

# *Rights to Offshore Resources After Mabo 1992 and the Native Title Act 1993 (Cth)*

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## **1. Introduction**

### **A. Preliminary Comments**

The question of ownership of offshore natural resources, particularly those in land-adjacent offshore zones, has a number of dimensions. These relate to competing interests for those resources. The competition arises from the existence of valuable resources in the offshore, and the fact that sovereignty (and property) in offshore areas, although much clearer now, still remains less settled than in the case of onshore areas.

The levels of disputation typically emerging include:

- i disputes over offshore areas between sovereign nation states;
- ii disputes between regional and central governments in federal nation states; and
- iii disputes between competing potential offshore stakeholders (other than those in ii) within nation states.

An example of first level disputation is the argument, now bilaterally resolved at least at a practical, exploitation level, between Australia and Indonesia over the Timor Gap.<sup>1</sup> Examples of the second listed level include the federalism disputes over offshore rights experienced in the United States of America, Canada and Australia since World War Two. The third category includes offshore property disputes between commercial stakeholders or between commercial stakeholders and governments. More recently, and potentially more significantly, there has arisen the possibility of native or Aboriginal title existing in offshore areas. It is this category of offshore interest which is the

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<sup>1</sup> Grace, J, "A Boundary Dispute Successfully Managed" (1995) (March) *Asian LJ* 26. This dispute remains deeply politically controversial 20 years after the Indonesian invasion of East Timor. See "Australia and Indonesia: Haunted" *The Economist*, 4 November 1995 at 32.

concern of this article. This category of offshore interest also raises the possibility of interests arising which have other than economic dimensions.

The primary focus of this article is on the impact on rights in Australia's Offshore Zones of the landmark decision of the Australian High Court in *Mabo (No 2) v Queensland*,<sup>2</sup> on the issue of traditional native property rights (TNPR).<sup>3</sup> *Mabo 1992* was the culmination of litigation begun in May 1982 arguing generally that Australia's original inhabitants, the Aborigines, enjoyed TNPR over Australia prior to European settlement and that their TNPR survived European settlement of Australia. The specific land in dispute in *Mabo 1992* was the Island of Mer, one of three islands in the Murray Island group immediately north of mainland Queensland in Torres Strait.

I believe that the Australian offshore case law presents some obstacles to establishing the existence of TNPR in the Australian Offshore Zones (marine TNPR). This is because the process by which offshore rights accrue raises certain difficulties for marine TNPR. The subsequent Commonwealth legislative modifications of the judicially decided offshore regime may, in turn, have extinguished any marine TNPR which did exist. That is, steps taken by the Commonwealth before, pursuant and subsequent to the settlement of Canberra's offshore dispute with the States in 1979, may have been sufficient to override or extinguish any previously existing marine TNPR. The recently challenged but substantially validated *Native Title Act 1993* (Cth) may have altered this outcome although this does not appear to be likely. If this argument is correct, Commonwealth authority in the offshore is sufficient, however, for it to legislate to recognise marine TNPR within the bounds of Commonwealth authority in the offshore.

The purpose of this article is to trace the development of the basic non-indigenous legal doctrine with respect to offshore rights as it now stands in the light of these most important recent developments with respect to TNPR.<sup>4</sup> The article reviews certain primary Commonwealth legislative measures and certain non-legislative actions by the Commonwealth. It does not consider the

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2 (1992) 175 CLR 1. I have referred to that case in this paper as *Mabo 1992* to distinguish it from *Mabo (No 1) v Queensland* (1988) 166 CLR 186. The *Mabo 1988* case concerned the preliminary (as a majority of the court decided) issue of the validity of the *Coast Islands Declaratory Act 1985* (Qld). That Act was found by the High Court to be invalid due to the application of s109 of the Australian Constitution (*Commonwealth of Australia Constitution Act 1900* (UK) ch 12). Section 109 provides for the supremacy of Commonwealth laws. The *Queensland Coast Islands Declaratory Act 1985* (Qld) was held to be invalid as it contravened s10 of the *Racial Discrimination Act 1975* (Cth). See Cullen, R, "Case Note: *Mabo v Queensland*" (1990) 20 *UWALR* 190. The literature on *Mabo 1992* is extensive. It includes more than one symposium in print and numerous books. Articles providing jurisprudential, policy and legal-interpretative perspectives include: Bartlett, R, "Political and Legislative Responses to *Mabo*" (1993) 23 *UWALR* 352; McIntyre, G, "Aboriginal Title: Equal Rights and Racial Discrimination" (1993) 16 *UNSWLJ* 57; Reynolds, H, "The *Mabo* Judgment in the Light of Imperial Land Policy" (1993) 16 *UNSWLJ* 27 and Lumb, R D, "Native Title to Land in Australia: Recent High Court Decisions" (1993) 42 *ICLQ* 84.

