The Torres Strait Islands: Constitutional and Sovereignty Questions Post-*Mabo*

Stuart B Kaye Tutor in Law, Faculty of Law, The University of Sydney.*

1. Background

The Torres Strait Treaty[1] is often cited by publicists as being one of the most creative maritime boundary agreements in the world. With its separation of the fisheries and seabed jurisdiction lines, its unique Protected Zone which seeks to preserve the way of life of the traditional inhabitants of the region, and its allocation of fisheries resources,[2] it is often held up as a model indicating the way complex issues can be resolved and entrenched points of view satisfied in maritime boundary disputes. This article will seek to critically examine one relatively minor aspect of the Treaty, specifically Australian recognition of Papua New Guinea (PNG) sovereignty over three small islands in the north of Torres Strait.

Torres Strait separates the northern tip of the Australian continent, Cape York Peninsula,[3] from the island of New Guinea, and is approximately seventy miles across. The Strait is dotted with small islands which are, virtually without exception, all under Australian control. The quite sizeable and inhabited Australian islands of Saibai and Boigu lie scarcely a mile or two off the PNG coast, separated by waters that are claimed by some to be so shallow as to permit a person to wade from one country to the other. This curious situation came about last century, before British annexation of the south-east portion of the island of New Guinea, at a time when Queensland was most anxious to ensure the Strait would not fall under the control of another European power, as well as to protect the natives of the Torres Strait Islands from violence, and to prevent the islands being used to evade Queensland revenue and immigration law.

At the time the Torres Strait Treaty was negotiated, PNG indicated its dissatisfaction with the existing situation of Australian sovereignty over all the Torres Strait Islands.[4] It

* This article is drawn from a chapter of an LLM thesis submitted to the University of Sydney in 1994. I would like to thank Professor I A Shearer, Mr D R Rothwell, and Professor B M Tsamenyi for their comments on earlier drafts of this paper, and for the suggestions of Professors J Goldring and G McCarry in the context of extra-colonial incompetence. Any errors or omissions remain my own responsibility.

1 Treaty between Australia and the Independent State of Papua New Guinea concerning the Maritime Boundaries in the Area between the Two Countries, including the Area known as Torres Strait, and Related Matters, Sydney, 18 December 1978, entered into force on the ratification of both States on 15 February 1985: *Aust TS* 1985 No. 5 (hereafter referred to as 'the Treaty').

2 For a detailed examination of the provisions of the Torres Strait Treaty, see H Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement' (1982) 76 *American Journal of International Law* 321; M E Lyon & R J Smith, 'The Torres Strait Treaty: Aspects of Implementation' in P J Boyce and M W D White (eds), *The Torres Strait Treaty: A Symposium* (Canberra: Australian National University Press, 1981), 26; K Mfodwo and B M Tsamenyi, *Enforcement of Marine Fisheries Law and Regulations: A Case Study of Papua New Guinea in International and Comparative Perspective,* Sydney (1992), 127.

3 *Wacando* v *Commonwealth* (1981) 148 CLR 1, 10 per Gibbs CJ.

4 This was most evident from statements made by PNG's then Foreign Minister, Sir Maori Kiki, made to the National Press Club in Canberra, in July 1976: see P J Boyce, 'The Politics and Diplomacy of the Torres Strait Treaty Negotiations' in Boyce and White, *supra* note 2, 7 and the chronology of the Treaty negotiations in the report of the Joint Committee on Foreign Affairs and Defence, *The Torres Strait Boundary*, Canberra (1976), 6–12 (hereafter cited as 'JCFAD' (1976)).

saw, with some justification, the presence of Australian islands so close to its coast as damaging to its sovereignty, and the perpetuation of an historical curiosity.[5] A similar view of the unsatisfactory nature of Australian sovereignty over the most northerly islands in Torres Strait had been taken by, amongst others, Sir William McGregor, the Administrator of what was then British New Guinea in 1893,[6] Sir Samuel Griffith,[7] and briefly the Australian Government.[8] However, due to perceived constitutional impediments preventing the cession of Australian territory to PNG,[9] the Treaty maintained the nineteenth century position, except for measures contained in Article 2(3).
Article 2(3) of the Treaty provides (in part):

> Australia recognises the sovereignty of Papua New Guinea over —
> (a) the islands known as Kawa Island, Mata Kawa Island and Kussa Island.

These three small islands lie just off the coast of mainland PNG, in the vicinity of Boigu Island. Prior to the Treaty negotiations, the islands had been believed to be part of Queensland, and had been administered by that State since the nineteenth century. The Australian Government was able to relinquish control over the islands to PNG, while avoiding the constitutional difficulties of such a transfer by a remarkable piece of research. In what must be a unique situation, Australia purported to prove that islands which it had administered as part of its territory for over eighty years were in fact never Australian.[10] If they were not Australian territory, then Australia could recognise PNG sovereignty in them without constitutional problems, and go at least a small way to meeting PNG's desire to correct the inequitable sovereignty situation.

The focus of this article is to probe the validity of the Commonwealth's researched conclusion that Kawa, Mata Kawa and Kussa Islands were never part of Queensland, and to examine the constitutional issues raised by questioning this conclusion, particularly in the light of *Mabo* v *Commonwealth.*[11] In order to do this, however, some consideration of the mechanisms by which most of the islands in Torres Strait became part of Queensland is necessary.

