NATIVE TITLE RIGHTS IN THE TERRITORIAL SEA AND BEYOND: EXCLUSIVITY AND COMMERCE IN THE *AKIBA* DECISION

SAMANTHA HEPBURN*

> At least in relation to the sea – and particularly in waters with the abundant resources Torres Strait has – it is by no means apparent, absent a legislative regime to the contrary, why marine resources may not be exploited by those who care to do so for trading and commercial purposes….[1]

I INTRODUCTION

One of the core principles underpinning the legal recognition and enforcement of native title rights in coastal waters lies in the need to ensure that such rights are classified as consistent with established domestic and international fishing and navigation rights. Native title rights that are inconsistent with these principles will not be legally recognised. The primary category of native title interests which have been found to be 'inconsistent' are those which are characterised as 'exclusive' in nature. The rationale for this is that rights of exclusivity anticipate a level of control and occupancy that leaves no room for co-functionality. For example, the validation of an exclusive right to fish coastal waters would necessarily prevent the Crown from upholding established public fishing rights. In light of this, the determination of whether a claimed native title right is, in substance, 'exclusive' in nature, is a significant one. In *Akiba*, Finn J characterised a native title right to exploit marine resources for commercial purposes as non-exclusive in nature, focusing on two primary issues. First, his Honour noted that the exercise of the right did not depend upon the assertion of complete control or occupancy. Second, his Honour held that it would be unfair to deny recognition of an indigenous right to commercially exploit marine resources given the fact that the Crown had been exercising such a right for many years. In this respect, Finn J concluded that it would be unreasonable to impose different standards upon indigenous claimants, and argue that the recognition of the claimed right depends upon the existence of exclusivity when the Crown itself has consistently exercised the same right in the absence of any exclusivity.

---

* Associate Professor, Faculty of Business and Law, Deakin University. The author would like to thank the anonymous referees for their constructive feedback on this article.

1 *Akiba v Queensland [No 2]* (2010) 270 ALR 564, 737 [752] ('*Akiba*').

This article overviews the principles that regulate the recognition and enforcement of native title rights and interests in both the territorial and the high seas. It argues that the consistency and continuity assessments that underlie native title validation must be contextualised, with due consideration given to the date when the Crown acquired sovereignty, the character of the right, the manner in which the right is exercised and broader issues of structural equality that apply to all 'recognition' rights in this region. The article argues that a balanced and comprehensive evaluation is particularly important where rights of a commercial nature are claimed. The recognition of rights to commercially exploit marine resources will provide significant benefits for the socio-economic development of indigenous communities. The promotion of comprehensive and balanced consistency and continuity tests for the translation and rationalisation of native title claims in coastal waters will encourage a more responsive recognition process better equipped to prevent native title claims from being unduly penalised for normative divergence.

Native title rights and interests claimed in coastal waters differ fundamentally from those claimed in the land because they are enforceable despite the absence of any core, derivative Crown ownership in the underlying seabed and waters.[2] Native title rights and interests which are recognised in these areas function primarily as recognition rights, validated in circumstances where continuous practices are both traditional in nature and consistent with the enforcement of other domestic and international rights.[3]

The claims are sourced in statute because, as the High Court indicated in *Yarmirr*, they retain a statutory foundation and are not 'derived' from the common law.[4] This means that native title rights and interests which are recognised in the territorial sea and in extra-jurisdictional zones of the high sea remain unburdened by the directives of institutionalised ownership, even though they are amenable to the vicissitudes of regulatory change. There is, however, one qualification to this. The requirement in section 223(1)(c) of the *Native Title Act 1993* (Cth) ('*NTA*') makes it clear that these claims can only be legally valid where they are 'recognised by the common law of Australia.'

The High Court in *Yarmirr* held that this legislative requirement has a particular cogency for native title claims which are made against coastal waters because of the existence of other domestic and international rights in these areas. The exigencies of coexistence means that native title claims in this context will only be valid where they are consistent with the recognition and enforcement of other rights. Hence, as Gleeson CJ, Gaudron, Gummow and Hayne JJ stated in

2 See *Commonwealth v Yarmirr* (2001) 208 CLR 1, 51 [50] ('*Yarmirr*') where Gleeson CJ, Gaudron, Gummow and Hayne JJ discuss the 'altogether different rights and interests which arose from the assertion of sovereignty over the territorial sea.' See also C Rebecca Brown and James I Reynolds, 'Aboriginal Title to Sea Spaces: A Comparative Study' (2004) 37 *University of British Columbia Law Review* 449.

3 See *Yarmirr* (2001) 208 CLR 1, 60–1 [76]. See also the requirements for a statutory native title claim against coastal waters as set out in *NTA* ss 6, 223(1).

4 *Yarmirr* (2001) 208 CLR 1, 47 [38].

Yarmirr, section 223(1)(c) will be satisfied and the common law will recognise native title rights and interests which, 'owing their origin to traditional laws and customs can continue to co-exist with the common law the settlers brought'.[5]

The modernisation of fishing methods and the commercialisation of marine resources has, inevitably, meant that many of the existing practices of indigenous communities are significantly different to those which were exercised by pre-sovereignty communities.[6] To ignore these developments in the validation of native title claims against coastal waters perpetuates a rigid and inflexible approach, unnecessary in the articulation of 'recognition' rights. The acceptance of adapted, commercially-oriented indigenous practices may not be possible in the static environment of land claims, where the dictates of feudal presumption have largely precluded the legal enforcement of such evolved and integrated practices. This article argues, however, that in the context of the territorial and high seas, where a parallel structure provides a strong foundation for the promotion and recognition of co-coordinated practices, a far greater potential exists for the endorsement of native title rights which connect to evolving social and economic frameworks. This potential is apparent in the recent conclusions of Finn J in *Akiba*.

II SOVEREIGNTY, OWNERSHIP AND NATIVE TITLE

The right of the Commonwealth to exercise sovereign power within the territorial sea was described by Windeyer J in *Bonser v La Macchia*, as 'residing in the imperial Crown' so that when Australia became a nation, the power 'automatically succeeded to the Commonwealth'.[7] Whilst the Crown has the power to regulate activities within the territorial sea, it is an established domestic and international principle that neither the territorial nor the high seas may be subjected to ownership rights. There are differing rationales for this. The high seas are immune from ownership because these areas are generally regarded as reserved for the 'common heritage of mankind'.[8] The territorial seas are immune from ownership because of the absence of any radical title in the Crown which in turn stems from the fact that the territorial waters were 'not the dominion of the common law.'[9]

---

5 Ibid 49 [42].

6 See S James Anaya, 'Divergent Discourses About International Law, Indigenous Peoples and Rights over Lands and Natural Resources: Towards a Realist Trend' (2005) 16 *Colorado Journal of International Environmental Law and Policy* 237.

7 (1970) 122 CLR 177, 223. Justice Windeyer relied upon the earlier English decision of *R v Keyn* (1876) 2 Ex D 63.

8 See generally Edward Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?' (2003) 4 *Melbourne Journal of International Law* 376; Bradley Larschan and Bonnie C Brennan, 'The Common Heritage of Mankind Principle in International Law' (1983) 21 *Columbia Journal of Transnational Law* 305.

9 *R v Keyn* (1876) 2 Ex D 63, 239 (Lush J). The rationale for the absence of radical title is discussed in more detail below.

