NATIVE TITLE ISSUES IN OCEANS POLICY: THE CROKER ISLAND CASE

BY

DAVID BENNETT QC
SOLICITOR GENERAL OF AUSTRALIA

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David Bennett *

The High Court's decision in *Mabo v. Queensland (No.2)*[1] heralded a minor revolution in Australian land law. The common law principles governing the effect of European settlement were altered to allow the recognition of the pre-existing rights and interests in land of Aborigines and Torres Strait Islanders under their traditional laws and customs. The Court rejected the theory that Australia was *terra nullius* at the time of European settlement, and held that native title rights and interests could survive the acquisition of sovereignty by Great Britain as a burden on the Crown's radical title to land. Several years later, in *Wik Peoples v. Queensland*,[2] a majority of the High Court held that the grant of a pastoral lease did not necessarily extinguish native title, significantly increasing the prospects that native title could co-exist with interests in land granted by the Crown. The Court played down the relevance of the traditional doctrines of tenure in resolving this question,[3] treating the pastoral leases in question as legislative creations comprising bundles of statutory rights.

When the High Court confronts the issue of native title in relation to the sea, as it inevitably will within the next few years, will there be a similar revolution in legal principle, and a reconsideration of accepted doctrines? If so, what challenges will this present to the implementation by Australian governments of policies in relation to the use and exploitation of the seas and their resources?

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* Solicitor-General of the Commonwealth of Australia.

1 (1992) 175 CLR 1.

2 (1996) 187 CLR 1.

3 See, in particular, (1996) 187 CLR 1 at 111-112, 122 per Toohey J, 186-187 per Gummow J, 235, 243-244 per Kirby J; cf. at 90-95 per Brennan CJ.

In this paper, I will begin by examining the Croker Island native title claim, which was determined by Olney J in the Federal Court a little over a year ago, and is currently on appeal to the Full Court of the Federal Court.[4] In particular, I will focus on the following central issues which will usually arise in any native title claim to an area of offshore waters:

- the basis for recognition by the Australian legal system of native title rights and interests in offshore areas;
- the types of native title rights which are capable of recognition in offshore areas, and in particular the difficulties raised by claims of exclusive rights; and
- the nature of the connection to an area of waters which is necessary to support a claim to native title, and the associated evidentiary issues.

I will then briefly consider the impact of the *Native Title Act 1993* (Cth) ("the NTA") on the legislative and administrative regulation of activities such as fishing and the exploitation of resources in offshore areas.

The decision in *Yarmirr v. Northern Territory*[5]

In *Yarmirr*, several groups of Aboriginal people[6] claimed native title rights and interests to an area of the seas surrounding Croker Island, which lies adjacent to the Cobourg Peninsula in the Northern Territory. Although several distinct "estate groups" joined in the application, each asserting traditional rights in respect of discrete areas of sea within the claimed area, Olney J accepted that together they constituted a single community for the purposes of the native title claim.[7] The area of the claim was limited to areas of sea, excluding any land within the boundaries of the claimed area over which a fee simple title had already been granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). While the application

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4 The Full Court heard argument in the appeal at the end of May this year, and has reserved its decision.

5 (1998) 82 FCR 533.

6 The application was made on behalf of the Mandilarri-Ildugij, Mangalara, Murran, Gadura-Minaga, and Ngaynjaharr peoples.

7 (1998) 82 FCR 533 at 569-570.

claimed a number of specific rights in relation to the claimed area, it ultimately sought a determination that the applicants were entitled to possession, occupation, use and enjoyment of the area to the exclusion of any other persons, thereby encompassing rights to control access to the area and to control the use of resources from the area.

The main findings of Olney J may be summarised as follows.

- The NTA discloses an intention to recognise and protect native title in any area to which the Act applies, including offshore areas such as the coastal sea and any waters over which Australia asserts sovereign rights. By doing so, the enactment of the NTA provided a *statutory* basis for the recognition of native title over offshore waters.

- However, native title is only capable of recognition in offshore areas to the extent to which it is consistent with the public right to fish and the public right of navigation at common law, and the right of innocent passage of foreign ships under international law. This effectively precludes the recognition of exclusive native title rights over offshore waters.