2. The Boundaries of Queensland

Queensland was made a colony by Letters Patent[12] in 1859, being separated from the northern portion of New South Wales.[13] The colony succeeded to all New South Wales territory north of the line that remains the boundary between the two States. This clearly indicated the continental extent of Queensland territory, but did not make it clear as to the reach of the colony into the Coral Sea and Torres Strait, as this depended on the extent of the colony of New South Wales prior to 1859. The original Commissions of Governor

5 Burmester, *supra* note 2, 323.
6 JCFAD (1976), *supra* note 4, 16–17.
7 K W Ryan and M W D White, 'The Torres Strait Treaty' (1981) 7 *Australian Yearbook of International Law* 87, 94; JCFAD (1976), *supra* note 4, 17.
8 See (1981) 44 *Australian Foreign Affairs Record* 41, Department of Foreign Affairs, Canberra.
9 These are discussed below.
10 Professor Prescott has said it is the only instance of which he is aware of a country undertaking research to prove it does have a claim to territory: J R V Prescott, *Australia's Maritime Boundaries*, Canberra (1985), 121–122.
11 (1992) 107 ALR 1.
12 'Letters Patent Constituting the Colony of Queensland' dated 6 June 1859: Reprinted in *Public Acts of Queensland* (Sydney: Butterworths, 1937) 2: 569.
13 Excluding what became the Northern Territory, which was ceded to South Australia in 1863. See F W S Cumbrae-Stewart, 'Australian Boundaries' (1965) 5 *University of Queensland Law Journal* 4.

Phillip issued in 1786[14] and 1787[15] stated that New South Wales included 'all islands adjacent in the Pacific Ocean'.[16] Requests in the early 1860s for guano licences on islands offshore of the new colony necessitated the clarification of the colony's extent, and Queensland requested the Colonial Office to advise it upon the question.[17]

The Law Officers responded in 1863, indicating that Queensland jurisdiction extended over all territory and islands that were part of New South Wales in 1855, and any islands within three miles of such territory.[18] For an island to be part of New South Wales and be beyond the three mile limit required the island to be occupied by British subjects.[19] Professor Lumb has noted that in 1855, none of the islands in Torres Strait was so occupied,[20] and consequently none became part of Queensland at its incorporation.

By the 1870s, the Queensland Government was anxious to extend the colony's authority to the numerous islands just offshore, and in response to these concerns, in 1872 new Letters Patent[21] were issued annexing all islands within sixty miles of the Queensland coast permitting the Governor of Queensland to transfer them into the colony.[22] Torres Strait, however, is more than sixty miles across, so the more northerly islands within the Strait were not made part of Queensland.[23]

In 1878, new Letters Patent were issued, empowering the Queensland Governor, upon the concurrence of the Queensland Parliament, to incorporate certain islands into the colony.[24] These Letters Patent (together with an illustrative chart)[25], purported to annex a number of named islands in the north of Torres Strait.[26] In 1879, the Queensland Parliament and Governor through the mechanism of the *Queensland Coast Islands Act* 1878 (Qld) and Proclamation accepted the islands.[27] No further extensions of Queensland

14 *Historical Records of Australia*, Series 1 (Sydney: Library Committee of the Commonwealth Parliament, 1914–1925) 1:1–2.

15 *Id* 1:2–16.

16 *Id* 1:2. See also R D Lumb, *The Maritime Boundaries of Queensland and New South Wales* (St Lucia: University of Queensland Press, 1964), 4.

17 D P O'Connell & A Riordan, *Opinions on Imperial Constitutional Law* (Melbourne: Law Book Co, 1971), 265–6; R D Lumb 'The Torres Strait Islands: Some Questions as to their Annexation and Status' (1990) 19 *Federal Law Review* 154, 155 (hereafter cited as Lumb (1990)).

18 O'Connell and Riordan, *supra* 17, 266. See Lumb (1990), *supra* note 17, 156–157.

19 O'Connell and Riordan, *supra* note 17, 270–271. The view of the Law Officers was that for unoccupied islands (ie by British subjects), Britain may have had inchoate title based on discovery and/or the issue of guano licences, but that title would lapse on occupation by another power: Lumb (1990), *supra* note 17, 158–160.

20 Lumb (1990), *supra* note 17, 158.

21 Dated 30 May 1872; reprinted in *Queensland Statutes*, Sydney (1963), 2:712.

22 The mechanism was to create a new Crown Colony out of the islands with the Queensland Governor as its Administrator. The Governor was then authorised to fuse the new colony with Queensland. This method (based on the 'Rolt-Bovill opinion') was first used to annex the Penguin Islands off the coast of what is now Namibia to the Cape Colony in 1866: Lumb (1990) *supra* note 17, 161–162. For the opinion itself, see O'Connell and Riordan, *supra* note 17, 274–275, and a similar opinion for Queensland at 281–282.

23 This appears to have quickly become a point of some concern in the Colonial Office, and prompted moves to bring about the annexation of these islands that led to the 1878 Letters Patent discussed below: see Colonial Office documents reproduced in JCFAD (1976), *supra* note 4, Appendix XI, 127–128.

24 Lumb (1964), *supra* note 16, 6–9.

25 This chart was not actually part of the Letters Patent but was forwarded with a copy of them to the Governors of Queensland and New South Wales to illustrate the boundary graphically.

26 The Letters Patent are reproduced in Appendix 1 to the document entitled 'Status of the Islands Kawa, Mata Kawa and Kussa', annexed to Joint Committee on Foreign Affairs and Defence, *The Torres Strait Treaty: Report and Appendixes*, Canberra (1979), Annex, Appendix 1 (hereafter cited as JCFAD (1979) Annex). See also, *Queensland Statutes*, Sydney (1963), 2:716.

