Native Title Offshore: At the Water's Edge or Beyond

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SUMMARY

The concept of native title offshore is explored first by looking at the account of Aboriginal sea tenure as conceptualised by the Aboriginal people who claim native title to the seas about Croker Island in the Northern Territory. A brief history of native title in Australia precedes a discussion of some of the legal issues arising in the Croker Island Seas claim, including whether indigenous rights and interests offshore can be recognised and protected by the common law in those areas. Finally, the possible existence of any offshore native title rights in minerals is considered.

INTRODUCTION

A native title claim to the seas in the Croker Island region of the Northern Territory was lodged with the National Native Title Tribunal on 22 November 1994.[1] The area covered by the application included sea, sea-bed, land or reefs (other than land granted pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976). On 21 May 1996, the Tribunal lodged the application with the Federal Court for decision, pursuant to s 74 of the *Native Title Act* 1993. Final submissions in the matter[2] concluded on 23 April 1998. The reasons for judgment were delivered by Olney J on 6 July 1998.

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1 The application was expressed to be to seas adjoining Croker Island, Manburra (Oxley) Island, Gurrmal (New Year) Island, Gurrbaluj (Lawson) Island, Injurrangarn (McCluer) Island, Wurralja (Grant) Island, other related islands, and a portion of the mainland which extends between de Courcey Head and the commencement of the Cobourg Peninsula Marine Park near Giualung Point. None of the claimed area was outside of the territorial sea, extending 12 nautical miles from the territorial sea baseline.

2 *Yarmirr v Northern Territory of Australia,* No DG 6001 of 1996, ("Croker Island Seas claim").

His Honour concluded that the applicants had established a non-exclusive native title right to have free access to the sea and the sea-bed for the purposes of:

(a) travelling through or within the claimed area;
(b) fishing, hunting and gathering to satisfy their personal, domestic or non-commercial communal needs (including for the purpose of observing traditional, cultural, ritual and spiritual laws and customs);
(c) visiting and protecting places of cultural and spiritual importance; and
(d) safeguarding cultural and spiritual knowledge,

those rights being subject to all valid laws of the Commonwealth and the Northern Territory and rights and interests granted thereunder.[3]

Many of the legal questions which arose in this case have fallen for decision for the first time and are not the subject of authoritative pronouncement by the High Court. Some of the issues argued in the Croker Island Seas claim, such as the extent to which the common law recognises and protects native title rights and interests offshore and the existence of any offshore native title rights in minerals, are the principal focus of this paper. In order to usefully consider these legal issues, it is necessary to understand how the applicants in the Croker Island Seas claim conceptualise their relationship with the sea and the resources therein.

ABORIGINAL SEA TENURE

The applicants, most of whom live on Croker Island or have close connections with it, identify themselves as a community of "sea people" whose relationship with the sea is a point of distinction between themselves and mainlanders. That relationship with the sea is said to form the basis for the claimed right to:

(a) ownership (including exclusive possession) of sea country and the resources therein;
(b) speak for and make decisions about the use of the waters and land claimed;
(c) access the waters and land claimed;
(d) control access of others to the waters and land claimed;
(e) use the resources of waters and land;
(f) control use by others of the resources;
(g) receive and pass on cultural and religious knowledge associated with the waters and land; and

[3] For a Summary of Conclusions and Proposed Determination, see *Yarmirr v Northern Territory of Australia* (unreported, Federal Court of Aust, 6 July 1998), Reasons for Judgment, pp 112-114. See also the Determination of Native Title Pursuant to the *Native Title Act* 1993, handed down by Olney J on 4 September 1998.

(h) care for and protect sites of significance and the resources of the waters and land.

Members of each "estate group"[4] claim to have rights in relation to a particular area or areas of sea country called an "estate". According to the traditional laws and customs of the applicants, membership of an estate group and the concomitant ability to exercise rights in relation to an area of sea country is primarily based on patrilineal inheritance, with the most senior members of the "yuwurrumu"[5] being able to exercise the claimed rights in their strongest form. According to the evidence of Mary Yarmirr:

> "The yuwurrumu is related to the land or the country itself ... It relates to both the sea country as well as the land ... the land and the sea country ... are the same ... It's always the yuwurrumu, yuwurrumu clan that owns a particular estate."[6]

The extent of sea country belonging to a yuwurrumu was described by Mary as "a traditional system, a law".[7] Sea country included:

ajbud	beach, the dry sand[8]
inyjagbirlil	wave crash[9]
aldij	sand bar[10]
inybarl	reef[11]
idamugi	sea grazing country[12]
balu	sea refuge[13]

Sea country, in this model, does not extend to the "birrina" or the ocean: "[i]t starts off at the ajbud [beach] and finishes at the balu [sea refuge] ... Because then we know that our sea creatures are safe. They will then come in with the tide back into sea grazing country where they feed, and that's where we catch them fullstop".[14] When discussing the divisions of sea country, Mary Yarmirr related them to the marine resources therein. The inybarl (reef) is where the fish breed,[15] marine creatures graze in the idamugi and take refuge in the balu when the tide goes out. Thus marine creatures are carried back and forth with

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4 The application was stated to be made on behalf of the Mangalara, Mandilarri-Ildugij, Murran, Gadura, Minaga, Mayarram and Yangardi peoples (or "estate groups").

5 A "yuwurrumu" is a group of people who can trace or claim descent through the male line.

6 Transcript, 23 April 1997, p 49.

7 Ibid, p 85.

8 Ibid: "The first one is ajbud, that is the sand, dry sand, the beach itself, ajbud."

9 Ibid: "Inyjagbirlil is where the waves crash onto the sand, onto the beach."

10 Ibid: "Further down, where you can see the white sand, the sand bar you call it, we call it aldij."

11 Ibid: "The next one is the reef which is inybarl."

12 Ibid, p 86: "Next one is the sea grazing land ... Idamugi."

13 Ibid: "Balu is the refuge or a deeper water when it is low tide, when the water goes right out, as it goes out it takes most of the marine creatures with it such as the turtles and the dugongs, the bigger ones, and they take refuge in the that balu. It's too deep, but we can still see it, the bottom of it."