The common heritage principle is sourced in the *res communes* principle which originated in Roman law.[10] In a modern context, *res communes* resources are distinguished by two primary characteristics: they may not be appropriated and the use of them belongs equally to all people.[11] This means that natural resources in the high seas may not be owned or apportioned otherwise than in accordance with rules promoting the common interest of all nations.[12] The common heritage principle has been codified in the *UNCLS* where art 137(1) sets out that '[n]o state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof.'[13]

The power of the Commonwealth to regulate the territorial sea was eventually codified in the provisions of the *Seas and Submerged Lands Act 1973* (Cth) ('*SSLA*'), an Act which also gives effect to the articles implemented in the 1982 *UNCLS*.[14] The validity of the *SSLA* was subsequently confirmed by the High Court in *New South Wales v The Commonwealth* ('*Seas and Submerged Lands Case*') where it was held that the Act was a valid exercise of the powers

10 Air and sunlight are other resources which have a *res communes* foundation: see generally *Black's Law Dictionary* (West Publishing, 5th ed, 1979) 1173.

11 See *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) art 2. This was subsequently adopted by *United Nations Convention on the Law of the Sea,* opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLS*').

12 Larschan and Brennan, above n 8, 306. There are four established elements to the common heritage principle. First, no nation may apportion the area to which the doctrine applies. Second, all countries must share in the management of the area. Third, all countries are entitled to share in the profits that may be derived from the natural resources in the area. Fourth, the area must be preserved for peaceful purposes: D Goedhuis, 'Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law' (1981) 19 *Columbia Journal of Transnational Law* 213, 219. See also Martin A Harry, 'The Deep Seabed: The Common Heritage of Mankind or Arena for Unilateral Exploitation?' (1992) 40 *Naval Law Review* 207, 226. The common heritage principle is now subject to the jurisdictional entitlements conferred upon the Commonwealth in right of the Crown in the Contiguous zone, the Exclusive Economic Zone ('EEZ') and the continental shelf.

13 In this context, 'state' refers to nation-states which have consented to be bound by this Convention and for which this Convention is in force. Whilst *UNCLS* art 137 is founded on the *res communes* principle, there are some fundamental distinctions. Unlike *res communes* which allows use or appropriation of resources provided such use does not interfere or injure the rights of other countries, art 137 makes it clear that the management, exploitation and distribution of the natural resources of the area in question are matters to be decided by the international community and that 'no state, or natural or juridical person shall claim, acquire or exercise rights to minerals recovered in this area except in accordance with this part.' See also Bin Cheng, 'The Legal Regime of Airspace and Outer Space: The Boundary Problem, Functionalism Versus Spatialism: The Major Premises' (1980) 5 *Annals Air and Space Law* 323, 380.

14 Section 6 of the *SSLA* declares that 'the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth.' Section 7 goes on to set out that the Governor-General can declare the limits of the territorial sea, as long as the declaration is 'not inconsistent with' the *UNCLS*. See also *SSLA* s 11 which sets out that the right to explore and exploit the natural resources of the continental shelf of Australia are vested in and exercisable by the Crown in right of the Commonwealth.

the Commonwealth acquired under *Australian Constitution* section 51(xxxix).[15] This means that, in the absence of legislation to the contrary, the jurisdiction of each Australian state and territory will terminate at the low-water mark. Since this date, the territorial seas have been extended from nine to twelve nautical miles from the low-water mark.[16] The sovereignty the Crown retains within this jurisdictional zone remains subject, however, to public and international rights of navigation and fishing.[17]

The power of the Crown to regulate the high seas that lie beyond the territorial seas is dependent upon the provisions of the *UNCLS*, which are qualified. The *UNCLS* basically sets out three zoned areas of jurisdiction which confer limited regulatory control on the Crown in this area. These areas are known as the contiguous zone,[18] the EEZ[19] and the continental shelf.[20] In each of these areas, the regulatory power of the Crown must accord with the scope and objectives of the *UNCLS*.

Native title rights and interests within the territorial sea were not expressly recognised by common law until the High Court decision in *Yarmirr*. In *Mabo v The State of Queensland* (*No 2*) ('*Mabo*') the conclusions of the High Court focussed upon land claims made over the Torres Strait islands.[21] This meant that it was not until the introduction of the *NTA* that the possibility of native title

15 (1975) 135 CLR 337, 368. Australian states and territories retain jurisdiction over the area extending to the low-water mark. *SSLA* s 7(2)(b) allows the Governor-General to make proclamations concerning the baseline from which the breadth of the territorial sea is to be measured. The *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006* (Cth) sets out the exact measurements of this area which extends to approximately three nautical miles. The power of the states to regulate these waters is endorsed in *Coastal Waters (State Powers) Act 1980* (Cth) s 5 and property in the sea and seabed is vested in the states and territories pursuant to the *Coastal Waters (State Titles) Act 1980* (Cth) s 4. See generally Donald R Rothwell, 'The Legal Framework for Ocean and Coastal Management in Australia' (1996) 33 *Ocean and Coastal Management* 41.

16 See *UNCLS* art 3; *SSLA* s 3, which endorse the extension of the territorial sea to a maximum of 12 nautical miles.

17 See *UNCLS* arts 17–26. The nature and scope of public and international fishing and navigation rights is discussed in more detail below.

18 In accordance with *UNCLS* art 33, the contiguous zone is a zone which is contiguous to the territorial sea, and which extends to 24 nautical miles from the baseline of the territorial sea within which the Crown in right of the Commonwealth is entitled to prevent and/or punish infringement of its customs, fiscal, immigration or sanitary laws and regulations.

19 The EEZ is a coastal zone that Australia has claimed which lies adjacent to but beyond the territorial sea which, in accordance with *UNCLS* arts 55, 57, extends to 200 nautical miles from the baseline of the territorial sea. The purpose of the zone is to confer sovereign rights of exploration, exploitation, conservation and management of marine and natural resources.

20 In accordance with *UNCLS* art 76, the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. See also R R Churchill and A V Lowe, *The Law of the Sea* (Manchester University Press, 3rd ed, 1999) chs 4, 7–9.

21 (1992) 175 CLR 1, [83] ('*Mabo*'). Justice Brennan specifically focuses his native title analysis upon 'land', because the maritime aspects of the *Mabo* decision were specifically withdrawn.

rights extending to coastal waters was acknowledged.[22] In the *NTA*, section 223(1) expressly sets out that a reference to native title includes rights and interests in both land and waters. Section 253 of the *NTA* defines 'waters' broadly to include the sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbor, subterranean waters as well as the bed, subsoil or airspace over those waters and the shore, subsoil or airspace between the high and low-water mark. Section 6 of the *NTA* makes it clear, however, that the *NTA* only retains jurisdiction over the internal, coastal and offshore waters to which Australia asserts jurisdiction.[23]

The combined effect of the *NTA* provisions has been statutory recognition of native title claims against any corpus of water, including coastal waters, over which the Crown retains jurisdiction. In this context, the coastal sea includes the airspace over the sea, the seabed and the subsoil beneath the seabed.[24] The breadth of this definition has prevented the 'seabed' from being incorporated into the definition of 'land' in other contexts. For example, in *Risk v Northern Territory*, the High Court held that the definition of 'land' in the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT) did not include the seabed.[25]

III THE ABSENCE OF RADICAL TITLE

One of the most significant difficulties underpinning the common law recognition of native title interests in coastal waters lay in the absence of Crown ownership over territorial waters. This issue was raised directly by the Crown in *Yarmirr* where it was argued that the absence of radical title effectively precluded the recognition and enforcement of native title interests in the territorial sea.[26] A majority of the High Court, Gleeson CJ, Gaudron, Gummow and Hayne JJ, rejected this argument holding that native title interests could be recognised and enforced within the territorial sea provided the claimed rights and interests were not inconsistent with fundamental common law and international principles.

---

22 The issue of whether a common law native title claim may be made against the sea has not, therefore, been determined.

23 *NTA* s 6 is premised upon *SSLA* s 6 which confers jurisdiction upon the Commonwealth over all waters to which Australia asserts jurisdiction.