- The applicants had established that, in accordance with their traditional laws and customs, they possessed non-exclusive native title rights of access to the claimed area and non-exclusive rights to fish, hunt and gather for personal and non-commercial purposes (including for sustenance and for cultural or spiritual purposes). The evidence did not support any right of exclusive possession or occupation, nor any right to control access by other persons.

- Some other rights claimed, such as the right to trade and the right to receive a share of resources taken from the claimed area, were regarded by Olney J both as unsupported by the evidence and as outside the *statutory* definition of native title (and therefore incapable of being included in a determination made under the NTA), which is limited to rights and interests "in relation to land or waters".

- The applicants also had the right to visit and protect places of significance, and the right to safeguard their cultural and spiritual knowledge, but these rights were essentially dependant on and derived from the right of access (and any

right to control access) to the claimed area.

- Although unnecessary to his decision, Olney J considered the question of the limits of the Northern Territory. His Honour adopted a conservative approach to the drawing of closing lines across bays and gulfs, concluding that, with the exception of Mission Bay on Croker Island, the limits of the Northern Territory followed the mean low-water mark.

- Olney J considered the impact of Commonwealth and Territory legislative regimes regulating fishing and mining in the claimed area. His Honour decided that this legislation did not reveal a clear and plain intention to extinguish *non-exclusive* native title rights and interests, but that any such rights and interests were subject to these laws and to any rights or interests validly granted to third parties thereunder.

Both the Commonwealth and the applicants appealed against the determination made by Olney J. The main grounds of appeal advanced by the Commonwealth were that the trial judge wrongly construed the NTA as providing a basis for the recognition of native title beyond the limits of the Northern Territory, and should instead have held that native title is not capable of recognition in offshore areas. The Commonwealth also argued that any "rights" of the applicants as identified in the determination made by the trial judge had been subsumed in the public right to fish and the public right of navigation. Finally, the Commonwealth submitted that there was no evidence on which Olney J could have determined that native title existed in the north-east corner of the claim area, in relation to which there was little or no evidence of use by the applicants or their ancestors.

The applicants' main argument on the appeal was that Olney J should have found that they have rights of exclusive possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area, and that they consequently have the right to exclude others from the claimed area (except those who have a valid right to enter the claimed area under a law of the Commonwealth or the Northern Territory) and to control access to resources within the claimed area. Further, the applicants argued that they have rights to fish, hunt and gather for the purposes of trade (*i.e.* that such rights were not confined to personal and non-commercial purposes). As to the basis

for the recognition of native title in areas beyond the limits of the Northern Territory, they argued that such recognition occurred concurrently with the acquisition and exercise of sovereign rights over the claimed area, which took place well before the commencement of the NTA.

The appeal was heard by Beaumont, Von Doussa and Merkel JJ at the end of May this year, and judgment is still awaited. It is probably a fair guess that, whatever the outcome of the Full Court's judgment, a further appeal will be brought to the High Court, so that it could still be some time before the basic legal principles governing native title in offshore areas are authoritatively settled.

The basis of recognition of offshore native title

Before considering the possible approaches to the recognition of native title in areas beyond the limits of Australian territory, it is helpful to outline the different categories of waters that extend outwards from those limits (these are sometimes described as "maritime zones"). This is so notwithstanding that the primary argument advanced on behalf of the Commonwealth does not differentiate between such zones, on the basis that native title is incapable of recognition in *any* area of waters outside territorial limits. Similarly, the position adopted by Olney J, relying on the statutory recognition of native title effected by the enactment of the NTA, would appear to apply uniformly to *all* waters over which Australia asserts sovereign rights.

The maritime zones are essentially as follows.

(i) Internal waters:[8] these are waters which are *within* the limits of a State or Territory, such as the waters inside a closing line drawn across the mouth of a bay or gulf. Most of the difficulties as to the recognition of native title in offshore areas do not arise in relation to internal waters.

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[8] I am here using this expression in a narrower sense than it is used in international law (see Convention on the Territorial Sea and the Contiguous Zone 1958, art.5; United Nations Convention on the Law of the Sea, art.8), where any waters outside territorial limits but on the landward side of the territorial sea baselines are regarded as part of the internal waters of the State. The territorial sea baselines do not correspond to the territorial limits. The baselines generally follow the low-water mark along the coast (although at lowest astronomical tide rather than the mean low-water mark) but straight baselines may be drawn across deep indentations or around a fringe of islands along the coast.

