OFFSHORE NATIVE TITLE: CURRENTS IN SEA CLAIMS JURISPRUDENCE

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I Introduction

This article questions whether offshore native title claims are presenting discrete conceptual and practical obstacles for the judiciary. Its aim is to chart the proverbial waters and provide an overview of both the legislation and the jurisprudence. The article also discusses alternative or complementary mechanisms for protecting Indigenous interests in sea country, including land rights legislation, sea closures and heritage registrations. Much of the judicial consideration of offshore areas, or sea country, appears to have been treated as an adjunct to the primary issues put before the court. The problematic legacy of this is increasingly evident as offshore claims are now arriving at the fore of native title jurisprudence weighed down with the baggage of incomplete and piecemeal reasoning assembled over the last decade of determinations.

The article begins with an overview of sea country claims. It then considers the difficulties faced by land *and* sea country claimants; discrete difficulties facing sea country claimants (particularly the element of ownership that title implies, which is ordinarily indicative of exclusive possession); and reviews the reasoning and consistency in native title case law.

II Overview of Sea Country Claims

Most native title claims in Australia are made over 'land'. That is, the mainland or parts of islands which remain above the rise of tides. This type of claim may include sections of water, such as rivers flowing over the land. Areas which are covered transiently by water, like beaches, are called intertidal zones. The claim there is made to the solum, not to the water itself. The particular focus of this paper is claims to areas *beyond* the low-tide line; to put it simply, sea country. Sea country may be claimed along with adjacent terrestrial land, or it may be that only parts of the waterscape are claimed. Sea areas are occasionally particularised as land covered by a layer of ocean, similar to intertidal zones, in the hope that the distinction will result in being granted a broader range of rights. To make it easier for the reader, the labels I employ, in contradistinction, are 'land' (dry land) and 'sea country' (waters *and* seabeds).

The Australian territory legally extends 12 nautical miles into the ocean (from the mean high water mark).[1] This region is the 'territorial sea'. Prior to 1990, the territory went out only to 3nm; that smaller moat around the nation is sometimes called our 'coastal waters'. The baselines of the mainland and territorial sea are set in section 7 of the *Seas and Submerged Lands Act 1973* (Cth). Beyond the 12nm mark, out to 24 nm, is an area categorised on the Register of Native Title Claims as the 'contiguous zone'. Beyond it is what the Register classes as the 'exclusive economic zone', extending out to 200nm.[2] Certain authors further distinguish between an inner territorial sea (State territory) and an outer territorial sea (Commonwealth).[3] The area beyond the territorial sea is recognised as the 'high seas', a zone of international jurisdiction. In the unique case of the Torres Strait, Australia's territorial seas are co-terminous with those of Papua New Guinea.[4] Over a limited area of the Strait, Australia exercises jurisdiction over the water while PNG controls the sub-adjacent seabed.[5] The jurisdictional complexity of the seas around Australia has been a source of judicial brow-furrowing. With this as the context, it is perhaps unsurprising that the jurisprudence about sea country claims is also a cause for headache.

Native title is a customary Indigenous interest in land and/or waters recognised by the common law. Recognition will take place when it is not an affront to the common law to recognise such an interest and where that interest has not been extinguished by another inconsistent interest, the granting or legal existence of which evinces a clear and plain intention not to tolerate continued enjoyment of native title (whether or not this other interest was ever applied in

practice). An interest in sea country finds particular difficulty in gaining recognition because:

a) the proprietary nature of the interest, framed as native title, *is* an affront to the common law because exclusive possession of waters is difficult to conceive of and to reconcile with the common notions of real property and sea territory:
b) the historic and continuing treatment of waters by the Crown suggests that exclusive possession reposing in any other party would be inconsistent and unable to be enjoyed.

This article suggests that the apparent affront that interests in sea country represent is in fact a problem of conceptualisation. Exclusive possession of waters is not actually without precedent under the common law and is also tolerated within statutory proprietary rights. Moreover, the affront is avoided once one accepts that title to waters need not comprise the same 'exclusive possession' that we identify with freehold land rights. Exclusivity in regards to sea has always meant something watered down to accommodate public fishing and navigation, so this need not become a problem when one talks of exclusivity in waters in the specific context of native title. In addition, it must be remembered that 'exclusive possession' of land is similarly not as absolute as we may sometimes conceive it to be. In short, the first obstruction in the path to recognition has been the framing of sea country interests in the jurisprudence. This article also questions whether the historic and continuing treatment of sea country by the Crown is in fact (though more importantly in law) inconsistent with enjoyment of title by Indigenous claimants.

It is clear that sea country claims, whether correctly or not, have been seen as a particular problem in any land rights scheme. For instance, in his report on the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*'), John Reeves QC recommended disallowing *claims* to intertidal zones (let alone the granting of rights), and suggested a joint management approach to avoid claims over seas and seabeds.[6] For different reasons the National Native Title Tribunal on its website provides separate maps and statistics for applications and Indigenous Land Use Agreements ('ILUAs') regarding sea country.[7] Creating more concern, the Commonwealth Government recently passed the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth), which terminates land claims to foreshore land not contiguous with Aboriginal land, even where the Land Commissioner has recommended that the land be granted.[8]

The litigation arising out of the claims of the Yarmirr people (*Commonwealth v Yarmirr*[9] and *Commonwealth v Yarmirr*[10]) indicates that native title claims to both land and sea will not result in exclusive possession of the sea country portion. Rather, offshore rights will be limited and their non-possessory nature emphasised. The following draft terms of a determination between parties appearing in a 2006 decision demonstrates the phrasing commonly used to explain offshore title:

> That agreement confers exclusive rights on the [claimants] to possession, occupation, use and enjoyment of the land in the determination area to the exclusion of all others. The native title in relation to the water is a right to:
>
> (a) hunt and fish in or on, and gather from, the water for the purpose of satisfying personal, domestic or non-commercial communal needs; and
> (b) take, use and enjoy the water for the purpose of satisfying personal, domestic or non-commercial communal needs.

The native title in relation to water does not confer upon the native title holders the right to possession, use or enjoyment of the water to the exclusion of others.[11]

Before considering the judicial response to offshore native title, an outline of legislation relevant to interests in sea country is provided, along with details of the frequency of sea country claims. This is followed by an overview of important recent judgments.

A The Legislation

The *Native Title Act 1993* (Cth) ('*NTA*') is the main act governing Indigenous interests in land and waters. Section 223 includes the familiar traditional interest/connection/recognition formulation of native title. Further, section 6 provides:

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

Each state also has legislation providing mechanisms for recognition, or more often confirming non-recognition, of sea country interests for Aboriginal people. Statutory recognition of Indigenous traditional owners' interests in sea country can come from one of three statutes in the Northern Territory: *ALRA*; the *Aboriginal Land Act 1978* (NT) ('*Aboriginal Land Act*'); and the *Aboriginal Areas Protection Act 1987* (NT) ('*Areas Protection Act*'). Under *ALRA*, transferred or granted coastal land extends to the low tide mark. However, this does not give control over the sea covering that intertidal zone. In *Risk v Northern Territory*[12] it was held that seabeds could not be land claimed under *ALRA*. Section 12 of the *Aboriginal Land Act* provides for sea closures at the direction of the Administrator of the Northern Territory for sea adjoining and within 2km of Aboriginal land. The sea country becomes closed to

> [a]ny persons or class of persons, or for any purpose other than to Aboriginals who are entitled by Aboriginal tradition to enter and use those seas and who enter and use those seas in accordance with Aboriginal tradition.[13]

The legislation is directed mainly at creating a buffer zone to protect the possession and use of the land; its focus is not sea country rights. The closures provided by the *Aboriginal Land Act* are porous: commercial fishing licences current at the time of closure are exempt, as are renewals of those licences, which may take place up to six months after a license's expiry. Although the right to access closed areas is not passed on when a person transfers or sells their license, corporations hold their licences effectively in perpetuity. Also, Navy vessels and Government personnel and supply boats for coastal communities are all allowed. Further, the sea closure does not give control to the Aboriginal community; all enforcement must be by way of reporting infringements to the police.[14]

In Queensland the seaward boundary of Aboriginal land is the high tide mark. Intertidal land *may* be gazetted as available for claim under the *Aboriginal Land Act 1991* (Qld) but this has not yet occurred. Therefore, no access to control of saltwater resources currently exists.