14 Ibid: cf Ilijili Lamilami at Transcript, 6 June 1997, p 659 who spoke of the balu and birrina being the same.

15 Ibid, pp 85-86.

the ebb and flow of the tide. They seek "refuge" in the deeper waters, but with the incoming tide they are again accessible by the Croker Island people as fishers. What Mary Yarmirr described as her sea country is that zone which is susceptible to use and exploitation of marine creatures by the island people. That zone extends to the outer edge of the shoreward shelf; to the place where inshore shallows give way to deeper water.[16]

Graphic accounts were given in evidence of hunting dugong and turtle. Only men hunt turtle and dugong. Turtle and dugong are caught for food and for some special ceremonial occasions such as funerals and ceremonies performed to reopen country after closure following the death of a traditional owner.[17] Otherwise people fish because "[i]t's their food" and get stingrays, crabs, oysters and fish to eat as well as turtle and dugong "because we are sea people and the turtle and dugong are our only source of food that we have here, as well as fish and other things".[18] Members of a yuwurrumu can hunt and fish in their own estate area without seeking permission from anyone, but persons are expected to ask permission of the appropriate person to hunt and fish on areas of sea country outside their own estate area.[19] When asked whether other (non-aboriginal) persons including commercial fishermen would be able to fish in her waters without permission, Mary Yarmirr answered:

> "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 negotiate with us."[20]

The same approach would be taken to any proposal for petroleum exploration.[21] When proposed oil exploration at Somerville Bay threatened "some of our sacred areas", the explorers were asked to look elsewhere, which they did.[22] Jang (or Dreamings) are places of particular significance in the sea country, being seen as dangerous areas requiring senior yuwurrumu members to ensure that unintended harm is not caused by them, or to them. Places associated with the ability to make rain are said to be a manifestation of jang, as are places which are able to release dangerous substances. One jang place near Lawson

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16 While Mary Yarmirr, in her evidence, did use phrases such as "as far as my eye can carry me" and "as far as my eyes can take me" (Transcript, 23 April 1997, pp 72, 73 and 80), she does not appear to use these words in the context of a conceptual definition of the extent of Aboriginal sea tenure. Mary Yarmirr's more restricted model was also supported by Ronald Lamilami, who confined (sea) country to the seabed (for grass) and the reef (Transcript, 24 April 1997, pp 194-195).

17 Deaths of traditional owners cause their inheritors and successors to close tracts of country until proper ceremonies of smoking marine animals and the burning of grass cover over land have been observed.

18 Mary Yarmirr, Transcript, 4 June 1997, pp 530-531. See also Ilijili Lamilami at Transcript, 6 June 1997, p 656.

19 Mary Yarmirr, Transcript, 23 April 1997, pp 49, 50-1, 53, 54.

20 Ibid, p 55.

21 Ibid, p 54.

22 Ibid.

Island is associated with Ngajablyn (Barracuda) Dreaming; the head of the barracuda is near Lawson Island and the tail is at McCluer Island, on the bottom of the sea. Meat thrown from a passing yacht, contrary to Aboriginal law, is believed by the Croker Island people to have angered the jang (Barracuda Dreaming) which caused two fishing boats and the yacht to disappear.[23]

It is the Dreamings which traditional Aboriginal people believe forge their relationship with their country. Customary law emerges through the activities of the Dreamings. It is that law to which the Croker Island people turned when explaining their rights in relation to sea country including the right to exclude others.

When asked whether she had a right to ask a person on her sea country without permission to leave, Mary Yarmirr's response was:

> "I have a law for the other person also ... 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 its a misunderstanding, they don't understand my law ... 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."[24]

AUSTRALIAN NATIVE TITLE LAW

If Mary Yarmirr's words were intended to be a statement of a dual system of laws, Aboriginal and non-Aboriginal, then it is negated by Kirby J in *Wik Peoples v Queensland*[25] in which he explained:

> "There was no challenge to the principle established in *Mabo (No 2)* that the duty of this Court (as of every Australian court) is to apply the common law and relevant statutes although this could lead to the impairment of native title. This Court, established by the Constitution, operates within the Australian legal system. It draws its legitimacy from that system. Self-evidently, it is not an institution of Aboriginal customary law. To the extent that native title is recognised and enforced in Australia by Australian law, this occurs because, although not of the common law, native title is recognised by the common law as not inconsistent with its precepts ... But no dual system of law, as such, is created by *Mabo (No 2)*. The source of the enforceability of native title in this or in any other Australian court is, and is only, as an applicable law or

[23] Charlie Wardaga, Transcript, 25 April 1997, pp 273-275.
[24] Transcript, 23 April 1997, p 65.
[25] (1996) 187 CLR 1.

statute provides."[26]

What is the applicable law on native title in Australia?

High Court cases

In *Mabo v Queensland (No 1)*,[27] the High Court (by a 4:3 majority), on the assumption that the plaintiffs could establish the rights claimed, held invalid the *Queensland Coast Islands Declaratory Act* 1985 (Qld) because it contravened the *Racial Discrimination Act* 1975 (Cth). The court declined to consider whether native title actually existed or not. The effect of the case was that if in the future, it was judicially determined that native title did exist, then it was protected by federal legislation in relation to certain actions.

When *Mabo v Queensland (No 2)*[28] was handed down on 3 June 1992, the High Court overturned the legal doctrine of terra nullius applying to Australia and recognised that a form of native title had the potential to survive the acquisition of British sovereignty and to exist as a burden on the Crown's radical title under Australian common law. While the court did not have to determine whether, on a factual basis, native title existed, it did come to some general conclusions about what native title is and who can hold it.

Occupancy of and traditional connection with land by Aboriginal people was held to be the source of native title. That traditional connection necessarily determines the content of native title. Brennan J emphasised the need for the occupancy or connection to be in accord with a system of laws and customs: "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."[29]

Native title can be possessed only by Aboriginal inhabitants of the land and their descendants.[30] His Honour stressed that the protection of native title is vested in members of the group or community:

> "so long as the people remain an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs as currently acknowledged and observed."[31]

Membership of the community (or group) depends upon "biological descent...and on mutual recognition of a particular person's membership by that person and by the elders or others enjoying

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[26] Ibid, 213-214.
[27] *Mabo (No 1)* (1988) 166 CLR 186.
[28] *Mabo (No 2)* (1992) 175 CLR 1.
[29] Ibid, *Mabo (No 2)* at 58.
[30] Ibid, at 59 per Brennan J.
[31] Ibid, at 61.

traditional authority among those people".[32]

Thus in order to hold native title recognised by the common law, a claimant must be an indigenous person and a biological descendant of the indigenous clan or group who exercised traditional and customary rights in respect of the area claimed at the time when the Crown first asserted its sovereignty over the land and must be a member of a community or group which continues to acknowledge and observe the laws and customs of the original indigenous community.[33]

While *Mabo (No 2)* was concerned only with the existence of native title on islands offshore from Queensland, *Western Australia v Commonwealth*[34] determined that the common law regarding native title, as expressed in *Mabo (No 2)*, applied throughout the Commonwealth of Australia.

The most recent case in which the High Court considered the question of native title was *Wik Peoples v Queensland.*[35] In that case, the High Court by a 4:3 majority held that the grant by the Crown of a pastoral lease under Queensland law did not necessarily extinguish all incidents of native title.

All of the High Court cases which have considered native title have done so in the context of native title to onshore land. The Croker Island Seas claim is the first case in Australia in which a court has been asked to make a determination of the existence of native title in relation to the sea and the seabed.[36]

Native Title Act 1993 (Cth)

The *Native Title Act* 1993 (Cth) was the legislative response to the decision in *Mabo (No 2).* Generally it sets up a mechanism for recognition of native title and its protection in relation to future dealings with land and waters. Past acts of the Commonwealth, invalid because of their effect on native title, are validated[37] subject to payment of compensation[38] and the States and Territories can similarly validate their own past acts.[39]

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32 Ibid, at 70.

33 See *Mason v Tritton* (1994) 34 NSWLR 572 at 384 per Kirby P, following *Mabo (No 2)*, as to what must be demonstrated in order to establish a successful common law claim for native fishing rights. That test was restated in *Derschaw v Sutton* (1996) 17 WAR 419 and applied in that case.

