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Offshore Cartography

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Having established the new parameters for on-shore title in the trilogy of High Court decision in *Mabo*, *Western Australia* and *Wik*, the enquiry now moves offshore as we turn to deal with offshore claims to native title rights. The middens found along Australia's shores bear testament to the Aboriginal peoples' relationship with the sea and their dependency on its resources. With the emergence of claims to the offshore waters, we are now concerned with this history, and its conflict with ancient rights and customs in the sea, such as the common law rights of the public to fish and to navigate freely in tidal waters and in the territorial sea, and the right of the ships of all nations under international law to navigate the oceans and to innocent passage through territorial waters.

Facts and Figures

The question whether native title can exist offshore is of special significance to an island nation such as Australia with some 12,000 miles of coastline and with rights to exploit the marine resources of the sea out to 200 nautical miles and the mineral resources of our vast continental shelf. [Attached to this paper is a chart of Australia's Marine Jurisdictional Zones.] To date some forty-one off-shore native title claims have been commenced under the *Native Title Act 1993* with at least that number again pending acceptance under that Act. Most claims are offshore Western Australia, but they also have been made off the coasts of the other States and the Northern Territory. And although the ACT includes Jervis Bay, its offshore waters remain part of NSW, so it is not

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* I acknowledge the research and assistance of Dr Melissa Perry, of the South Australian Bar who appears with me as counsel in the *Croker Island Case*.

possible for there to be a claim made offshore the ACT.[1] It is with respect to a claim off the coast of the Northern Territory that these issues will first be tested in Australia in the *Croker Island Case*, where final submissions are to be made in Darwin in December.

In broad terms, current claims range from areas exclusively within Australia's territorial sea (as in *Croker*) to the outer limits of the continental shelf and even beyond. These claims also raise for the first time the question whether indigenous rights offshore may extend to the exclusive possession of the seas and the sea-bed. The current claims plead native title rights to close off or control access to areas of the sea. These are ambit claims unique in both national and international jurisprudence.

And it seems, the capacity to claim offshore native title is not limited to Australian nationals. The captains and crews of two Indonesian ships have claimed that they were exercising native title rights to fish in the Australian Fishing Zone and on that basis, are not liable for prosecution for certain fisheries offences. In principle there seems no reason why Australian citizenship should be a requirement for a native title claim, on or offshore.

Themes

Claims to exclusive possession of sea areas directly raise a conflict with ancient common law rights and with rights of foreign ships in our waters from which a number of different themes or strands can be separated:

- the tension between private and public rights;
- the tension between ancient customs and spiritual associations with territory, on the one hand, and the increasing capacity and

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1 The area of the Jervis Bay Territory described in the Agreement surrendering the Territory to the Commonwealth (Schedule 1 to the *Jervis Bay Territory Acceptance Act 1915*) is defined as ending at the high water mark. It would seem to follow that the inter-tidal zone and any waters within the jaws of the land remain part of NSW, and that the adjacent waters of the territorial sea are thus adjacent to NSW rather than the Territory. This understanding is reflected in the definition of 'adjacent areas' in the *Petroleum (Submerged Lands) Act* 1967 (s.5A and Schedule 2), which is in turn adopted as part of the definition of the 'coastal waters' of NSW under the *Coastal Waters (State Powers) Act 1980* (see s.3). The same position is expressly enacted for the purposes of the *Fisheries Management Act 1991* by s.5(2) of that Act.

necessity to exploit the resources of the sea and the seabed, on the other hand;

- the tension between open and closed seas; and

- the interaction between international and municipal law.

Overlaying these themes is the further complication of the federal system which operates so as to divide jurisdiction over off-shore areas between the Commonwealth and the States.[2]

In the literal (and littoral) sense, we here venture into unchartered waters. Native title rights have not been recognised in Australia by treaty as they have in other jurisdictions such as New Zealand, and there is no constitutional protection of such rights as in Canada.[3] In the two cases in Australia where the question of native title rights offshore has been considered, the rights asserted were not found to have been established on the evidence and the question remains an open one.[4]

Before one can turn to look at the special issues which arise offshore and how they have been dealt with in other jurisdictions, it is helpful first to look briefly to the principles which govern recognition of native title to Australian land. This may provide a raft to move offshore to examine native title from the perspective of the common law and its recognition of the freedom of the seas and then to consider how native title rights offshore might fare in the open waters of international law.

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2 See eg *Bonser v. La Macchia* (1969) 122 CLR 177; *New South Wales v. Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337; and s. 51(x) of the Constitution in relation to the power to make laws with respect to fisheries beyond territorial limits.

3 See s. 35(1), *Constitution Act 1982*.

4 *Mason v. Tritton* (1994) 34 NSWLR 572; *Dershaw v. Sutton* (1995) 82 A Crim R 318 (first instance); unreported, Full Court of the Supreme Court of Western Australia (Franklyn, Wallwork and Murray JJ), 16 August 1996.

What is Native Title?

Recognition of Native Title

The question whether native title can survive offshore arises in the wake of *Mabo (No 2)*. To some extent *Mabo* was a conservative decision. Its critical step was to reject the fiction that on settlement Australia was an empty continent devoid of inhabitants. The failure, until 1992, to recognise native title rights was based upon a false assumption. Principles which had been long established in other common law countries were applied to support the finding that native title rights survived the acquisition of Imperial sovereignty in Australia. The High Court shifted the responsibility for the termination of native title from the common law to the executive and the legislators.

