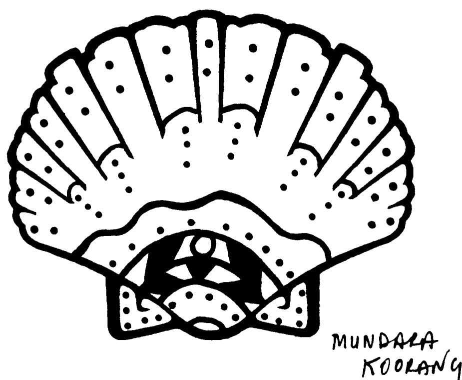
So long, and thanks for all the fish . . .

Jason Behrendt

Aboriginal fishing rights and the Commonwealth's acquisition power.



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On 1 January 1994 the *Native Title Act 1993* (Cth) (*NTA*) came into effect. The provisions requiring that, in certain circumstances, just terms compensation be paid to native title holders whose interests are extinguished or impaired are an important component of this Act. The practical effect of these provisions is that the *NTA* ensures that just terms compensation will be paid for the extinguishment of native title rights and interests in off-shore areas including Aboriginal fishing rights.[1] This article explains the necessity for these provisions.

The nature of Aboriginal fishing rights

Native title is a title based on the laws and customs of indigenous people which is recognised by the common law of Australia.[2] Until the Crown extinguishes native title, through an exercise of its sovereign power, native title continues and the only title residing in the Crown is a radical title. The Crown's radical title forms the cornerstone on which the common law has sought to legitimise Crown grants, and the tenure system, as it ensures that there can be no alienation of pre-existing property rights other than to the Crown.[3] Because the common law presumes that fishing rights are vested in the Crown[4] and that exclusive fishing rights cannot be created except by grant from Parliament,[5] the relationship between native title and radical title is as relevant in legitimising grants of fishing interests as it is to grants of land.

While the High Court did not elaborate on the application of native title rights to the sea, the general principles pronounced in *Mabo [No. 2]* laid the basis for Kirby P to acknowledge in *Mason v Tritton* that a 'right to fish is a recognisable form of native title defended by the common law of Australia'.[6] He regarded fishing rights arising from possession of native title to land or the sea-bed as being uncontroversial.[7] The degree to which they can arise independently from possession of native title to the sea-bed is yet to be clarified; however there is no logical reason why fishing rights cannot be proprietary in nature despite their independence from the sub-soil.[8] Nor is there any reason why various activities, such as hunting and fishing, cannot continue in the form of usufructuary rights after a proprietary title is extinguished. For present purposes, however, it is clear that native title fishing rights, whether usufructuary or otherwise, are valuable legal rights which are a burden on the Crown's title.

Traditional fishing rights can only be extinguished by legislation if the legislation contains a clear and plain intent to have that effect.[9] A law which merely regulates native title fishing rights or a law which is consistent with the continuation of those interests does not amount to an extinguishment.[10]

The point at which a valid exercise of legislative power amounts to an extinguishment of native title interests rather than mere regulation will ultimately be a question of fact as to whether the regulation is so stringent that traditional fishing rights can no longer be enjoyed.[11] As will be seen, the distinction between regulation and extinguishment is

significant in determining whether just terms compensation must be paid.

Section 51(xxxi) — a constitutional guarantee for traditional fishing rights

Section 51(xxxi) of the Constitution has the two-fold function to confer power on the Commonwealth to acquire property and to provide a guarantee to the dispossessed owner.[12] The second function represents a guarantee of the property protections that the common law has long provided.[13] The uniqueness of the provision in this respect has formed the cornerstone of its liberal interpretation.

Section 51(xxxi) places two limitations on the acquisition of property. It must be on just terms and it must be for a purpose in respect of which the Commonwealth has legislative power.[14] There are, however, a number of components which must be present before Aboriginal people will be entitled to compensation at the level of 'just terms' for extinguishment of their traditional fishing rights.