In New South Wales the purpose of native title legislation is to validate 'past acts' and 'intermediate past acts' of non-Indigenous people.[15] In relation to sea country, section 17 of the *Native Title (New South Wales) Act 1994* (NSW) ('*NSW NTA*') states:

> (1) The existing ownership of all natural resources owned by the State is confirmed.
> (2) All existing rights of the State to use, control and regulate the flow of water are confirmed.
> (3) All existing fishing access rights under State law are confirmed to prevail over any other public or private fishing rights.

The legislation in South Australia is very similar to that existing in New South Wales. Section 39 of the *Native Title (South Australia) Act 1994* (SA) ('*SA NTA*') replicates sections 1-3 of the *NSW NTA*, but adds the following additional provisions:

> (4) Existing public access to and enjoyment of the following places is confirmed:
> (a) waterways;
> (b) beds and banks or foreshores of waterways;
> (c) coastal waters;
> (d) beaches;
> (da) stock-routes;
> (e) areas that were public places at 31 December 1993.
> (5) Nothing in this section—
> (a) extinguishes native title; or
> (b) affects land or an interest in land held by Aboriginal peoples under a law that confers benefits only on Aboriginal peoples.

The qualification in subsection (5)(a) is interesting in that it seems to construct the aforementioned rights (public access, Crown control over waterways, statutory fishing rights) as continuing without extinguishing native title in the sea country. This seems more obliging than the thinking of the judiciary, which finds that such rights certainly vitiate any exclusivity of title, which would have to be accepted as an important element in the make up of native title.

Section 14 of the *Native Title (Tasmania) Act 1994* (Tas) ('*Tasmanian NTA'*) mirrors subsections (4) and (5) of the *SA NTA*, while section 14 of the *Land Titles Validation Act 1994* (Vic) replicates section 17 of the *NSW NTA*, but also includes in section 16 a qualification much like that in the *SA NTA* and *Tasmanian NTA*.

In Western Australia sections 13-14 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) give the

same confirmations as sections 1-4 of the *SA NTA*, but not that of that regarding non-extinguishment.

B The Statistics

It is almost universal in native title claims to sea country that some intertidal land is included: out of 90 applications registered on the Register of Native Title Claims at 30 June 2006,[16] 89 claimed an intertidal zone. Roughly 74 percent also claimed a coastal zone. The proportion continued to drop zone by zone, and only six claims in 90 applied to sea country out in the exclusive economic zone: the Darumbal People and the Torres Strait Regional Sea Claim (Qld); the Esperance Nyungars; the Nyangumarta People; the Kariyarra People; and the Ngarla (WA). By September 2006, when updated data was published, there were 89 applications on this Register, 88 of which covered an intertidal zone. Again, 6 claims covered part of the exclusive economic zone.[17] The Schedule of Applications (Federal Court) and Determinations Including Sea Country at 30 June 2006[18] had a slightly higher total: 117 matters. Within these, the frequency of claims decreased relative to the distance from the coast, as it had on the Register above. Only eight claims reached as far out as the exclusive economic zone; they were the same six as listed above, plus two 'not accepted' claims: those of the Wom-Ber (WA) and the West Arnhem Seas (NT). In all, 19 claims covered what may be termed 'high seas'. At the September update, there were 118 matters, the addition being the as-yet untested South West Boojarah 2, which extends only to the intertidal zone.[19]

At June 2006 12 Federal Court applications already at the determination stage included sea country.[20] None of those 12 included country in the exclusive economic zone, though the Ngaluma/Injibandi claim includes contiguous zone sea country, and a further three include territorial sea.[21] Three others include parts of the coastal zone.[22] All 12 cover intertidal country.

The conclusion to be drawn from these figures is that some relationship with sea country is felt by the applicants in a large proportion of claims, but that the majority of applicants are interested in a relatively narrow band of sea country. I say relatively as the intertidal zone in northern Australia is often many kilometres wide and is abundant in marine resources. Whether it means claimant groups have no particular interest in sea country further from the coast, or whether it reflects legal advice given to limit their claims to sea country closer to the shore is not revealed in the data. Certainly, sea claims have been cut from larger native title claims to improve the chance of success, including the first sea claim, which was within the original claim resulting in the *Mabo v Queensland (No 2)*[23] decision.

C Case Law

(i) *Yarmirr (HCA)*

In this case the High Court heard an appeal against the finding of the Full Federal Court in *Yarmirr (FFCA)*, itself having been an appeal against the decision of Olney J of the Federal Court.[24] The claim was the first to exclusively involve rights to sea country.[25] The claimants sought recognition of exclusive possession, ownership, occupation, use and enjoyment of certain sea, seabed and resources in the Croker Island region. Justice Olney found native title in those areas, but did not confer exclusive rights on the title holders.

The critical findings of the High Court were:

- The common law does extend beyond the low water mark, but not into the high seas.
- The public rights of navigation and fishing are such that title in the claimed waters would be encumbered. This led to the conclusion that the native title claimed was unable to be recognised because exclusivity created an inconsistency. A selection of particularised rights was granted in lieu; a selection of rights which had been found to exist during the factual inquiry.[26]

Exclusivity was the crucial issue. When the concept of *title* cannot be made manifest (as here), elements of traditional law are translated into particularised *rights* (particularised but not precisely defined). Similar 'non-exclusive' rights to sea country were later granted in *Sampi v Western Australia*.[27] This is not equivalent to title being recognised in a reduced or modified form, as the rights are given in an exhaustive list and provide no residual or transcending interest in the way native title does. Moreover, these rights empower individual subjects, whereas native title is a communal holding. It is for these reasons that I contend that, implicit in the High Court's reasoning in *Yarmirr (HCA)*, is the notion that native title exists *not* as a bundle of divisible rights, but rather as an all-or-nothing concept.

(ii) *The Lardil Peoples v Queensland*[28]

This case involved a claim to the waters around the Wellesley Islands in the Gulf of Carpentaria. Behrendt points out that it was only the second claim after *Yarmirr (FCA)* relating to areas below the high water mark without involving an onshore portion.[29] The rights recognised were:

- native title to intertidal zones and adjoining waters extending between 2.7 and 5nm, depending on whether the adjoining land was occupied at sovereignty;
- rights to fish, hunt and gather living and plant resources in those set waters;
- rights to access land and waters below the high tide for religious and spiritual purposes allowed under traditional law and custom.

(iii) *Gumana (on behalf of the Yarrwidi Gumatj and other groups) v Northern Territory*[30]

Relevant to the present discussion is the claim raised by the plaintiffs in *Gumana (FCA)* for dry land, an intertidal zone and adjacent sea. Some intertidal zones and dry land had been granted to Aboriginal people as a fee simple under *ALRA.* Justice Selway found:

- the applicants had a native title right of exclusive possession over the land but not the intertidal zone;
- the native title rights were 'similar to those identified in *Yarmirr* … as further explained in *Lardil Peoples*'.[31]

After comprehensive reasoning Selway J found that:

> If the issue were free from authority then in my view the grant of a statutory fee simple to the low water mark would abrogate the public rights to fish and navigate in the inter-tidal zone.[32]

However, in *Yarmirr (FCA)*, the trial judge had *not* understood the foreshore (intertidal zone) to come within the grant of exclusive possession.[33] It is that authority which Selway J had in mind. *Risk v Northern Territory*[34] treated *Yarmirr (HCA)* as having left open the question of intertidal zone rights, but in *Gumana (FCA)* Selway J decided that *Yarmirr (FFCA)* was binding in regards to intertidal zone rights.[35] His Honour held that exclusive rights to control access to intertidal zones are not a corollary of the grant of a fee simple. Further, the owner of land does not own every thing physically on it, particularly not free-flowing water.[36] As a result, the statutory fee simple over the intertidal zone was not able to found a native title right of exclusive possession for the claimants.