It remains that it is only native title rights existing *before* the acquisition of sovereignty by the Crown which can be recognised by the common law. And the common law only *recognises* native title rights, it does not create them. Native title rights are not rights or estates created by the common law such as freehold or leasehold estates or an easement over land. Hence, the common law principles governing native title are concerned to define the circumstances in which the common law will recognise and enforce native title rights. The mere fact that indigenous rights in relation to land can be proved to have existed under customary laws before settlement does not guarantee their recognition by the common law. The limits of common law recognition are most clearly tested when considering claims to native title offshore.

Extinguishment

Native title rights are vulnerable to extinguishment where the executive acting within power or legislation exhibits a clear and plain intention to do so. The enquiry is not for an express or deliberate intention to terminate something which was not recognised to exist before the *Mabo* decision. Instead we look at the extent to which an inconsistency arises between legislation or acts of the Crown and the native title rights which are established. The *Mabo* principles were reworked in *Wik*, and we now know that rights under Crown grants and native title rights may co-exist.

Extinguishment presupposes recognition in the first place. However, a failure to recognise a particular right will have a similar effect to extinguishment. In other words, if the common law does not first recognise native title rights, those

rights will not be enforceable by the common law, even if they continue to exist as a matter of Aboriginal customary law.

A Bundle of Rights

Native title rights do not have a fixed and definite content. They comprise instead a bundle of rights which is defined by the Aboriginal customary laws of a particular community.[5] The content of that bundle of rights may vary from a right to hunt or to hold ceremonies, on the one hand, to rights of the kind established in *Mabo (No. 2)* where the Court declared that the Meriam people were "entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands".[6] It does seem clear that rights to fish may be included in that bundle of rights.[7] However, as we will see, that does not determine whether they can exist in Australia's territorial sea and beyond.

The *Native Title Act* is built upon these common law principles. Its concern is with creating procedures and mechanisms to facilitate the recognition of those rights and giving those rights a greater measure of protection from extinguishment than that given to them by the common law.

It is for the common law to determine whether native title rights may be recognised offshore and to determine the extent to which they may be recognised. As this is a matter for the common law, absent some new legislative prescription, recognition of any such rights is a matter for articulation by the High Court. Until it speaks with certainty on the offshore issues, we will have only a rough chart as our reference points, as was the case for the pastoral lease issue between *Mabo* in 1992, and *Wik*, in 1996.

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5 *Mabo (No. 2)* (1992) 175 CLR 1, 58, 61 Brennan CJ, 110 Deane and Guadron JJ, 195 Toohey J; *Wik Peoples v. Queensland* (1996) 141 ALR 129, 151 Brennan CJ, 185 Toohey J, 220 Gummow J, 256 Kirby J.

6 *Mabo (No. 2)* (1992) 175 CLR 1, 217.

7 See eg *R v. Sparrow* [1990] 1 SCR 1075; *Mason v. Tritton* (1994) 34 NSWLR 572; *Dershaw v. Sutton* unreported, Full Court of the Supreme Court of Western Australia (Franklyn, Wallwork and Murray JJ), 16 August 1996.

Private Rights v. Public Rights: Freedom of the Seas in Municipal Law

The freedom of the seas finds reflection in the common law in the existence of the public rights to fish and to navigate in tidal waters and the high seas. These rights are well established in Australia and in other common law countries.[8]

In 1821, at a time when bathing became fashionable in England, it was suggested that there might also be a public right to bathe and, incidental to that, to cross the seashore with horse and carriage, and with bathing machines to ensure public decency. The majority in *Blundell v. Catterall*[9] were unpersuaded, but in a delightful dissenting judgment, Justice Best argued most vigorously for the benefits of bathing in promoting health and in teaching those who live near the sea their "first duty, ... to assist mariners in distress."[10]

The origins of the public rights to fish and to navigate are now obscure. It may be that they derive from the Roman law which characterised the sea as *res communis,* meaning that it was beyond appropriation by private persons. Lord Haldane has suggested it was an common practice from time immemorial which, "[f]inding its subjects exercising this right as from immemorial antiquity the Crown as parens patriae ... regarded itself as bound to protect the subject in exercising it".[11]

At the end of the day, however, whatever the origins of the public rights, it seems clear that they are ultimately based upon a broad public policy which

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8 See eg *Malcolmson v. O'Dea* (1863) 10 HL Cas 593 [11 ER 1155]; *Gammell v. Commissioners of Woods and Forests* (1859) 3 Macq 419 (HL); *Gann v. Free Fishers of Whitstable* (1865) 11 HLC 192 [11 ER 1305]; *Duchess of Sutherland v. Watson* (1868) 6 SC 199; *Lord Advocate v. Trustees of the Clyde Navigation* (1891) 190 SC 174; *Lord Fitzhardinge v. Purcell* [1908] 2 Ch 139; *Blundell v. Catterall* (1921) 5 B & Ald 268 [106 ER 1190]; *Attorney-General (British Columbia)v. Attorney-General (Canada)* [1914] AC 153 (PC); *Attorney-General (Canada) v. Attorney-General (Quebec)* [1902] 1 AC 413 (PC); *Gladstone v. R* (1996) 137 DLR (4th) 648 (SCt Can); *Harper v. Minister for Sea Fisheries* (1989) 168 CLR 314, 325 Mason CJ, Deane and Gaudron JJ, 329 Brennan J; *New South Wales v. Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337, 419, 421, 423 Stephen J and 489 Jacobs J.

9 (1821) 5 B & Ald 268 [106 ER 1190]

10 Id, 1194.

11 *Attorney-General (British Columbia) v. Attorney-General (Canada)* [1914] AC 153, 169.

ensures that all have access to the sea, all are able to move freely about upon the sea and that its resources are available to all, subject only to Parliamentary regulation. Underlying these policy considerations is a recognition of a necessary distinction between laws which govern rights and interests on land and those which govern rights offshore. This in turn reflects the different physical character of the sea and the incapacity of people to walk on, to occupy, and fence it in.