Must be a law with respect to an acquisition of property

As a general rule, s.51(xxxi) is the only source of the Commonwealth's power to acquire property and just terms can not be avoided merely because the acquisition is done for another purpose under which the Commonwealth has power to legislate.[15] Section 51(xxxi) places a limit on legislative action under other heads of power in s.51 as long as:

- The exercise of a grant of legislative power under s.51 does not by necessary implication require the acquisition of property unrestricted by just terms;[16] or
- The law is *wholly* within another head of power and can not be categorised as being partly or wholly an acquisition of property for the purposes of s.51(xxxi) even though property may be acquired.[17]

However, to the extent that a law can be categorised as an acquisition of property outside these two exceptions, just terms must be provided regardless of whether the law is authorised by another head of power in s.51. Indeed, the application of s.51(xxxi) has been broad.

Must not be an acquisition in a territory

Section 51(xxxi) does not apply to acquisitions in Commonwealth territories, as a result of the plenary nature of s.122 of the Constitution. In *Teori Tau*, the High Court held that s.122 is an independent source of power and is therefore not limited in the same manner as the legislative power conferred in s.51 of the Constitution.[18]

Must involve 'property'

In an approach consistent with the constitutional guarantee nature of the placitum, 'property' for the purposes of s.51(xxxi) has been interpreted liberally. It has been held to extend 'to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action'.[19] It includes 'any tangible or intangible thing which the law protects under the name of property'.[20] Furthermore, the fact that an interest is not assignable does not prevent it from being deemed property.[21]

In light of this liberal interpretation of property it would be extraordinary if native title fishing rights, whether proprietary, usufructuary or otherwise, were not considered property for the purposes of s.51(xxxi).

Must be an acquisition

In order to attract s.51(xxxi) there needs to be an acquisition. It is not necessary that the Commonwealth take possession and ownership of land in order for it to amount to an acquisition, exclusive possession for an indefinite period is sufficient.[22] Property will be deemed to be appropriated even if the interest acquired is only a portion of the interest concerned.[23]

Nor does the property have to go to the Crown. Just terms will be required if, as a result of Commonwealth action a third party acquires an interest in the property.[24] Likewise, the Commonwealth cannot authorise a third party to acquire land in order to avoid the payment of just terms.[25]

There are, however, important limits on what constitutes an acquisition. A mere extinguishment of an interest does not amount to an acquisition.[26] It is only where the Commonwealth gets a benefit or a financial advantage that an acquisition occurs.[27] Similarly, a mere regulation or restriction on use will not constitute an acquisition unless it gives the Commonwealth or someone else an interest of any kind in the property. There is also some authority to suggest that oppressive regulations can amount to an acquisition. While Deane J, in *Tasmanian Dams* agreed that laws which 'merely' regulated the use of land did not constitute an acquisition, he added that the situation became blurred when the Commonwealth gained a benefit by virtue of the regulation.[28]

In determining whether interference with or extinguishment of fishing rights amounts to an acquisition, it must be remembered that native title represents a burden on the Crown's radical title. It is only upon extinguishment that the Crown receives an unburdened interest. Therefore, by the very nature of native title, the Crown acquires an interest and a benefit through the wholesale extinguishment of native title and associated interests. Any law which prevents the continuance of traditional laws and customs will therefore automatically result in the Crown or another party getting a greater interest and will therefore constitute an acquisition. Accordingly, the extinguishment of traditional fishing rights would result in a benefit flowing to the Crown in the form of unencumbered ownership over certain resources. Even if the benefit flowing to the Commonwealth or a third party from such extinguishment is only financial, it still constitutes an acquisition.[29]