(iv) *Gumana v Northern Territory*[37]

In *Gumana (FFCA)* French, Finn and Sundberg JJ overturned Selway J's decision in *Gumana (FCA)* and held that freehold land granted under *ALRA* does carry with it exclusive rights regarding commercial fishing in intertidal zones and in tidal rivers over that land. Their Honours asked whether the grant in fee simple excluded any subsisting public right to fish in the intertidal zone, answering the question thus:

> But for the joint judgment of Beaumont and von Doussa JJ in *Yarmirr FC*, Selway J would have answered this question favourably to the appellants. Because of that decision, his Honour held that the fee simple grant did not confer on the Land Trust a right to exclude from the waters of the inter-tidal zone persons exercising public rights to fish or to navigate. His Honour also considered that such persons were not so excluded by s 70 of the Land Rights Act and that *Yarmirr FC* dictated this conclusion: *Gumana* 141 FCR at [80], [85] and [87]. The correctness of *Yarmirr FC* is in issue on the appeal as are the above conclusions which stemmed from that decision.[38]

Their Honours then expressed the opinion that the decision of the Full Court in *Yarmirr (FFCA)* was 'plainly wrong'.[39]

This clear and sequential discussion of the jurisprudence, combined with the apparent willingness to independently evaluate the correctness of the *Yarmirr* suite of litigation is to be welcomed. Nevertheless, given the Northern Territory's decision to appeal to the High Court against the finding in *Gumana (FFCA)*, it is necessary to reserve definitive judgment until a decision granting or denying special leave is made.

(v) Risk (HCA)[40]

Risk (HCA) arose out of a string of appeals concerning whether an application under *ALRA* could be made to claim certain seabeds under Northern Territory waters. At first instance the Aboriginal Land Commissioner held the seabed was not 'land' for the purposes of *ALRA*.[41] His view was endorsed by the majority of the Federal Court bench, then unanimously in the High Court.[42]

(vi) Griffiths v Northern Territory[43]

Griffiths affirms that *Yarmirr (HCA)* determined that no native title right to exclusive possession can exist over tidal waters.[44] The pleadings suggest that non-tidal waters can be under exclusive possession. This is not out of step with the long history of the law, but does seem difficult to manage in situations where the waters form a river which is both tidal and non-tidal, as in this instance, as access to the tidal parts must remain unrestricted. Justice Weinberg seems of the opinion that any common law 'property' in flowing water is really property in the land under that water. Also, the decision considers the common law rights to fish and to freely navigate, deciding that the right to fish need not be limited only to those waters which are navigable; in effect, the two rights are not coextensive.[45]

III Difficulties Faced by Land and Sea Country Claimants

A Removal from Land

Forced removals are a key issue in native title jurisprudence. Physical separation and general changes in custom are problematic as connection to the land must be proven to establish the existence of native title.[46] However, it appears this has had less effect in sea country regions because they were subject to less interference. This is borne out in the *Living on Saltwater Country* report, which notes that 'northern Aboriginal populations … were not physically dispossessed by waves of new settlers *to the same extent*'.[47] In the case of the Torres Strait there was, by contrast, an influx of European settlers working in fisheries and the pearl shell industry, although Island men were engaged to work for the companies which enabled them to continue to live in the region and visit its islands.[48] There were other areas where movement away from coastal settlements disturbed interaction with sea country, but in *Gumana (FCA)*, for instance, it was noted that despite relocation to a mission south of Blue Mud Bay, many Indigenous locals returned to their country in spare time. It was held that their connection remained during times of physical absence.

B Mistranslation

It has been difficult in both onshore and offshore claims for courts to articulate rights which properly translate the relationships between Indigenous people and country.[49] Not only are customary conceptions of proprietary interests very different, but the spiritual rationale behind Indigenous law is also foreign to the common law's concepts. Peterson notes that, '[p]articularly where the issue of property rights are concerned, [the law] has difficulties with the open-ended, decentred, continuously negotiable indeterminacies of Aboriginal discourse'.[50] One of the central reasons for claiming native title is to protect a spiritual interrelation with land and enable native title holders to fulfil a sense of spiritual responsibility for land. It is unfortunate that the very process by which Indigenous people must seek to have their title recognised seems inherently incapable of emphasising the depth of that spiritual aspect. In *Hayes v Northern Territory*[51] Olney J warned that 'any form of native title which did not recognise the need to protect sacred and significant sites would debase the whole concept of traditional rights in relation to land'.[52] Personally, I am unconvinced that claimant groups feel that this is a useful warning so much as a description of the way the system already operates. The boundaries of sea interests are also suffering in translation. This appears partly due to the reduced awareness of physical landmarks in the sea, but also because of a dearth of principles. In *Lardil*, the extent of a right 'as far as the eye could see' was 'translated' as 5nm. Mistranslation is a more acute problem when sea country interests are the subject of a claim, as discussed later in the paper.

C What Does 'Access To Use or Protect Sacred Sites' Mean?

Yarmirr (HCA) suggests that offshore rights can be put no higher than rights to access and protect sacred sites for purposes existing in traditional laws and customs (and to fish and hunt on a non-commercial scale).[53] Some onshore claims are also expressed in that way. These rights already seem to be addressed by heritage legislation. What is not clear from judgments is what the nature of such rights actually is. To what extent can right-bearers control access to and use of a site by non-clan members to ensure it is not harmed? Proper maintenance of traditional sites (both physically and spiritually) would appear to require a very high level of control, verging on exclusive possession. However, exclusive access to sacred *sea* sites has been rejected in native title claims (though heritage rights theoretically stop people entering some sites).[54] Therefore, the difficulty is greater in offshore claims where the recognition of a right to protect sites sits uncomfortably with the disallowance of exclusive use/control.

The reasoning in *Yarmirr (HCA)* appears to import a very strict reading of 'ownership' into a claim for native title over waters. *Ownership* of sea country (importing the notions of control and exclusivity pertaining to ownership of land) is simply not part of the common law. Rather than working through the difficulty of translating Indigenous water rights, thereby developing a specific water-based common law interest, the High Court rather bluntly dismissed the claim because ownership cannot be affixed to water. This illustrates the attempt to claim a right which is 'awkwardly extracted from Western doctrines which have distinctly different conceptual backgrounds'.[55]

If a narrow reading is taken of the right to protect sacred sites, it would seem that other rights relating to sacred sites may not be recognised. These fall into a category which Brennan CJ (as he then was) loosely termed 'non-accessory rights'.[56] It is clear that the judiciary has not yet plumbed the depths of possible rights which relate neither to *access* ('accessory rights') or to *protection* of sacred sites (a specific usufructuary right, in my opinion). Indigenous relationships to sea country are not restricted to physical access to specific sites. [57] They are part of a cosmology and a 'saltwater' identity.[58] Further, title to marine resources is sought by Indigenous groups as the foundation of economic independence, as Woodward first reported some 30 years ago.[59] This cannot be realised given the limited rights granted. Procuring rent from leased sea country would be another way title could provide economic empowerment, a goal which currently is only given lip service in Indigenous policy, as Strelein notes.[60]

(i) Rights to exclude tourism?

As tourism grows offshore, it is possible to imagine boat loads of tourists being shipped to a reef formation to sightsee during Aboriginal practices or ceremonies. The use of such areas for tourism may well offend people who hold that reef to be sacrosanct or who recognise a code of gendered access, as was pleaded in relation to a men's religious site in *Sampi*.[61] Rights to protect and use sites may not be infringed, if no physical harm results and if Indigenous people are not restricted in their ability to use the particular reef. Only Kirby J, in his dissent in *Yarmirr (HCA)*, suggested that claimants may have the right to exclude people engaging in tourism.[62] It is common for Aboriginal communities to traditionally require visitors to seek permission to enter areas, not because of proprietary control but to avoid people without the requisite knowledge coming onto sacred sites and thereby provoking disastrous consequences for that society.[63] A right acknowledging the sacredness of sites but not empowering title-holders to restrict other people from entry cannot fully protect the sacred nature of those sites.