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(ii) Coastal waters: these are waters which lie between the limits of a State or Territory and the distance of 3 nautical miles from the territorial sea baselines proclaimed under the *Seas and Submerged Lands Act 1973* (Cth). Under the legislation enacted to implement the Offshore Constitutional Settlement,[9] title to the sea-bed beneath this area was vested in each of the States and the Northern Territory, whose legislative powers were also declared to be exercisable over this area as if it were within the limits of the relevant State or Territory. The Offshore Constitutional Settlement, however, did not alter the limits of the States and the Northern Territory.

(iii) Territorial sea: this comprises waters extending out to a distance of 12 nautical miles from the territorial sea baselines proclaimed under the *Seas and Submerged Lands Act 1973* (Cth). International law has long recognised the sovereignty of a nation state over its adjacent territorial sea (subject to the right of innocent passage by foreign ships), which by the beginning of this century was generally acknowledged to extend to a width of 3 nautical miles from the territorial limits. Sovereignty over the territorial sea surrounding Australia was initially vested in Great Britain, but at some time after Federation that sovereignty in due course passed to the Commonwealth.[10] In 1983, when territorial sea baselines were proclaimed under the Seas and Submerged Lands Act, the territorial sea extended to the distance of 3 nautical miles from such baselines. On 13 November 1990, by proclamation under the Seas and Submerged Lands Act, the territorial sea was extended to a distance of 12 nautical miles from the territorial sea baselines, anticipating the United Nations Convention on the Law of the Sea which confirmed the entitlement of nations to do so.[11]

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[9] See *Coastal Waters (State Title) Act 1980* (Cth); *Coastal Waters (Northern Territory Title) Act 1980* (Cth), which commenced operation on 14 February 1983; *Coastal Waters (State Powers) Act 1980* (Cth); *Coastal Waters (Northern Territory Powers) Act 1980* (Cth)

[10] See generally *New South Wales v. The Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.

(iv) Waters beyond 12 nautical miles from the territorial sea baselines: Australia claims sovereign rights (for example, to control the exploitation of resources) over the waters in its Exclusive Economic Zone (to a distance of 200 nautical miles) and over its continental shelf.

It appears to be beyond dispute that, prior to European settlement, coastal or island indigenous peoples hunted and fished in the immediately adjacent or surrounding seas, and that under their traditional laws and customs they maintained a connection to those waters. Nor is it surprising that, in some areas, the descendants of those indigenous peoples have continued those practices and maintained that traditional connection to the present day. However, neither the existence of rights and interests under traditional laws and customs nor their continued exercise in the relevant area are sufficient in themselves to establish a native title which is enforceable under the Australian legal system. It is also necessary for those rights and interests to be recognised by Australian laws, that is, either by common law or by statute.[12] This requirement is reflected in the statutory definition of "native title" contained in the NTA, which requires (among other things) that the relevant rights and interests "are recognised by the common law of Australia" (s.223(1)(c)).

This brings me to the first fundamental difficulty in the way of the recognition of native title rights in offshore areas. It has been held that the common law does not apply of its own force in areas beyond the limits of what were once the Australian colonies and are now the States and the Northern Territory.[13] Without the application of the common law to areas of offshore waters, one of the necessary pre-conditions to the recognition and enforcement of native title may be absent.

When sovereignty was acquired over the territory of Australia, it brought with it the common law, and conferred on the Crown a "radical title" to all land within that territory. The recognition and enforcement of the prior rights and interests of indigenous peoples as native title rights and interests depended on the common law,

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[11] UNCLOS entered into force on 16 November 1994.

[12] See, for example, *Wik Peoples v. Queensland* (1996) 187 CLR 1 at 213-214 per Kirby J; see also *Coe v. The Commonwealth* (1993) 118 ALR 193 at 200 per Mason CJ.