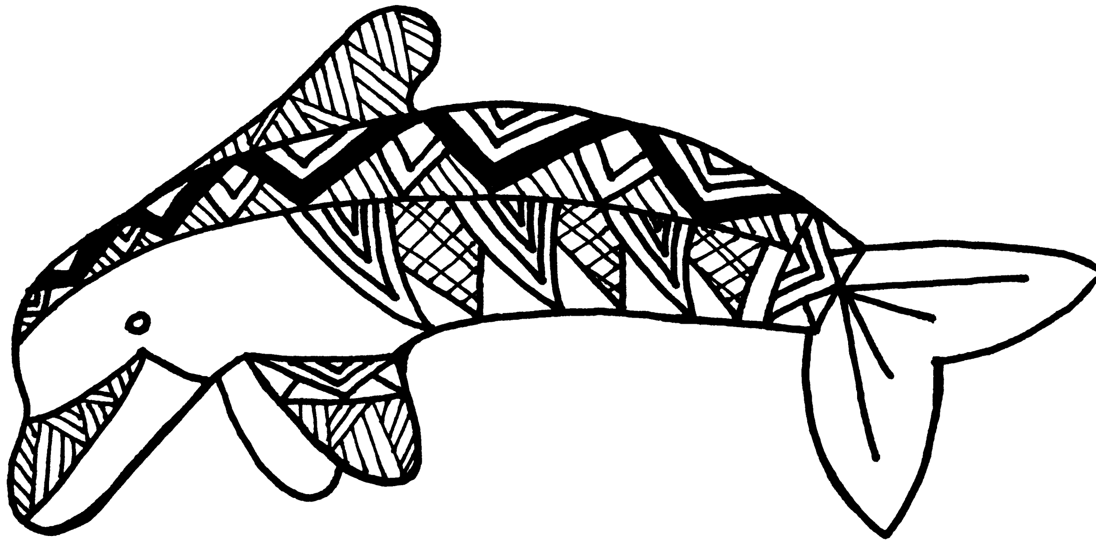
Just terms and off-shore Aboriginal native title rights

Whether just terms is payable for interference with native title fishing rights off-shore depends upon whether the power being exercised is a Commonwealth power granted under s.51. This is a difficult question as both Commonwealth and State power to legislate for off-shore areas are derived from a number of sources.

Source of Commonwealth power

In 1973 the Commonwealth Parliament passed the *Seas and Submerged Lands Act 1973* (Cth) (*SSLA*), the purpose of which was to declare Commonwealth sovereignty over the territorial sea as recognised in various international agreements.[30]

Australia's territorial sea extends 12 nautical miles from the coast. Excepting internal waters enclosed by bays and estuaries, the low water mark is where State sovereignty ends and Commonwealth sovereignty becomes exclusive.[31] Com-



monwealth legislative power in off-shore areas can be attributed to a number of sources of power.

The majority in the *Seas and Submerged Lands* case held that the external affairs power gives the Commonwealth broad power over off-shore areas and was broad enough to wholly support the *SSLA*.[32] The Court also confirmed that the external affairs power, s.51(xxix), is plenary and consequently a law purporting to be a valid exercise of that power does not have to be within the subject matter of another head in order to be valid.[33] It would most certainly be broad enough to support laws regulating or extinguishing Aboriginal fishing rights off-shore.

The Commonwealth also derives power to extinguish or regulate traditional fishing rights in off-shore areas by virtue of the fisheries power in s.51(x) of the Constitution. While conferring broad powers over the activity of fishing to the Commonwealth,[34] s.51(x) does not give the Commonwealth legislative competency with respect to the first three nautical miles from the coast or the internal waters of the States. This limitation results from the fact that 'territorial limits' for the purpose of s.51(x) is derived from the *Constitution*, as opposed to international law, and the territorial limit at the time of federation was three nautical miles.[35] It is clearly not as broad as s.51(xxix). While, the fisheries power provides the Commonwealth with legislative power over fisheries outside the three mile limit, it is difficult to see what power it adds given the broad interpretation of s.51(xxix).

While it may be suggested that the Commonwealth's power to legislate with regard to off-shore areas is sourced in s.122 of the Constitution, this is not the case. The territorial sea is not a 'Territory' for the purposes of s.122. The *Seas and Submerged Lands* case also clarified that the *SSLA* did not represent an exercise of s.122, but rather, fell wholly within s.51(xxix) of the Australian Constitution.[36]

Finally, the Commonwealth can also legislate with regard to off-shore areas if the law is with respect to other heads of power in s.51. Thus although s.51(xxix) and s.51(x) are interpreted broadly enough to cover most exercises of Commonwealth power in off-shore areas, there may be circumstances where the valid incidental operation of laws under other heads of power in s.51 affect off-shore regions.[37] There is nothing preventing the extinguishment or regulation of Aboriginal fishing rights through Commonwealth legislative action under these heads of power also. Indeed part of the off-shore settlement discussed below is a valid exercise of the legislative power conferred in s.51(xxxviii).