The Magna Charta enjoined the Crown from granting exclusive fisheries. In this way, the public right to fish was protected for future generations.[12] An American judge explained from across the Atlantic that the effect of the Charter was to restore again the ancient public rights and prevent them from ever again being wrongfully appropriated by "powerful barons" to themselves, or granted by kings "to their courtiers and favorites".[13] After Magna Charta grants of exclusive fisheries could only be made with Parliamentary sanction. Indeed, even where such ancient grants were proved, they have been held to be subject to the public right of navigation and primacy was therefore given to that public right over any which might be granted on the whim of the King.[14]

Following the Great Charter, rights of exclusive fishery could still be acquired by prescription, on the basis that such rights were presumed to originate in a grant pre-dating Magna Charta. But in Australia it would make no sense to speak of rights granted or presumed to have been granted before Magna Charta[15]. It is unlikely that an Australian court could find that any rights of exclusive fishery may be acquired by prescription in Australia.

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12 *Malcolmson v. O'Dea* (1863) 10 HL Cas 593 [11 ER 1155]; *Gann v. Free Fishers of Whitstable* (1865) 11 HLC 192, 209, 213-214, 221 [11 ER 1305]; *Attorney-General (British Columbia) v. Attorney-General (Canada)* [1914] AC 153 (PC); *Harper v. Minister for Sea Fisheries* (1989) 168 CLR 314, 330 Brennan CJ. See also *Halsbury's Laws of England* (4th Ed), vol. 18, §615.

13 *Arnold v. Mundy* 10 Am Dig 356, 368

14 *Gann v. Free Fishers of Whitstable* (1865) 11 HLC 192 [11 ER 1305]; *Duchess of Sutherland v. Watson* (1868) 6 SC 199; *Lord Advocate v. Wemyss* [1900] AC 48 (HL); *Lord Fitzhardinge v. Purcell* [1908] 2 Ch 139, 165, 166; *Blundell v. Catterall* (1921) 5 B & Ald 268 [106 ER 1190, 1200, 1203].

15 See eg *Donnelly v. Vroom* (1907) 40 NSR 585, 589-590 in relation to exclusive fisheries; and *Caldwell v. McLaren* (1884) 9 App Cas 392, 405 (PC) in relation to the public right to navigate a stream.

How then has the tension between public rights and indigenous rights offshore been dealt with by the Courts? Although our way is still to be chartered, this question has been considered in other common law jurisdictions.

New Zealand

In 1913, a Maori woman by the name of Waipapakura was fishing with a net for whitebait in the Waitotara River in New Zealand. The net with which she fished was too wide and breached certain fisheries regulations. As a result, her nets were seized by a diligent fisheries officer and she was charged. In her defence, Waipapakura claimed that she was lawfully using the nets in exercise of an "existing Maori fishing-right" and this entitled her to rely upon a statutory exemption from prosecution. She said that those rights were granted to her by the Treaty of Waitangi of 1840 which expressly guaranteed to the Maori people their rights of fisheries.[16]

Her appeal was dismissed as it was held that her rights could not have been preserved by the Treaty alone but required statutory protection of which there was none.[17] Her downfall seems to have lain in the assumption that the rights upon which she relied were exclusive and therefore brought in conflict with the public right to fish which was preserved by the Act under which she was charged, for Stout J held that:

> "There is no attempt in the Fisheries Act, 1908, to give rights to non-Maoris not given to Maoris. All have the right to fish in the sea and in tidal rivers who obey the regulations and restrictions of the statute. This statute has not given, and no New Zealand statute gives, any communal or individual rights of fishery, territorial or extra-territorial, in the sea or tidal rivers. All that the Fisheries Act does is to regulate all fisheries so as to preserve the fish for all. ...Now, in English law - and the law of fishery is the same in New Zealand ... there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast. In the sea beyond the three-mile limit all have a right to fish, and there is no limitation of such general right in the regulations dealing with

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16 The second article of the English version of the Treaty of Waitangi guaranteed to the Maori people "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess."

17 *Waipapakura v. Hempton.* (1914) 33 NZLR 1065.

> such waters.... In the tidal waters - and the fishing in this case was in this area - all can fish unless a specially defined right has been given to some of the king's subject which excludes others."

Many years later, Te Weehi visited Motunau Beach to gather shellfish with the permission of a Maori elder. Like Waipapakura, he had the misfortune to meet a diligent fisheries officer who found that the paua shells which he had collected were undersized. Accordingly, he was charged with breaching regulations made under the 1983 Fisheries Act. Williamson J of the High Court of New Zealand proved more sympathetic than his predecessor, Stout J, whose decision he declined to follow.[18] Williamson J considered that the Treaty of Waitangi had preserved Maori fishing rights and in so doing, he followed Canadian decisions which had held that such treaties recognise obligations arising from such customary rights. He further held that the statutory defence relied upon by Te Weehi was intended to recognise those treaty obligations. However, for present purposes what is significant is that the conflict addressed in *Waipapakura* between public and private rights did not arise in *Te Weehi* because the Maori right claimed in that case was not said to be an exclusive one.