24 See *NTA* s 253 where coastal water is defined by reference to the definition in s 15B(4) of the *Acts Interpretation Act 1901* (Cth).

25 (2002) 210 CLR 392, 403–4 [26] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) where their Honours stated:

> it may be doubted, however, that the word would ordinarily be understood as encompassing the seabed. The distinction between 'land' and 'sea' is often made. It is only when particular attention must be paid to distinguishing between the two that the distinction can be seen to be attended by the same kind of difficulty as arises in distinguishing between 'night' and 'day'. In each case, the legal geometer who seeks to define the line may find it blurred and indistinct. But that is not to deny either that there is a distinction, or that 'land' is ordinarily used in a way that would not include the seabed.

26 The Court summarised the argument of the Commonwealth as follows: 'It was said that, because the common law did not apply beyond the low-water mark, there was no lex situs and there was, therefore, no law which could "recognise" native title rights and interests': (2001) 208 CLR 1, 46 [36].

In reaching this conclusion, the majority in *Yarmirr* reinforced a number of key principles. First, their Honours approved the early English decision of *R v Keyn*, where Lush J held that the 'dominion' the Parliament retained against the territorial waters of Great Britain was 'not the dominion of the common law' because that dominion 'extends no further than the limits of the realm'.[27] In this respect, Gleeson CJ, Gaudron, Gummow and Hayne JJ held that the common law had no application to the territorial sea apart from upholding established fishing and navigation rights.[28] The territorial sea was governed by international law and the sovereign power that the Crown acquired in this area was, as outlined by the High Court in the *Seas and Submerged Lands Case*, a product of international law, flowing from the fact that Great Britain held 'sovereignty over the adjoining land mass'.[29]

The absence of common law from the territorial sea, apart from its role in upholding established principles of fishing and navigation, meant that the Crown could not assert or retain any common law ownership over this area. As outlined by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Yarmirr*, the absence of radical title was consistent with the fact that 'at no time before federation did the Imperial authorities assert any claim of ownership to the territorial seas or sea-bed.'[30]

In exercising the sovereign regulatory power over this area, however, the Crown and, by agreement, state and territory governments, had issued legislation which purported to vest property in the seabed beneath the territorial sea and in the space above the seabed (including the space occupied by the water) in the relevant state or territory.[31] According to Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Yarmirr*, the effect of these vesting provisions could not be characterised as conferring 'full ownership' because any such interpretation would be inconsistent with the recognition and enforcement of established public and international fishing, navigation and free passage rights.[32]

Despite the absence of radical title in the territorial sea and the uncertain scope and effect of the vesting provisions, the majority in *Yarmirr* concluded that native title rights and interests could be recognised within this area because

---

27 *R v Keyn* (1876) 2 Ex D 63, 174–6, 195–6, 211 (Cockburn J), cited in *Yarmirr* (2001) 208 CLR 1, [56]-[57] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

28 *Yarmirr* (2001) 208 CLR 1, 55–6 [59]–[61].

29 Ibid 55 [59], quoting *Seas and Submerged Lands Case* (1975) 135 CLR 337, 361 (Barwick CJ). The majority also suggested that the acquisition of sovereignty could be treated as a prerogative right: at 55–56 [60].

30 Ibid 55 [59].

31 On the facts of *Yarmirr*, the legal regime was as follows. The Commonwealth had sovereign power vested in it pursuant to the *SSLA*. Thereafter, the Commonwealth and States arrived at the offshore constitutional settlement reflected in the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth). Pursuant to s 5(a) of this Act, the legislative assembly in the Northern Territory was given the power to make all such laws as could be made if the territorial waters were within the limits of the Territory. Then, pursuant to *Coastal Waters (Northern Territory Title) Act 1980* (Cth) s 4(1), title to the seabed and waters above the seabed was vested in the Northern Territory.

32 The majority held that it was 'unnecessary to decide what was the right and title that was vested in the Territory': *Yarmirr* (2001) 208 CLR 1, 59 [70].

native title in the territorial sea was a product of statute rather than the common law. Gleeson CJ, Gaudron, Gummow and Hayne JJ expressly concluded that the native title rights and interests given effect to by the *NTA* are not 'interests which are derived from the common law.'[33] In light of this, their Honours concluded that it was not necessary to apply the 'taxonomy' of the common law in deciding whether the rights and interests were 'recognised by the common law.'[34] The statutory nature of native title rights within the territorial sea meant that it was not possible to negate their existence by the 'bare assertion' of an absence of lex *situs* or by arguing 'that the only possible candidate for consideration is the common law.'[35] According to the majority, the only real test that these statutory interests needed to satisfy was that their recognition was not inconsistent with established public and international principles of fishing, navigation and free passage.[36]

IV THE INCONSISTENCY PRINCIPLE: PUBLIC AND INTERNATIONAL RIGHTS OF FISHING AND NAVIGATION

Following the conclusions of the majority in *Yarmirr*, the 'inconsistency principle' has become the foremost test for determining the validity of native title interests which are claimed within the territorial sea and seabed.[37] Native title rights and interests will infringe the inconsistency principle where the character of the claimed native title right interferes with or disrupts the full and effective enforcement of public and international rights of fishing, navigation or free passage. A full appreciation of the operation of the inconsistency principle therefore depends upon an understanding of the nature and scope of the public and international fishing and navigation principles that it protects.

---

33 Ibid 46 [37]. This is consistent with the subsequent conclusions of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 440 [32], 453 [75] ('*Yorta Yorta*') where Gleeson CJ, Gummow and Hayne JJ held that native title was now to be regarded as a statutory creature and that the requisite elements were set out in *NTA* s 223(1)(a)–(b) rather than s 223(1)(c), which was a broader recognition provision.

34 *Yarmirr* (2001) 208 CLR 1, 46 [37].

35 Ibid 47 [38].

36 The majority stated that there was no '*necessary* inconsistency between the rights and interests asserted by Imperial authorities and the continued recognition of native title rights and interests': ibid 56 [61] (emphasis in original). Justice McHugh dissented on this point, holding that the absence of radical title within the territorial sea necessarily precluded recognition of native title rights and interests. His Honour stated: 'But the common law cannot recognise rights and interests under traditional law when, at the date of acquiring sovereignty, it did not operate over the area where the rights and interests are now asserted': at 105 [223]. Justice Kirby also dissented, but on different grounds. His Honour agreed with the majority that native title could be recognised in the territorial sea; however he disagreed about the type of native title rights that were capable of being recognised.

37 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 187 [388] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Yorta Yorta* (2002) 214 CLR 422, 440 [32]; *Gumana v Northern Territory* (2007) 158 CLR 349; *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; *Akiba* (2010) 270 ALR 564, 736 [745].

A public right of fishing refers to community rights to fish marine life on the seabed and free-swimming fish within the sea, and includes ancillary rights of access and limited control.[38] A public right of navigation refers to rights to pass and re-pass over the water and includes rights to anchor, moor and ground pursuant to ordinary navigation or as deemed necessary by the force of circumstance.[39] It is not entirely clear whether the foundation of these municipal 'public' rights is derived from the common law or via an application of prerogative limitation and this uncertainty has meant that they are largely regulated by legislation.[40] In *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*, Gleeson CJ, Gummow, Hayne and Crennan JJ held that public fishing and navigation rights were 'freely amenable to abrogation or regulation by a competent legislature' and that in Queensland, these rights had been completely 'supplanted' by the statutory regime.[41]

By contrast, the international principle of innocent passage is a product of international law, being specifically endorsed in the *UNCLS*, and it entitles ships of all nation-states to pass through the territorial seas of coastal states, without prior consent, in accordance with ordinary navigation or as deemed necessary by the force of circumstance.[42]

Where a native title right is found to be inconsistent with these public or international rights it is henceforth described as a 'non-recognition' right.[43] In effect, this means that the right is incapable of being legally recognised, despite its continued customary acknowledgement by indigenous communities.[44] Non-recognition rights cannot be legally enforced, even where they satisfy all of the requirements of section 223(1) of the *NTA*, because in the context of the territorial sea, consistency is the threshold test for enforcement.