[13] See *R v. Keyn* (1876) 2 Ex.D. 63; *New South Wales v. The Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337 at 368-369, 485-486; *Commonwealth v. WMC Resources*

if not also on the radical title of the Crown which those rights and interests burdened. However, the common law did not at that time apply over the adjacent seas outside the territorial limits, nor did the Crown possess any proprietary interest or title over the sea-bed beneath those seas. Over the ensuing decades, international law progressively acknowledged the sovereignty or sovereign rights of a nation state over its offshore waters. However, this alone may not be a sufficient foundation for the recognition of native title rights and interests in those areas.

Olney J did not disagree with most of this analysis. His Honour accepted that the boundaries of the former colonies ended at low-water mark, and that the common law did not apply beyond those boundaries. Each of the Parliaments of Australia, on the other hand, has power to enact legislation which has extra-territorial effect, and as a consequence can extend the common law to areas of offshore waters. Over the last 20 years, many of the States and Territories have enacted such legislation applying the "written and unwritten" laws in force in the State or Territory to offshore areas, although the extent of this application varies drastically between jurisdictions, resulting in a rather haphazard picture. In *Yarmirr*, however, Olney J did not rely on legislation of this kind to provide a statutory basis for the recognition of offshore native title. Instead, his Honour concluded that the enactment of the NTA had a similar effect.

The starting point for Olney J was section 6 of the NTA, which provides that the Act –

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

Given that one of the main objects of the NTA is to provide for the recognition and protection of native title (sections 3(a) and 10), Olney J concluded that the application of the Act to offshore areas was intended to have the broad effect of supplying a basis for the recognition in those areas of rights and interests under traditional laws

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(1998) 152 ALR 1 at 11.

and customs, even where those rights and interests had not previously been recognised by the Australian legal system. His Honour said:[14]

> "In confirming the application of the *Native Title Act* in relation to the coastal sea and extending its effect to all waters over which Australia asserts sovereign rights Parliament has indicated a specific intention to recognise that native title rights, if proved, are capable of recognition in relation to those seas and waters. Section 6, coupled with the recognition of native title accorded by s 10, namely recognition 'in accordance with this Act', supports the proposition that the legislative intention was to provide a statutory basis for recognition offshore. Indeed, consistent with the established learning on the subject, the only way in which Australian law can apply to an offshore area is by legislative enactment."

It is questionable whether any such legislative intention can properly be discerned from the provisions of the NTA. At the time of enactment of the NTA, the question whether native title was capable of existing in offshore areas was (like many other questions as to the nature and extent of native title at common law) as yet undetermined. In this context, it was quite understandable that the NTA should cater for the *possibility* that native title may be capable of existing offshore, by allowing native title claims to be made under the Act in respect of offshore areas,[15] and by putting in place a regime regulating future acts which affect any native title that might exist over such areas. However, it is unlikely that this was intended by the Parliament to pre-empt the question whether or not offshore native title was capable of being recognised offshore. Like many other unresolved issues, this was left to be determined by the common law. The NTA contains other examples of provisions which were included to address eventualities that might never have materialised: for example, the provision providing for the revival of native title over Aboriginal-owned pastoral leases (s.47), which was primarily intended to alleviate the consequences of the extinguishment of native title by the grant of such leases, and even the validation regime, which was intended to remove any doubt as to the validity of past acts over native title land or waters.

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[14] (1998) 82 FCR 533 at 550.

[15] In the absence of the provisions of the NTA conferring jurisdiction on the Federal Court to hear and determine native title claims over offshore areas, it is possible that only the High Court would have possessed original jurisdiction in relation to such claims.

Another key provision of the NTA is sub-section 223, which provides the basic statutory definition of native title rights and interests for the purposes of the Act. That sub-section provides as follows:

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

On one view of paragraph (c) of this sub-section, the statutory definition is only intended to "pick up" native title rights and interests which are already recognised and enforceable prior to the commencement of the NTA. On this view, it was not a purpose of the NTA to cover traditional rights and interests which were *not* so recognised, and to recognise and protect those rights and interests for the first time.