The importance of the non-exclusive nature of the rights recognised in *Te Weehi* also emerges in a decision of the New Zealand Court of Appeal expressing a tentative preference for the view that Maori fishing rights might exist in the sea. But at the same time, the Court indicated that the Treaty was not intended to exclude non-Maori's from fishing.[19]

But we are unlikely now to have the benefit of the New Zealand Court's final view on this issue as the question whether Maori fishing rights might exist offshore has been overtaken by the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1991*. This dealt comprehensively with the rights of Maori peoples in respect of commercial and non-commercial fishing. Nonetheless, a similar issue arose in a case outside that Act where Maori rights were said to found a monopoly on commercial whale-watching. The court rejected that assertion, observing that "it is obvious that commercial whale-watching is a very recent enterprise, founded on the modern tourist trade and distinct from

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18 [1986] 1 NZLR 641. See generally Mylonas-Widdall, "Aboriginal Fishing Rights in New Zealand" (1988) 37 ICLQ 386.

19 *Te Runanga o Muriwhenua Inc v. Attorney-General* [1990] 641, 655-656.

anything envisaged in ... the treaty".[20] But in the course of their reasons, the Court also emphasised that, while a right of development of indigenous rights is becoming recognised in international jurisprudence, "any such right is not necessarily exclusive of other persons or other interests."[21]

Canada

In Canada, claims to exclusive fisheries have also been met with an equal lack of success. In most cases, such claims have been considered in the context of rivers and lakes rather than in the sea.[22] In a number of recent cases where rivers were held to be navigable and subject to the public rights to fish and to navigate, the Courts have not accepted that the Indian fishing rights were exclusive.[23]

In the recent decision of the Supreme Court of Canada of *Gladstone v. R*[24] the question of fishing rights in the sea arose directly. The Gladstones, who were members of the Heilsuk Band, took a pail of herring spawn on kelp to a fish store in Vancouver to sell it. Little did they then know that they were under close surveillance by a number of fisheries officers who promptly seized the pail together with a further 4200 pounds of herring spawn and charged them with offering to sell herring spawn in breach of their Indian food fish licence.

The question which arose for the Court was whether the regulations under which the Gladstones were charged were invalid in that they violated the appellants' rights recognised under section 35(1) of the *Constitution Act 1981*. That section "recognised and affirmed" the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". Its effect was to give constitutional protection to indigenous rights and render invalid legislation which

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20 *Ngai Tahu Maori Trust Board v. Director-General of Conservation* [1993] 3 NZLR 553, 559.

21 *Ngai Tahu Maori Trust Board v. Director-General of Conservation* [1993] 3 NZLR 553, 560. Nonetheless the Court held that those responsible for the grant of such permits were required to recognise the special interests of the Ngai Tahu in the use of the coastal waters by reason of the statutory incorporation of the principles of the Treaty.

22 See eg *R v. Sparrow* [1990] 1 SCR 1075; *NTC Smokehouse Ltd v. R* (1996) 137 DLR (4th) 528; *Adams v. R* (1996) 138 DLR (4th) 657; *Côté v. R* (1996) 138 DLR (4th) 385.

23 *Nikai v. R.* unreported decision of the Canadian Supreme Court delivered 25 April 1996; *R v. Lewis* [1996] 1 SCR 921.

24 (1996) 137 DLR (4th) 648.

contravened the provision. In the course of their reasons, the Court rejected any construction of section 35(1) which would extinguish the ancient common law rights to fish in tidal waters. "It was surely not intended", said the Court "that by the enactment of section 35(1), the common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed."[25]

The United States

Likewise in the United States where indigenous Americans have claimed exclusive fisheries by way of prescription, these have been unsuccessful. Even where title to a river bed or exclusive fisheries have been granted to an Indian community, such as by treaty, such grants have been held to remain subject to the public right to navigate on navigable waters.[26]

In rejecting such claims in America, historical and policy considerations have been given significant weight. For example, in the *Te-Hit-Ton Indians case*,[27] the plaintiff alleged that the Alaskan Indian clan to which he belonged had acquired a large area of land including some 350 square miles of water extending out at some points to five miles from the coast. He sought compensation from the United States government for having authorised the taking of salmon from the area and for closing some of the plaintiff's ancestral fishing grounds. The United States Court of Claims rejected the claim on the basis that no grant of an exclusive fishery could be presumed as it was contrary to the policy of the government to make such grants. The Court also observed that there was no reason to assume that, prior to the acquisition of Alaska by the United States, Russia would have been any more generous in granting exclusive fisheries. In reaching this decision, the court relied upon a passage from *Shively v. Bowlby*, in which the United States Supreme Court stated that:

> "The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that

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25 *Gladstone v. R* (1996) 137 DLR (4th) 648, 679.

26 See eg *Moore v. United States* 157 F2d 760 (9th Cir. 1946); *Finch v. United States* 548 F2d 822 (9th Cir. 1976), 831 and note 25.

27 *Te-Hit-Ton Indians v. United States* 132 FSupp 695 (1955).

> the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and being chiefly valuable for the public purposes of commerce, navigation, and fishery, ... shall not be granted away ... "[28]

The importance of the great rivers such as the Mississippi and the Colorado rivers to the settlement of the United States then provided new vigour to the ancient public rights.

The Implications for Australian Offshore Native Title Claims

Hence the jurisprudence of these common law countries points to offshore native title rights which may exist not being exclusive. The common law has given primacy to the public right to fish and, even more critically, to the public right of navigation. If this is so, and native title rights have no constitutional or treaty protection, then it may be that they have become assimilated into the common law public rights and have no separate legal identity. In other words, they are rights which are protected by the common law but only as rights exercised in common with the general public.

The fact that the common law will not recognise a right which is held in any event by all subjects of the realm as the subject of a customary right or right by prescription[29] tends to support the proposition that rights exercised in common with all subjects cannot exist as separate rights.