---

38 The Judicial Committee of the Privy Council stated that 'the right of the public to fish in the sea has been well established in English law for many centuries and does not depend upon the assertion or maintenance of any title in the Crown to the subjacent land': *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153, 174. See also *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

39 See generally *Commonwealth v Yarmirr* (1999) 101 FCR 171, 224–5 [213]–[218] (Beaumont and von Doussa JJ).

40 Justice Barrett commented, 'it is not possible to make, with any degree of confidence, a complete and exhaustive statement of the common law rights of the public in relation to tidal waters and the foreshore. The matter is a "difficult question" no less today than when so described by Lord Wright in 1935 [in *Williams-Ellis v Cobb* [1935] 1 KB 310, 320]': *Georgeski v Owners Corporation SP 49833* (2004) 62 NSWLR 534, 557 [84]. See also *Gumana v Northern Territory* (2007) 158 FCR 349, 372 [89] (French, Finn and Sundberg JJ).

41 (2008) 236 CLR 24, [27] (Gleeson CJ, Hayne, Gummow and Crennan JJ). Their Honours approved the conclusions of Brennan J in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314, 330. The statutory regime in Queensland is regulated by the *Fisheries Act 1994* (Qld) and the *Torres Strait Fisheries Act 1984* (Cth).

42 *UNCLS* arts 17, 18. See generally *R v Keyn* (1876) 2 Ex D 63, 70; *Foreman v Free Fishers and Dredgers of Whitstable* (1869) LR 4 HL 266; Ian Brownlie, *Principles of Public International Law* (Manchester University, 5th ed, 1998) 191–5.

43 The term 'non-recognition' rights was used in *Akiba* (2010) 270 ALR 564, 736 [744] (Finn J).

44 Justice Finn noted that 'non-recognition' should not be equated with extinguishment and that a non-recognised native title right may continue to be acknowledged and observed by an indigenous community: *Akiba* (2010) 270 ALR 564, 736 [745].

The argument that 'inconsistent' native title rights and interests may be saved by making it clear that the scope of their enforceability is subject to public or international rights of fishing and navigation has not been accepted. This argument, described as 'qualified enforcement', was not approved by a majority of the High Court in *Yarmirr* because, as Gleeson CJ, Gaudron, Gummow and Hayne JJ outlined, '[t]he two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights.'[45]

In dissent on this issue, Kirby J took a different view, arguing that the recognition of exclusive rights in the territorial sea does not necessarily mean that all other legal rights within that area must be defeated. His Honour suggested that it is 'conceivable' that rights of innocent passage or public rights to fish and navigate may not be disturbed by the enforcement of exclusive native title rights.[46] Where an exclusive native title interest is recognised, general public rights will be 'subservient' to the native title interest. Hence, Kirby J argued that there was no 'fundamental inconsistency' between the recognition of an exclusive native title interest and public and international rights of navigation and fishing rights, provided it is accepted that public and international rights only endure to the extent that exclusive native title rights remain unproven.[47] Qualified enforcement has, however, been expressly rejected by subsequent courts.[48]

At its core, the inconsistency principle that the majority in *Yarmirr* articulate as the 'fundamental' test for recognising native title rights and interests in the territorial sea is a connecting device rather than a derivative concept; it is aimed at linking public and international principles with indigenous customary law but does not, in itself, provide any substantive basis for institutional recognition. Its primary focus, therefore, is the promotion of domestic and international stability rather than the creation of positive rights.[49] This means that native title rights and interests that are recognised and enforced in the territorial sea differ fundamentally in nature and scope to those which are recognised and enforced

45 (2001) 208 CLR 1, 68 [98]. Qualified recognition was approved by Kirby J in dissent at 121–2 [273] who noted that the

> demonstrated capability of the common law to recognise exclusive interests in territorial sea waters subject to the international principle, lead inevitably to a conclusion that a general right of passage through an area of sea does not necessarily defeat all other legal rights within that area to control access and exclude others.

46 (2001) 208 CLR 1, 122 [274]–[275].

47 Ibid.

48 See *Western Australia v Ward* (2002) 213 CLR 1, 187 [388] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Yorta Yorta* (2002) 214 CLR 422, 440 [32]; *Gumana v Northern Territory* (2007) 158 CLR 349; *Akiba* (2010) 270 ALR 564, 736 [745].

49 See the dissenting judgment of McHugh J in *Yarmirr* (2001) 208 CLR 1, 103 [216] where his Honour concluded that,

> [w]ithout the intervention of federal Parliament, no one can acquire a legal right in relation to the territorial sea, sea-bed and sub-soil that the common law courts can enforce. It is erroneous to suggest, as the claimants do, that sovereignty in the territorial sea carries with it judicial power to protect and enforce private rights and interests in respect of the territorial sea and sea-bed.

against the land.[50] Sea-based claims do not exist as encumbrances upon the underlying title of the Crown and are therefore not governed by the same directives that inform formal land interests. Rather, native title claims against the territorial sea retain a 'special, juridical character' making them akin to 'continuity' rights whose legal identity depends entirely upon their capacity to co-exist.[51]

V RIGHTS OF EXCLUSIVITY

The only category of native title rights and interests which the majority in *Yarmirr* found to have expressly infringed the inconsistency principle were those which amounted to rights of 'exclusivity'.[52] Rights of exclusivity were defined broadly by the majority to include rights which had the effect of excluding or restricting others from entering any area of the claimed waters.[53] The breadth of this definition means that any claimed right or interest that incorporates rights to control, manage or possess the territorial sea is, potentially, a 'non-recognisable' right. On the facts of *Yarmirr*, rights of exclusivity were found to include rights of control which prevented other people from entering the claimed area; rights which conferred free access to the estate and its marine resources upon indigenous members; rights to speak for and make decisions about significant places in the estate; and rights to safeguard the cultural and religious knowledge associated with the estate. This broad ranging collection of native title practices could not be recognised because in each case it was felt that the right was

50 Ruru notes that native title rights in the sea-water conjure up a 'special juridical space' founded upon the inconsistency principle: Jacinta Ruru, 'What Could Have Been? The Common Law Doctrine of Native Title in Land Under Salt Water in Australia and Aotearoa/New Zealand' 32 *Monash University Law Review* 116, 138.

51 See *Yarmirr* (2001) 208 CLR 1, 49 [42] where Gleeson CJ, Gaudron, Gummow and Hayne JJ state: 'Thus the question about continued recognition of native title rights requires consideration of whether and how the common law and the relevant native title rights and interests could co-exist.' In this respect, the common law will recognise the rights 'by giving effect to those rights and interests owing their origin to traditional laws and customs which can continue to co-exist with the common law the settlers brought'. See also Paula Quig, 'Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands – An Overview' (2004) 45 *Les Cahiers de Droit* 659, 685 where the author suggests that it is 'unclear' whether Canadian courts would reach a similar decision given the fact that Lamer CJ in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 specifically concluded that 'Aboriginal title is a burden on the Crown's underlying title' and accordingly, it only actually 'crystallizes' at sovereignty. It should, however, be noted that there are significant distinctions between Canadian and Australian native title jurisprudence in this regard, as Canadian courts have distinguished aboriginal title from aboriginal rights, the latter being specifically recognised pursuant to the *Canada Act 1982* (UK) c 11, sch B s 35.