The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) makes it an offence to enter, work on, or desecrate a registered sacred site, including marine sites. However, this is not authority for traditional owners to manage sacred sea country, and there have been reports of unwanted access continuing regardless of registration. Effective patrolling of access points to sea country is logistically very difficult and the weaker or smaller the right, the harder it is to devote resources to its enforcement and to stamp it on the consciousness of other seafarers. In Queensland there is an EPA registry of heritage sites, but none are Aboriginal sea country sites.[64] Further, the *NTA* right to negotiate over permissible future acts, a powerful mechanism for registered claimant groups, is not operative in circumstances of damaging *offshore* future acts, or offshore acts retrospectively declared permissible future acts.[65] Again, it is clear that only very limited legal mechanisms exist. More symbolically, in the politics of recognition, it is apparent that Indigenous spirituality is open to denigration and abuse because of the dearth of effective legal mechanisms to protect against the potentially nefarious impact of tourism.

(ii) Rights of access over sea country

Many sea sites for which protection rights have been granted may not be accessible without crossing water in which native title has been found *not* to exist. Regarding the Wellesley Islands, Behrendt notes, '[i]t would have been thought that a right of access across those waters would have at least been recognised'.[66] Does a right of access to sites include some sort of right of way over those other waters? To pin it down legally, is this a derivative right? Or is it enough for Indigenous people to rely on the public right of free navigation (remembering it may not be public water that one has to cross). A comparison with the hypothetical situation of a homeowner who has a battleaxe property, but whose conveyancing documents and LTO registration forget to mention an access driveway, is a useful heuristic. Equity may imply a right of access in the form of an easement. Could this easement be recognised or registered if a previous case had *explicitly* held that the front block was the exclusive property of its owners and not of the battleaxe owners,

on top of the implicit exclusive possession that the front property owners enjoy with their fee simple? The answer would seem to be yes. However, if the scenario were not two neighbouring homeowners but the Sovereign and a native title holder, neither of whose ownership is based on garden-variety property law, can some sort of analogous easement exist to cross water to a protected site? This is not yet clear, on the authorities. *Griffiths* touches on whether possession of a riverbed creates apparently derivative control rights relating to waters but does not advance the jurisprudence.

D Tenure

Hepburn argues, rather convincingly, that the system of feudal tenure was never organic or well-suited to the Australian context. She would rather see an allodial system, as 'native title cannot evolve within a common law framework that regards ownership as a derivative of the English Crown'.[67]

The counter-argument is that *Mabo (No 2)*'s finding that radical title, rather than full beneficial title, was reposed in the Crown obviates problems of tenure. All putative native title would have been extinguished, on the High Court's analysis, if beneficial title had been reposed in the Crown since sovereignty. However, the running of offshore claims has demonstrated that radical tenure remains a hurdle. Most sea country has *not* been granted to other settlers by way of freehold, pastoral lease, or Crown grant. No title exists over sea other than that which common law deems to have existed at sovereignty, (which apparently involves only radical title). However, claims are failing during the inquiry into extinguishment. The type of title reposed in the Crown is being considered in such a way that an exclusive native title could not co-exist. The question of how title could be recognised to fit around other rights is not being asked and a more profound inquiry into extinguishment involving clarifying the Crown interest and exactly what the claimed rights entail is not being reached. The prevailing view appears to be that Crown title in sea country is prima facie sufficient to extinguish native title. The acquisition of waters upon sovereignty, or in some cases a later assertion of sovereignty, becomes the extinguishing act. This retrograde operation parallels the way in which beneficial title was once held to quash native title under the *terra nullius* doctrine.

No matter how sea claims are characterised, it seems, they will be defeated by the radical title, and at most a mix of ersatz public rights and heritage legislation rights granted. This supports Hepurn's comment that even 'within the radical tenure system, native title has effectively become an estranged misfit'.[68]

E Enforcement of Control

Formal and onerous expectations of enforcement of control over (entry onto) land are difficult, and stem from an uneffaced common law view regarding what constitutes land ownership and how a land owner would behave. This is exacerbated offshore because of the actual logistical difficulties in exercising control over people coming on to expanses of water; and the waters themselves, which necessarily shift out of the claimed area. Peterson has argued that 'asking or letting the appropriate people know where one is going is the *fleeting and virtually invisible* day-to-day social expression of the system of sea tenure'.[69]

Justice Callinan in *Yarmirr (HCA)* went so far as to require that claimants prove they could *enforce* their own land laws against non-Indigenous persons before those laws could be recognised. This was an almost impossible burden to meet, and seemed arbitrarily imposed in sea claims. Enforcement is usually the result of a law's recognition of a right, not the test of a law's legality or legitimacy in granting that right. Happily, the success of such enforcement was legally irrelevant in the eyes of other judges, so this added burden is not imposed.

IV Discrete Difficulties Facing Sea Country Claimants

Behrendt is alluding to discrete difficulties now faced in sea country claims when he notes that *Lardil* 'highlight[s] the deficiencies in *Yarmirr*'.[70] *Yarmirr (HCA)* dealt with (and sometimes created) the particular hurdles in the path of a sea country claim. This section teases out the pertinent issues in these variegated strains of difficulty.

A Exclusivity

Yarmirr (HCA) affirmed that exclusive possession cannot be recognised offshore. In Australia's system of property law, an owner's freehold title is characterised by exclusive rights over land. On an abstract level, an exclusive right granted to a third party defeats native title in that land because exclusivity, by nature, cannot be shared or divided. However, it has since been recognised that less-than-complete native title may exist as the remainder left once the 'extent of the inconsistency' has

extinguished any rights in its path. This remainder may be title, implying exclusivity (the *Wik Peoples v Queensland*[71] line), or it may be an exhaustive list of non-exclusive rights *instead* of title (as in *Yarmirr (HCA)*). The sovereign's prerogative powers are limited by customary navigation and fishing rights.[72] As all proprietary rights in Australia derive from the rights of the sovereign, any ownership of sea country cannot be so exclusive as to oust navigation and fishing rights. This makes governments sensitive about granting exclusive offshore native title, as it may seem to give more that could be granted to non-Indigenous people. Further, it was implied in *Gumana (FFCA)* that exclusive rights cannot be granted because moving waters are akin to atmosphere or airspace above land.[73] The opprobrious implications of this governmental insensitivity are evident in the Queensland and Commonwealth Government's doggedly litigious approach to the *Lardil* claim, even though 'the State of Queensland accepted that native title existed in the claim area'.[74]

There is also a less political difficulty derived from the operation of native title as a body of law recognised by the common law. Behrendt suggests that non-recognition

> is a product of inappropriate approaches to determining inconsistency between native title and other interests and the difficulty Australian courts have in translating Aboriginal laws and customs into native title rights and interests.[75]

The common law does not often entitle subjects to exclusive rights to sea country. Under the common law all rights currently exercised on or in relation to the sea could not be complementary with an exclusive right in that area. Even when exclusivity is not explicitly claimed, the litigated claims process draws attention to exclusivity because it is an expected point of tension and tends towards translating rights claimed as exclusive rights. It essentialises native title as exclusive in character, and exclusive in a fashion inherently incompatible with any others' sea rights. Justice Olney found *as a fact* in *Yarmirr (FCA)* that traditional rights did not include a right to exclusive possession. This should suggest that the claimants were not attempting to claim proprietary exclusivity. This indicates a fundamental problem of conceptualisation regarding claims to sea country. By framing such claims as essentially claims to ersatz freehold, the judiciary imposes an implicit handicap on Indigenous claims to sea country.

It is suggested that the *sui generis* nature of native title rights is an additional stumbling block to sea country claims because of the inherent conceptual difficulty in fashioning rights outside of the traditional ambit of property law. The judiciary's mettle is tested when claimants submit that the non-proprietary nature of native title rights should in fact transcend the options established in property law. If native title rights and interests were characterised in a less rigid manner, they could be less inherently ill-suited to a test of inconsistency. In *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory*[76] Mansfield J opined:

> I do not consider it inconsistent with such rights [pastoral lease-holder rights] that the native title right to control access to land should survive to exclude persons who might wish to enter the land to do things unrelated to the pastoral lease or without some other reserved or statutory rights [these being the potential sources of extinguishment].[77]

What Mansfield J outlines is not quite the doctrine of suppression of native title that may be extracted from *Wik*, because the title does not lie nascent. Instead, he is allowing native title to exist as an interest from which others' rights are carved. These carved-out rights may be permanent, but theoretically could also be temporary and merely suppress that portion of native title in the way adumbrated in *Wik*.

