) 135 CLR 337 at 465. See also at 368-369 per Barwick CJ, 378 per McTiernan J, 501, 505-506 per Murphy J. Jacobs J at 491-492, while agreeing with the result in *Keyn*, took the view that "[i]t was not strictly necessary to decide in *Reg v Keyn* whether the Crown of England owned the sea or any part thereof below low-water mark … The important point was that the common law did not extend there."

**507** (1975) 135 CLR 337 at 470. See also at 360 per Barwick CJ.

to legislate upon the topic of the territorial sea and its solum." (emphasis added)

364 It must be acknowledged, therefore, that as a result of the acceptance of the application of the principles of international law with respect to the high seas, and, as Mason J said[508], their incorporation into British municipal law, those principles have now come to be part of the common law of this country. They establish that unless and until, by an exercise of sovereignty, dominion is actually asserted, and rights, titles and interests are expressly conferred by the sovereign authority, the common law does not recognise any other rights, titles or interests claimed in or in respect of territorial waters and what lies above and below them. It follows that the common law does not and cannot recognise any of the rights claimed by the claimants in respect of what lies beyond the low water mark in this case: a critical requirement of s 223 of the Act has therefore not been met.

365 I have briefly pointed out that because the Act refers to the coastal sea of Australia (which, by definition in s 15B(4) of the Interpretation Act, means the territorial sea) and by implication therefore to the possibility of native title rights to or in respect of it, does not mean that native title rights or interests do exist there. Nor do, for example, the references in s 4(1) of the NT Title Act to "right and title to the property in the sea-bed beneath the coastal waters of the Territory", or the conferring by s 5 of the NT Powers Act upon the Territory of legislative power with respect to various maritime matters within a distance of three nautical miles from the low water mark, have that meaning or produce that result. It is a result that can only be derived by satisfaction of the criteria set out in s 223 of the Act. Legislatures and legislators are certainly not unknown to have made assumptions and to have held misconceptions about the meaning of provisions in enactments and their application, although by reason of the matter referred to by McHugh J in his reasons that does not seem to be the case with respect to the possibility of native title over the sea[509]. The Act itself, in its original form, is a case in point. The Prime Minister, Mr P J Keating, in his second reading speech of 16 November 1993[510] in respect of the Bill for the Act, said that "leasehold grants extinguish native title. There is therefore no obstacle or hindrance to renewal of pastoral leases in the future, whether validated or already valid", yet this Court held in *Wik Peoples v Queensland*[511] that the grant of pastoral leases in Queensland did not necessarily extinguish native title.

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**508** (1975) 135 CLR 337 at 465.

**509** See reasons of McHugh J at [132]-[141].

**510** Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 November 1993 at 2879-2880.

**511** (1996) 187 CLR 1.

Another example is provided by the advice of the Privy Council (Lord Keith of Kinkel, Lord Roskill, Lord Brandon of Oakbrook, Lord Brightman and Lord Mackay of Clashfern) in *Abel Lemon & Co Pty Ltd v Baylin Pty Ltd*[512], in which their Lordships advised that an Act, the *Sydney Building Act* 1837 (NSW), which was expressly repealed by another Act, the *New South Wales Acts (Termination of Application) Act* 1973 (Q) relevantly had no operation because, despite the Queensland legislature's view to the contrary, the former Act had never applied in Queensland[513].

North American authorities

366 In North America, not only has a clear distinction been drawn between ownership and sovereignty, but also, claims to rights and powers by anyone other than the sovereign nation have been rejected.

367 Both the Canadian and American courts have accordingly refused to recognise claims to native title rights (or their equivalent) in the sea, sub-soil and sea-bed, notwithstanding the formal treaties, different constitutional relationships between the various North American indigenous peoples and the national governments of Canada and the United States, and the different histories of those countries.

*Canada*

368 In *Re Offshore Mineral Rights of British Columbia*[514], the Supreme Court of Canada was asked to provide an advisory opinion whether British Columbia or Canada had ownership over the sea-bed and sub-soil from the low water mark of British Columbia to the limit of the territorial sea. The Court was also asked to advise whether British Columbia or Canada had the right to explore and exploit the resources of the continental shelf adjacent to British Columbia. The Court found for the national government on each issue. Central to its reasoning was the proposition in *Keyn* that (in the absence of legislation) the jurisdiction of the common law had never extended beyond the low water mark. The Court concluded that the territorial sea and all the land that lay beneath it (including the continental shelf) were, at common law, part of the high seas and not part of British Columbia[515]. The Court accepted that after the Dominion of Canada had

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**512** (1985) 60 ALJR 190; 63 ALR 161.