52 Chief Justice Gleeson, Gaudron, Gummow and Hayne JJ state that an 'inconsistency' will exist 'with the continued existence of any exclusive rights and interests': (2001) 208 CLR 1, 60–1 [76]. Hence, their Honours found that the native title rights and interests did not confer possession, occupation, use and enjoyment of the sea and seabed within the claimed area to the exclusion of all others.

53 Ibid 62–3 [85]. The term 'estate' was defined by the primary judge as 'the primary spatial unit in which estate groups have native title rights and interests': at n 274.

dependant upon an unacceptable level of control or dominion over the territorial sea.

The determination that a native title right amounts to a 'right of exclusivity' is, to a large degree, pervaded by Western concepts of occupation. According to common law principles, exclusive possession will exist where it can be established that a sufficient degree of occupation or control has been asserted and consistently maintained over the claimed area.[54] Where, however, the level of control is only intermittent, the right is more likely to be characterised as an entitlement akin to a usufructuary right, conferring upon a holder a non-transferable right of 'medium temporal length', to carry out a particular activity, which will terminate upon cessation or death.[55]

In many situations, the rights claimed by indigenous claimants are largely usufructuary and only display limited aspects of exclusivity. For example, fishing practices are generally seasonal, hence the same fishing site may be used consistently, at the same time each year, or sacred sites may be utilised for cultural ceremonies or spiritual practices may be carried out within a similar region at regular intervals.[56] These practices anticipate an intermittent level of occupation and control because they are, in substance, ritualistic or seasonal in character. It is therefore arguable that they do not, in substance, restrict or exclude the entry of others in any substantial manner.

The Canadian courts have adopted a different approach to the recognition and enforcement of indigenous rights that display aspects of exclusivity which is much more reliant upon common law principles. In the first place, unlike Australia, Canadian courts have not expressly rejected the possibility of rights of exclusivity being accepted as constituents of aboriginal title, at least with respect to land claims. In order, however, for such rights to be recognised and enforced, it must be proven that the level of control and occupancy of the claimed indigenous right is commensurate with the concept of exclusivity that exists under common law.[57] As outlined by Lamer CJ in *Delgamuukw v British Columbia*, 'exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" … an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation.'[58]

Whilst the facts in *Delgamuukw* did not involve a claim to exercise indigenous rights and interests over territorial waters, it has been argued that

---

54 See *Street v Mountford* [1985] 1 AC 809, 820–2; *Radaich v Smith* (1959) 101 CLR 209, 223 (Windeyer J); *Wik Peoples v Queensland* (1996) 187 CLR 1, 152.

55 See *Griffiths v Northern Territory* (2006) 165 FCR 300, 350 [588] (Weinberg J). See also Robert C Ellickson, 'Property in Land' (1993) 102 *Yale Law Journal* 1315, 1364 where the author notes that a 'classic usufruct' can be described as 'an immutable package of land use rights that are not transferable and that terminate when the owner dies or ceases the use': William Blackstone, *Commentaries on the Laws of England* (First published 1765–9, online ed, <http://www.lonang.com/exlibris/blackstone/bla-310.htm>) vol 3, ch 10.

56 See *Griffiths v Northern Territory* (2006) 165 FCR 300, 375 [796].

57 See *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [118]–[124] (Lamer CJ) ('*Delgamuukw*').

58 Ibid [156].

there is no reason why the same principles would not be applied in that context.[59] The enforceability of First Nation claims over Canadian coastal waters has not been specifically endorsed within the British Columbia treaties although a number of 'agreements in principle' have been entered into which either vest parcels of submerged land in first nation people or, which allow the parties to negotiate the nature, source and extent of their jurisdiction in these areas.[60]

Post-*Delgamuukw* courts have, however, taken a stricter common law analogy approach in assessing indigenous rights of exclusivity. In *R v Marshall*; *R v Bernard*, the Canadian Supreme Court concluded that First Nation rights of exclusivity could only be upheld where indigenous practices 'indicate possession similar to that associated with title at common law.'[61] In that case, the majority held that if aboriginal practices do not indicate a type of control commensurate with exclusivity, title could not be conferred because this would 'transform the ancient right into a new and different right.'[62] Whilst absolute congruity is not necessary, it must be established that the practice engages the core idea of the modern right. This stricter test creates potential difficulties for the recognition of First Nation rights within territorial waters because it means that fishing or cultural practices which follow a ritualistic pattern may fail to 'engage the core idea' of common law exclusivity.[63]

The complete refusal of Australian courts to recognise and enforce native title rights of exclusivity in territorial waters is, in part, a consequence of a broader trend favouring the conferral of 'lesser' forms of entitlement for indigenous claimants. The rationale for this trend, as McNeil has pointed out, is the prevention of undue disruption to the existing economic and political power structures.[64] Inevitably, this trend has generated significant difficulties for indigenous inhabitants seeking rights that better equip them to participate within changing social and economic paradigms.[65] It has also meant that indigenous people have encountered significant demarcation difficulties because the absence of rights conferring physical control or occupancy prevents claimants from identifying and locating the physical boundaries of their claims. This, in turn,

---

59 Brown and Reynolds note that the two important issues that require clarification are, first, the date of the assertion of British or Canadian sovereignty to the sea space and, second, the meaning of 'exclusive occupation' when applied to a sea space: above n 2, 454–8.

60 See, eg, *Tsawwassen First Nation Final Agreement*, Canada–Tsawwassen First Nation–British Columbia, signed 12 June 2007 (entered into force 4 March 2009) ch 4 art 18 which sets out that 'Other Tsawwassen Land' includes parcels in both Boundary Bay and Fraser River.

61 [2005] 2 SCR 220 [54] (McLachlin CJ, Major, Bastarache, Abella and Charron JJ).

62 Ibid [77].

63 Ibid [50]. Quig notes that the holistic approach of indigenous communities to land and water resources is often incompatible with the 'compartmentalised' approach that characterises the common law: above n 51, 680.

64 See generally Kent McNeil, 'The Vulnerability of Indigenous Land Rights in Australia and Canada' (2004) 42 *Osgoode Hall Law Journal* 271. The author notes that 'at the end of the day what really seems to determine the outcome in [indigenous land claims] is the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure': at 300.

65 See generally Anaya, above n 6, 242.

interferes with indigenous peoples' way of life and impedes their aspirations for self-determination.[66]

VI BEYOND THE TERRITORIAL SEA: PROGRESSIVE SOVEREIGNTY AND NATIVE TITLE IN THE HIGH SEAS

To date, native title rights and interests have only been recognised within territorial waters, in accordance with the existing jurisdictional scope of the *NTA*. A looming issue, however, concerns the recognition of native title rights and interests in waters beyond the territorial sea, over which Australia asserts jurisdiction.[67] As outlined above, Australia acquired sovereignty over the territorial sea pursuant to section 6 of the *SSLA* and rights to regulate in the 'extended' territorial sea pursuant to *UNCLS*.[68] Beyond the territorial sea, new areas of resource jurisdiction may be declared subject to Crown control, provided any such declaration remains consistent with the provisions of the Convention.[69]

Section 6 of the *NTA* makes it clear that native title rights can only be recognised over waters which are subject to Australian jurisdiction, with the provision expressly setting out that the *NTA* extends to 'any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*.'[70] On the face of it, this would appear to condone the recognition of native title rights and interests in waters beyond the territorial sea, provided those waters remain subject to Australian jurisdiction.