Commonwealth power, native title and just terms compensation

As a result of the Commonwealth's declaration of sovereignty in the *SSLA* and the fact that its legislative competency in off-shore areas is derived from s.51 of the Constitution, two important consequences arise. The first is that the Commonwealth acquires a radical title over off-shore areas and the power to extinguish any native title rights and interests in that area. The effect of the *SSLA* in this regard is apparent from the observations of Jacobs J in *Robinson v Western Australian Museum*;

> By s.6 of the *Seas and Submerged Lands Act 1973* (Cth) sovereignty in respect of the territorial sea is vested in and exercisable by the Crown in right of the Commonwealth. Thereby in respect of the territorial sea all prerogatives of the Crown are vested in and exercisable by the Crown in right of the Commonwealth.
>
> Sovereignty vested in the Crown in right of the Commonwealth in respect of the territorial sea carries with it the sovereign right of the Crown to dominion over the territorial sea over which by any law, including the law of the prerogative, the Crown has dominion.[38]

Although it has been suggested that the *SSLA* confers no proprietary rights on the Commonwealth,[39] this view is unsustainable with regard to the radical title which, in off-shore areas, can only belong to the Commonwealth by virtue of its sovereignty. Although further legislative action is required to transform the radical title into a full beneficial interest, the mere acquiring of sovereignty only creates the radical title.

Second, the extinguishment of native title by the Commonwealth gives rise to the requirement to pay just terms compensation. Native title fishing rights, regardless of their ultimate classification, constitute property for the purposes of s.51(xxxi). In addition, the extinguishment of native title interests invariably results in at least a financial benefit flowing to either the Commonwealth or a third party. Consequently, it is unlikely that an extinguishment of native title fishing rights could be described as a 'mere extinguishment' and thus avoid the requirement to pay compensation. Finally, because Commonwealth legislative power in off-shore areas is sourced in s.51 of the Constitution, the legislative power with regard to off-shore areas is limited by the Constitutional guarantee in s.51(xxxi). While it is theoretically possible for the Commonwealth to extinguish native title without paying

just terms if it is an exercise of legislative power under a head which by necessary implication requires the acquisition of property on unrestricted terms, it is difficult to see when this might occur in practice. In *Mutual Pools* the sections in s.51 which were said to have, by necessary implication, no requirement to pay just terms were s.52(ii) — taxation, and s.51(xxxiii) — acquisition of State railways on terms arranged between the Commonwealth and the States.[40] Neither of these heads of power could support a law which extinguished native title fishing rights. Likewise, the circumstances in which the extinguishment of native title fishing rights could be regarded as a means by which a law achieves an objective wholly within another head of power (not s.51(xxxi)), must also be limited. This is particularly so considering the severe consequences for indigenous people resulting from the extinguishment of their traditional fishing rights. Again it is difficult to conceptualise a law which could adopt such an extreme measure and still be regarded as only a means to achieving an objective wholly within another head of power.

Accordingly, the conclusion in *Mabo [No. 2]* by Deane and Gaudron JJ that 'any legislative extinguishment of [rights under common law native title] would constitute an expropriation of property to the benefit of the underlying estate, for the purpose of s.51(xxxi)',[41] is inescapable and equally valid to Aboriginal fishing rights. This is particularly so given the Constitutional guarantee status of s.51(xxxi) and its liberal interpretation.

State power, native title and just terms compensation

Despite the conclusion in the *Seas and Submerged Lands* case that the Commonwealth possesses sovereignty over the territorial sea, the States can legislate with regard to fishing along Australia's coast by virtue of power derived from a number of sources.