34 (1995) 183 CLR 373.

35 (1996) 187 CLR 1.

36 In *Mason v Tritton* and *Derschaw v Sutton*, the issue of a native title right to fish arose in the context of a defence to a prosecution.

37 *Native Title Act* 1993, s 14.

38 Ibid, s 17.

39 Ibid, ss 19 and 20; and see *Validation (Native Title) Act* 1994 (NT), previously *Validation of Titles and Actions Act* 1994 (NT); *Native Title (New South Wales) Act* 1994 (NSW); *Land Titles Validation Act* 1994 (Vic); *Titles Validation Act* 1995 (WA); *Native Title (South Australia) Act* 1994 (SA); *Native Title (Tasmania) Act* 1994 (Tas); *Native Title Act* 1994 (ACT).

The *Native Title Act* 1993 seeks to adopt or codify the common law definition of native title as espoused by Brennan J in *Mabo (No 2)*,[40] which case determined only common law recognition and protection of native title rights to land. By including in the definition of native title[41] rights and interests in relation to waters, the Act does not preclude the possibility that native title may also exist in relation to waters, including waters in an offshore place as defined.

Olney J in the Croker Island Seas claim held that the application of the *Native Title Act* 1993 extends offshore to include the area of the continental shelf beyond the territorial seas, being waters over which Australia asserts sovereign rights.[42] An "offshore place" for the purposes of the Act extends seaward from low water mark to the outer limit of the continental shelf, but does not include a tidal inlet, bay, estuary or harbour which is within the limits of a State or Territory.[43]

Although the exact extent of waters which attach to a State or Territory is not known, waters are generally recognised as being within the limits of the State or Territory if:

(a) they are completely or largely encompassed by land;
(b) there is evidence of historical usage by the State or Territory; or
(c) there is an historical assertion of boundaries beyond the land mass.

What waters landward of the baselines fall within the limits of a State or Territory is a matter to be determined when the question arises. Examples of "inland waters" are two major South Australian gulfs (Gulf of St Vincent and Spencer Gulf) which the High Court considered to be within the territorial limits of that State in *Raptis v South Australia*.[44] This finding primarily arose from the court's examination of historical documents relating to the boundaries of the Province of South Australia as including the "bays and gulfs thereof".[45] The limits of the Northern Territory, at least in relation to the Croker Island area under claim, and the inclusion and extent of certain bays[46] arose in the Croker Island Seas claim in the context of argument as to the recognition by the common law of native title offshore and the limits of application of the common law.[47] Although ultimately it was a question unnecessary for his Honour to decide because of the

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40 *Mabo (No 2)* at 58.
41 *Native Title Act* 1993, s 223.
42 Reasons for Judgment, p 25.
43 *Native Title Act* 1993, ss 6 and 253; *Seas and Submerged Lands Act* 1973 (Cth), s 11.
44 (1977) 138 CLR 346.
45 Similar words were used to describe land boundaries in documents and statutes relating to the Northern Territory, including the Letters Patent of 1863 annexing the Northern Territory to South Australia, the *Northern Territory Act* 1863 (SA), the *Northern Territory Surrender Act* 1907 (SA) and the *Northern Territory Acceptance Act* 1910 (Cth). See also *Raptis v South Australia*, ibid at 381 per Mason J.
46 Mountnorris Bay, Malay Bay, Palm Bay, Mission Bay and Somerville Bay were the named bays under consideration.
47 This argument is discussed below under the heading "Indigenous Rights Offshore".

conclusion he reached as to the meaning of "recognised by the common law" in the context of s 223(1) of the *Native Title Act*, Olney J expressed the view that the territorial limits of the Northern Territory extended to the low water mark[48] of the coastline of the islands and mainland and that only Mission Bay (adjacent to the main living area on Croker Island) was included in the limits of the Northern Territory, that bay having the physical characteristic of an arm of the sea enclosed by a narrow entrance.[49]

Another aspect relevant to the limits of the Northern Territory which Olney J was required to decide, albeit it in the context of defining the area in respect of which a determination of native title was sought, was the proper manner for identifying the low water mark. While the proclamation of territorial sea baselines pursuant to s 7 of the *Seas and Submerged Lands Act* 1973 (Cth)[50] made on 4 February 1983 used the lowest astronomical tide as the basis for that measurement because that was the correct method to be applied under international law in 1983 (and remains so today), it was argued that that baseline measurement is not relevant to the determination of the common law limits of the States and the Northern Territory.[51] The correct approach must be to apply common law and constitutional law principles applicable on Federation. According to common law principles, low water mark is to be measured as the ordinary or "mean low water mark", that is, the low water mark between ordinary spring and neap tides.[52] His Honour accepted that approach and held that the landward and seaward limits of the foreshore are the mean high and low water marks respectively.[53]

The tidal foreshore

The area between low water mark and high water mark falls within the definition of an onshore place for the purpose of the *Native Title Act* 1993, but it was not clear from the definitions of "land" and "waters" in s 253 (prior to amendment) whether this area was onshore waters or onshore land. The amendment to the definition of "waters" in s 253 of the *Native Title Act* 1993 clarified that "waters" includes the shore, or subsoil under or airspace over the shore, between high water and low water,[54] hence the area between low water mark and high

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48 To be measured as mean low water mark, see op cit n 53.

49 Reasons for Judgment, p 36.

50 Published in *Commonwealth of Australia Gazette* No S29, 9 February 1983.

51 Nor could the adoption of that measurement have affected the limits of the States as the Commonwealth lacks the constitutional power to alter the limits of the States other than by the process specified in s 123 of the Constitution. (Commonwealth Submissions, 24 November 1997, para 2.11).

52 See *Delap v Hayden* [1923] 4 DLR 1102 at 1104, 1106 per Harris J. See also the Report of the Aboriginal Land Commissioner, "Closure of Seas: Castlereagh Bay/Howard Island Region of Arnhem Land" (1988) per Kearney J at paras 55-67.

53 Reasons for Judgment, pp 19-20.

54 See s 101 of the *Native Title Amendment Act* 1998. The operative provisions of the *Native Title Amendment Act* commenced on 30 September 1998.

water mark is onshore waters.

There was some uncertainty in the Croker Island Seas claim as to the status of the waters in the inter-tidal zone between high water mark and low mark, and whether or not they were subject to native title claim. This arose because the application for determination of native title was worded in such a way as to avoid the native title claim extending over land held by an Aboriginal Land Trust pursuant to the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). The grant to the Aboriginal Land Trust was of land to low water mark.[55] Olney J held that the application extended to the waters of the inter-tidal zone, but not to the seabed of that zone.[56]

INDIGENOUS RIGHTS OFFSHORE

The threshold legal question in relation to indigenous rights and interests offshore is whether the common law recognises and protects those rights and interests in the same way as native title rights to land. That is, are sea-based native title rights, as distinct from land-based native title rights, interests recognised and capable of protection by the common law of Australia?[57] Both New Zealand and Canadian jurisprudence suggests that the common law can recognise customary fishing rights as a form of indigenous title, at least in relation to onshore and enclosed waters and foreshore areas.[58] It seems that, prior to the decision in the Croker Island Seas claim, none of the cases recognising an indigenous right to fish have done so in the context of waters outside territorial limits.