**513** (1985) 60 ALJR 190 at 192-193, 194 per Lord Keith of Kinkel; 63 ALR 161 at 166, 168-169.

**514** [1967] SCR 792.

**515** [1967] SCR 792 at 814.

become a sovereign state, it could acquire sea territory and assert jurisdictional rights over it and that this had been done by legislation[516].

*The United States of America*

369 In the United States, a similar conclusion has been reached by the adoption of a doctrine of paramountcy by the Supreme Court of the United States.

370 From 1947 to 1975, cases were heard in the Supreme Court between various American coastal states and the Federal Government: *United States v California*[517], *United States v Louisiana*[518], *United States v Texas*[519] and *United States v Maine*[520]. In these cases, these coastal states claimed to possess rights over the resources of the adjacent territorial sea, the sea-bed underneath it and the sub-soil.

371 In every case, the Court found both for the national government, and against the theory that any state or similar subordinate claimant had jurisdiction or rights below the low water mark. The basis for these findings was threefold: historically, (as with the Australian colonies) there was no legitimate tradition of colonial rights to the sea and sea-bed[521]; secondly, rights to the geographic areas contested, inevitably or, at least potentially, involved or concerned the external relations of the United States, as well as its treaty and commercial obligations or arrangements, with the result that the existence of competing rights of a party which was subordinate to the nation would be irreconcilable with the position of the United States as the sole international personality; and thirdly, the distinction which the states as subordinate polities sought to draw between their putative rights of *dominium* (ownership or proprietary rights) and the national government's rights of *imperium* (powers of regulation and control), would have the effect of causing the piecemeal derogation of sovereignty from the national government and towards state governments[522].

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**516** [1967] SCR 792 at 815-816.

**517** 332 US 19 (1947).

**518** 339 US 699 (1950).

**519** 339 US 707 (1950).

**520** 420 US 515 (1975).

**521** See *United States v California* 332 US 19 at 31-33 (1947).

**522** See *United States v Texas* 339 US 707 at 719 (1950).

372 Historically, the original thirteen colonies which united to form the United States of America had not made any claims to proprietary rights in or over the seas, or as to what lay beneath them. Black J, delivering the opinion of the majority of the Supreme Court of the United States in *United States v California*[523], said this[524]:

> "At the time this country won its independence from England *there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders*. Some countries, notably England, Spain, and Portugal, had, from time to time, made sweeping claims to a right of dominion over wide expanses of ocean. And controversies had arisen among nations about rights to fish in prescribed areas. *But when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion*. Neither the English charters granted to this nation's settlers, nor the treaty of peace with England, nor any other document to which we have been referred, showed a purpose to set apart a three-mile ocean belt for colonial or state ownership. Those who settled this country were interested in lands upon which to live, and waters upon which to fish and sail. There is no substantial support in history for the idea that they wanted or claimed a right to block off the ocean's bottom for private ownership and use in the extraction of its wealth." (emphasis added)

373 In *United States v Texas*, Douglas J said[525]:

> "[O]nce low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign."

This approach to the paramountcy doctrine was approved and adopted by Barwick CJ in the *Seas and Submerged Lands Case*[526].

374 In *United States v California*[527], the opinion of the majority of the Supreme Court with respect to a dispute between California and the United

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**523** 332 US 19 (1947).

**524** 332 US 19 at 32-33 (1947) (footnotes omitted).

**525** 339 US 707 at 719 (1950).

**526** (1975) 135 CLR 337 at 360, 373-374.

**527** 332 US 19 (1947).

States as to the ownership of, and rights and powers in and over minerals below the Pacific Ocean and beyond the low water mark off the coast of California, was this[528]:

> "The point of difference is as to who owns, or has paramount rights in and power over several thousand square miles of land under the ocean off the coast of California. The difference involves the conflicting claims of federal and state officials as to which government, state or federal, has a superior right to take or authorize the taking of the vast quantities of oil and gas underneath that land, much of which has already been, and more of which is about to be, taken by or under authority of the state. Such concrete conflicts as these constitute a controversy in the classic legal sense, and are the very kind of differences which can only be settled by agreement, arbitration, force, or judicial action."

Later, the majority went on to say[529]:

> "The crucial question on the merits is not merely who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it."

375 In *United States v Texas*[530], Texas argued that its history entitled it to unique treatment by the Court, because, before its annexation by the United States, it had possessed both *dominium* and *imperium* over its adjacent seas. Texas claimed that when it entered the Union in 1845, it had retained the *dominium* over the territorial sea that the Republic of Texas had previously acquired and that it transferred to the United States its powers of sovereignty – its *imperium* only – over the territorial sea. The majority of the Supreme Court rejected Texas's argument and found for the United States, holding that to do

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**528** 332 US 19 at 24-25 (1947).