The States have always had power to legislate in off-shore areas by virtue of their extra-territorial power.[42] The extra-territorial operation of a State law is valid as long as the subject matter of the law has a 'sufficient connection with the State and its government'.[43] The High Court has indicated that 'the requirement for a relevant connexion between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connexion between the subject-matter of the legislation and the State will suffice'.[44]

However, State extra-territorial power is not unrestrained. Apart from the requirement that there be a sufficient connection with the State, a further limitation is that it must not conflict with a valid law of the Commonwealth. A significant limitation in this regard is s.16(1)(b) of the *SSLA* which provides that the assertion of sovereignty by the Commonwealth does not exclude the operation of State laws except 'in so far as the law is expressed to vest or make exercisable any sovereignty or sovereign rights' otherwise than provided by the Act.[45]

A law that has the effect of extinguishing a native title interest and thus converting a radical title into an unburdened title involves an act of sovereignty and s.16(1)(b) would prohibit the States from such an act in off-shore areas. Even presuming that such a law could be categorised as being for the peace, order and good government of a State it is arguable that State extra-territorial power does not go so far as to allow a State to interfere with the propriety interests arising from the Commonwealth's sovereignty.

It is at least arguable that the off-shore settlement remedies this situation. The off-shore settlement took the form of a number of legislative enactments, the most crucial of which are the *Coastal Waters (State Powers) Act 1980* (Cth) (*State Powers Act*) and the *Coastal Waters (State Title) Act 1980* (Cth) (*State Title Act*). The *State Powers Act* confers legislative power over the first three nautical miles of the territorial sea to the States. This power is very broad and includes the making of:

> all such laws of the State as could be made by virtue of those powers if the coastal waters of the State, as extending from time to time, were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the coastal waters of the State.[46]

The *State Powers Act* does not authorise a law which is inconsistent with a Commonwealth law.[47] However, in 1980, the *SSLA* was amended to clarify that s.16(1)(b) does not affect powers conferred on the States by the *State Powers Act* nor does it affect the ability of the States to pass laws with regard to off-shore areas to which proprietary rights have been vested in the States by Commonwealth legislation.[48] This is significant as the *State Title Act* vests title to the first three nautical miles of the territorial sea in the States. This transfer is subject to:

> (a) any right or title to the property in the sea-bed beneath the coastal waters of the State of any other person (including the Commonwealth) subsisting immediately before the date of commencement of this Act, other than any such right or title of the Commonwealth that may have subsisted by reason only of the sovereignty referred to in the Seas and Submerged Lands Act 1973.[49]

Importantly, this means that the *State Title Act* itself does not interfere with native title fishing rights. However, as a result of the 1980 amendments to the *SSLA*, the powers conferred in the *State Powers Act* have the effect of authorising State governments to deal with the first three nautical miles of the territorial sea as though it was part of the State. This power would appear to be broad enough to include the right to extinguish native title fishing rights, despite the fact that the original vesting of title in off-shore areas was subject to native title interests.

The States are under no obligation to pay just terms compensation for the extinguishment of native title fishing rights unless the legislative authority for an act is derived from the Commonwealth. Just terms compensation will not have to be paid for extinguishment in internal state waters or where the State is exercising its plenary extra-territorial power. However, since the *SSLA*, it is doubtful whether the States could extinguish native title where the Commonwealth held the radical title. This is definitely the case by virtue of s.16(1)(b) of the *SSLA*. This does not mean that they cannot validly regulate native title fishing rights through extra-territorial legislation, but to the extent that such regulation is so oppressive that it constitutes extinguishment, it is invalid. The inability of the States to extinguish native title in their coastal waters has been partly remedied by the off-shore settlement. However, as this legislative power is derived from the Commonwealth, indigenous Australians are entitled to just terms compensation for any extinguishment as required by s.51(xxxi).