Olney J, however, construed paragraph 223(1(c) differently. In his Honour's view, the paragraph did not mean that the definition only covered rights and interests in relation to areas where the common law applied. On his approach, this would never be satisfied in relation to offshore areas – even if a statute applied the common law to such areas, the applicable law would still be the statute rather than the common law itself.[16] It would then appear absurd for the NTA to cater for the possibility of native title in offshore areas if rights and interests in those areas were never capable of falling within the statutory definition. Accordingly, Olney J decided that paragraph 223(1)(c) "merely identifies the nature of the rights and interests which are capable of being recognised as native title rights and interests" or "the types of rights and

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[16] (1998) 82 FCR 533 at 548-549.

interests which are encompassed within the concept of native title".[17] For example, rights and interests would not be recognised by the common law, and would fall outside the definition of native title, if they "fractured a skeletal principle" of the Australian legal system, or if they had been extinguished or abandoned.

The other, and probably the better, view is that, paragraph 223(1)(c) should be construed as referring to the *particular* rights and interests claimed in relation to the *particular* area of land or waters concerned, rather than to the nature or type of rights or interests claimed. In this way, the definition set out in s.223 covers any native title which existed at the commencement of the NTA, codifying the elements of native title as laid down in *Mabo (No.2)* – namely, rights and interests in relation to land or waters possessed under traditional laws and customs, as recognised by the common law. If necessary, the requirement in paragraph 223(1)(c) could be regarded as broad enough to cover the common law as applied to an area of offshore waters by statute, if that were held to have the effect of providing a basis for the recognition of native title rights and interests in relation to that area. But unless and until the common law, whether of its own force or as applied by statute, recognises native title rights and interests in relation to offshore areas, no such rights and interests can fall within the statutory definition of "native title" under the NTA.

As was recognised by Olney J,[18] all of this raises some difficult temporal issues. In relation to onshore land, the date from which native title is recognised is the date of the acquisition of sovereignty. However, in relation to offshore waters, any recognition of native title over such waters may have come at a point *after* the Crown acquired sovereignty over the adjacent land, and even *after* the Crown acquired sovereignty or sovereign powers over the offshore waters themselves.[19] This in turn poses several important questions.

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[17] (1998) 82 FCR 533 at 550.

[18] (1998) 82 FCR 533 at 591.

[19] This is unless, of course, the applicants' submission is accepted that the acquisition of sovereignty or of sovereign powers over offshore waters by the Crown was itself sufficient to enable the

First, from what date must an indigenous community be able to trace their traditional connection to an area of offshore waters? Is it the date upon which native title was recognised, which may be very recent (for example, when the common law was finally extended to the area by statute)? Is it the date on which sovereignty or sovereign rights were first acquired by the Crown over the relevant area of waters, which may in turn depend on whether the claim area is within 3 nautical miles, between 3 and 12 nautical miles or beyond 12 nautical miles? Is it the date on which sovereignty was first acquired over the adjacent onshore land? The first suggestion above, the date of recognition, seems to be untenable. The most satisfactory date is probably the one last suggested, ensuring consistency between the position in relation to claims over onshore land and claims over the seas, particularly where both areas are encompassed within a single claim. Olney J appears to have adopted this approach, focussing on the traditional laws and customs "which have their origins in the culture and social organisation of the relevant group as it existed prior to the advent of non-Aboriginal interference with that culture and social organisation", and requiring the applicants to establish (albeit with the aid of inference as well as direct evidence) that they were descended from the indigenous inhabitants of the islands and adjacent mainland "since a time prior to the first European contact with the area and in particular prior to the acquisition of sovereignty in 1824".[20]

Second, what are the applicable principles governing how traditional rights and interests over offshore waters may be affected by the exercise of sovereign powers at a time prior to the recognition of the traditional rights and interests as native title? The impact of laws and administrative acts on the exercise of traditional rights and interests must be reflected in the extent of any subsequent recognition of those rights and interests as native title. However, is this impact governed by principles analogous to those governing the extinguishment of native title which has previously been recognised by the Australian legal system? In *Yarmirr*, the Commonwealth attempted to distinguish the two situations of "non-recognition" due to the impact of government acts prior to the recognition of native title, and extinguishment of native

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recognition of native title.

[20] (1998) 82 FCR 533 at 568-569.

title rights after their recognition. Olney J rejected any such distinction,[21] indicating that it was possible to "extinguish" native title rights at a time prior to their recognition and that this would be governed by the same tests as post-recognition extinguishment.