**529** 332 US 19 at 29 (1947).

**530** 339 US 707 (1950).

otherwise would be to derogate from the sovereignty of the national government[531]:

> "Unless any claim or title which the Republic of Texas had to the marginal sea is subordinated to this full paramount power of the United States on admission, there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States."

The Court also said[532]:

> "In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States."

*The paramountcy of the national government over indigenous claims*

376 There have been few cases in which indigenous North Americans have claimed native title rights over the seas. When they have, federal courts in the United States have applied the doctrine of paramountcy developed in the litigation between the national government and the states to defeat those claims, most relevantly in *Inupiat Community of the Arctic Slope v United States*[533] ("*Inupiat*") and *Native Village of Eyak v Trawler Diane Marie Inc*[534] ("*Eyak*").

377 In *Inupiat*, the Inupiat people of Alaska claimed, among other things, a declaration that they possessed sovereign rights and unextinguished aboriginal title to an area lying 3 to 65 miles offshore from Alaska, including the seas, the sea-bed and the minerals lying underneath the sea-bed. The Inupiat people sought to distinguish their case from the cases in which the states had failed, by arguing that competition between the federal and state governments for sovereign rights was irrelevant to the resolution of a dispute between the national government and native Americans[535].

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**531** 339 US 707 at 719 (1950).

**532** 339 US 707 at 718 (1950).

**533** 548 F Supp 182 (District of Alaska, 1982).

**534** 154 F 3d 1090 (9th Circuit, 1998).

**535** 548 F Supp 182 at 185 (District of Alaska, 1982).

378 The Inupiat people's claim was rejected at first instance by Fitzgerald J (and the rejection affirmed by the Ninth Circuit Court of Appeals[536]; certiorari was denied by the Supreme Court[537]) on the ground that, to uphold the claim, "would be to ignore the underlying principle upon which the Supreme Court has placed reliance, that federal supremacy over the adjacent seas is an essential element of national sovereignty"[538]. Fitzgerald J said[539]:

> "If, as a matter of constitutional law, the federal government must be possessed of paramount rights in offshore waters, it makes no difference whether the competing domestic claimant is a state or a tribe of American natives. All are subordinate to the federal government, and neither can, under the Constitution, claim rights which are at odds with those which are of necessity entrusted to the one external sovereign recognized by the Constitution."

379 In *Eyak*[540], various Native Villages in Alaska claimed to maintain a traditional way of life, which was heavily dependent on their freedom to hunt and to fish in their traditional waters. Basing their claim upon unextinguished native title, the Native Villages argued that they were entitled to the exclusive use and occupancy of their various waters for hunting and fishing on the outer continental shelf of the United States[541]. They challenged fishing regulations promulgated by the federal Secretary of Commerce on the grounds that the regulations unlawfully permitted non-tribal people to fish within the Native Villages' exclusive aboriginal territories, and prohibited Native Village members from doing so *without* a permit. The Native Villages sought an injunction against the Secretary and a declaration that the Native Villages held aboriginal title and exclusive rights to use, occupy, possess, hunt, fish and exploit the waters, and the mineral resources within their traditional use areas of the outer continental shelf of the United States.

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**536** 746 F 2d 570 (1984).

**537** 474 US 820 (1985).

**538** 548 F Supp 182 at 185 (District of Alaska, 1982).

**539** 548 F Supp 182 at 187 (District of Alaska, 1982).

**540** 154 F 3d 1090 (9th Circuit, 1998).

**541** 154 F 3d 1090 at 1091 (9th Circuit, 1998).

380 At first instance, the District Court (Holland J) held that the doctrine of federal paramountcy applied to deny the existence of any aboriginal title in or over the outer continental shelf of the United States[542].

381 An appeal from that decision to the Ninth Circuit Court of Appeals was rejected. In delivering the unanimous opinion of the Court (Farris, O'Scannlain and Hawkins JJ), O'Scannlain J said that there was little difference between the assertion of exclusive rights to use, occupy, possess or exploit the waters or mineral resources by the Native Villages on the one hand, and the claims of the states which had unsuccessfully challenged the federal paramountcy doctrine on the other[543]. The Court held, citing *Inupiat*[544], that[545]:

> "[i]f, as a matter of constitutional law, the federal government must be possessed of paramount rights in offshore waters, it makes no difference whether the competing domestic claimant is a state or a tribe of American natives".