Similarly, in the United States, the courts have found that fishing and navigation carried out by indigenous Americans in offshore areas could not have given rise to prescriptive rights because they were no more than the exercise of the common rights of fishery and of public navigation.[30]

When these public rights are spoken of, they are often referred to in the same breath as the rights held by the subjects of the Crown in common with the people of all nations to freely navigate and fish in the high seas and it is likely that some of the same policy considerations have had a bearing upon the state of international law in this area.

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28 *Shively v. Bowlby* 152 US 1.

29 *Ward v. Creswell* (1741) 125 ER 1165, 1166-1167. See also Wisdom, *The Law of Rivers and Watercourses* (4th Ed, 1979), n1, 256. But cf *Blundell v. Catterall* (1921) 106 ER 1190, 1200.

30 Eg *United States v. 10.95 Acres of Land in Juneau* 75 F Supp 841.

This then takes us to consideration of the nature of the rights held by the Crown offshore, the interaction between municipal law and international law in offshore areas and how those principles might affect claims to native title. Not only is the sea a highway employed by local and international shipping alike but it is also, in a very real sense, a meeting place for international and municipal law. As a result, Australia's rights and obligations in international law are not matters which can be left out of account in determining the issue of offshore native title.

The Interaction between Municipal and International Law: the Nature of the Crown's Rights and Obligations Offshore

High Seas: Mare Clausum v. Mare Liberum

The nature of the Crown's rights in offshore areas is best understood by looking first at the regime of the high seas which still governs the largest proportion of the seas and oceans of the world. In particular, the history which shaped that legal regime has impacted upon subsequent developments in international law, including the evolution of the modern concepts of the territorial sea, the continental shelf and the exclusive economic zones.

Until recently, all areas beyond the territorial sea of a State were high seas. The areas of the high seas cannot be subjected to the sovereignty of any States and States are bound to refrain from any acts which might adversely affect the use of the high seas by other States or their nationals.

The foundation of the modern concept of the freedom of the seas is found in the enduring work of Hugo Grotius. As a young Dutch scholar and lawyer, Grotius wrote the work *Mare Liberum* in 1608 on a retainer by the Dutch East India Company. Grotius' main thesis was that the seas and oceans of the world could not be the object of private or State appropriation but were to be accessible to all nations.

Mare Liberum was written specifically to defend the right of the Dutch to participate in the East Indian trade.[31] At the time that Grotius wrote, the Spanish claimed the Pacific Ocean and the Gulf of Mexico as their own while Portugal claimed the Atlantic south of Morocco and the Indian Ocean and they sought to exclude all foreign ships from navigating those waters. Those aggrieved by these actions included the ships of the Dutch East India Company. Other great maritime powers which then claimed rights to close the seas included in their number England, the Papacy, Turkey and Venice.

A decade after Grotius wrote, an English scholar, Seldon, set out to refute his arguments and stoically defended the English claims by his work *Mare Clausum.* As the title suggests, Seldon argued that the sea could be owned by the maritime powers. Seldon, no doubt, felt that God was on his side as he began his work with the gift of the earth, including the seas, to Noah. Nonetheless, it was Grotius' vision of the freedom of the seas which ultimately won out. As James Brown Scott commented in his introduction to *Mare Liberum*:

> "In this battle of books ... the Dutch Scholar has had the better of his English antagonist. ... the *Mare Liberum* is still an open book, the *Mare Clausum,* is indeed a closed one, and as flotsam and jetsam on troubled waters, [*Mare Liberum*] rides the waves, whereas its rival, heavy and water-logged, has gone under."[32]

It is not clear, however, whether Grotius meant by the freedom of the seas to exclude the concept of a territorial sea.[33] Nonetheless, by the eighteenth century that more limited concept which was conceived by the Dutch jurist Bynkershoek in 1702[34] began to evolve and was based upon the range of a cannonshot from the shore - no doubt a very effective, but rather unfriendly, way of excluding others from areas of the sea.

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31 Grotius, *The Freedom of the Seas or the Right which Belongs to the Dutch to take part in the East Indian Trade*, (Ed Scott, trans Van Deman Magoffin) (Oxford University Press, 1916).

32 Grotius, *The Freedom of the Seas or the Right which Belongs to the Dutch to take part in the East Indian Trade*, (Ed Scott, trans Van Deman Magoffin) (Oxford University Press, 1916), ix.

33 See eg O'Connell, *International Law* (2nd Ed, 1970), vol. 1, 456.

34 *De Dominio Maris,* ch. 2.

The precise breadth of the territorial sea as well as the precise nature of the coastal State's rights in that area remained a matter of contention even into this century. However, by the late nineteenth century, if not earlier, it is fair to say that there was a strong body of international practice which favoured the three-mile limit based upon Bynkershoek's ambitious cannon range. Of relevance to Australia is the fact that that limit was reflected in the jurisdictional limits adopted by Great Britain in the *Territorial Waters Jurisdiction Act* of 1878 which was passed by Great Britain to address the well-known decision in *R v. Keyn.*[35] In *Keyn's* case, of course, the Court, by a majority of only seven to six members, had held that the English common law courts had no power of adjudication over acts committed below the low water mark which marked the limits of the realm of England. The massive body of learning which saw the judgments in that case span some 174 pages obviously proved too much for one judge who died before judgment but who, we are told, posthumously joined the majority in spirit.[36]

Subsequently, the expanding limits of the territorial sea out to twelve nautical miles and the evolution of the concepts of the continental shelf and the exclusive economic zone in international law have been inroads into the principle of the freedom of the high seas. These developments in international law have evolved largely as a response to the increasing capacity through new technology to exploit the resources of the sea and the seabed, and through concerns of coastal States to have greater control over conservation and protection of the environment. Nonetheless, the legal regimes which govern those various maritime zones have maintained to a substantial extent certain critical elements of the freedom of the seas.