27 The Queensland Supreme Court was of the view that the islands were annexed to Queensland by exercise of Crown prerogative with the consent and concurrence of the Legislature of the colony: *R* v *Gomez* (1880) 5 QSCR 189, 190–1 per Lilley CJ (with Harding J concurring).

boundaries were made by Letters Patent, although later Letters Patent indicating the then existing extent of Queensland were made.[28] Of relevance though is the passing of the *Colonial Boundaries Act* 1895 (Imp). This Act was passed to allay doubts raised as to the validity of the 1878 Letters Patent (and other colonial annexations on the same pattern), and sought to confirm the boundaries made in 1878, and dating their validity from their acceptance by the Colonial Legislature and Proclamation in 1879.[29]

The efficacy of the Letters Patent, and the *Queensland Coast Islands Act* 1878 (Qld) has been examined by the courts on at least two occasions since 1879. In *R* v *Gomez*[30] the Queensland Supreme Court held that the Letters Patent, together with the approval of the legislature of the colony (in the form of the *Queensland Coast Islands Act* 1878 (Qld)) were sufficient to annex Possession Island in the extreme south of the Strait.[31]

In more recent times, the High Court considered essentially the same question in *Wacando* v *Commonwealth*,[32] although in the context of the more northerly Darnley Island. There the plaintiff argued that the Letters Patent and complementary Queensland legislation were unable to annex territory to the colony, and that the *Colonial Boundaries Act* 1895 (Imp) had no application to rectify the deficiency in the instrument and legislation.[33] The High Court emphatically rejected this argument, with all the judges holding that Darnley Island was part of Queensland. Three members of the Court favoured incorporation of the island by virtue of the Letters Patent, Act and Proclamation,[34] while two others felt it was clear that the *Colonial Boundaries Act* 1895 (Imp) operated to confirm the annexation made in 1879, even if that was inoperative of itself.[35] Brennan J noted the effect of the *Colonial Boundaries Act* 1895 (Imp) made it unnecessary to consider the effect of the Letters Patent and complementary legislation.[36]

3. The Commonwealth's Case

On 31 March 1978, the then Minister for Foreign Affairs, Mr Peacock, issued a statement that research had shown that Kawa, Mata Kawa and Kussa Islands had not been annexed to Queensland in 1879, as had been thought, and accordingly these islands were to be under PNG jurisdiction.[37] As noted above, PNG sovereignty of the three islands was expressly recognised in Article 2(3) of the Treaty.

However given that there is High Court and other authority to the effect that islands in Torres Strait were effectively incorporated into Queensland, for Australia to validly recognise PNG sovereignty over Kawa, Mata Kawa and Kussa Islands, it must be demonstrated that these three islands were not part of the 1879 annexation, nor subsequently incorporated into Queensland. The Commonwealth's case therefore focuses on the 1878 Letters Patent, particularly in relation to the islands they purported to authorise Queensland to accept.

The Commonwealth's case for the islands never being part of Queensland is contained

28 This view of all subsequent Letters Patent, not seeking to extend or diminish the earlier boundaries was taken by Gibbs CJ in *Wacando* v *Commonwealth* (1981) 148 CLR 1, 19.

29 See copies of the Colonial Office Circulars reprinted in O'Connell & Riordan, *supra* note 13, 299–300; see also Lumb (1990), *supra* note 13, 163.

30 (1880) 5 QSCR 189.

31 *Id* 190–191 per Lilley CJ, 191 per Harding J.

32 (1981) 148 CLR 1.

33 *Id* 3.

34 *Id* 16 per Gibbs CJ (with whom Aickin J agreed at 28), 24 per Mason J.

35 *Id* 27–28 per Murphy J, 30 per Wilson J. Both Gibbs CJ and Mason J held that if the Letters Patent were ineffective, then the *Colonial Boundaries Act* would confirm the annexation of the islands in any case: 16–18 per Gibbs CJ, 24–25 per Mason J.

36 *Id* 30.

37 See the preamble to JCFAD (1979) Annex, *supra* note 26.

in a document entitled 'Status of the Islands of Kawa, Mata Kawa and Kussa'.[38] The analysis that the islands are not Australian appears to turn on the interpretation of 'Talbot Islands' in the 1878 Letters Patent which dealt with the boundaries of Queensland. The Australian Government is of the view that when this expression is considered together with charts of the region, it cannot include the three islands. Rather, the 'Talbot Islands' must necessarily be limited to Boigu, (formerly Talbot Island)[39] and its small neighbours Aubusi Island and Moimi Island.[40] In addition, the document makes much of the Admiralty chart circulated with the 1878 Letters Patent which shows the line indicating the islands under Queensland control.[41] Although the chart does not show the three islands currently in issue, the indicating line does run physically south of where these islands are now known to be.