Conclusion

By the very nature of the native title and the existence of the Crown's radical title, the extinguishment of native title interests will automatically result in the Crown or a third party receiving a proprietary benefit. The extinguishment of native title fishing rights will have the same effect. Crown ownership of fisheries and the public and private fishing rights which flow from that ownership cannot exist until native title fishing rights have been extinguished, or at least altered so that they are no longer exclusive. As soon as such interference takes place, the proprietary benefit that would flow to the Crown, or an individual in the case of an inconsistent grant, would constitute an acquisition. The requirement to pay just terms compensation would therefore arise.

The States are not normally bound by s.51(xxxi), however to the extent that exercise of State power to extinguish native title and thus acquire property is derived from a grant of legislative power from the Commonwealth, they, too, are bound to pay just terms. This is crucial in off-shore areas where the ability of the States to interfere with native title rights and interests is dependent on Commonwealth legislation in the form of the off-shore settlement.

It should be apparent from the above discussion that the provisions of the *Native Title Act* that require just terms compensation be paid for the extinguishment of native title rights and interests in off-shore areas were essential. Independent of any moral argument, they were necessary by virtue of the Constitutional guarantee in s.51(xxxi). While determining the content of compensation for the extinguishment of native title rights and interests in order to make such payment 'just' will no doubt be a matter of considerable difficulty, the guarantee of just terms should ensure that compensation is not merely nominal and takes into account factors such as spiritual attachment and the loss of culture that will flow from the extinguishment of traditional customs. This will be important to indigenous people who have already lost most of their land without compensation and hopefully may provide a financial incentive on all governments to extinguish native title only in extreme cases of so-called public need.