The Territorial Sea and the Right to Innocent Passage

When, then, did the Crown acquire a territorial sea and what is the nature of its rights in the territorial sea? Great Britain acquired sovereignty over Australia by an incremental process which began in 1788. As sovereignty was acquired over the various parts and parcels of Australia, a territorial sea adjacent to that territory was also acquired by the operation of international

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35 *R v. Keyn* (1876) 2 Ex D 63.

36 Id,138 Cockburn CJ.

law.[37] Australia has now an independent statehood at international law, and the territorial sea passed from Great Britain to the Commonwealth by the operation of international law principles of state succession.[38] The States of Australia did not benefit by any extension to their boundaries. The territorial sea previously vested in Great Britain became vested in the Commonwealth. But the States had, of course, the capacity to regulate fisheries in the exercise of their extra-territorial jurisdiction. The extent of Australia's claims in these areas is mapped in the Annexure.

The freedom of the seas for traverse as of right by all ships is central to modern concepts of the sea. Within the territorial seas of nation States, the right of innocent passage assures that freedom. The territorial sea of a State is a concession by international law of sovereignty of a kind which is different from sovereignty over land in that it is qualified by that right. Coastal States may, however, reserve fisheries for their own nationals within the territorial sea and indeed, long asserted claims to fish in territorial waters were often the first means from which a more general jurisdiction over those waters evolved.[39]

The right to innocent passage was first defined in some detail in the *Convention on the Territorial Sea* in 1958 which excluded *cabotage,* being vessels involved in coastal trade, but otherwise affirmed the right of the ships of all nations to navigate through the territorial sea provided that such passage was not "prejudicial to the peace, good order or security of the coastal State." A more detailed definition of "innocent passage" was included in the 1982 *United Nations Convention on the Law of the Sea,* to, which Australia is a party, and that revised definition took account of States increasing concern with the implications of expanding claims to territorial seas. That definition,

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37 *New South Wales v. Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337, 361, 362-363, 374 Barwick CJ, 468 Mason J, 487, 493 and 494 Jacobs J; *Bonser v. La Macchia* (1969) 122 CLR 177, 186-187 Barwick CJ, 221-222 Windeyer J. See also eg the *Grisbadarna Case: Norway v. Sweden,* Scott, *Hague Court Reports* 121, 127 (1909); *Anglo-Norwegian Fisheries Case* ICJ Reports 1951, 116, 160; *North Sea Continental Shelf Cases* ICJ Reports 1969; the *Beagle Channel Arbitration,* 18 Apr. 1977, 52 *ILR* 93; and Brownlie, *Principles of Public International Law* (4th Ed, Clarendon Press, Oxford, 1990), 121 and 181.

38 *New South Wales v. Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337, 366 Barwick CJ; *Bonser v. La Macchia* (1969) 122 CLR 177, 189 Barwick CJ, 223-224 Windeyer J.

39 *Bonser v. La Macchia* (1969) 122 CLR 177, 225 Windeyer J; Brownlie, *Principles of International Law* (1990), 194.

among other matters, provides that passage is not innocent if the foreign ship engages in acts of wilful pollution or fishing or loads commodities or people contrary to the customs, fiscal, immigration or sanitary laws of the coastal State.[40]

The Nature of the Crown's Rights Offshore and Implications for Native Title

While the provisions of an international treaty are not part of Australian municipal law unless validly incorporated into municipal law by statute, statutes are interpreted so far as possible so as not to be inconsistent with international law obligations and the development of the common law is influenced by international law norms. Justice Brennan recognised this in the decision of *Mabo (No. 2)* itself when he observed that:

> "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..."[41]

Further, the qualified nature of Australia's sovereignty over its territorial sea in one sense perhaps stands apart from the general principle that international law is not of itself a part of our law. In the same way that the common law must recognise Australia's sovereignty over its territorial sea, it must also recognise that qualification, being the right to innocent passage, which defines the very nature and extent of that sovereignty. In this case, therefore, the argument that the common law is not free to disregard the rights of foreign ships to innocent passage in dealing with native title claims offshore is all the more compelling. In any event, the relevant provisions of the 1982 Convention on the Law of the Sea now appear on the statute books as a schedule to the *Seas and Submerged Lands Act* 1973 and it is clear that in declaring and enacting Australia's sovereignty over the territorial sea in that Act, that sovereignty was intended to be subject to the right of innocent passage. It seems likely then that the common law must accommodate the right of foreign vessels to innocent passage and that it could not now recognise the rights of any of its nationals to close those seas. Nor does it seem likely that it could ever have recognised such claims.

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40 *United Nations Convention on the Law of the Sea, 1982,* Article 19.

41 *Mabo (No. 2)* (1992) 175 CLR 1, 43.

It is because the acquisition by Great Britain (and later the Commonwealth) of the territorial sea occurred by virtue of the operation of international law that its outward limits are defined by international law. The rights of the Commonwealth in that area are defined by international law. As Barwick CJ held in the *Seas and Submerged Lands Act case*, adopting the words of the United States Supreme Court in *United States v. Texas*, "once the low-water mark is passed, the international domain is reached." The common law does not apply in this area of its own force and, leaving aside decisions which pre-date the decision in *Keyn's case*, it would seem that the common law has not recognised rights of a private nature in this area other than those granted by statute. There is then a very real question as to whether the common law could recognise any native title rights offshore, at least beyond the limits of the States.