Griffin has directed much forceful criticism at the evidence relied on by the Commonwealth in attempting to alienate the islands. He has noted that significant doubt exists as to the interpretation of the 'Talbot Islands', and that the Commonwealth's conclusion that it refers only to Boigu and to the two islands closest to it may not be well founded.[42] His assertion is supported by much historical evidence which was apparently drawn from documents at the disposal of the Commonwealth, or annexed to its statement, and appears to have been conceded as having some weight by the Government.[43] Notable among this evidence is a reference to a statement by Sir Samuel Griffith in 1879 (the year of the Queensland legislation and Proclamation that incorporated the islands), that the Talbot Islands included the three islands in question.[44]

Griffin also questions the usefulness of the Admiralty chart that accompanied the Letters Patent. It ought to be noted that the chart was merely illustrative, and is not referred to in the instrument (nor in the *Queensland Coast Islands Act* 1878), and so has no legal force of itself. In fact, the original Queensland copy of the chart was lost, and only a copy in the possession of the New South Wales Government was available to the Canberra researchers.[45] Griffin notes the chart was out of date at the time the boundary line was drawn as indicated by the absence of the three islands from it.[46] As such, Griffin argues, it should be given little weight, when compared to the subsequent plethora of maps which

38 JCFAD (1979) Annex, *supra* note 26.

39 The name was apparently given to the island by Captain William Bampton of the *Hormuzeer* on 26 August 1793. It appears he sighted no other islands in the vicinity, except the mainland of New Guinea: JCFAD (1979) Annex, *supra* note 26, 1.

40 JCFAD (1979) Annex, *supra* note 26, 1-2 and 4-5. That this is a significant point in the Commonwealth's analysis is agreed by J Griffin, 'Territorial Implications in the Torres Strait' in Boyce and White, *supra* note 2, 92, 99; and appears to be conceded as such in a comment on his paper prepared by the Department of Foreign Affairs and the Attorney-General's Department, 'Status of the Islands of Kawa, Mata Kawa and Kussa' in Boyce and White, *supra* note 2, 138.

41 JCFAD (1979) Annex, *supra* note 26, 2-4. See also Griffin, *supra* note 40, 99; Department of Foreign Affairs and Attorney General's Department, *supra* note 40, 138–139.

42 Griffin, *supra* note 40, 101–105 and 127–128.

43 The Commonwealth's response to Griffin's assertions regarding the meaning of 'Talbot Islands' was as follows: '[I]t needs to be pointed out that a lack of certainty as to what is comprehended by the term 'Talbot Islands' does not invalidate the conclusions reached by the Government's research as to the boundaries of the area in question. Any resulting lack of certainty in the text of the Letters Patent only confirms the significance of the accompanying chart': Department of Foreign Affairs and Attorney-General's Department, *supra* note 40, 138.

44 Griffin, *supra* note 40, 128. Griffin quotes the 1979 Parliamentary Committee Report, which wrongly ascribes Sir Samuel Griffith as Premier of Queensland when at the time he was Shadow Attorney-General: Joint Committee on Foreign Affairs and Defence, *The Torres Strait Treaty: Report and Appendixes*, Canberra (1979), 8.

45 JCFAD (1979) Annex, *supra* note 40, 3.

46 Griffin notes that from the researches of Professor Dalton of James Cook University, the chart was dated as 1 March 1862, which was 14 years prior to the first survey 'showing the Talbot islands as a group': Griffin, *supra* note 40, 106–107.

followed, showing the islands to be part of Queensland.[47] The Government's response, however, effectively questions the assertion that the Admiralty chart was out of date.[48]

Certainly, had the sovereignty of Kawa, Mata Kawa and Kussa Islands been disputed between Australia and PNG, Australia would have had a far stronger case. The Commonwealth's case for disowning the islands rests upon a 'lost' chart that has no legal consequences flowing from it of itself, and certainly may be treated as ambiguous given that it does not even show the islands. Further, as late as 1976, Canberra was producing 'official' maps showing the islands to be part of Australia, without objection from PNG.[49] The production of widely circulated maps showing the islands as part of Queensland from the late nineteenth century, without any objection (even after PNG independence), would on the precedent of the *Temple of Preah Vilhear* case,[50] be sufficient to establish the islands as Australian. In addition, there are the actions of the Administrator of British New Guinea (the entity in international law which was one of the predecessor states of PNG[51]), in not pursuing headhunters from Dutch New Guinea who sheltered on Mata Kawa Island, much to his chagrin. Sir William McGregor complained strenuously over the incident, and in doing so expressly stated the island was 'unnaturally in the jurisdiction of Queensland'.[52]

4. Incorporation of Territory and Colonial Boundaries

Even if the Australian Government's analysis of the islands being successfully annexed to Queensland by the 1878 Letters Patent is correct, that does not necessarily preclude the possibility that the islands were part of Queensland. There are two ways in which the islands may have become part of Queensland in spite of the intentions of the Colonial Office as expressed in the Letters Patent.

First, there is some authority, dealing with the South Australian/Victorian border,[53] that is suggestive that Queensland could incorporate the islands through administrative action. In 1836, Letters Patent created the 'Province of South Australia', which was to have its eastern border along 'the 141st meridian' from 'the Southern Ocean to the 26th parallel'. Subsequent surveys erroneously placed the physical border in 1847 two and one quarter miles west of the true meridian, and this was used as the border between the colonies of South Australia and New South Wales. In 1866, New South Wales and South Australia adjusted their boundaries to physically reflect the true meridian but Victoria, which had been created from New South Wales territory south of the Murray in 1850, refused to surrender two miles and nineteen chains of territory it had acquired.[54]

In the *State Boundaries* case[55] both the High Court and Privy Council on appeal held

47 Griffin, *supra* note 40, 107–112.

48 Department of Foreign Affairs and Attorney-General's Department, *supra* note 40, 139.

49 See JCFAD (1979) Annex, *supra* note 26, 4–5. The Commonwealth as late as 1976 was producing maps that included Kawa, Mata Kawa and Kussa as Australian territory: JCFAD (1976), *supra* note 4, Map 1.