Outside territorial limits, the fundamental question, as argued in the Croker Island Seas claim, was whether indigenous rights and interests can be recognised by the common law, where the common law itself does not extend beyond those limits. And even where there is a basis for recognition by the common law of indigenous rights and interests offshore, are the rights and interests which the common law may recognise as native title necessarily more limited than those which could be recognised on land?

For the purpose of discussing these issues, offshore areas can be considered in a number of different (but overlapping) zones:

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[55] See also *Aboriginal Land Rights (Northern Territory) Act* 1976, Sch 1, Arnhem Land (Mainland); also Arnhem Land (Islands).

[56] Reasons for Judgment, p 19.

[57] This question was identified by Kirby J in *Mason v Tritton* (1994) 34 NSWLR 572 at 579. See also G Meyers et al, "A Sea Change in Land Rights Law: the Extension of Native Title to Australia's Offshore Areas", NTRU Legal Research Monograph, 1996 at 23.

[58] *Calder v Attorney-General British Columbia* (1973) 34 DLR (3d) 145 included waters of Observatory Inlet and Portland Inlet and Canal; *R v Sparrow* (1990) 70 DLR (4th) 385 included tidal waters at the mouth of a river; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 extended to collection of shellfish on the foreshore.

- "Inland waters" are those waters regarded as attaching to land territory and therefore within the geographical limits of a State or Territory.[59]
- "Coastal waters" of a State or the Northern Territory extend from the geographical limits of a State or the Territory to a line which is at all points 3 nautical miles seaward of the territorial sea baseline.[60] Following the 1979 Offshore Constitutional Settlement, the Commonwealth enacted legislation vesting in the States and the Northern Territory title and certain proprietary rights,[61] together with extended legislative powers, in coastal waters.[62] As a result, while the Commonwealth retains sovereignty over the area, the States and the Northern Territory are primarily responsible for administration of coastal waters.
- "Territorial waters" is used here to refer to that area of the territorial sea, which is not included within coastal waters of a State or territory. The "territorial sea" extends from the territorial sea baseline to 12 nautical miles from that baseline. Thus "territorial waters" refers to that part of the territorial sea between 3 nautical miles and 12 nautical miles from the baselines. The Commonwealth retains sovereignty over this area,[63] together with legislative and administrative power.

Beyond the territorial sea stretching from 12 nautical miles from the territorial sea baseline out to 200 nautical miles is the "exclusive economic zone". The Commonwealth's sovereign rights in the area are limited to exploring, exploiting, conserving and managing the natural resources.[64] Australia also asserts some limited sovereign rights over the continental shelf. The marine area beyond 12 nautical miles from the baselines is not dealt with in this paper, nor are international law issues developed to any extent, those matters remaining to be dealt with in some detail elsewhere.

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59 These waters are also "internal waters" for the purposes of international law.

60 The territorial sea baseline is proclaimed under the *Seas and Submerged Lands Act* 1973 (Cth); see op cit n 45. Generally the baseline is low water mark, but where the coastline is irregular or there is a fringe of islands along the coastline, the baseline is formed by drawing appropriate closing lines. "Coastal waters" may include areas within the baseline but outside the limits of the State or Territory, which areas considered to be "internal waters" for the purposes of international law.

61 *Coastal Waters (State Title) Act* 1980 (Cth); *Coastal Waters (Northern Territory Title) Act* 1980 (Cth).

62 *Coastal Waters (State Powers) Act* 1980 (Cth); *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth).

63 The Commonwealth asserted its sovereignty over this area on 13 November 1990 when it extended the territorial sea from 3nm to 12nm by proclamation pursuant to s 7 of the *Seas and Submerged Lands Act* 1973 (Cth). See op cit n 41.

64 See *Maritime Legislation Amendment Act* 1994 (Cth) amending the *Seas and Submerged Lands Act* 1973 (Cth).

The argument as to non-recognition of native title in offshore areas

Native title rights derive from rights being exercised under indigenous customary laws immediately before acquisition of sovereignty and they depend entirely for existence on recognition by the common law.[65] How can common law native title exist in an area where the principles of the common law upon which native title depends for its recognition do not extend? This, simply stated, is one argument for non-recognition of native title in offshore areas, which arose for consideration in the Croker Island Seas claim.[66]

Based on the decision in *R v Keyn*,[67] at the dates Great Britain acquired sovereignty over various areas of the Australian continent,[68] the common law extended over land territory[69] only to the low water mark. The view that the common law did not apply beyond low water mark was supported by the majority in the *Seas and Submerged Lands Case.*[70] If it is correct that indigenous rights and interests cannot be recognised as native title where the common law by which they are recognised does not apply, then, applying *Keyn's Case,* native title could not be recognised seaward of the limits of the States and the Northern Territory.

However, the Parliament can extend the application of the common law into offshore areas[71] and the Commonwealth has done so in relation to petroleum and mineral exploration and exploitation, and to offshore installations generally.[72] The States and the Northern Territory have also enacted legislation expressed to extend the common law offshore.[73] Whether or not any of the applicable offshore legislation in the Northern Territory effected an extension of the common law offshore so as to be capable of providing a basis for the recognition of native title in that area was considered in the Croker Island Seas claim.

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65 *Mabo (No 2)* (1992) 175 CLR 1 at 69 per Brennan J; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 213 per Kirby J.

66 See also the discussion in Meyers et al, op cit n 57, at 33 et seq.

67 (1876) 2 Ex D 63.

68 The relevant year in relation to the area claimed in the Croker Island Seas claim being 1824.

69 Including within land territory, waters which at common law attached to the land (inland waters).

70 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 368-369 per Barwick CJ, at 378 per McTiernan J, at 462 per Mason J, at 485, 486 per Jacobs J. See also *Bonser v La Macchia* (1969) 122 CLR 177 at 184 per Barwick CJ, at 218-219 per Windeyer J; *Reference re Ownership of Offshore Mineral Rights* (1967) 65 DLR (2d) 353 at 363.

71 *R v Keyn* (1876) 2 Ex D 63 at 239; see also *New South Wales v Commonwealth* (1975) 135 CLR 337 at 368.

72 See eg *Petroleum (Submerged Lands) Act* 1967, s 9; *Sea Installations Act* 1987, s 46; *Offshore Minerals Act* 1994, s 428.

73 See, eg, *Off-shore (Application of Laws) Act* 1982 (WA); *Coastal and Other Waters (Application of State Laws) Act* 1982 (Tas); *Application of Laws (Coastal Sea) Act* 1980 (NSW); *Off-shore Waters (Application of Laws) Act* 1976 (SA); *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT); *Off-shore Facilities Act* 1986 (Qld); *Interpretation of Legislation Act* 1984 (Vic).