There is nothing in *UNCLS* that expressly approves (or prohibits) the recognition of native title rights and interests beyond the territorial sea.[71] The

66 See generally Erica-Irene A Daes, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land,* UN ESCOR, 53rd sess, Provisional Agenda Item 5, UN Doc E/CN.4/Sub.2/2001/21 (11 June 2001); Andrew Erueti, 'The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law' (2006) 23 *Arizona Journal of International and Comparative Law* 543, 546.

67 This issue has not been directly addressed by the courts, although Olney J quoted Justice Brennan's words in *Mabo* that 'international law is a legitimate and important influence on the development of common law': *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 591.

68 *UNCLS* Preamble, art 136. The extension of Australia's territorial limit from 12 to 200 nautical miles, as provided by the entry into force in Australia on 16 November 1994 of the *UNCLS*, constitutes a permissible future act for the purposes of *NTA* s 233.

69 New zones of resource jurisdiction within the Torres Strait region include the Contiguous Zone, the EEZ and the Continental Shelf. See generally Ian Brownlie, *Principles of Public International Law,* (Oxford University Press, 7th ed, 2008) chs 9, 10; Malcolm Evans, 'The Law of the Sea' in Malcolm Evans (ed), *International Law* (Oxford University Press, 2003) 623. See also Michael White, *Australia Offshore Laws* (Federation Press, 2009).

70 See generally Stuart Kaye, 'Torres Strait Native Title Sea Claim: Legal Issues Paper' (Occasional Paper No 2, National Native Title Tribunal, September 2004) 8. See also *Akiba* (2010) 270 ALR 564, 735 [737] where Finn J concludes that the extension of native title rights and interests to areas of international jurisdiction had not yet been 'specifically determined.'

71 Kaye notes that the *UNCLS* does not recognise indigenous rights as it is concerned with 'the interests, rights and obligations of states in respect of the seas, and there is very little in it directed towards the rights of individuals or groups': Kaye, above n 70, 6.

UNCLS does, however, impose jurisdictional limitations upon States with respect to their offshore jurisdiction and it has been suggested that these limitations may not always be consistent with the full recognition of native title claims.[72]

The extent to which native title rights and interests may be recognised beyond the territorial sea has a particular cogency in the Torres Strait region where the territorial waters of Australia are in close proximity to those in Papua New Guinea. The complex jurisdictional boundaries that exist in this area have meant that in some regions, the seabed may be controlled by Papua New Guinea whilst the waters above it are subject to the jurisdiction of Australian fisheries.[73] In such situations, it is arguable that native title rights and interests may be enforceable against the jurisdictional waters of Australia but not against the Papua New Guinea seabed.[74] This may, of course, create logistical difficulties and in this respect, 'high sea' native title claims may be better suited to areas where recognition is consistent with the specific objectives of the zone. For example, in the protected zone, one of the explicit objectives is to promote the capacity of traditional owners to exploit the resources.[75]

Very few Australian cases have dealt expressly with this issue because native title claims beyond the territorial sea are rarely made. The issue was not directly addressed by the High Court in *Yarmirr* although, more recently, in *Akiba*, Finn J suggested that the extension of native title rights and interests to areas of international jurisdiction beyond the territorial waters should not be arbitrarily rejected.[76] His Honour argued that the absence of any 'clear and obvious justification or reason for precluding the application of native title to areas beyond the territorial sea,' meant that it would be 'anomalous and unprincipled' for the common law to refuse to recognise native title within extended areas of jurisdictional control.[77]

Presumably, the recognition of native title rights and interests within extended areas of jurisdictional control in the high seas will attract the same 'inconsistency principle' as has been applied to territorial sea claims.[78] This would mean that native title rights which involve substantial possession and control of high sea waters will not be legally recognisable given the capacity of such rights to impede the transit passage of foreign vessels.[79]

---

72 It has been suggested that compliance with international law obligations may necessitate either an abrogation or, at least, a dilution, of native title rights and interests: ibid.

73 *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*, Australia–Papua New Guinea, signed 18 December 1978, ATS 1985 No 4 (entered into force 15 February 1985) pt III ('*Torres Strait Treaty*').

74 See Kaye, above n 70, 8.

75 Kaye argues that any rights conferred by the *Torres Strait Treaty* upon indigenous owners may be better categorised as statutory in nature and therefore exist in addition to any enforceable native title rights: ibid.

76 Justice Finn, discussing *Yorta Yorta*, expressed that there was no reason why 'a continuing society of Aboriginal or Islander peoples should be denied this capacity in relation to a territorial area over which Australia has not previously asserted sovereignty': *Akiba* (2010) 270 ALR 564, 735 [737].

77 Ibid 735 [738].

78 Ibid 736 [745].

79 Ibid. See *UNCLS* pt III s 2.

Arguably, however, given the fact that the Commonwealth has already evinced a preparedness to disrupt international rights of free passage in the pursuit of broader ecological objectives, a more flexible approach to the recognition of native title interests may be possible. For example, the introduction of the 'mandatory pilotage' system in the Torres Strait region, requiring international vessels transiting through the strait to pick up a 'pilot' at one end of the strait, have the 'pilot' navigate the ship through the strait, then reimburse the pilot and drop him off once the restricted area has been traversed, suggests a greater preparedness to regulate free passage. The primary objective of the mandatory pilot scheme is to facilitate a balance between free passage for international vessels and protection of the delicate ecological environment. The continuous disruption the pilotage scheme has had upon the expeditious transit of foreign vessels reveals, however, a greater preparedness to mitigate the scope of free passage to the exigencies of social, economic and ecological progression.[80]

One of the most significant issues affecting the recognition of native title interests in the high seas lies, however, in the question of progressive sovereignty. It is unclear whether native title rights and interests which are claimed in zones where sovereignty has been progressively acquired require claimants to establish that their rights and interests were practiced at the date when sovereignty was acquired over the adjoining land, or, whether it is sufficient to establish that the laws and customs emerged at the date when offshore jurisdiction was acquired.[81]

This issue has a special relevance in the Torres Strait region where the offshore jurisdiction was progressively acquired between 1872 and 2006. In *Akiba*, the State argued that the capacity of the Torres Strait Islanders to create new rights and interests in the EEZ ceased upon the acquisition of sovereignty over the adjoining land, and the fact that sovereignty over the EEZ was asserted much later was irrelevant. The State argued that rights and interests which post-dated sovereignty of the adjoining land would not satisfy the requirements of *NTA* section 223(1) because they were not 'traditional' in nature.[82]

The State's argument was grounded in the earlier conclusions of the High Court in *Yorta Yorta*, which, held that native title rights and interests could only be characterised as 'traditional' under section 223(1) of the *NTA* where it was established that they were practised by pre-sovereignty normative communities.[83] The majority in *Yorta Yorta* held that new rights or interests which were created at a later date, and which did not amount to a post-sovereignty alteration contemplated by the traditional law or custom, were not traditional. Their

80 See especially John T Oliver, 'Legal and Policy Factors Governing the Imposition of Conditions on Access to and Jurisdiction over Foreign-Flag Vessels in US Ports' (2009) 5 *South Carolina Journal of International Law and Business* 209, 288–90.

81 The concept of 'progressive' or 'rolling' sovereignty was described by Finn J as the progressive acquisition of territorial jurisdiction: *Akiba* (2010) 270 ALR 564, 734 [732]. Australia acquired sovereign rights within the EEZ of the Torres Strait by proclamation under the *SSLA* in 1994: at 592 [92].

82 Ibid 592–3 [92].

83 (2002) 214 CLR 422, 443 [44] (Gleeson CJ, Gummow and Hayne JJ).