50 *Temple of Preah Vilhear* ICJ Reports 1962, 6. In that case, the official use of and acceptance by Thailand of a map showing a border was deemed to amount to an acceptance of that border as the official one, even in the face of possibly conflicting treaty terms. Although for most of the relevant period (1906–75) Papua was under Australian control, there were still no protests as to the various maps incorporating the three islands as part of Australia.

51 PNG was created in 1975 out of the Australian territory of Papua, and the United Nations Trust Territory of New Guinea. Papua was placed under Australian control in 1906, having formerly been British New Guinea.

52 Griffin, *supra* note 40, 97–98.

53 *South Australia* v *Victoria (the 'State Boundaries case')* (1912) 12 CLR 667 (HC); (1914) 18 CLR 115 (PC).

54 An extremely detailed exposition of the facts of the case can be found in the judgment of Griffith CJ (1912) 12 CLR 667, 672–99; and a slightly briefer version in the judgment of Lord Moulton (1914) 18 CLR 115, 117–136. A most succinct summary is that of Professor Cumbrae-Stewart, *supra* note 13, 10–12.

55 (1912) CLR 667.

that the Letters Patent establishing the boundaries of South Australia gave implied authority to the Governors of South Australia and New South Wales to physically establish where the boundary was. Once physically fixed, that physical boundary was to be the border even if it in reality differed from the boundary authorised by the Letters Patent.[56] As such, Victoria could retain the lands west of the 141st meridian, in spite of the Letters Patent. In the appeal judgment, Lord Moulton for the Privy Council stated:

> In the case of such a bundary as that defined by the Letters Patent it was necessary in order to accomplish this that there should be an Executive act so defining and representing the enacted boundary; and seeing that such an Executive act was and must have been known to be essential to render the provision in the Letters Patent a boundary such was needful for the purposes of the Act, their Lordships have no doubt that on well-known principles of the interpretation of Statutes the Letters Patent must be taken to have implied and authorized the delimitation and determination of the effective boundary by such an Executive act.[57]

If a similar interpretation could be made of the 1878 Queensland Letters Patent, then the Governor (presumably together with the Parliament) of Queensland had implied authority to establish which islands were incorporated pursuant to it. If Queensland erroneously believed the 'Talbot Islands' included more islands than they should, the physical manifestation of the error through acts of administration over all the islands should make them part of Queensland. Administrative acts by British New Guinea conceding Queensland jurisdiction over the islands would only seem to strengthen the analogy.[58] This argument need not be damaged by the existence of the accompanying chart, as it is not legally a part of the Letters Patent, and even if it were, it does not show all the islands in the region. For example, neither the chart nor the Letters Patent shows or refers to Kaumag Island, immediately to the north of Saibai Island. The Letters Patent refer to Saibai Island in the singular, not as an island group, yet this island appears to have been successfully incorporated into Queensland. To reject the above argument is to suggest that Kaumag Island was wrongly annexed under the Letters Patent, which in itself would create similar constitutional difficulties.

As an additional ground for his decision in the *State Boundaries* case, Sir Samuel Griffith (with whom Barton and O'Connor JJ concurred) stated:

> Effective occupation is ordinarily the best proof of title to territory. In my judgment, for the reasons already given, the effective occupation which followed on the adoption of Wade's and White's line [that is, the incorrect physical boundary] was conclusive upon all persons unless and until the boundary should be otherwise determined by competent authority.[59]

Competent authority would be the exercise of the Crown prerogative to alter colonial boundaries, and as such was not open to challenge by the High Court. The High Court could not therefore correct the boundary.[60]

The acts referred to above, namely asserting jurisdiction over the islands, periodic visits, and the printing of maps showing the islands as part of Queensland would also amount to 'effective occupation' at international law,[61] given that the islands are, and have always been, uninhabited. As such, they could only be removed from Queensland by exercise of the Crown prerogative. Regardless of where and in whom this prerogative

56 (1912) 12 CLR 667, 700 per Griffith CJ; 706 per Barton J; 711–712 per O'Connor J; 733 per Isaacs J; (1914) 18 CLR 115, 140–142 per Lord Moulton.

57 (1914) 18 CLR 115, 140.

58 See note 51.

59 (1912) 12 CLR 667, 703.

60 (1912) 12 CLR 667, 703–706; cf the judgment of Isaacs J (at 717–720) who questions whether the alteration to correct the boundaries of South Australia would be an exercise of the prerogative at all, given the self-governing nature of the colonies. However, this does not materially affect Griffith CJ's contention.

61 This is discussed in a different context immediately below, *infra* note 65.

power now resides, it is subject to the Constitution, whose requirements for the exercise of such power have not been met.[62]

The second argument is far more tenuous, and is based on colonial extra-territorial competence. In the later half of the nineteenth century, British law officers were generally of the view that colonial legislatures were extra-territorially incompetent.[63] From this doctrine came the doubts that the annexation of the islands by Letters Patent, with colonial legislation and a proclamation of the Queensland Governor led to the *Colonial Boundaries Act* 1895. While the occupation of territory by Queenslanders could constitute a basis for British sovereignty over unclaimed territory, it was thought that such a claim could not make such territory part of Queensland.