Much of what is outlined above no doubt appears to be rather abstract and theoretical, and only remotely connected with the realities of the physical relationship of indigenous people with areas of their "sea country". Nevertheless, an examination of the theoretical underpinnings for any recognition of native title in offshore areas is fundamentally important to the way in which native title claims to such areas are framed and proved, or even whether such claims are maintainable at all.

The content of offshore native title rights

For the purposes of a legal system of property rights, the oceans are very different in nature from an area of land. The former cannot be occupied or utilised in the same manner as an area of land, and generally cannot be fenced off within clear boundaries. Further, as the Commonwealth's submissions in the Croker Island case emphasised, the seas and their resources have traditionally been regarded both by the common law and by international law as open and to be shared, subject to any regulation in the greater public interest. Thus, while international law has increasingly acknowledged national sovereign interests in the seas, and countries such as Australia have exercised their sovereign powers to regulate offshore activities and to grant private interests in offshore areas, the notion of exclusive possession and occupation of any offshore area is alien to both international law and to the common law.

These considerations are reflected in the common law public rights to fish in and to navigate over the seas. Such rights date back several centuries. Since Magna Carta, the Crown has not been able to derogate from the public right to fish by the creation of private fisheries; any such exclusive private fishing rights can only be conferred by or under legislation. In addition, the right of ships to innocent passage through the territorial sea of Australia is protected by international law.

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[21] (1998) 82 FCR 533 at 591.

Olney J accepted that it would be inconsistent with these rights to recognise any native title right to exclude other persons from an area of offshore waters. As a consequence, it may be that native title claimants can establish no more than non-exclusive rights of access to and use of their traditional waters, and that even such rights would be subject to regulation by valid laws. The Commonwealth went further, arguing that in such circumstances the non-exclusive native title rights would rise no higher than the general public rights to fish and to navigate, and therefore should be subsumed in those rights.

While the content of non-exclusive native title rights to offshore waters may be quite similar to the public rights to fish and navigate, the NTA would now differentiate the position of native title holders from the general public by giving the former procedural and compensation rights in relation to acts which affected their rights. The recognition of non-exclusive native title rights would also provide a foundation for the statutory exemption of the native title holders from licensing requirements under Commonwealth, State or Territory laws. As a consequence, the question whether non-exclusive native title rights should be subsumed in the public rights to fish and to navigate is of more than merely academic interest.

There are also many interesting issues raised in the characterisation of native title rights. For example, at what level of generality should such rights be characterised? Is a right to hunt or fish in an area of offshore waters limited to the particular species which were hunted or fished by the ancestors of the claimant group, or to the methods which were employed by those ancestors. Are such rights limited in purpose, so that the descendants of an indigenous group which hunted or fished solely for their sustenance or for ceremonial and spiritual needs would not be able today to exploit commercially their native title rights? While these issues may also arise in relation to native title claims over land, it may be noted that it is not uncommon for statutory fishing rights granted over offshore waters to be limited by reference to species, methods or purpose, or perhaps all three. Thus, the history of the regulation of offshore waters might suggest that there is a need for some specificity in the characterisation of native title rights in such areas. On the other hand, native title holders should not be unduly constrained by unrealistic requirements that they must conform to anachronistic notions of "traditional" society.

While the nature and extent of their rights is undoubtedly governed by their traditional laws and customs, it is those laws and customs as currently acknowledged and observed which are relevant. Such laws and customs do not freeze practices at a time prior to European contact.

The connection required to establish native title over offshore areas

Native title is ultimately based on the exercise of rights by indigenous people over an area of land or waters. Thus, a key part of proving a claim to native title is to demonstrate both the historical and (in most cases) contemporary use of the relevant area by the claimant group, either positively (for example, by travelling through the area, hunting or fishing in the area, and so on) or negatively (by preventing others from accessing or using the area, such as by closing an area of waters upon the death of a senior member of the community). Of course, the nature and size of the area claimed will influence the intensity and frequency of the use required to establish a connection to the area. It should not be enough, however, for the claimants simply to assert that they have a spiritual connection to a particular area without demonstrating some physical connection.