References

1. See ss.17 and 20 and s.23(4)of the *Native Title Act 1993* (Cth). See also the definition of 'native title' in ss.223(1) and 223(2) which include 'rights and interests' and 'traditional customs'. This includes traditional fishing rights.
2. *Mabo v Queensland [No.2]* (1992) 175 CLR 1, per Brennan J at 57.
3. *Mabo v Queensland [No.2],* above, at 54. See also Cohen, F., 'Original Indian Title', (1947*) 32 Minnesota Law Review*, 47-51.
4. *Murphy v Ryan* (1868) 2 Ir Rep CL 143 per O'Hagan J, at 149. See also *The Mayor and Corporation of Carlisle v Graham and Another* (1869) 4 LR Ex Chq 361, per Kelly CB at 367-368.
5. *A-G for British Columbia v A-G for Canada* [1914] AC 153 at 167-168.
6. *Mason v Tritton & Anor*, (1994) NSW Court of Appeal, (unreported) 30/8/94, per Gleeson J, Kirby P and Priestly JA, No. CA 406 20/93, at 9.
7. *Mason v Tritton & Anor*, above, per Kirby P, at 10.
8. Sweeney, D., 'Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia', (1993) 16 *University of New South Wales Law Journal*, 110-112.
9. *Mabo v Queensland [No.2],* above, per Brennan J at 64, Toohey J at 196, and Deane and Gaudron JJ at 111.
10. *Mabo v Queensland [No.2],* above, per Brennan J at 64-65.
11. *Mason v Tritton & Anor*, above, per Kirby P, at 30.
12. *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, per Dixon J, at 349.
13. Quick, J., and Garran, R., *The Annotated Constitution of the Australian Commonwealth*, Legal Books, Sydney, 1976, p.641.
14. *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, per Rich J, at 285.
15. *Johnston Fear & Kingham & The Offset Printing Co. Pty Ltd v The Commonwealth* (1943) 67 CLR 314, per Latham CJ at 318.
16. *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 68 ALJR 216, per Deane and Gaudron JJ at 231. Examples of this include taxation under s.52(ii) and acquisition of state railways on terms arranged between the Commonwealth and the States in s.51(xxxiii).
17. *Mutual Pools,* above, per Brennan J at 227. Thus, for example, the acquisition of property for the purpose of forfeiture resulting from an offence is not protected by s.51(xxxi) despite involving the acquisition of property.
18. *Teori Tau v The Commonwealth* (1969) 119 CLR 564 at 570.
19. *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, per Starke J, at 290.
20. *Minister of State for the Army v Dalziel,* above, per McTiernan J, at 295.
21. *Georgiadis v Overseas Telecommunications Corporation* (1994) 68 ALJR 272, per Brennan J, at 278.
22. *Minister of State for the Army v Dalziel*, above.
23. *Minister of State for the Army v Dalziel*, above, per Rich J, at 290.
24. *Tasmania v The Commonwealth* (1983) 158 CLR 1, per Mason J at 145. See also *Georgiadis v AOTC,* above, per Dawson J at 280.
25. *Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 per Williams J, at 188.
26. *Mutual Pools*, above, per Mason CJ at 229.
27. *Mutual Pools*, above, *per* Mason CJ at 222, Brennan J. at 244, and Deane and Gaudron JJ at 229.
28. *Tasmania v The Commonwealth,* above, per Deane J, at 283.
29. *Georgiadis v AOTC,* above, per Mason CJ, and Deane and Gaudron JJ, at 275.
30. See s.6 of the *SSLA*. For a handy summary to the political background to this Act see Cullen, R., *Australian Federalism Off-Shore*, Intergovernmental Relations in Victoria Program, 1985, esp. pp.9-20.
31. *NSW v Commonwealth* (1975) 135 CLR 337 (the *Seas and Submerged Lands* case).
32. *Seas and Submerged Lands*, according to Barwick CJ, at 365, McTiernan J, at 382, Mason J, at 470 and Murphy J, at 503-4, this was because it validly implemented treaty rights. Jacobs J, upheld the *SSLA* because it was a law with respect to a matter geographically external to Australia. (at 497-498).
33. *Seas and Submerged Lands*, per Barwick CJ, at 360 and Mason J, at 470.
34. *Bonser v La Macchia* (1968-69) 122 CLR 177. For a useful summary of the case law on this term see Waugh, J, *Australian Fisheries Law* , Intergovernmental relations in Victoria Program, 1988, pp.11-14.
35. *Bonser v La Macchia*, above, per Barwick CJ, and Kitto and Menzies JJ. See also Waugh J, above, pp.21-29.
36. *NSW v Commonwealth,* above, per Barwick CJ at 356-66. Jacobs too came to this conclusion at 497.
37. In *NSW v The Commonwealth,* above, Murphy J argued that the *SSLA* may also be supported by s.51(i) — trade and commerce, s.51(vi) — defence and, s.51(xv) — measurements (at 504).
38. *Robinson v Western Australian Museum* (1976-1977) 138 CLR 283, per Jacobs J, at 340.
39. See for example, *Robinson v Western Australian Museum* (1976-1977) 138 CLR 283, per Mason J, at 337.
40. See ref.17 above and accompanying text.
41. *Mabo [No.2],* above, per Deane and Gaudron JJ, at 111.
42. *Union Steamship Co. of Australia Pty Ltd v King* (1988) 166 CLR 1, at 10.
43. *Pearce v Florenca* (1976) 135 CLR 507 per Gibbs J, at 518; *Bonser v La Macchia* above, per Windeyer J, at 216 and Barwick CJ at 189; *Robinson v Western Australian Museum* above; and *Port MacDonnell Professional Fisherman's Assoc. Inc v South Australia* (1989) 168 CLR 340 at 372. See also Waugh J, above, p.4.
44. *Union Steamship of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14. Thus the Court unanimously endorsed the view of Gibbs J, in *Pearce v Florenca*, above, at 518.
45. Section 16(1)(b) of the *Seas and Submerged Lands Act 1973* (Cth) as amended by the *Seas and Submerged Lands Act 1980* (Cth). See also *Port MacDonnell Professional Fisherman's Association Inc. v South Australia* (1989) 168 CLR 340 at 373.
46. Section 5(a) *Coastal Waters (State Powers) Act 1980* (Cth).
47. Section 7(c) *Coastal Waters (State Powers) Act 1980* (Cth).
48. See s.16(2) of the *Seas and Submerged Lands Act 1973* as amended.
49. *See s.4, Coastal Waters (State Titles) Act 1980* (Cth).