This view of colonial extra-territorial incompetence has undergone a review by the High Court in the last twenty years, and is open to question. In *Wacando*, Mason J, in dealing with the validity of the 1878 Letters Patent, rejected the notion that the Australian colonies' legislatures were extra-territorially incompetent, confirming a number of the High Court's previous decisions.[64] The corollary of this conclusion is that a colony ought also to have extra-territorial executive competence. That is to say, the government of each of the colonies, within an imperial context, should be competent to perform administrative and executive acts beyond its boundaries. Were this not the case, extra-territorial legislation would be valid, but completely ineffective, as any act to enforce it, or action based upon it would be invalid, which is a patently illogical result.

In international law, there is a significant body of authority dealing with the acquisition of territory. For small uninhabited islands like Kawa, Mata Kawa and Kussa, discovery may confer an inchoate title upon the flag State of the discovering vessel but, in order to be confirmed, the State will need to perform other acts.[65] The extent of the action required will depend upon the territory in question, and the claims or actions of other States.

From the 1880s Queensland purported to assert its jurisdiction over the three islands, as can be evidenced by official Queensland government publications showing the islands to be part of Queensland. Queensland law was applied to the islands, and presumably Queensland officials occasionally visited the islands in the course of their work on Boigu Island. No other State or colony claimed to have title to the islands and, as noted above, the Commonwealth as late as 1976 was still of the belief the islands were part of Queensland. Were the colony of Queensland in the 1880s and beyond an independent State, these actions would certainly have been sufficient to establish good title over the islands in international law. The only difficulty then preventing the islands being incorporated into Queensland (without the Letters Patent) would be Queensland's colonial status.

Similarly, it could be argued that the annexation of the islands was accomplished by the *Queensland Coast Islands Act* 1879 alone, regardless of the Letters Patent. Since it was certainly the intention of the Queensland Parliament to annex all the islands in the

62 See note 5.

63 *MacLeod* v *Attorney-General (NSW)* [1891] AC 455 (PC). A non-judicial example of this can be evidenced by the perceived necessity of the *Statute of Westminster* to remove the extra-territorial incompetence of the Dominions. See generally, P Hanks, *Constitutional Law in Australia* (Sydney: Butterworths, 1991), 175–178.

64 (1981) 148 CLR 1, 20–21. His Honour cited *Bonser* v *La Macchia* (1969) 122 CLR 177; *Seas and Submerged Lands Case* (1975) 135 CLR 337; *Pearce* v *Florenca* (1976) 135 CLR 507; and *Robinson* v *Western Australian Museum* (1977) 138 CLR 283, as authority for his conclusion.

65 See *Island of Palmas Case* 2 RIAA 829; *Legal Status of Eastern Greenland Case* PCIJ Reports, Series A/B, No 53 (1933); *Clipperton Island Case* reprinted in (1932) 26 *American Journal of International Law* 390; *Minquiers and Ecrehos Case* ICJ Reports 1953, 47.

Strait,[66] and the colonial Government did not prepare an Admiralty chart to reflect its wishes, then the islands would be part of Queensland. While it would seem difficult to maintain such an argument, given the express references to the Letters Patent in the Act,[67] a number of High Court judgments at least leave open the question of the Queensland legislation being the actuating mechanism of the annexation of the Torres Strait Islands.[68]

5. Constitutional Implications and *Mabo*

If the three islands were part of Queensland, was it open to the Commonwealth to renounce Australian sovereignty by recognising PNG's sovereignty over them? Certainly the annexation of territory lies within the prerogative of the Commonwealth, and *prima facie* would be valid,[69] but there is some doubt as to whether the cession of territory lies within the exclusive power of the Executive in peacetime.[70] Certainly in every case where Australia has relinquished its jurisdiction over territory with PNG and Nauru, it has done so in concert with an Act of Parliament. In British constitutional law, a convention appears to have built up since the middle of the nineteenth century that the approval of Parliament is necessary to dispose of territory, except in time of war.[71] If this is so, then it seems an Act of Parliament consenting to the cession of territory would be necessary, although it is worth noting that the *raison d'être* behind the convention was the preservation of British citizenship and privileges upon the inhabitants of the ceded territory.[72] Given that the isles in question here are uninhabited, the convention may have no application in any case.

Whatever the position with the cession of territory, all Commonwealth power, legislative and executive, must be subject to the Constitution, and as the ceding of the islands to PNG has the effect of altering the boundaries of Queensland, it must be done in accordance with s 123.[73] Section 123 provides:

> The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed upon, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

66 As seen from subsequent Queensland Government maps.

67 This also does not sit well with Lilley CJ's judgment in *R* v *Gomez* (1880) 5 QSCR 189, where his Honour indicated it was Imperial Crown prerogative ultimately responsible for the annexation of the islands, not the Queensland Parliament alone.

68 See the judgments of Wilson J in *Wacando* v *Commonwealth* (1981) 148 CLR 1, 29, and Brennan J in *Mabo* (1992) 107 ALR 1, 15.

69 For example, Burmester cites the Coral Sea Islands Territory as an example of the Commonwealth exercising its prerogative to acquire territory, independent of any Imperial action to acquire the territory: H Burmester, 'Outposts of Australia in the Pacific Ocean' (1983) 29 *Australian Journal of Politics and History* 14, 17.

70 Hood Phillips and Jackson observe that there appears to have developed a convention in British constitutional law that the Crown may only cede territory in peacetime with the approval of Parliament, either before or at least in confirmation of the cession: 0 Hood Phillips and P Jackson, *Constitutional and Administrative Law* (7th ed, London: Sweet and Maxwell, 1987), 287.