There is much to be said for this conceptualisation. It is not as absolutist as the approach taken in *Yarmirr (HCA)*, such that one element of inconsistency here would not bring down completely and forever the prospect of native title. But it is also not a 'bundle of rights' approach, which can breed in weakness because it limits rights to those particularised. It is suggested that the 'holistic and integrated nature of Aboriginal interests in Australia's northern marine environments'[78] makes a segregated bundle of rights an inappropriate option.

The *Living on Saltwater Country* report stated that the complexity of Indigenous peoples' relationships to sea country is 'in many ways similar, or possibly identical, to that between Aboriginal people and land'.[79] While this is a sensible comparison, it should not be used to stunt the development of sea country jurisprudence. Simply because a bundle approach has been used in relation to land rights does not mean it is an appropriate approach to sea rights (or indeed that it was a good choice in the land rights scenario).

In *Mabo (No 2)* Brennan J (as he then was) suggested that the aversion to recognising exclusive native title in sea

country might be because non-exclusivity of water rights is a 'skeleton principle' of our legal system, and as such improper to overturn.[80] With respect, I cannot agree. Water rights, while significant, are hardly inviolable cornerstones of the common law. McIntyre subsumes navigation rights within the broader right to freedom of movement.[81] This framing suggests that the boney core of the law is not under threat when sea country claims run into public navigation rights.

B Extinguishment

In terrestrial land claims extinguishment occurs on a legal, not a factual level. This is because the freeholder's exclusive right to land leaves no room for any other title. There is no chance of a competing fee simple in most sea country, and yet the battle seems stricter, and more abstract. The public right to navigate is held conceptually unable to co-exist with exclusive, or full, native title, despite the fact that a right to navigate is in no way as expansive as an exclusive right to control. In so far as the rights to navigate and to fish are common law creatures they are vulnerable to abridgment by statute, in the normal course of legal reasoning. This reading was affirmed in *Gumana (FFCA)*. Native title is a creation of statute, and therefore should be able to abrogate conflicting public rights. However, the Australian judiciary has not welcomed this sort of prioritisation.

Indeed, it seems that the conceptual battle has reached a level of theory so abstract that almost any two rights are unable to co-exist. Alternatively, a claim for native title is *not* a claim for freehold estate. While the broad rights of freehold cannot tolerate other rights including native title; native title need not be unable to tolerate other rights.

The readiness to extinguish based on mutually exclusive rights can be attacked from another angle. Freehold persists in other (intertidal) situations even when that same right to navigate seeks to overlay itself.[82] Behrendt bolsters this common sense argument with some case examples:[83]

- *Lord Advocate v Young*[84]: 'possession of the foreshore … can never be, in the strict sense of the term, exclusive'.
- *Mace v Philcox*[85]: an owner's title in foreshore was strong enough to successfully sue for trespass even though public navigation rights existed there.

Gumana (FFCA) adds that at common law the foreshore belongs prima facie to the Crown but can 'be made subject of private ownership'.[86] The enumerated cases above also involve the public right to fish, similarly unthreatening to the property owners (successfully) purporting to have excusive title. Justice Kirby dissented in *Yarmirr (HCA)* in acknowledging that 'exclusive' titles over dry land may be subject to public access rights, and that the common law right to fish ceases in sea areas where there are proprietary rights, like aquaculture leases.[87] Country with a foreshore may be held exclusively while others' rights to navigate and to fish exist over that land, yet sea country cannot be held exclusively because of the existence of these same rights.

Moreover, de facto exclusive possession of the sea is allowed to others. As Gaskin has noted, the 'long lines' set up under pearling leases in actuality exclude all public navigators and Indigenous claimants from passing through. As she puts it, the sea becomes 'physically appropriated space and legally expropriated country'.[88] Thus, while native title need not result in such public exclusion, it will not even be recognized over sea country, yet leases which in practice do create strict exclusive use and control are readily granted.

This illustrates a difference in the way that Indigenous and non-Indigenous rights are protected. It is contended that this sort of discriminatory approach to the exercise of a right is within the purview of the *Racial Discrimination Act 1975* (Cth) ('*RDA*').[89] That native title is unable to gain legal exclusivity when encumbered by navigation rights, while other title is exclusive despite the same encumbrance, shows a differential treatment of land rights that, by definition and also by effect, disadvantages only Indigenous people. In this way, it is a racially-founded discrimination.[90]

This leads to the conclusion that if freehold retains its exclusive nature, despite coexisting navigation rights, then it cannot reasonably be claimed that native title must fail to gain recognition because navigation rights render it unable to be labelled exclusive. Moreover, it should not be extinguished because of an inconsistency presumed to arise out of any claimed exclusivity, because exclusivity is not, even on a conceptual level, inconsistent with others' navigation and public fishing rights in other cases.

C What Extinguishing Act?

Whose power is it to extinguish native title because of public rights? Certainly Parliament, with legislation, may extinguish common law rights but the *NTA* is empty on that issue in

regards to sea claims. The rights to navigate and to fish are not prerogative grants. They are both *recognised* by the common law, one sourced from international law, and one from the fictional 'time whereof there is no memory to the contrary'. They are not statutory creations and are amenable to abrogation by the legislature.[91] Statutory fishing rights, under licenses, override public rights. As a point of law, it is unclear how these public rights operate to extinguish native title, being neither inconsistent Crown grants nor a use of the prerogative (not that this could be used to deny native title[92]). Sea-use licenses (such as those granting pearling or fishing rights) are obviously restricted and impermanent, and clearly not exclusive because of the legal meaning of a license in contradistinction to leases or freeholds. I would suggest that licenses would struggle to extinguish native title, much as farming licenses (pastoral leases) have struggled.

D Clash with International Rights

International law can be enforced in international jurisdictions. However, to be enforced within the domestic jurisdiction, that law must be ratified into Australian legislation, have direct effect, or be recognised by the common law. In the case of sea country claims, the native title holders' purported right conflicts to some limited extent with the international right to navigate freely through those waters. For instance, in the Wellesley Islands claim, evidence was put that claimants considered themselves to have a right to stop boats passing through their country.[93] There does not seem a particular, principled reason why an international law right should trump an Indigenous law right in the contest for recognition. However, that is clearly the way the conflict is to be resolved, following *Yarmirr (HCA).* Kaye notes that '[t]o remain compliant with international law, a state may have to dilute or even negate indigenous rights over offshore areas'.[94] To have exclusive control over a sea area may require a sea closure (see *NTA* and *ALRA*). According to Kaye closing off access in territorial seas contravenes Part 11, Article 3 of the *United Nations Convention on the Law Of the Sea ('UNCLOS')*.[95] However, it cannot be said that Australian policy is overly concerned about compliance with international covenants. Similarly, the High Court is not quick to cite international law as a reason why a right cannot be exercised under domestic law. The concern in native title seems to be with upsetting the common law which recognises a right, rather than upsetting any international body of law from which the right arises.

In *Wik* Kirby J said:

> [t]he theory accepted by this Court in Mabo [No 2] was not that the native title of indigenous Australians was enforceable of its own power or by legal techniques akin to the recognition of foreign law. It was that such title was enforceable in Australian courts because the common law in Australia said so.[96]

This apparently negatives my earlier contention that both types of recognised rights are equivalent. However, in the context of that judgement, it appears that Kirby J is articulating the way in which native title differs from international law in the absence of a ratification process.

More importantly, if the exercise of a right which is purporting to extinguish native title in offshore areas is the exercise of an international right reposed in individuals then it is not an explicit act of government. It would appear that the doctrine of radical title as opposed to beneficial title is that extinguishment of native title can only occur off the back of an inconsistent sovereign act evincing a clear and plain intention to extinguish.[97] As discussed, sea country may not be under radical title whereas land is, but the judicially-developed notion of extinguishment has not been, and need not be, replaced. Perhaps the sovereign act, then, is the common law's act of recognising a right of navigation, but this is a very loose application of what it means to act. To view this as the sovereign acting via the common law is artificial. Moreover, the removal of a right is generally exercised by the legislature, not the judiciary. And even if the right were not reposed only in individuals, the sovereign's prerogative powers are limited by customary navigation and fishing rights.[98] It is for this reason that any 'ownership' of sea country by the Crown or derived from the Crown's title cannot be so exclusive as to exclude public navigation and fishing rights. Therefore, if a grant of native title purported to go beyond that limit of sovereign power, it might be ultra vires and need to be *read down* rather than being held as absolutely exclusive and therefore as inconsistent.