Even less likely is a court to find that such rights can exist in the areas of the continental shelf and the exclusive economic zones where the rights of the State itself amount to less than sovereignty. In these areas (where some claims have already been made) Australia has sovereign rights to exploit the mineral resources of its continental shelf and the marine resources of its exclusive economic zone and fishing zone. However, these areas are not assimilated to Australian territory.[42] And although the area of Australia's exclusive economic zone is not now designated as "high seas" in the 1982 Convention of the Law of the Sea, those waters are nonetheless subject to a significant number of the high seas freedoms.

More significantly, by article 62 of the 1982 Convention, Australia's powers over fisheries in its exclusive economic zone are not absolute. It has a discretion to determine the amount of allowable catch of living marine resources and must share those resources with others if it lacks the capacity to harvest the allowable catch. It can therefore be said that to recognise that its nationals might have exclusive fisheries rights in Australia's exclusive economic zone would be to recognise rights in excess of those held by Australia. Similarly, American decisions have held that "citizens of a sovereign do not possess rights of ownership beyond that which the sovereign

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42 *In re Ownership and Jurisdiction over Offshore Mineral Rights* (1967) 65 DLR 2d 353; *Bonser v. La Macchia* (1969) 122 CLR 177; *Clark (Inspector of Taxes) v. Oceanic Contractors Inc* [1983] 2 AC 130.

itself might own."[43] It then seems unlikely at the least that native title rights to exclusive fisheries in these outer maritime zones might be recognised.

Conclusion

It is clear at the end of the day that the courts will have to steer a course between public and private rights and Australia's international obligations. The case against exclusive native title rights being capable of recognition by the common law offshore is strong. But, as yet, there is not authority either in Australia or any other common law jurisdiction. As to non-exclusive rights, the history of the common law regime which governs the seas beyond the foreshore also tends to suggest that public and international law rights should predominate even if there is some recognition of non exclusive native title rights offshore. But in this area nothing is certain other than that the High Court will complete this offshore mapping for us, and until it does we remain at sea with no certified charts. The *Wik* result seems inconsistent with the principal judgment of Sir Gerard Brennan in *Mabo*. The High Court could surprise us again when dealing with rights over offshore waters, especially in the area of the territorial sea, measured to the 12 mile limit.

This may be an area where there is a merging of the physical and philosophical differences between land and water. Our relationship with the sea is necessarily different from the land which we are able to cultivate and improve. We mainly take from and traverse the sea, although we now have a limited capacity also to harvest and cultivate (as with closed salmon fisheries in Tasmania or pearl cultures offshore Broome). The common law has always recognised the essential differences between land and water as much as did the Greeks. Whilst protecting, perhaps too completely, property rights onshore the common law has traditionally treated the resources of the sea and the ability to traverse it as available to all. The hurdle facing current claims to exclusive possession which now run offshore to the limits of our territorial sea and beyond (and above and below) is that they are framed as rights almost equivalent to that which may exist on land. Our continuing inability to stand on

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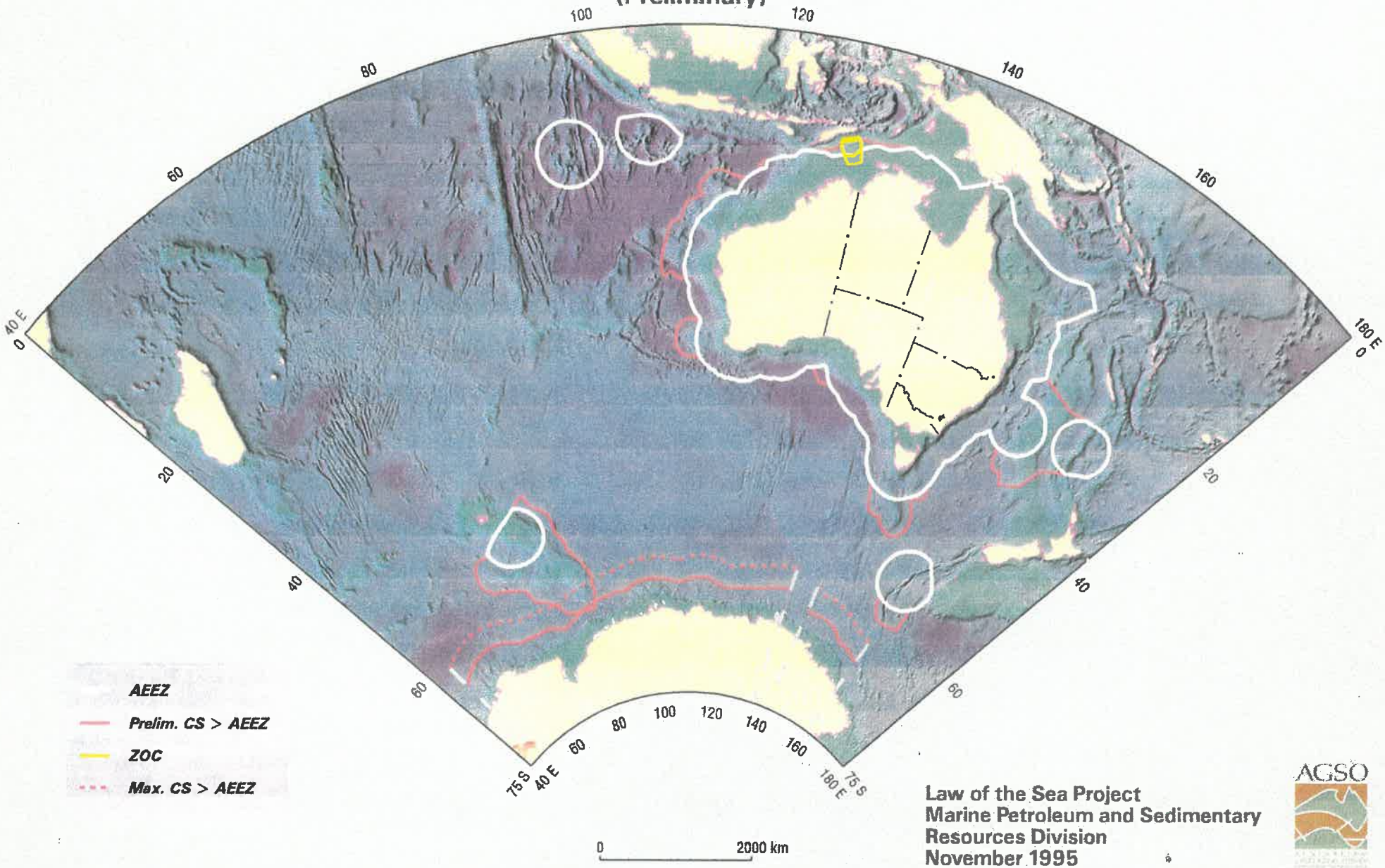
43 See eg *Tlinit and Haida Indians of Alaska v. United States* 389 F2d 778 (1968), 786. Note, however, that in *People of Village of Gambell v. Hodel* 869 F2d 1273 (9th Cir. 1989), the Court held that non-exclusive fishing rights were not necessarily repugnant to the federal government's "paramount interest" in its outer continental shelf.