In that case, the Commonwealth argued that no legislative or executive act has operated to provide a basis for recognition of native title beyond the limits of Northern Territory.[74] The *Coastal Waters Acts* did not alter the limits of the States or the Northern Territory, nor did they affect the international status of the territorial sea and the capacity of the Commonwealth to carry out its obligations in that area, the international status of those waters being preserved by s 6 of those Acts.[75] The Commonwealth submitted that s 5 of the *Coastal Waters (Powers) Acts* only conferred legislative power on the States and the Northern Territory, but of itself, did not alter the status of the territorial sea from the perspective of the common law.[76] Nor could s 4(2) of the *Coastal Waters (Titles) Acts*[77] preserve indigenous rights and interests offshore (in the areas covered by the Acts) as native title rights because, while Aboriginal traditional laws and customs may have existed before the commencement of the Acts,[78] if indigenous rights and interests exercised in accordance with those traditional laws and customs had not been recognised by the common law, they did not have the character of any legal right and therefore did not "subsist" in any relevant sense before the commencement date of the applicable Act. In any event, no private rights of title or property to the waters above the seabed were preserved, the only rights being preserved by s 4(2) of the *Coastal Waters (Titles) Acts* in the area being property rights in the seabed. In the Commonwealth's submissions, the only examples of statutory property rights in the seabed are those which vested property in mineral resources of the seabed in the Crown in right of the Commonwealth or which rights were conferred on other persons to exploit the mineral resources of the seabed.[79]

Nor, in the submissions of the Commonwealth,[80] did the *Coastal Waters (Northern Territory) Title Act* 1980 (Cth) (or the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT)) have the effect of extending statutes and the common law previously applying within the limits of the Northern Territory over coastal waters such as to provide any basis upon which native title rights can be recognised in the area between the limits of the Northern Territory and 3 nautical miles

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74 Commonwealth Submissions, 24 November 1997, Pt 4. The same reasoning would also apply to native title beyond the limits of a State.

75 Ibid, para 4.9.

76 Ibid, paras 4.10-12.

77 Section 4(2) of the *Coastal Waters (Titles) Acts* relevantly provides:

"The rights and title vested in the [State/Territory] under subsection (1) are vested subject to:

(a) any right or title to the property in the sea-bed beneath the coastal waters of the [State/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."

78 Being 14 February 1983.

79 Commonwealth Submissions, 24 November 1997, paras 4.13-18.

80 Ibid, paras 4.19-23.

from the territorial sea baseline.[81]

In relation to territorial waters, the Commonwealth also submitted[82] that native title could not be recognised in this area because common law did not extend so far, and while the Commonwealth may hold sovereignty in territorial waters by international law concepts and has undoubted powers to legislate or acquire property in the area, that area remained within the international domain in which no property rights, other than those granted by statute have been recognised. Without statutory extension of the common law to the area, no indigenous rights and interests in or with respect to the seas or the seabed and subsoil below it can be recognised as native title.

However, there may be a question of whether acquisition of sovereign rights offshore since Federation affects any common law recognition of native title rights in that area.[83] Sovereign rights offshore have accrued through a process of interaction of international and municipal law.[84] The temporal element, however difficult to ascertain,[85] of any such gradual accretion of sovereign rights in each offshore zone may lead to an interesting problem in ascertaining the existence of native title rights offshore. According to Richard Cullen,[86] it is likely that sovereignty offshore to 3 nautical miles gradually accrued in a process which began in 1901 and was completed sometime before the enactment of the *Seas and Submerged Lands Act* 1993 (Cth); beyond 3 nautical miles (in territorial waters) the date may be later.[87]

On one argument, in relation to each marine zone, the time frame for proof of native title may depend on the date of any extension of the common law to the area, either by statute (if the effect was to recognise native title) or by acquisition of sovereignty sufficient to provide a basis for common law recognition of native title offshore.

In the Croker Island Seas claim, the Commonwealth contended that acquisition of sovereignty over the territorial sea did not provide any basis for the recognition of native title beyond the limits of the Northern Territory because the common law did not extend beyond those limits and because the Crown lacked title to the seas and seabed.[88] In addition, as the area seaward of the limits of the States and

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[81] Compare decision of Ambrose J in *Queensland v Jones* (unreported, Supreme Court of Queensland, 31 October 1997) as to the effect of the *Coastal Waters (State Title) Act* 1980 (Qld).

[82] Commonwealth Submissions, 24 November 1997, Pt 3.

[83] Meyers et al, op cit n 57, at 36 et seq; A Bergin, "A Rising Tide of Aboriginal Sea Claims: Implications of the *Mabo* Case in Australia" (1993) 8 *International J Marine & Coastal Law* 359 at 364; R Cullen, "Rights to Offshore Resources after Mabo 1992 and the *Native Title Act* 1993 (Cth)" (1996) 18 *Sydney Law Review* 125 at 138.

[84] Ibid. (I leave this topic to be developed more by others elsewhere).

[85] Meyers et al, op cit n 57, at 42.

[86] Referred to in Meyers et al, op cit n 57, at 43, note 181.

[87] Ibid.

[88] Commonwealth Submissions, 24 November 1997, Pts 2-4; also Commonwealth Submissions, 25 March 1998, paras 2.1-2. See also *Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280 at 287-288 per Brennan CJ (paras 20-22), at 298 per Gaudron J (para 84).

the Northern Territory is, by nature, international in character and external to Australia, the only rights which are recognised in the offshore area and enforced by the courts are public rights, statutory rights and international law obligations.[89]

The applicants' position was that acquisition of sovereignty over the territorial sea was a sufficient basis for common law recognition of native title in that area.[90] If that be so, and on the basis that Great Britain acquired sovereignty by operation of international law over the area out to the original 3 nautical mile limit of the territorial sea when sovereignty was acquired over land,[91] the only question that then arises in that area is whether any native title rights which may have existed at acquisition of sovereignty have since been extinguished.

However, in the area beyond the original 3 nautical mile limit of the territorial sea, recognition of native title may have occurred at a later date. A number of possible dates, other than 1824, for common law recognition of native title in various offshore areas were suggested in the Croker Island Seas claim:

(i) 6 December 1976 for the "coastal sea of Australia",[92] it being contended by the applicants that the operation of s 80 of the *Judiciary Act* 1903, as applied by s 15B of the *Acts Interpretation Act* 1901, extended the common law to that area[93];

(ii) 9 February 1983 in those areas included within the territorial sea as a result of drawing straight baselines;

(iii) 18 September 1985 in the coastal waters of the Northern Territory, by virtue of the commencement of the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT);

(iv) 13 December 1990 in the area between 3-12 nautical miles from the baselines (territorial waters) when the territorial sea was extended from 3 nautical miles to 12 nautical miles; or

(v) 1 January 1994 in the whole of the claimed area by virtue of the commencement of the *Native Title Act* 1993 (Cth) which itself recognised native title offshore.

If native title is recognised beyond the limits of the Northern Territory on any of the bases set out above, then unlike recognition of

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[89] In the alternative, the Commonwealth submitted that if native title rights can be recognised by the common law in any offshore areas, those rights cannot extend to exclusive possession, exclusive rights to fish or to ownership of marine resources because:

(a) any native title rights below high-water mark would be subject to public rights to fish and navigate;

(b) the common law does not recognise private ownership of free-swimming marine resources in the sea, until lawfully killed or captured;

(c) the common law will not recognise any private rights which interfere with the obligation to permit innocent passage except where the Parliament has clearly provided to the contrary.

See Commonwealth Submissions, 24 November 1997, Pt 5.