V Reviewing the Reasoning and Consistency in Native Title Case Law

A Legal not Factual Extinguishment

A disenchanting feature of native title determinations is the legal, rather than factual, nature of the enquiry into

extinguishment. However, it seems that this legal focus has misguidedly been used as a basis in sea country matters for further limiting claimants' success. Justice Gaudron noted, during the hearing of *Yarmirr (HCA)*, that native title cannot be claimed in a manner that requires a finding square kilometre by square kilometre, which appeared to presume that the factual circumstances of each square kilometre would otherwise be put in issue rather than simply put in evidence.[99] Her concern seems to be that one area of water may be subject to native title while an adjacent, ostensibly identical patch is not. It was for fear of uncertainty, or at least fear of a complicated result, that she would not sustain the submission that fishing licenses need not have extinguished title. However, this seems to misunderstand how the legal enquiry is constructed. In asking whether there is a legal inconsistency of rights, the nature of the common law/statutory right is compared with the purported Indigenous right. The location and content of that right is shaped by the facts of the claimant group's customs. This problem of perception may be exacerbated because Western culture does not articulate the same nuanced changes between parts of the sea. However, the untrained Western eye also cannot discern a difference between a pastoral lease paddock and a neighbouring freehold paddock, because the difference is legal not physical. That differing legal status seems arbitrary to lay people cannot be a reason for disallowing rights. Further, that the 'uncertain' division seems more obvious on an open body of water should not be accepted as a relevant or principled reason for being more constricted in sea country claims than land claims.

Additionally, when the common law or statutory right is not absolute in nature (again, take the pastoral lease example) it becomes relevant to look at the factual operation of the two rights to determine whether an inconsistency arises. This inquiry may even need to be made on numerous occasions, if the *Wik* doctrine of suppression applies, to check whether the suppression is lifted as circumstances change. Therefore, it will always be that Indigenous interests will need to be assessed square kilometre by square kilometre.

B The 'Skeleton Principle' Test

The reasoning in *Yarmirr* seems to replace the 'fracturing the skeletal principle' test[100] with a more onerous test requiring claimants to establish that no inconsistency would exist at all, rather than merely establishing that the inconsistency would not be undermining the skeleton principle, or if it were, that it is nevertheless justified.[101] The skeletal principle idea was set up as a test of proportionality. However, the balance between benefits and harms seems rarely to be assessed. Before *Yarmirr (HCA)* there was little opportunity to assess whether reform of the undeniably fundamental concept of tenure could be justified because of the benefits it would allow in reconciling Indigenous law and the common law,[102] not to mention the bolstering effect this would have on another fundamental principle, that of equality before the law.[103] One aspect of *Yarmirr (HCA)* that *is* consistent with authorities is the way it jumps over any consideration of proportionality.[104]

C Handling Bundles of Rights

In *Western Australia v Ward*[105] the High Court characterised native title as involving a bundle of rights, whereas *Yarmirr (HCA)* can be interpreted as supporting an indivisible conceptualisation of native title. *Yarmirr (HCA)* is not watertight authority on the (in)correctness of the bundle of rights approach as it presents title as indivisible rather than an agglomerated 'bundle'. Howden suggests there is a tension between *Yarmirr (HCA)* and *Ward* as to whether protecting cultural knowledge of the land can be a burden on radical title.[106] Claimants must be very careful to establish the nature of rights claimed; if exclusivity is found *as a fact* not to be part of the traditional laws this cannot be appealed. Further, claimants should ensure all other aspects of their relationships to sea country are comprehensively expressed, otherwise this non-exclusivity may suggest to the bench that a limited bundle of rights is all that is needed to recognise the traditional role of the country, or worse, a limited list of rights. But also, if the fact finding reveals exclusivity as a tenet of the tradition and custom, claimants will want to be wary of running their submissions in a way that suggests to the bench that the title sought will not be worth granting unless exclusive, as exclusivity is bound to overshadow the claim and ultimately very unlikely to be recognised.

If, on the evidence, exclusivity was not a feature of traditional laws, as was found to be the case in *Yarmirr (FCA)*, does this mean it should not be when formulated into Australian law? It may still be that to translate the traditional rights requires the auxiliary element of exclusivity, which was simply unnecessary under Indigenous law when there were no non-Indigenous peoples challenging the interests to sea country. Unfortunately, the path by which Olney J arrived at his finding that exclusivity was not a traditional right is

'not clear'.[107] It is therefore difficult to determine how claims should be framed in the future.

D Crown Title, and the Leviathan Lurking in the Deep

The reasoning on sea country and land claims seems inconsistent regarding the royal prerogative. That the prerogative power may deny Indigenous land rights was rejected in *Mabo (No 2)*. Our system does not confer absolute beneficial title on the Crown, only radical title. Further, *Yarmirr (HCA)* recognises that a common law public right to navigate and fish is inconsistent with an absolute Crown title, in the intertidal zones at least. Yet the indivisible notion of native title, and the finding that it cannot co-exist with the type of rights currently held in the sea, even though those in question are neither freehold title nor de facto rights manifesting some Crown use, suggests that Crown title is in fact asserted in an absolute form.[108] The ambiguity is heightened by reasoning that presumes *radical* title is absent from the sea and the seabed.[109] The Crown 'interest' seems to be authority, as yet unexercised, to legislate in respect of waters and to grant to others ownership or lesser proprietary rights. An internationally-recognised right of ownership by coastal states has long been inconsistent with the right of innocent passage.[110]

In *Yarmirr (HCA)* the Court inquired into the types of rights and interests that were asserted at sovereignty over the territorial sea. It was held that the pertinent sovereign actions 'did not amount to an assertion of ownership to or radical title in respect of the sea-bed or super-adjacent sea in that area, whether as a matter of international law or of municipal law'.[111] This leaves uncertain the precise ambit of the sovereign interest obtained by the Crown upon colonisation. Jurisprudence explores what the sovereign interest is not, but what is still unclear is whether this elusive interest is more or less powerful than radical title. The majority in *Yarmirr (HCA)* firmly avoided this interrogation.[112] It is submitted this is the chasm into which much offshore title jurisprudence is unwittingly falling, for without a clear-cut interest against which to contrast claims for title, the foci of title determinations are not aligned to one course and rely upon reacting to whatever conceptual cohesion exists across the claims.

VI Conclusion

This article suggests that enumerated, specific rights regarding waters are not ersatz native title, and should not be treated as agglomerating into 'non-exclusive title'. There are difficulties shared by claimants to onshore and offshore areas, but some are felt more acutely offshore. It is clear from earlier native title cases that customary rights are translated into roughly equivalent common law terms. This creates particular problems in offshore claims because of the common law's dogged insistence that waters cannot be subject to exclusive rights. Consequently, in those cases that deliver partial success for claimants, certain specific rights to use and protect sea country, and to non-commercially harvest marine resources, are itemised. This is not native title. It is an aggregation of usufructuary and accessory rights. There is no plenary, underlying or residual interest. Moreover, there is no *communal* proprietary right, but rights *to individuals* to do certain things. Another clear manifestation of the distinction between onshore and offshore interests is found in the legislation regarding the right to negotiate:

> Evidently, since the right to negotiate does not apply to offshore areas, native title in marine areas is already considered from a legal point of view – prior to full resolution through the courts – as constituting a lesser property right than land-based native title rights.[113]

The non-exclusive rights found regularly in the judgments are limited first in their scope and second by their imprecision. I maintain that those rights which are being included in judgments are in need of further clarification before they can be fully enjoyed.