the waters of the sea dictates the articulation of somewhat modified principles from those which have come to be expressed as applying to native title claims the land mass of Australia. Offshore we will find out more when the *Croker Island* claim (or some other of the current cases) is exposed for decision in the same forum as were the *Wik* claims.

Australia's Marine Jurisdictional Zones

(Preliminary)



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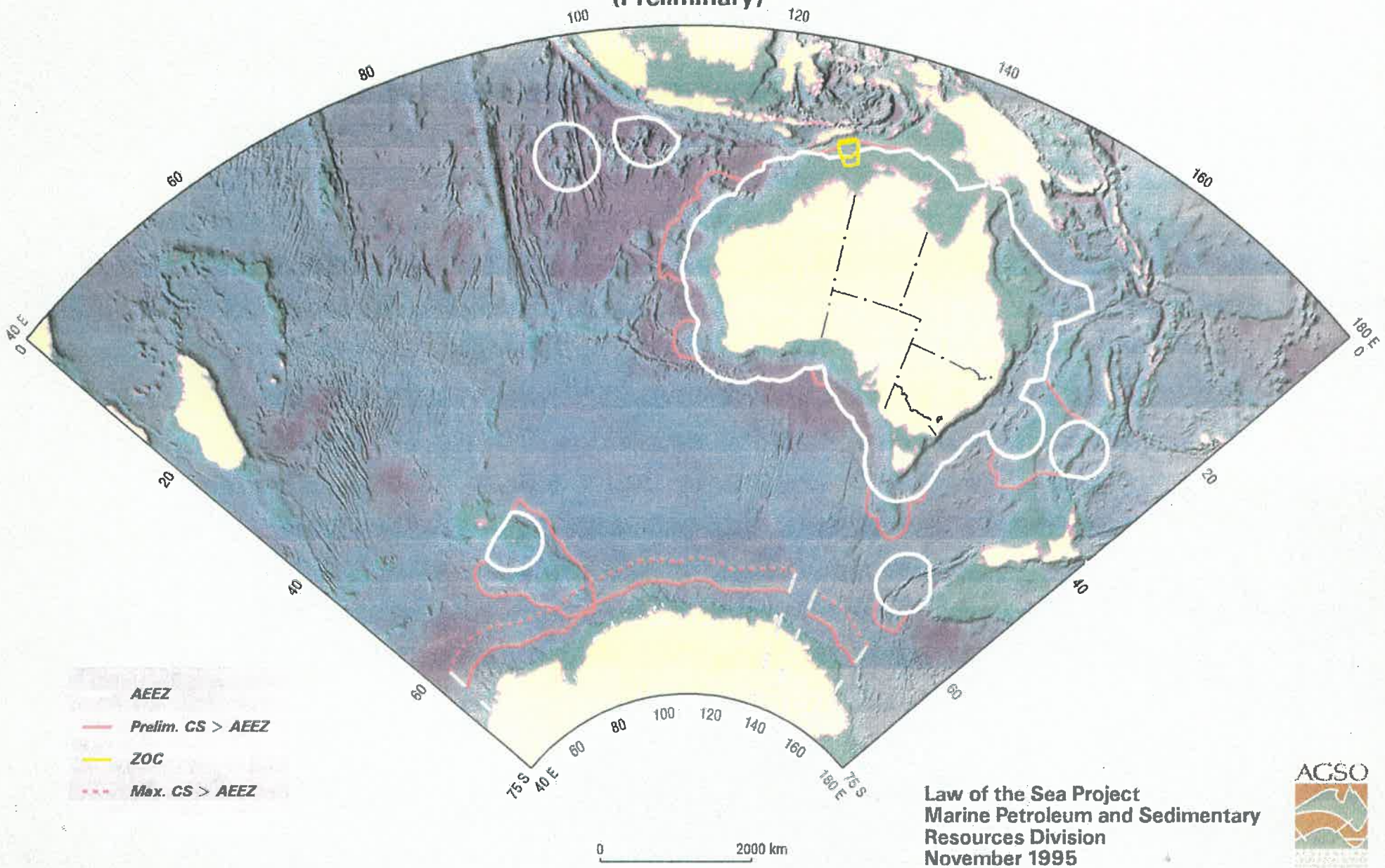

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