Honours felt that to hold otherwise would effectively impugn Crown sovereignty because 'there could be no parallel law-making system after the assertion of sovereignty'.[84]

In *Akiba*, Finn J rejected the State's argument, holding that it would be unfair to acknowledge traditional rights and interests over territorial areas but 'refuse to acknowledge a subsequent accretion to those rights and interests in an area not hitherto the subject of Australian territorial sovereignty (that is the emergence of new rights and interests under its traditional laws and customs).'[85] His Honour could not understand why a continuing society of Aboriginal or Islander peoples should be denied the capacity to make 'subsequent accretions' in relation to an area over which Australia had not previously asserted sovereignty. Hence, his Honour felt that where progressive sovereignty exists, a native title determination 'should be made by reference to the situation existing at that time.'[86]

The conclusions of Finn J in *Akiba* are yet to be examined by a Court of Appeal, although the jurisdictional assessment appears consistent with fundamental sovereignty assumptions.[87] It is not entirely clear, however, whether the 'new rights' to which Finn J alludes are 'accretions' to pre-existing traditional rights or separate and independent rights, enforceable because they predate the 'progressive sovereignty' of the Commonwealth in this region. The latter is more probable, particularly given the fact that laws and customs were unlikely to have been practiced at all in these areas at the time when sovereignty over the adjoining land mass occurred.[88]

In extra-jurisdictional areas of the high sea, where the Crown has acquired sovereignty well after the date it was acquired over the adjoining land, rights to commercially trade in marine resources are also more likely to satisfy the traditionality requirements. This is because the later sovereignty date allows for the incorporation of commercial fishing rights into customary practices.[89] In *Akiba*, Finn J argued that upholding such rights was not inconsistent with the conclusions of the High Court in *Yorta Yorta* because what the Court was specifically 'discountenancing was the recognition of new native title rights in land over which territorial sovereignty had previously been acquired.'[90] His Honour felt that it was, therefore, fair and reasonable to assess the traditionality of native title rights in 'later acquired areas' in the high seas at the time when sovereignty over such areas was asserted. This of course means that the traditionality of native title fishing practices in these areas must be examined 'by

84 Ibid 444 [44].
85 (2010) 270 ALR 564, 735 [738].
86 Ibid.
87 The decision has been appealed and is set for determination by the Full Federal Court later in 2011.
88 For a discussion on the sovereignty and customary practices in the Torres Strait see generally Colin Scott and Monica Mulrennan, 'Land and Sea Tenure at Erub, Torres Strait: Property, Sovereignty and the Adjudication of Cultural Continuity' (1999) 70 *Oceania* 146.
89 See especially Guy Powles, 'Common Law at Bay? The Scope and Status of Customary Law Regimes in the Pacific' (1997) 21 *The Journal of Pacific Studies* 61.
90 (2010) 270 ALR 564, 734 [735].

reference to the situation that existed at that time' rather than the practices of a much earlier time.[91]

VII RIGHTS TO COMMERCIALLY EXPLOIT MARINE RESOURCES: *AKIBA*

The issue of whether rights to commercially exploit marine resources may be recognised as constituents of a native title claim against either the territorial sea or extra-jurisdictional areas within the high seas is an important one.[92] The recognition of such rights will inevitably contribute to a much stronger framework for economic progression, particularly for indigenous communities in coastal areas. However, the recognition of such rights inevitably involves reconciling commerciality with traditional practices. Pre-sovereignty normative communities were subsistence oriented and the practice of commercially exploiting marine resources is a modern one, largely responsive to the vicissitudes of European settlement and the need for indigenous communities to adapt to the demands of a pluralist framework.

As outlined above, in *Yorta Yorta*, the High Court held that native title laws and customs would not be traditional under section 223(1) of the *NTA* if they were not sourced in the practices of pre-sovereignty, normative communities. This definition will exclude native title rights which have evolved to take advantage of commercial fishing markets unless such practices can be validated as substantial adaptations of traditional subsistence rights or, alternatively, as practices which were in existence at the later date when 'progressive' sovereignty rights were acquired. A further difficulty with the recognition of rights to 'commercially' exploit marine resources lies in the fact that these rights may be characterised as 'rights of exclusivity,' and therefore non-recognition rights, because of the level of control and occupancy over the claimed waters that they anticipate.

The difficulties associated with the recognition of commercial rights to exploit marine resources within native title claims were raised by Finn J in *Akiba*. The facts of *Akiba* concerned an application for the recognition of native title rights and interests in the Torres Strait seas. The Torres Strait is classified as an international strait in accordance with *UNCLS*.[93] The application was made by a diverse range of indigenous groups, all of whom identified as Torres Strait Islanders, including an aggregate of the claimants from the *Mabo* decision. The claim was made over a large section of the territorial sea as well as the high seas and seabed surrounding the Torres Strait region. Australia acquired sovereignty

91 Ibid 735 [738].

92 The reference to 'commercial' in this context may be read as indicating that the right is exercised either partially or exclusively for profit motives. In the context of native title, this would indicate that the right allows indigenous owners to sell or otherwise deal with the fish that they catch and it would also anticipate the setting up of a trade or business in fishing.

93 *UNCLS* pt III.

over the high sea areas of the Torres Strait progressively as a result of three separate alterations made to the measurement of the territorial seas in treaties entered into between Australia and the independent state of Papua New Guinea.[94]

The claimants in *Akiba* sought to have a range of different native title rights and interests recognised in this area. The claim itself covered approximately 42 000 square kilometres of sea country between mainland Cape York and Papua New Guinea. This region is vitally important for state and federal fisheries and it also has a fundamental importance for international shipping given its inclusion in many international shipping routes. These issues aside, there are also significant jurisdictional difficulties associated with the region given the fact that in some places, the territorial sea of Australia either touches or overlaps with the territorial waters of Papua New Guinea.

The entire claim area is subject to the provisions of the *Torres Strait Treaty*.[95] This treaty was implemented in 1975, following the independence of Papua New Guinea. The treaty created a jurisdictional distinction between the seabed and fisheries as well as a protected zone explicitly aimed at promoting and protecting traditional indigenous practices (art 10) and protecting the marine environment and its flora and fauna (art 16). Within the protected zone, all commercial fishing is subordinate to traditional fishing carried out by indigenous communities.

Article 2 of the *Torres Strait Treaty* sets out that most of the Islands, apart from three which are very close to the Papua New Guinea mainland, remain Australian territory. The treaty also separates the continental shelf and the fisheries jurisdiction with the aim of allowing Papua New Guinea access to resources within Torres Strait as well as preserving the right of Torres Strait Islanders to enjoy fisheries in the area. There is a residual jurisdiction in the region between the seabed and fisheries, covering marine environment, energy production and other associated activities, which require a concurrence of approval by both the Australian and Papua New Guinea governments.

The native title claims raised by the claimants applied to the territorial sea, the high seas within the protected zone and international waters within the Papua New Guinea jurisdiction. The native title claims were categorised into three groups. The first were rights to 'enter and remain' and to 'use and enjoy'. The second were rights to 'access the resources', 'to take the resources' and to a 'livelihood based upon accessing and taking resources'. The third were rights to 'protect the resources', to 'protect the habitat of resources' and to 'protect places of importance.' A reference to resources within the second and third groups was to all living and inanimate things within the sea, other than minerals or petroleum which were owned by the Crown, but including the sea-water itself. In this respect, Finn J adopted a broad approach, arguing that the right of indigenous

94 *Torres Strait Treaty* arts 1, 2, 3, 4, 9, 10.