[90] Transcript of Proceedings, 4 December 1997, pp 1368.20-1369.15.

[91] Being 1824 in relation to the claimed area in the Northern Territory.

[92] Including "coastal waters" of the Northern Territory for the purposes of the claim.

[93] Further Submissions for Applicants, April 1998, para 2.4.

native title in 1824, later recognition takes place within an existing statutory framework. Even in the absence of any application of the common law to waters seaward of the limits of the Northern Territory, nonetheless, the Crown could legislate with respect to areas adjacent to its land territory and any persons within that area, including Aboriginal people, were subject to that legislation, irrespective of whether the common law itself extended to the area.

What was made clear in *Mabo (No 2)* was that it was the actions of government after acquisition of sovereignty, and not the operation of the common law, which dispossesses Aboriginal people of their land.[94] *Mabo (No 2)* was, of course, concerned with native title to land over which sovereignty had been asserted. But where the Crown asserts sovereignty to land and then takes legislative action in relation to the adjacent seas, for example, in relation to fishing and mining activities, those legislative actions of the Crown are just as capable of affecting the activities of Aboriginal people and dispossessing them of their rights in that area as they would be if the actions were taken over the land to which sovereignty had been asserted. And when the common law is later extended to the adjacent seas, whether by assertion of sovereignty or statutory extension, what is then recognised and protected by the common law are those indigenous rights and interests possessed under the traditional laws acknowledged and the traditional customs observed which are lawfully being exercised by Aboriginal people at that date. So the argument (in summary) was put to the court in the Croker Island Seas claim.

Thus a distinction was drawn by the respondents between extinguishment of native title rights and interests by legislative or executive action taken after common law recognition of native title, and the operation of legislation and executive actions taken prior to recognition which had the effect of precluding any recognition by the common law of some indigenous rights and interests as native title, or alternatively determining them before such recognition. An example of the latter situation of non-recognition or prior determination might be a legislative prohibition against a certain practice which Aboriginal people may have been accustomed to carry out in accordance with their traditional laws and customs.

The effect of the prohibition prior to recognition of native title by the common law would be to limit the incidents of native title which might be recognised at common law, rather than to extinguish them, the main relevance (for present purposes) being that the "clear and plain intention" test in relation to extinguishment arguably would not apply where the question is whether any particular legislative action operated to limit the incidents of native title which might be recognised.[95] However, it was argued, in deciding the latter question (as to non-recognition), the Court would be required to determine

[94] *Mabo (No 2)* per Brennan J at 68-69.
[95] Submissions of the Fishing Industry Parties on Extinguishment, para 3.4.

whether the rights claimed to be exercised by Aboriginal people were inconsistent with any relevant legislative regimes or executive acts, that process being analogous with the process undertaken to determine extinguishment of native title rights after recognition of those rights by the common law.[96]

The finding as to recognition by the common law of native title offshore

Olney J held that the *Native Title Act* 1993 has extended and enhanced the concept of native title as explained in *Mabo (No 2)*[97] and that it would be inconsistent with the thrust of that Act if the requirement that native title rights and interests must be recognised by the common law of Australia were to be construed as imposing a territorial limit in relation to recognition of native title.[98] His Honour rejected the argument that s 223(1)(c) of the *Native Title Act* should 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" and was of the view that the words "recognised by the common law of Australia" in the context of s 223(1) of the *Native Title Act* would exclude from that definition such rights as rights which would "fracture a skeletal principle of our legal system", rights which are possessed other than by indigenous inhabitants and their descendants, and rights which have not continued to be observed in conformity with traditional laws and customs.[99] By his Honour so finding, the temporal difficulties as to the date of recognition of native title were avoided, as were any issues arising from any relevant difference between non-recognition of native title and extinguishment.

In the event that native title was to be recognised offshore, it was contended by the respondents[100] in the Croker Island Seas claim that the legislative regimes (fishing and mining) applying to the claimed area offshore are inconsistent with some or all claimed indigenous rights and interests in the area. Those regimes have therefore extinguished some or all of the incidents of native title. The impact of minerals and petroleum legislation upon the rights claimed by the applicants is discussed below. Discussion of the impact of fishing legislation on Aboriginal rights and interests offshore will be left for another time and place.

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[96] Commonwealth Submissions, 25 March 1998, paras 2.18-20.
[97] Reasons for Judgment, p 26.
[98] Ibid.
[99] Ibid, p 27.
[100] The Commonwealth, the Northern Territory and the Fishing Industry Parties.

THE IMPACT OF MINERALS AND PETROLEUM LEGISLATION UPON THE RIGHTS CLAIMED

Ordinarily the question of extinguishment and inconsistency should be considered in the context of indigenous rights and interests which have been found to exist.[101] This was particularly relevant in the Croker Island Seas claim where, although the claim was said to extend to the ownership of the seabed and the subsoil within the claimed area, no rights to minerals or petroleum were specifically claimed and no evidence given of any traditional right involving exploitation of those substances. As Counsel for the applicants expressed the situation: "The issue is really one of the right of native title holders to control and, if necessary, provide consent to the exploitation of those minerals if and when the time arises."[102]

It is unlikely that any finding of native title offshore in Australia would automatically include ownership of minerals or petroleum, or a right to control their exploitation. The decision in *Mabo (No 2)* does not extend that far. The content of native title is to be determined in accordance with the traditional laws and customs acknowledged and observed by the Aboriginal inhabitants.[103] What traditional laws and customs give rights to control minerals and petroleum?

Richard Bartlett,[104] in his recent article on the content of native title, and whether it includes minerals, recognises that this Australian focus on traditional laws and customs makes it unlikely that there will be any finding of beneficial ownership of minerals by Aboriginal people for the purpose of commercial exploitation. So too would this reasoning apply to any suggested indigenous right to control exploitation of mineral and petroleum resources. It cannot be the case under Australian native title law that the consequences of finding that any native title right exists is an entitlement to possession of land and waters to the exclusion of all others, and it cannot be presumed that the existence of any native title right to the seas or seabed can be expanded to include rights to minerals and petroleum, in the absence of any evidence of any traditional law or custom as to indigenous use or exploitation of those substances. It must be for the applicants in any claim to establish, on the evidence, what their rights are.

In the Croker Island Seas claim, Olney J found no basis for a determination that would recognise native title in minerals that may

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[101] See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1 at 249 per Kirby J: "Because the interests under native title will not be uniform, the ascertainment of such interests, by evidence, is necessary in order to judge whether such inconsistency as exists will extinguish the particular native title proved."

[102] Transcript, 21 April 1998, 1512.3-5.

[103] *Mabo (No 2)* per Brennan J at 58 as now expressed in the *Native Title Act*, s 223(1)(a).

[104] R Bartlett, "Native Title includes Minerals!" (1998) 17 AMPLJ 43 at 55, referring also to G P J McGinley, "Natural Resource Comprises and Aboriginal Title to Land" 28 *The International Lawyer* (1994) 695 and M Hunt, "Mineral Development and Indigenous People" (1993) 11 J Energy & Nat.Resources L 155 at 166.

exist or be found in the seabed or subsoil of the waters of the claimed area, there being no evidence of any traditional law or custom relating to the acquisition or use of, or trading in, any such minerals.[105]

However, if there had been any question of the existence of indigenous rights to minerals and petroleum offshore existing in the Croker Island Seas claim, it was argued that the impact of mining and petroleum legislation in the area would have extinguished any native title rights to minerals and petroleum.