Specifically, it is contended that usufructuary rights are lesser rights because of their individualised subjects and particularised parameters. Hebron notes that by characterising the rights relating to sacred sites as usufructuary, an opportunity to grant a stronger right is lost. He argues the spiritual importance of land (including waters) could have instead been interpreted as a right *in toto*, at least to the subsoil under the waters. The *Living on Saltwater Country* report makes the point that the marine interests of coastal Aboriginal communities 'are not restricted to technical management issues, such as fisheries or marine protected areas'.[114] Such commentary is important when realising that the reasoning undertaken by the Australian courts regarding sea country was not foreclosed. Successful

claims require claimants to show that laws and customs relating to lands (which are founded on spiritual beliefs) continue to be observed such that a traditional spiritual connection is maintained. If this is shown regarding dry land, courts are likely to find native title rather than some lesser right of a usufructuary nature. However, even when a spiritual connection is accepted in a sea country context, the courts are far less willing to grant native title. Instead, they become focused on how to express the particular rights the bench feels can be recognised. A spiritual connection appears to assist in successfully mounting a case when it relates to land, whereas spiritual connection has less impact in sea country claims because the less-generous option of usufructuary rights has become a habitual remedy which judges accept as a legitimate modification of a claim for full use and enjoyment.

Despite others being able to hold excusive proprietary rights in intertidal zones, regardless of public fishing and navigation rights, it seems that recognising native title to sea country is not possible because that would import exclusivity into the Indigenous interest. While pearling licences, for example, deliver de facto exclusive control of sea country, native title, which need *not* have the same exclusive results in application, will not be recognised. Justice Merkel commented thus in his dissent in *Risk v Northern Territory:* 'there is nothing about the nature of an estate in fee simple that makes it inapplicable to the seabed'.[115] Nevertheless, the reasoning of most judgments suggests any sort of title involving exclusive possession would be an unthinkable departure from the common law. Even Merkel J did not speak of rights in the waters themselves. These are obstacles sea country claims are running into, yet native title, with its implications of exclusivity, is recognised over land despite prevailing access rights of telecoms and government agents. Moreover, when a traditional interest is recognised, the courts readily see extinguishment because of an inconsistency between native title holding and public fishing and navigation rights. I have argued that, on a conceptual level, there is no inconsistency between these rights sufficient to extinguish title. I identified a 'reading down' approach to assist with the co-existence of interests. Certain state legislation also does not consider public access, Crown control over waterways or even statutory fishing rights as necessarily extinguishing title.[116]

The absence of Crown *ownership* seems to forestall the inquiry into sea country native title before one even gets to questions of extinguishment, as, axiomatically, one cannot give that which one does not own. And yet the sovereign interest includes a power to grant ownership and other interests to others. *Yarmirr (HCA)* suggests the Crown interest might be understood as an exercise of the prerogative.[117] Is sea country an exclusive category where an exercise of the prerogative may extinguish native title? *Yarmirr (HCA)* skirts that danger by holding that the interests asserted by Imperial authorities were not inconsistent with recognition of native tile.[118]

The complexity of the jurisprudence regarding the different categories of sea; the confusion over the nature of the Crown interests; and the scant guidance as to how tradition and custom may be better presented or claimed in litigation suggests that native title over waters, as envisaged by the *NTA,* might never be won in court. There is a constant difficulty in conceptualising sea country title as anything but exclusive in exactly the way land is exclusive. This is combined with a failure to recognise that even an exclusive sea country interest can be reconciled with both public navigation and fishing rights.

Howden warns that the existing patchwork of recognition may 'eventually leave native title law looking like an artificial and unsupported construct of the common law'.[119] Decisions on sea country claims seem to be accelerating towards that situation, and seem *particularly* insouciant in their attempts to recognise Indigenous interests. Many difficulties faced in offshore claims also arise onshore but it is evident that the offshore nature presents additional and discrete conceptual and practical difficulties for the judiciary. I suggest that this added difficulty is exacerbating the existing fault lines in our native title jurisprudence.

Endnotes

* Alexandra Grey is a solicitor based in Sydney. The author extends warm thanks to Brigit Cowling, Ron Levy, David Saylor and Sean Brennan for their research, guidance and assistance

1 The 12 nm limit was declared in 1990.

2 On the calculation of coastal water boundaries see Stephen Sparks, 'Native Title – All at Sea?', (Paper presented at the Native Title Representative Bodies Legal Conference, 28-30 August 2001, as amended at 21 April 2002).

3 See, eg, ibid.

4 The jurisdictions of islands, their surrounding waters, seabeds and seas in the Torres Strait is covered by the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres*

Strait, and Related Matters, Australian Treaty Series 1985 No 4, December 18 1978 (entered into force 15 February 1985).

5 See Stuart B Kaye, 'Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait' (2001) 2 *Melbourne Journal of International Law* 381.

6 John Reeves QC, *Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (2006) 247, 259.

7 National Native Title Tribunal, *National Maps* <http://www.nntt.gov.au/publications/national_maps.html> at 9 August 2007.

8 Sean Brennan and Allison Rickett, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006: Report on Parliamentary Process*, Gilbert + Tobin Centre for Public Law <http://www.gtcentre.unsw.edu.au/news/docs/ALRA_2006.pdf> at 9 August 2007. The Bill was assented to on 5 September 2006 and became an Act of the same title.

9 (1999) 101 FCR 171 ('*Yarmirr (FFCA)*').

10 (2001) 208 CLR 1 ('*Yarmirr (HCA)*').

11 *Nona and Manas v Queensland* [2006] FCA 412 (Unreported, Dowsett J, 13 April 2006) [5] ('*Nona*'). This also demonstrates parties themselves embracing the distinct and narrower formulation of native title in relation to water.

12 (2002) 210 CLR 392 ('*Risk (HCA)*').

13 North Australian Indigenous Land and Sea Management Alliance, *Living on Saltwater Country: Review of literature about Aboriginal rights, use, management and interests in northern Australian marine environments* (report prepared for the National Oceans Office) 40 ('*Living on Saltwater Country*'). See also, Paul Memmott and Graeme Channells, *Living on Saltwater Country: Southern Gulf of Carpentaria Sea Country Management, Needs and Issues* <http://www.oceans.gov.au/pdf/losc_carpentaria.pdf> at 9 August 2007.

14 See, *Living on Saltwater Country*, above n 13, 40-43.

15 *Native Title (New South Wales) Act 1994* (NSW) s 3.

16 National Native Title Tribunal, *Native Title Claimant Applications as per Register of Native Title Claims That Include Sea within Area Being Claimed as at 30 June 2006*.

17 National Native Title Tribunal, *Native Title Claimant Applications as per Register of Native Title Claims That Include Sea within Area Being Claimed as at 30 September 2006* <http://www.nntt.gov.au/publications/data/files/sea_RNTC_stats.pdf> at 9 August 2006.

18 National Native Title Tribunal, *Native Title Claimant Applications as per Schedule of Applications (Federal Court) and Determinations as per National Native Title Register That Include Sea as at 30 June 2006*.

19 National Native Title Tribunal, *Native Title Claimant Applications as per Schedule of Applications (Federal Court) and Determinations as per National Native Title Register that Include Sea as at 30 September 2006* <http://www.nntt.gov.au/publications/data/files/Sea_Schedule_NNTR_stats.pdf> at 9 August 2007.

20 National Native Title Tribunal, *Determinations as per National Native Title Register That Include Sea within Area Being Claimed as at 30 June 2006*.

21 See the Wellesley Islands Sea Claim, the Bardi Jawi claim, and the Croker Island Seas claim.

22 See Wanjina-Wunggurr Wilinggin Native Title determination No 1; Larrakia - Darwin Part A; and Blue Mud Bay No 2.

23 (1992) 175 CLR 1.

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

25 At trial, Olney J decided that the *Native Title Act 1993* (Cth) ('*NTA*') covered claims to waters without needing a claim to the seabed. In later cases this may be referred to as a claim to the 'water column'.

26 'Examination reveals no inconsistency with rights and interests of the kind that have been found to exist, but does reveal an inconsistency with the continued existence of any exclusive rights and interests of the kind that were claimed': *Yarmirr (HCA)* (2001) 208 CLR 1, 60.

27 *Sampi v Western Australia* [2005] FCA 777 (Unreported, French J, 10 June 2005) ('*Sampi*').