95 The *Torres Strait Treaty* has been described as 'one of the most complicated maritime boundary delimitations in the world, with jurisdiction over seabed and water column divided at different points between Australia and Papua New Guinea': Kaye, above n 70, 'Scope of Work'.

claimants to remove sea-water was not inconsistent with any of the underlying common law principles governing water ownership in Australia.[96]

Both the Queensland and Commonwealth governments conceded the non-exclusive right of the claimants to access the territorial sea and waters within the protected zone for the purposes of carrying out traditional laws and customs including fishing, hunting and gathering living and plant resources for personal and domestic or non-commercial use. Both the State and the Commonwealth objected, however, to the second group of claimed rights to livelihood, to the exploitation of resources for commercial purposes and to the right to protect. The State argued that the right to take resources for commercial or trading purposes was not enforceable because its existence was wholly dependent upon the existence of a right of exclusive possession and such a right was fundamentally inconsistent with the recognition of native title rights in both the territorial and high seas.

Justice Finn rejected the argument of the State, holding that marine resources are perfectly capable of being exploited for trading and commercial purposes without the need for any exclusive possession.[97] In reaching this decision, his Honour adopted a methodology that took into account the manner in which the right was to be exercised as well as broader issues of structural equality. Justice Finn argued that it would be both 'curious' and 'untenable' to characterise the practices of indigenous inhabitants, in taking marine resources for trade and commercial purposes, as necessarily dependent upon the existence of a right of exclusivity.[98] The taking of marine resources for trade and commercial purposes was an established activity of the Crown within its own territorial waters and these activities were carried out in the absence of rights of exclusivity because the Crown retained no radical title in the territorial sea. Justice Finn argued that if the absence of exclusivity was never regarded as an impediment to the validity of Crown practices indigenous inhabitants should be accorded the same standards. Rights to commercially exploit marine resources, whether exercised by the Crown or by indigenous inhabitants, should not be regarded as dependent upon proof of the existence of rights of exclusivity when such rights have never existed.

Justice Finn rejected, however, the third group of rights that would have entitled the claimants to protect the habitat of resources as well as places of cultural importance. His Honour concluded that these rights were, in substance, rights of exclusion because of the substantive level of control necessarily connected to rights of protection. His Honour rejected any attempt to validate the third group of rights under the qualified enforcement argument that Kirby J had raised in *Yarmirr*, arguing that qualified exclusion was an 'elusive' and unclear concept which 'emasculate[s] and dismember[s] a holistic traditional right'.[99]

96 *Akiba* (2010) 270 ALR 564, 738–9 [758]–[760].
97 Ibid 738 [753].
98 Ibid 738 [754].
99 Ibid 688 [536].

The approach taken by Finn J to the validation of rights to commercially exploit marine resources encompassed not only a holistic examination of the nature of the right in issue but also the manner in which the right had, to date, been exercised by both indigenous and non-indigenous participants. Of particular concern was the need to ensure that in the absence of corporeal title, the rights of both the indigenous inhabitants and the Crown were assessed by reference to a similar framework and were therefore accorded similar privileges. The approach that Finn J took to the interpretation of commercial fishing rights is broadly reminiscent of the conclusions of the majority in *Western Australia v Ward* where the concept of possession was distinguished from that of occupation, and it was argued that the bare fact that an area is in occupation does not, in itself, suggest that the occupation amounts to exclusive possession and nor is such an occupation necessarily inconsistent with other exclusive possession rights.[100] The judgment of Finn J in *Akiba* can, however, be clearly contrasted with the conclusions of the Federal Court in *Daniel v Western Australia* which, in the context of a native title claim against land, held that rights to trade in resources were necessarily interconnected to rights of control and exclusivity and were therefore incapable of being legally recognised.[101]

The more difficult issue, not fully explored by Finn J in *Akiba*, lies in the problem of proving that rights to commercially exploit marine resources are capable of satisfying the traditionality requirements set out in the *NTA* and interpreted by the High Court in *Yorta Yorta*. Whilst *Yorta Yorta* made it clear that some new, adaptive rights could be upheld, these rights could only be treated as traditional where they were 'contemplated' by the original law or custom.[102] Hence, as outlined in *Bodney v Bennell*, adaptive rights could be enforced where the adaption continued to have its origins in a pre-sovereignty law or custom. For example, where a practice of fishing in the sea had developed since sovereignty, a change in the number and identity of people who could fish would not necessarily mean that those rights were no longer traditional.[103] Laws and customs which continue to connect to the core, derivative right will continue to be classified as traditional; however laws which, in substance, amount to completely different rights, cannot be regarded as traditional and are not enforceable.

Rights to commercially exploit marine resources do not constitute developments in the scope and range of a subsistence fishing right. The

---

100 Justice McHugh concluded that '[t]he occupation of the land by Aboriginals [was] no more inconsistent with the legal possession of the land being in the pastoral lessee than the sole occupation of a room by a lodger is inconsistent with legal possession of the room being in the owner of the boarding house': (2002) 213 CLR 1, 229–30 [522].

101 [2003] FCA 666, [320].

102 The majority in *Yorta Yorta* (2002) 214 CLR 422, 443 [43] stated (emphasis in original):

> Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.

103 (2008) 167 FCR 84, 114 [120]–[121] (Finn, Sundberg and Mansfield JJ).

commerciality of the right fundamentally changes the focus of the original practice. Commercial exploitation anticipates large-scale fishing for the purpose of profit, which surpasses the subsistence objectives of pre-sovereignty practices. This does not, however, mean that commercial or trading rights cannot be viewed as adaptive rights, particularly in a context where the Crown does not retain any radical title. If the courts are prepared to adopt a broader approach to the interpretation of traditionality in these circumstances, indigenous rights may be examined in terms of extant practices rather than static customary law. This would represent an important development for native title claims in both the territorial seas and in extra-jurisdictional zones of the high seas. Within these areas, fishing practices have undergone significant changes and a failure to acknowledge this shift overlooks the importance of these transformative events upon cultural progression.[104]

VIII CONCLUSION

The recognition and enforcement of native title rights and interests within both territorial waters and extra-jurisdictional zones within the high seas has been a gradual process, activated by the introduction of the *NTA* and the increasing cultural and jurisdictional importance of protecting indigenous fishing practices. The acceptance in the recent *Akiba* decision, that rights to commercially exploit marine resources are valid constituents of native title claims in both the territorial sea and the protected zone of the high seas, represents a turning point in this process. The approach taken by Finn J, whilst broadly consistent with the principles enunciated by the High Court in *Yorta Yorta*, reveals a greater preparedness to compare indigenous and non-indigenous practices and to take account of the non-proprietary foundation of both claims. The absence of radical title in the territorial sea means that, unlike land claims, rights in this area are not derivative of the Crown and therefore do not depend upon the institutional assumptions that govern the underlying feudal framework. Practices are validated in terms of their consistency with established international and domestic fishing and navigational practices. This process focuses upon the importance of reconciling differing entitlements rather than, as occurs with land based native title claims, validating presumptive entitlements.

In *Akiba*, Finn J rejected the idea that rights to commercially exploit marine resources were dependent upon exclusive possession because he noted that identical Crown rights had been carried out in the absence of any such claim for many years. Further, his Honour was prepared to accept that the continuity test

104 Alexander Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453. Benedict Kingsbury notes that efforts to 'express culture and history as legal tests have tended to produce feeble and ultimately unconvincing searches to find or not find essentialized culture': 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189, 244.

that underpins native title validation should not be frozen in time, and that where claims were made against progressive sovereignty areas in the high sea, account could be taken of native title practices at the time when sovereignty was actually acquired. The flexibility and reciprocity inherent in this analysis means that the consistency test that governs native title claims against the territorial and high seas is better able to incorporate issues of structural equality and is more fundamentally responsive to the emergent demands of 'recognitional' pluralism.