Counsel for the applicants conceded that valid Commonwealth legislation which vests beneficial ownership in minerals in the Crown may have the effect of extinguishing native title rights and interests in relation to minerals in the seabed, the issue then being whether particular provisions in fact vest beneficial ownership in the Crown, or merely confirm the radical title of the Crown.[106]

There are various Commonwealth and Northern Territory Acts which have had the effect of acquiring minerals and petroleum in the ground in the Northern Territory, including below Northern Territory waters:

1. Section 6 of the *Atomic Energy (Control of Materials) Act* 1946 (Cth) and/or s 35(2) of the *Atomic Energy Act* 1953 (Cth) vested title in prescribed substances[107] located within the limits of the Northern Territory in the Crown in right of the Commonwealth with effect from 11 September 1946. This included title to those substances on or below the surface of the seabed.
2. By s 3 of the *Minerals (Acquisition) Ordinance* 1953, all minerals[108] (aside from the prescribed substances referred to above) within the limits of the Northern Territory, including those on or below the seabed, were "acquired by, and vested absolutely in, the Crown in right of the Commonwealth". Title to those minerals within the limits of the Northern Territory was transferred to the Northern Territory on 1 July 1978 by operation of s 69(4) of the *Northern Territory (Self-Government) Act* 1978 (Cth). The statutory extension of Northern Territory laws into the adjoining coastal waters out to 3 nautical miles from the baselines, under the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) and the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth), read with the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT), arguably extended the effect of the Crown acquisition of minerals under the *Minerals (Acquisition) Ordinance* 1953 to minerals in those coastal waters, including in the seabed, beyond

[105] Reasons for Judgment, p 110.
[106] Further Submissions for Applicants (April 1998), para 6.1.
[107] For definitions see *Atomic Energy (Control of Materials) Act* 1946 (Cth), s 3; *Atomic Energy Act* 1953, s 5(1) and as amended by s 3 of *Atomic Energy Amendment Act* 1978 , No 31 of 1978.
[108] See definition in *Minerals (Acquisition) Ordinance* 1953, s 2.

the geographical limits of the Northern Territory.[109]

3. By s 5 of the *Petroleum (Prospecting and Mining) Ordinance* 1954, title to all helium and natural gas, including petroleum, below the seabed[110] was vested in the Commonwealth.[111] That title (at least within the limits of the Northern Territory) was subsequently transferred to the Northern Territory by virtue of s 69(4) of the *Northern Territory (Self-Government) Act* 1978 (Cth). Title to such gases and liquids in the area between the limits of the Northern Territory and the outer limits of the coastal waters was vested in the Northern Territory by virtue of the operation of s 4(1) of the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth). Note also s 6 of the *Petroleum Act* 1984 (NT) deeming all petroleum on or below the surface of land within the Northern Territory to always have been the property of the Crown.[112]

There was a clear and plain intention expressed in the minerals legislation referred to above to acquire all interests in minerals. In this regard, the provision considered in *Delgamuukw v British Columbia*[113] as not clearly intending to extinguish aboriginal title to minerals can be distinguished. The proclamation there under consideration declared that all lands in British Columbia and all mines and minerals therein belonged to the Crown in fee.[114] The legislation here under consideration clearly intended to compulsorily acquire all rights in minerals in the ground and to vest property in those minerals (including mineral oils and valuable substances) in the Crown.

The *Atomic Energy (Control of Materials) Act* 1946 (Cth), the *Atomic Energy Act* 1953 (Cth) and the *Minerals (Acquisition) Ordinance* 1953 all contain rights to compensation.[115] Accordingly no issue of acquisition

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[109] Note that there may be a counter implication to this effect arising from the need under the Ordinance to lodge a compensation claim by 31 December 1954.

[110] "Land" was defined in s 4 of the *Petroleum (Prospecting and Mining) Ordinance* 1954 as including "the sea-bed adjoining the coast of the Territory extending to the outer edge of the continental shelf, and the bed of a river, estuary, lake or swamp".

[111] Or vesting was confirmed, to the extent to which such substances may have already have been vested in the Commonwealth by the *Minerals (Acquisition) Ordinance* 1953; see definition of "minerals" in s 2, including "mineral oils and valuable ... substances".

[112] As with the *Minerals (Acquisition) Ordinance,* arguably the operation of s 6 the *Petroleum Act* (NT) was also extended to the adjoining coastal waters out to 3 nautical miles from the baselines, under the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) and the *Coastal Waters (Northern Territory Title) Act* 1980 (Cth), read with the *Off-shore Waters (Application of Territory Laws) Act* 1985 (NT). Note that by Act No 30 of 1994 amending the *Petroleum Act* from 29 June 1994, "land" was defined as "land within the jurisdictional limits of the Territory and includes waters within those limits other than waters to which the *Petroleum (Submerged Lands) Act* applies".

[113] (1993) 104 DLR (4th) 470.

[114] Ibid, at 525.

[115] *Atomic Energy (Control of Materials) Act* 1946, s 14; *Atomic Energy Act* 1953, s 42; *Minerals (Acquisition) Ordinance* 1953, s 4.

other than on just terms can there arise.[116]

While the *Petroleum (Prospecting and Mining) Ordinance* 1954 did not provide for the payment of compensation, the intention to acquire all interests in the relevant substances (to the extent that those interests may not already have been acquired by the *Minerals (Acquisition) Ordinance* 1953) is evinced in those sections which enabled the Crown to grant permits, licences or leases in respect of private land, conferring exclusive rights on the permit holder or lessee in relation to petroleum.[117]

Note that the effect of a compulsory acquisition of all property under statute has been held to include all mineral rights. In *Commonwealth v Maddalozzo,*[118] Stephen J said: "The Commonwealth cannot acquire the fee simple in land and leave unacquired some interest in the land."[119]

It must be presumed that this would also extend to any subsisting native title rights to minerals and petroleum. Such a compulsory acquisition of land would therefore be inconsistent with the continuation of any native title rights to those substances. It follows that if a compulsory acquisition is of all minerals (and petroleum), there must be a clear and plain intention that no interests in those substances are to be left in private hands, including any native title rights and interests.

Olney J concluded that the impact of mining and petroleum legislation in the area would have had the effect of appropriating to the Crown full beneficial ownership those substances, thereby extinguishing any native title rights to minerals or petroleum in the claimed area which may otherwise have existed.[120]

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[116] Note that the validity of the *Minerals (Acquisition) Ordinance* 1953 was upheld in *Kean v Commonwealth* (1963) 5 FLR 432, on the assumption that just terms were required. Of course *Teori Tau v Commonwealth* (1969) 119 CLR 564 held that that assumption was not required in the Northern Territory. Nor does the decision in *Newcrest v Commonwealth* (1997) 71 ALJR 1346 necessarily change this position, it still being arguable that just terms are not required for an acquisition of property in the Northern Territory under s 122 of the Constitution unless the legislation is also supportable under s 51. That was the effect of the judgment of Toohey J at 1367, Brennan CJ, Dawson and McHugh JJ holding that *Teori Tau* was correctly decided in that s 122 was not qualified by s 51(31); per Gummow J (Gaudron and Kirby JJ agreeing) that *Teori Tau* should no longer be treated as authority denying the operation of the constitutional guarantee in s 51(31) in respect of s 122 laws.