This can give rise to some problems in defining the area of any native title established in areas of offshore waters, as is revealed in the following comments by Olney J in the course of summarising the native title claimed in *Yarmirr*:[22]

> "An estate is usually made up of a single continuous tract of land and sea but it may have separate smaller tracts as well. No distinction is made between the sea and land components of an estate but as a matter of convenience the sea component of an estate is referred to as the "sea country" of the relevant estate group. The boundaries of the sea country of an estate are relatively well marked along the shoreline but at sea there is less concern with their exact location. The seaward extent of an estate has no measurable dimension to it but is said to extend as far as the eye can see."

There are obvious difficulties in quantifying the exact distance involved in the expression "as far as the eye can see", particularly where the NTA requires an application for a native title determination to contain information that enables the

boundaries of the area covered by the application to be identified, as well as a map showing those boundaries.[23] As a result, the claimants and their lawyers are ultimately forced to adopt a pragmatic approach by formulating a clear boundary to the area over which a determination is sought. More fundamentally, it is not clear how a native title claim may be made to extend out to the visible horizon without some evidence of use of that area by the claimants and their ancestors.

Of course, the Federal Court has some flexibility in the application of the rules of evidence when hearing native title claims. Olney J explained:[24]

> "Any proceeding in which the Court is required to make findings as to traditional laws and customs practiced more than 150 years ago must necessarily rely upon evidence other than that of the personal observations of witnesses. Similarly, the proof of genealogical connections to ancestors living at or prior to European settlement cannot be proved by reference to official records. To a large extent some of the most important issues before the Court can only be resolved upon evidence which in other circumstances may be regarded as hearsay. However, apart from s.82 of the *Native Title Act* the provisions of ss.73(1)(d) and 74(1) of the *Evidence Act 1995* (Cth) relating to evidence of reputation concerning history and family relationships and of reputation concerning the existence, nature or extent of a public or general right enable the Court to have regard both to the evidence of witnesses who have recounted details concerning relationships and traditional practices which have been passed down to them by way of oral history and to matters recorded by ethnographers and other observers."

The Court is also likely to be reasonably generous in the drawing of inferences from the evidence, for example, to complete the line of descent back to the indigenous inhabitants of an area prior to European settlement.[25]

As the NTA stood at the time that Olney J heard the Croker Island claim, s.82(3) of the NTA provided that the Court was not bound by technicalities, legal forms or the

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[22] (1998) 82 FCR 533 at 564.

[23] Paragraphs 62(2(a) and (b) of the NTA.

[24] (1998) 82 FCR 533 at 544.

[25] See (1998) 82 FCR 533 at 569; see also *Mason v. Tritton* (1994) 34 NSWLR 572 at 586-588 *per*

rules of evidence in conducting proceedings under the Act. Nevertheless, Olney J saw that there were limits to how far the Court could depart from evidentiary requirements in the exercise of the judicial power of the Commonwealth:

> Litigation conducted under the *Native Title Act* has its own peculiarities, not the least of which is that the Court is not bound by the rules of evidence. But s 82(3) does not stand alone. It must be applied in the context of the other provisions of the Act including s 82(1) which imposes upon the Court the obligation to provide a mechanism that is, *inter alia*, fair and just. Notwithstanding the special statutory regime under which the Court is required to perform its functions under the *Native Title Act*, fundamental to any exercise of judicial power is the requirement that the Court can only have regard to evidence which is relevant, probative and cogent.

The relevant sections to which Olney J referred have since been amended, and now require the Court to observe the rules of evidence unless it otherwise orders. In exercising this power to relax or dispense with rules of evidence, however, the comments made by Olney J will still be relevant.

Protection of offshore native title under the NTA

On the assumption that native title is capable of being recognised in relation to areas beyond the limits of a State or Territory, the question arises how any such native title might affect governments in the exercise of their legislative and administrative powers over offshore waters.

At common law, native title is inherently defeasible by the inconsistent exercise of sovereign power. Thus, the valid grant by the Crown of a right or interest over land or waters which is inconsistent with the continued existence or exercise of native title rights over that land or those waters will extinguish the native title to the extent of the inconsistency. However, since the enactment of the *Racial Discrimination Act 1975* (Cth) and then the NTA, the protection of native title against discriminatory extinguishment or impairment has been enhanced.