71 Roberts-Wray examines the major instances of the cession of British colonial territory from 1850 to the 1960s. In the majority of cases Parliamentary approval was sought: K Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966), 117–126); cf *Damodhar Gordhan* v *Deoram Kanji* (1875) 1 AC 332, where the Privy Council cast doubt on the necessity of the consent of Parliament.

72 Roberts–Wray is of the view that the concern over the maintenance of nationality are the 'principal, and the only substantial reason' for the approval of Parliament: Roberts–Wray, *supra* note 71, 126.

73 The constitutional problems caused by the cession of Torres Strait islands to PNG are discussed in Ryan and White, *supra* note 7, 88–9. Lumb is of the view that any such cession would 'fall foul' of s 123 of the Constitution: R D Lumb 'Legal Aspects of the Torres Strait Treaty' in Boyce and White, *supra* note 2, 52 (hereafter cited as Lumb (1981)). The 1976 Parliamentary Committee Report also took this view: JCFAD (1976), *supra* note 4, 60–4.

Clearly, if the removal of the three islands 'diminishes' the 'limits of Queensland', then there is a requirement that the cession of those islands to PNG be approved by a referendum in Queensland, and the approval of the Queensland Parliament.

Even if s 123 is not necessary in the process, there is still the requirement of the consent of the Parliament of a State to surrender part of its territory, under s 111, as was the opinion of Sir Isaac Isaacs when Commonwealth Attorney-General.[74]

The only potential way of avoiding the requirements imposed in the Constitution was suggested by Sir Isaac Isaacs in the opinion noted above. He was of the view that as Australia was to be treated as a self-governing colony for the purposes of the *Colonial Boundaries Act* 1895 (Imp), by virtue of s 8 of the *Commonwealth of Australia Constitution* 1900 (Imp), the islands in Torres Strait could be ceded to what was then British New Guinea by the Commonwealth Parliament consenting to an Imperial Order in Council to that effect.[75] As no such Order in Council has ever been made, the question of the accuracy of this opinion has never been tested, although there appears to be some doubt whether it could bypass the constitutional requirements of ss 111 and 123.

Whatever the mechanism for disposing of State territory to a foreign power, none of the possible alternatives for such action has ever been used. Since there has been no referendum or parliamentary vote concerning the status of the three islands in that State, nor any Order in Council made pursuant to the *Colonial Boundaries Act* 1895 (Imp), it follows that if the islands were part of Queensland, the Commonwealth's recognition that they are part of PNG must be unconstitutional and invalid.

A challenge to the validity of the Commonwealth's action in relation to Kawa, Mata Kawa and Kussa Islands would be difficult to undertake. The primary difficulty for a plaintiff would be to establish *locus standi*, given that the islands are remote and uninhabited, and not environmentally significant or threatened. This being the case, prior to 1992, a challenge to the Commonwealth's position could only come from a person with the fiat of either the Commonwealth or Queensland Attorney-General. The political implications of such a challenge would certainly seem to preclude the former and given Queensland's cooperation with Canberra in the negotiation of the Treaty, the latter would also seem most unlikely.

This situation may have changed since the High Court's landmark finding in *Mabo* v *Queensland*.[76] In that case, the Court recognised for the first time that Australia was not *terra nullius* on British settlement of the continent, and that the traditional rights of indigenous people could, in certain circumstances, be enforceable rights at common law.[77] More specifically, if the traditional inhabitants of an area continue to respect and give effect to their traditional laws and customs, then they are entitled to assert 'native title' over their own land.[78]

74 P Brazil and B Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia* (Canberra: AGPS, 1981), 1:298–301.

75 *Id* 1:298–301; see also Ryan and White, *supra* note 7, 95; JCFAD (1976), *supra* note 4, 61–62.

76 (1992) 107 ALR 1.

77 *Id* 28–29 and 51 per Brennan J (with whom Mason CJ and McHugh J agreed), 75 and 82–83 per Deane and Gaudron JJ, 142 per Toohey J.

78 The High Court has indicated that Aboriginal law and lifestyle need not be frozen as at 1788 to continue to generate rights in the common law. Changes to law and custom are permissible '[p]rovided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land': (1992) 107 ALR 1, 83 per Deane and Gaudron JJ. See also the judgment of Brennan J (with whom Mason CJ and McHugh J agreed) at 51.

The mechanisms for the assertion and extinguishment of native title have subsequently been codified by the Commonwealth in the *Native Title Act* 1993 (Cth), with four categories of 'past act'[79] of the Commonwealth[80] which may extinguish or impact upon the native title rights of the traditional inhabitants.[81] However, it is submitted that the provisions of the *Native Title Act* 1993 (Cth) would not be applicable to any claim involving Kawa, Mata Kawa or Kussa Islands because they are now PNG territory, and the Act's application has only been extended to 'each external Territory, and to the coastal sea of Australia, and to any waters over which Australia asserts sovereign rights'.[82] Given the presumption in statutory interpretation against the extra-territorial operation of an Act in the absence of express intention, it seems unlikely that the *Native Title Act* 1993 (Cth) could apply to any part of PNG. If this is so, there can be no compensation under the Act if the Commonwealth's recognition of PNG sovereignty extinguished or affected any native title over the islands.[83]