[117] See particularly ss 12(1) and (3), 29, 60 and 74 of the *Petroleum (Prospecting and Mining) Ordinance* 1954. See also *Wik Peoples v Queensland* (1996) 134 ALR 637 at 685-686 per Drummond J referring to extinguishment of native title rights to minerals by the *Mining on Private Land Act* 1909 (Qld).

[118] (1980) 54 ALJR 289.

[119] Ibid; see also Wilson J at 294; Mason J at 291; Aickin J at 292, 292.

[120] Reasons for Judgment, p 111.

REGULATION OF MINING IN THE CLAIMED AREA

The *Mining Act* 1980 applies to all mining within the Northern Territory,[121] including the mining of prescribed substances under the *Atomic Energy Act* 1953 (Cth).[122] The Act provides for the grant of various mining interests. Exploration for or mining of minerals otherwise than in accordance with the Act is prohibited by s 190. While there is as yet no *Minerals (Submerged Lands) Act* (NT) enacted to parallel the *Off-shore Minerals Act* 1994 (Cth), it is arguable that the operation of the *Mining Act* 1980 has been extended out to 3 nautical miles from the declared territorial sea baselines by virtue of the *Coastal Waters (Northern Territory Powers) Act* 1980 (Cth) read with the *Off-shore Waters (Application of Territory Laws) Act* 1985.[123]

The *Offshore Minerals Act* 1994 (Cth)[124] applies from the seaward limit of coastal waters to the outer edge of the continental shelf and applies to the mining of all substances other than petroleum[125] in that area. The relevant prohibition is in s 38 which provides that a person may not explore for or recover minerals in the area except pursuant to the grant of a licence under the Act. While s 43 provides that the grant of a licence would not extinguish any native title rights, there is no exemption from s 38 provided in relation to mining of minerals by native title holders.

In relation to exploration and recovery of petroleum, the *Petroleum Act* 1984 (NT)[126] applies within the Northern Territory and s 105 prohibits exploration for or recovery of petroleum other than pursuant to an authority issued under the Act. The *Petroleum (Submerged Lands) Act* 1982 (NT) which applies in coastal waters mirrors, in most respects, the provisions of the *Petroleum (Submerged Lands) Act* 1967 (Cth) regulating exploration and exploitation of petroleum beyond the coastal waters of the Northern Territory. Sections 19 and 39 of both Acts contain the relevant prohibitions on exploration or recovery of petroleum without an authority issued under the applicable Act.

Even if any native title rights in minerals and petroleum survived the vestings in and acquisitions by the Crown referred to above,[127] the legislative regimes in relation to those substances which confer rights

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[121] The *Mining Ordinance* 1939 (NT) (now repealed) was of similar regulatory effect as the later *Mining Act* 1980.

[122] See *Margarula v Minister for Resources and Energy* (unreported, Federal Court, 11 February 1998), confirmed on appeal in (1998) 157 ALR 160.

[123] And see the definition of "land" in s 4(1) of the *Mining Act* 1980 (as amended by Act No 30 of 1994) being "land within the jurisdictional limits of the Territory and includes waters within those limits".

[124] See previously the *Minerals (Submerged Lands) Act* 1981 (Cth).

[125] As to which see the *Petroleum (Submerged Lands) Act* 1967 (Cth).

[126] See previously the *Petroleum (Prospecting and Mining) Act* 1954 (NT).

[127] Contrary to the decision of Olney J, see op cit n 120.

to explore and mine in offshore areas and prohibit mining without an appropriate statutory mining interest (with penalties for breach) must operate to extinguish any native title rights to minerals or petroleum.

Grants of mining and petroleum interests offshore

Prior to amendment of the *Native Title Act* 1993, s 235(8)(a) provided that all future acts were permissible future acts and s 23(2) provided that all such acts were valid.[128] Even if native title existed offshore and the grant of a mining or a petroleum interest affected that native title, there is no need to go through any negotiation/arbitration procedure in relation to the grant.[129] Note however that in relation to offshore acts, native title holders will have procedural rights to the same extent as holders of "corresponding rights and interests ... that are not native title rights and interests".[130] Procedural rights in relation to an offshore act encompasses rights of notification, objection or any other right available as part of the procedures to be followed when it is proposed to do the act.[131]

The "freehold test" does not apply to future acts in relation to offshore places.[132] Thus, there is no restriction on the type of interest which can be granted offshore, even if native title exists. Any existing native title will not be extinguished by a future act in relation to offshore places, but compensation will be payable to native title holders who can show that their interests have been affected.[133] It is not required that the "similar compensable interest" test[134] be satisfied.

Thus, even if native title rights exist offshore there are no apparent impediments to future grants of mining and petroleum interests offshore or renewal of existing interests, subject to payment of compensation if any native title can be shown to have been affected. However it should be noted that difficulties may arise where interests to be granted or renewed involve both offshore and onshore places as the "right to negotiate" provisions and the "freehold test" may apply in relation to the onshore, but not the offshore place.

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[128] Those sections are now repealed. See now s 24NA of the *Native Title Act* 1993 as amended by the *Native Title Amendment Act* 1998 which provides that future acts offshore are valid.

[129] *Native Title Act* 1993, s 26. See now s 26(3) of the *Native Title Act* 1993 as amended by the *Native Title Amendment Act* 1998 excluding the sea and inter-tidal zone from Subdivision P – Right to Negotiate.

[130] Ibid, s 23(6) (now repealed). See now s 24NA(8) of the *Native Title Act* 1993 as amended by the *Native Title Amendment Act* 1998.

[131] Ibid, s 253.

[132] Compare ibid, ss 235(2) and (5) (now repealed) for onshore places. See now s 24MC of the *Native Title Act* 1993 as amended by the *Native Title Amendment Act* 1998.

[133] Ibid, s 23(4) (now repealed). See now s 24AA(6) and s 24NA(6) of the *Native Title Act* 1993 as amended by the *Native Title Amendment Act* 1998.

[134] See ibid, s 23(4)(b)(ii)(B) (now repealed, see new s 24MD(3)) and s 240 in relation to onshore places.

CONCLUSION

The decision by the Federal Court in the Croker Island Seas claim will be subject to scrutiny by the Full Federal Court[135] and the matter will likely conclude in the High Court. The issues, of which just a few are discussed in this article, are novel and complex.

Irrespective of the result of any possible appeal, it seems reasonably certain that the determination will not be extended to include native title rights to minerals and petroleum in or under the seabed. Nor will the existence of any native title rights and interests offshore have an impact on the grant of mining and petroleum interests in that area, subject to the payment of compensation for any native title rights and interests which are affected by the grant.

[135] Appeals have now been filed by both the Commonwealth and the applicants: see Federal Court Proceedings DG 6005 of 1998 and DG 6006 of 1998 respectively.