In reaching its decision the Court did not overlook that, historically, the indigenous tribes of Alaska had hunted and fished in the area for thousands of years, just as the Supreme Court had been well aware of the different history of the former Republic of Texas[546] and its entry into the United States.

382 Although the path to the conclusions of the North American courts is not identical with the one that I think should be followed here, the conclusion is the same, and each has these in common: a recognition of the reality of the difference between the land mass and the seas; the over-arching importance, for a multiplicity of reasons, such as national defence, foreign relations, strategy, diplomacy and related treaty, trade and commercial considerations, of unrestricted control by the national sovereign of the territorial sea; and, an acknowledgment of the relevance and influence of international law and the history of international relations on the development of the concept of sovereignty over the territorial sea as part of the municipal law[547].

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**542** 154 F 3d 1090 at 1092 (9th Circuit, 1998).

**543** 154 F 3d 1090 at 1096 (9th Circuit, 1998).

**544** 548 F Supp 182 at 187 (District of Alaska, 1982).

**545** 154 F 3d 1090 at 1096 (9th Circuit, 1998).

**546** 154 F 3d 1090 at 1093, 1096 (9th Circuit, 1998).

**547** In *United States v California* 332 US 19 at 32-33 (1947), the majority, in describing the origins of the idea of a territorial sea, referred to the concern of the early statesmen of the American republic, such as President George Washington's

(Footnote continues on next page)

The determinations of native title

383 I turn now to the determination which was made by the primary judge and affirmed by the Full Court by reason of the dismissal of the appeals to that Court. It follows from what I have held that that determination by the primary judge and affirmed on appeal cannot stand. The question is whether any determination in favour of the claimants should have been made at all, that is to say, even with respect to the internal waters of the Northern Territory. Regardless whether the parties are in conflict over that matter, the terms of s 225 of the Act require, I think, that it be addressed.

384 The determination was that rights and interests, to travel through the areas, to fish and hunt in them for the various purposes stated, and to visit areas of cultural and spiritual importance, are all rights and interests which, pursuant to par 3 of the determination, did not confer on the holders possession, occupation, use and enjoyment to the exclusion of all others. Non-exclusivity necessarily involves a number of different elements: that anyone else might at any time and at any place within the relevant area do what the claimants non-exclusively did or do there. If everyone can draw water from a well, absent effective regulation, no one can say that he or she has any proprietary, or indeed enforceable right or interest in respect of the well or any quantity of water in it. If others have a right to occupy or use a particular area, and to exploit its resources, then it is always possible, indeed perhaps optimistic to believe other than, that someone will wish to, and indeed will, exploit those resources, unless restrained, to the point of depletion. It seems to me that a non-exclusive right to do something may be of little or no value in the absence of enforceable, effective rules to regulate the use, access and exploitation by all users descending to the detail of all of, times, places, persons, numbers, means of access to the area, and other like essential matters. There was certainly no evidence in this case as to any system of law with respect to, or regulation of these critical matters. Its absence raises the question whether non-exclusive rights to be shared with the public in general and in no way otherwise defined, are rights to which the common law would accord recognition. It may be, however, that such rights and interests do have a particular value to the claimants in that any law or regulation which restricted or denied their rights to do anything of the kind to which par 4 of the determination refers would give them a right to compensation, even though no other member of the public who ordinarily resorted to the determination area might be so entitled. In that sense therefore, the rights the subject of the determination may have value to the claimants and hence are cognisable by the common law.

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Secretary of State, Thomas Jefferson, that there be established a sufficiently ample maritime zone for the protection of the neutrality of the United States during the French revolutionary wars.

The boundaries

385 The primary judge said that he had been obliged to fix arbitrarily the boundary of the claimed area, particularly the western and the northern boundaries. It is easy to understand why his Honour had difficulty in this exercise, having regard to the imprecision of the evidence with respect to them. Equally, it is easy to understand how a people whose lives have generationally been disrupted and whose ancestors have been relocated found it difficult to be precise. When rights and interests in respect of an area have to be defined, it is important that the area in which they may be enjoyed also be defined. The boundaries of a claimed area should, as in all civil litigation, be established on the balance of probabilities. The Commonwealth has not shown that his Honour erred here in this regard. I would reject the Commonwealth's ground of appeal that goes to this question.

Orders

386 I would uphold the appeal of the Commonwealth and dismiss the claimants' appeal. I would order that the determination be amended so as to be restricted to and apply to the internal waters of the Northern Territory as I have defined them earlier in my judgment, including the inter-tidal zone both of the mainland and of the islands within the claimed area. The claimants should pay the costs of both the claimants' and the Commonwealth's appeals.