However, the failure of the *Native Title Act* 1993 (Cth) to deal with this situation would not necessarily preclude the operation of common law. Although the three islands in question are uninhabited, it may be that Australian law would recognise the traditional rights the people of Boigu Island may have to Kawa, Mata Kawa and Kussa Islands. The ceding of those islands to another State may have deprived those peoples of their rights in Australian law. The 'reserve islands' of Torres Strait (of which Boigu is one) certainly appear to fit the conditions of the High Court for the assertion of native title. The traditional inhabitants are still in possession, and still pursue their traditional way of life, with some modifications reflecting modern technology.[84] Mer Island, one of the Murray Islands, is one of the 'reserve' islands and was also the island around which the *Mabo* case was based. The successful assertion of native title from one reserve island in Torres Strait strongly suggests that native title could be successfully asserted on the other reserve islands, although, given that the three islands in issue are not inhabited, the analogy may be weakened.[85]

A problem for the islanders in utisiling such an argument is that the Commonwealth's actions may have been sufficient executive action to extinguish any native title in the islands. Brennan J has indicated that executive action may extinguish native title where 'a clear and plain intention to do so exists.'[86] While the recognition of PNG sovereignty in the islands might be perceived as a sufficiently clear intention of the destruction of any Australian rights in the islands, it is submitted that this is to ignore the nature of the Torres

79 An 'act' is defined under s 226 of the *Native Title Act*, and includes an exercise of executive power by the Crown. 'Past act' is extensively defined in s 228 as any act occurring before 1 January 1994 (or 1 July 1993 for legislative acts) that would be valid but for an invalidity arising out of the *Native Title Act*. The four categories of 'past act' deal with differing types of such acts, with a past exercise of executive power falling in the generic category D: see Attorney-General's Legal Practice, *Native Title: Legislation with Commentary by the Attorney-General's Legal Practice*, Canberra (1994) C12–15.

80 All past acts of the Commonwealth are deemed valid: *Native Title Act*, s 14(1).

81 A Category D past act will not extinguish native title (*Native Title Act*, s 15) but will be subject to a suspension of any rights inconsistent with the past act: (s 238). Where the past act is attributable to the Commonwealth there is an entitlement to compensation (s 17(2)).

82 *Native Title Act* 1993 (Cth), s 6.

83 If this conclusion is incorrect, and the *Native Title Act* does apply, then any rights compromised by Australia's recognition of PNG sovereignty would entitle the affected parties to compensation under s 17(2) of the Act.

84 For discussions of the population, distribution, history, lifestyle and practices of the Torres Strait Islanders see E K Fisk and M Tait, 'Rights, Duties and Policy in the Torres Strait' in E K Fisk, M Tait, W E Holder and M L Treadgold (eds), *The Torres Strait Islanders: The Border and Associated Problems* (Canberra: Australian National University Press, 1974), 1, 9–14; JCFAD (1976), *supra* note 4, 22–34.

85 Even prior to *Mabo*, the High Court was prepared to hold that Aboriginal people had sufficient standing to commence actions to prevent activities taking place on tribal lands: *Onus* v *Alcoa of Australia Ltd* (1981) 149 CLR 27.

86 (1992) 107 ALR 1, 46.

Strait Treaty itself. The three islands all lie within the Protected Zone, an area established under the Treaty with the aim, *inter alia*, of preserving the traditional way of life of the indigenous inhabitants.[87] Further, the Treaty provides for the mutual recognition of the traditional rights of the local people by Australia and PNG.[88] Rather than extinguish native rights, it is clear that the Treaty seeks to protect them, so Article 2(3) of the Treaty would not seem to exhibit a sufficiently clear intention.[89]

In addition, as the Commonwealth cannot acquire property on other than just terms,[90] and the ceding of the property of Australian nationals (that is the native title) to another State implicitly indicates an acquisition of that property to the Commonwealth, if only to pass it on immediately. On this additional basis, the Boigu islanders might challenge the validity of recognising PNG's sovereignty over the islands.

It should be noted though, that even if the islands were part of Queensland prior to the Treaty, it could not be said that the islands are still Australian in international law. Australia has expressly recognised PNG sovereignty in an international instrument, and since 1979, PNG has been responsible for the administration of the islands. As Prescott has noted, Australia could have successfully demonstrated its title over the islands prior to the Treaty.[91] However, Australian and PNG actions since 1979 would make any Australian claim now unsustainable, despite any constitutional difficulties Australia may have created for itself in the implementation of the Treaty. Australia would now be estopped in international law from asserting its sovereignty over the island,[92] and they must remain part of PNG.

87 The Protected Zone is dealt with in Part 4 of the Treaty. Useful discussions as to its aims and functions may be found in Burmester, *supra* note 2, 329–347; Ryan and White, *supra* note 7, 103–108; Lyon and Smith, *supra* note 2, 29–33.

88 Article 12 of the Treaty provides: 'Where the traditional inhabitants of one party enjoy traditional customary rights of access to and usage of area of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and those rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.'

89 Such a conclusion is supported by the judgment of Deane and Gaudron JJ, where their Honours held that Executive acts declaring the Murray Islands 'Crown land for public purposes' could not be construed as extinguishing native title, as these were intended to protect the rights of the local inhabitants by making the islands an aboriginal reserve: (1992) 107 ALR 1, 89. Similar motives manifestly exist in relation to the Treaty.

90 Section 51 (xxxi) of the Constitution.

91 Prescott, *supra* note 10, 122.

92 Article 27, Vienna Convention on the Law of Treaties provides (in part): 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'