It should be remembered that the enactment of a regulatory regime will not in itself necessarily extinguish native title, even though the native title holders may be subject to the requirements of that regime while it remains in force. This was made clear by Brennan J in his judgment in *Mabo (No.2)*, where he stated:[26]

> "A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title."

However, the effect of any absolute prohibitions contained in a regulatory regime may need to be assessed from case to case. If such prohibitions prevent native title holders from lawfully carrying out certain activities in the exercise of their native title rights and interests, and remain in force for a substantial period of time, it might be arguable that those rights have been extinguished in whole or in part.[27]

The recent amendments to the NTA introduced new provisions (Part 2, Division 3, Subdivision H) which permit the doing of "future acts" (that is, acts affecting native title) which relate to the management or regulation of waters, whether onshore or offshore. Section 24HA applies to legislation in relation to the management or regulation of water and living aquatic resources, and to the grant of leases, licences, permits or authorities under such legislation. The section applies the "non-extinguishment principle" to these acts, ensuring that they take precedence over but do not extinguish any native title that may exist in the relevant area (see s.238). The section also imposes notification requirements before the doing of such acts, and gives native title holders a right to compensation payable by the relevant government. The enactment of legislation regulating fishing in offshore waters, and the grant of fishing licences under such legislation, might provide examples of government acts which would be permitted under Subdivision H.

Offshore acts which do not fall within s.24HA are governed by Subdivision N. The regime applicable in offshore areas under this Subdivision is much less strict than that applicable onshore. All acts affecting native title are valid, although (with the

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[26] (1992) 175 CLR 1 at 64 (footnotes omitted).

[27] Compare Walden v. Hensler (1987) 163 CLR 561 at 566-567 per Brennan J. Similar issues may

exception of the compulsory acquisition of native title rights and interests) they are subject to the non-extinguishment principle. Native title holders are entitled to compensation for any effect of the act on their native title, and must also be accorded the same procedural rights as the holders of corresponding non-native title rights.

It will be seen that the existence of native title in offshore areas does not pose a major obstacle to the implementation of government policies in offshore waters. Provided that governments adequately notify and compensate affected native title holders, they can continue to manage and regulate the use of the seas. Particularly where any native title rights are likely to be non-exclusive, the impact of management and regulation on native title holders is unlikely to be significant. Native title holders will largely be able to continue to exercise their rights, subject to any applicable regulation and alongside any other persons who have been granted rights under statute. The situation in which native title holders are most likely to be significantly affected by offshore management and regulation will be where relevant laws impose an absolute or qualified prohibition on certain activities in an area of offshore waters.

In formulating and administering licensing regimes in offshore waters, however, governments should be aware that s.211 of the NTA may exempt native title holders from a requirement to hold a license under Commonwealth, State or Territory laws. There are a number of limitations on the operation of s.211, the most important of which is that the exemption only covers the exercise of native title rights for the purposes of satisfying the personal, domestic or non-commercial communal needs of the native title holders.

Finally, it should be noted that the "inter-tidal zone", the area of foreshore between high and low-water mark, falls within the limits of a State or Territory and is therefore an onshore place. Not only do the difficulties in the recognition of native title not apply in relation to a claim made over the inter-tidal zone, but acts done in relation to the inter-tidal zone are governed by different provisions of the NTA than those that apply to acts done in relation to offshore places.

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be addressed in *Yanner v. Eaton*, in which the decision of the High Court is currently reserved.

The NTA is primarily concerned with regulating the exercise of sovereign power by governments, rather than the conduct of activities by private individuals. If native title does exist offshore, then any acts by private individuals which interfere with or impair the native title rights may attract remedies under the general law. However, as discussed above, it is highly likely that any native title rights in offshore areas will be subject to the public right to fish and the public right of navigation. Accordingly, the recognition of offshore native title is unlikely to detract from the free access to the seas which has long been enjoyed by all Australians.

Conclusion

It remains to be seen whether the Full Court of the Federal Court will agree with the approaches taken by Olney J at first instance. The principles which will ultimately be accepted by the High Court lie even further into the future. For the time being, interested parties including claimants and governments must feel their way, until such time as it becomes clear whether native title can exist and be recognised over areas of offshore waters, and if so what kinds of rights are capable of being established. The decision of Olney J may provide an interim guide in relation to these issues, but the voyage is far from over.