28 [2004] FCA 298 (Unreported, Cooper J, 23 March 2004) ('*Lardil*').

29 Jason Behrendt, 'The Wellesley Sea Claim: An Overview' (Paper presented at AIATSIS Native Title Conference 2004, Adelaide 3-4 June 2004) 1.

30 [2005] FCA 50 (Unreported, Selway J, 7 February 2005) ('*Gumana (FCA)*').

31 Ibid [3].

32 Ibid [69](b)(3).

33 Ibid [75].

34 (2002) 210 CLR 392 ('*Risk (HCA)*').

35 *Gumana (FCA)* [2005] FCA 50 (Unreported, Selway J, 7 February 2005) [80].

36 Ibid [70].

37 [2007] FCAFC 23 (Unreported, French, Finn and Sundberg JJ, 2 March 2007) ('*Gumana (FFCA)*').

38 Ibid [58]

39 Ibid [91].

40 (2002) 210 CLR 392.

41 Ibid.

42 Ibid.

43 *Griffiths v Northern Territory of Australia* [2006] FCA 903 (Unreported, Weinberg J, 17 July 2006) ('*Griffiths*').

44 Ibid [737].

45 His Honour relied on *Gumana v Northern Territory of Australia (No 2)* [2005] FCA 1425 in reaching this conclusion.

46 See *NTA* s 223(1)(b) and also the high bar of continuity developed by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 ('*Yorta Yorta*').

47 *Living on Saltwater Country*, above n 13, 25 (emphasis added).

48 See the comments of Dr Garrick Hitchcock in *Nona* [2006] FCA 412 (Unreported, Dowsett J, 13 April 2006) [9].

49 'Because native title has its origin in traditional laws and customs, and is neither an institution of the common law nor a form of common law tenure, it is necessary to curb the tendency (perhaps inevitable and natural) to conduct an inquiry about the existence of native title rights and interests in the language of the common law property lawyer': *Yarmirr (HCA)* (2001) 208 CLR 1, 37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

50 Nicholas Peterson, 'On the visibility of Indigenous Australian systems of marine tenure', in Nobuhiro Kishigami and James Savelle (eds), *Indigenous Use and Management of Marine Resources* (Senri Ethnological Studies 67) 440.

51 (1999) 97 FCR 32.

52 Ibid [51].

53 See also, *Sampi* [2005] FCA 777 (Unreported, French J, 10 June 2005).

54 *Gumana (FCA)* [2005] FCA 50 (Unreported, Selway J, 7 February 2005) [243].

55 Kristin Howden, 'Indigenous Traditional Knowledge and Native Title' (2001) 1 *University of New South Wales Law Journal* 60.

56 *Wik Peoples v Queensland* (1996) 187 CLR 1, 26.

57 See further, Katie Gaskin, 'Limitations to the Recognition and Protection of Native Title Offshore: The Current "Accident" of History' (2000) *Land, Rights, Laws: Issues of Native Title* 2.

58 See Jackie Morris, 'Sea Country – The Croker Island Case – Casenote; *Commonwealth of Australia v Yarmirr*' (2002) 14 *Indigenous Law Bulletin* 18.

59 See Peterson, above n 50, 434.

60 Lisa Strelein, 'Native Title-Holding Groups and Native Title Societies: *Sampi v State of Western Australia [2005]*' (2005) 4 *Land, Rights, Laws: Issues of Native Title 3* 8.

61 Ibid 9.

62 *Yarmirr (HCA)* (2001) 208 CLR 1, 138-39.

63 *Living on Saltwater Country*, above n 13, 42.

64 Ibid 73.

65 See G McIntyre and G Carter 'Future Acts Affecting Native Title Offshore and Injunctive Relief' (Paper presented at *Native Title in the New Millennium – Representative Bodies Legal Conference*, Melbourne 16-20 April 2000). See also, Stephen Sparkes, 'Below Low Water: Marine Boundaries and Native Title – A Brief Overview' in G D Meyers (ed), *In the Wake of Wik: Old Dilemmas, New Directions in Native Title Law* (1999).

66 Behrendt, above n 29, 17.

67 Samantha Hepburn, 'Feudal Tenure and Native Title: Revising an Enduring Fiction' (2005) 1 *Sydney Law Review* 49, 57.

68 Ibid 81.

69 Peterson, above, n 50, 440 (emphasis added).

70 Behrendt, above n 29, 2.

71 (1996) 187 CLR 1 ('*Wik*').

72 *Yarmirr (HCA)* (2001) 208 CLR 1, 55.

73 *Gumana (FFCA)* [2007] FCAFC 23 (Unreported, French, Finn and Sundberg JJ, 2 March 2007) [92].

74 Behrendt, above n 29, 5.

75 Ibid 21.

76 [2004] FCA 472 (Unreported, Mansfield J, 23 April 2004).

77 Inconsistency here is in relation to extinguishment, not recognition. However, the test of inconsistency is the same for both, following *Ward*: see Behrendt, above n 29, 24.

78 *Living on Saltwater Country,* above n 13 8.

79 Ibid 22.

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

81 Greg McIntyre, 'The Ebb and Flow of Croker Island' (2001) 5(2) *NTN* 22, 22.

82 *Gumana (FFCA)* (1999) 101 FCR 171 makes it clear that for almost all practical purposes the equivalent of full ownership, which is axiomatically exclusive. Those limitations are when the fee simple is qualified by statute or changed by a previous title-holder: [84]-[85].

83 See Behrendt, above n 29, 25-27.

84 (1887) 12 AC 544 (Lord Watson).

85 (1864) 15 CB (NS) 600.

86 *Gumana (FFCA)* (1999) 101 FCR 171 [85].

87 Ibid [281], [283].

88 Gaskin, above n 57, 6.

89 See further, *Mabo v Queensland* (1988) 166 CLR 186.

90 It cannot be approved under the first classification set out by Mason J in *Gerhardy v Brown* (1985) 159 CLR 70, but must instead be seen as falling into the third classification.

91 *Gumana (FFCA)* [2007] FCAFC 23 (Unreported, French, Finn and Sundberg JJ, 2 March 2007) [86].

92 *Mabo (No 2)* 175 CLR 1.

93 *Living on Saltwater Country*, above n 13, 12.

94 Stuart B Kaye, 'Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait' (2001) 2 *Melbourne Journal of International Law* 409.

95 Ibid 410.

96 *Yarmirr (HCA)* (2001) 208 CLR 1, 89 (McHugh J).

97 *Mabo (No 2)* (1992) 175 CLR 1.

98 *Yarmirr (HCA)* (2001) 208 CLR 1, 55.

99 'Native title is not something which can be worked out square kilometre by square kilometre on a case by case basis according to the particular facts which may be true for November, but untrue for December.': McIntyre, above, n 81, 24.

100 See James Hebron, 'How Deep Does Native Title Go?' (2002) 5(11) *NTN* 182.

101 On the 'simple inconsistency test' see Paul Burke, 'Analysis of the High Court's Decision in the Croker Island Case' 5 *Native Title Law Policy and Practice* 100.

102 Howden, above n 55 77. See generally, Hepburn, above n 67.

103 Howden, above n 55 81.

104 Ibid 79.

105 (2002) 214 CLR 422 ('*Ward*').

106 Howden, above n 55 73.

107 *Gumana (FCA)* [2005] FCA 50 (Unreported, Selway J, 7 February 2005) [237].

108 Behrendt, above n 29, 34-35.

109 *Yarmirr (HCA)* (2001) 208 CLR 1, 51-53.

110 Ibid 54.

111 Ibid 53.

112 Ibid 59.

113 Gaskin, above n 57.

114 *Living on Saltwater Country*, above n 13, 8.

115 *Risk v Northern Territory* [2000] FCA 1779 (Unreported, French, Kiefel, Merkel JJ) [63].

116 See *Native Title (South Australia) Act 1994* (SA); *Land Titles Validation Act 1994* (Vic); *Native Title (Tasmania) Act 1994* (Tas).

117 *Yarmirr (HCA)* (2001) 208 CLR 1, 55.

118 Ibid 56.

119 Howden, above n 55, 76.