3 This term is used as a collective expression to encompass all rights which may be derived through Aborigines' connections with the land.

4 Webber draws a useful distinction for discussions such as this, between indigenous (aboriginal) and non-indigenous (standard general law) doctrines. See Webber, J, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 *Syd LR* 5 at 7.

impact of secondary legislative measures by the Commonwealth (for example, regulation of fisheries and the offshore petroleum industry) nor State regulation of offshore fishing and other offshore matters.<sup>5</sup> The application of section 51(xxxi) of the Australian Constitution to the issue of compensation is discussed but not in detail. That is a matter which deserves to be explored in a separate article. Finally, the recent decision of the High Court holding the *Native Title Act* to be mainly valid is not analysed. A review of the detailed arguments in that case is not necessary for the purposes of this article which considers only a limited number of provisions of the Act. The important point for this paper is that the *Native Title Act* was held to be substantially valid.

### B. *Conspectus*

In Part 2 the main reasoning and conclusions to be derived from *Mabo 1992* are summarised. In Part 3 the principal issues related to the constitutional and political resolution of the dispute over Australia's offshore area are outlined. These are not set out in detail but are rather summarised. The implications of *Mabo 1992* with respect to Australia's offshore areas are considered in Part 4. Part 5 reviews the impact of the *Native Title Act*. Part 6 considers the state of some pending applications for marine TNPR. Part 7 forms the conclusion.

## 2. *Mabo 1992*

### A. *Summary of the Judgments*

All seven High Court judges<sup>6</sup> in *Mabo 1992*<sup>7</sup> explicitly accepted or assumed that (by varying names) TNPR prevailed before European colonisation in Australia. Even Dawson J, who was the lone dissident, suggested that this was the case. Not that this made much difference, as he laid emphasis on the need for the Crown to recognise any form of native interest in land, and noted that that had not occurred. In the absence of that recognition, on the assumption of Crown sovereignty, any TNPR as may have existed were extinguished.<sup>8</sup>

The other six judges found both that TNPR existed and had survived the assertion of Crown sovereignty in Australia. Brennan J (with whom Mason CJ and McHugh J concurred) concluded, after a long historical survey of the law and relevant socio-political history, that TNPR existed and could continue to exist and were cognisable by the common law after colonisation. Their nature is discussed further below. The assertion of Crown sovereignty in Australia delivered the radical title to all land in Australia to the Crown. But that radical title did not equal absolute beneficial title. Radical title indeed could coexist with TNPR.

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5 It follows that I have not addressed the difficult issues of environmental management in the offshore. A good overview of environmental (and economic) offshore management problems can be found in Hildreth, R G and Galc, M K, "Institutional and Legal Arrangement for Coastal Management in the Asia-Pacific Region" in Hotta, K and Dutton, I M (eds), *Coastal Management in the Asia-Pacific Region* (1995) at 21.

6 Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

7 *Mabo 1992*, above n2 at 139.

8 *Id* at 175. See also *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422, 433-4 and 452-3. In this case all members of the Court, apart from Dawson J, wrote a concurring judgment.

The question which then arises is, can TNPR be extinguished? The answer is yes, the Crown can extinguish TNPR.<sup>9</sup> It must do so clearly and unambiguously, although words expressly extinguishing TNPR are not required.<sup>10</sup>

Deane and Gaudron JJ essentially came to the same conclusion, again after a long historical discussion where they canvassed the appalling history of Aboriginal deprivation and destruction in Australia in detail and with considerable feeling.<sup>11</sup> TNPR, they said, have existed and survived into postcolonial Australia although they could be extinguished by the Crown.<sup>12</sup> They described TNPR as "presumptive common law native title".<sup>13</sup> This formulation is somewhat different to that used by Brennan J but nothing seems to turn on the difference. What is different about the Deane-Gaudron judgment and that of Toohey J is that all three judges argued that, in certain circumstances, any government extinguishing TNPR would be obliged to make compensation.<sup>14</sup>

Although the circumstances where compensation had to be made were limited, this is an important distinction. However, Mason CJ and McHugh J in their half-page concurring joint judgment explained that the combined views of Mason CJ and Brennan, McHugh and Dawson JJ have created a majority *against* the proposition that:

in the absence of clear and unambiguous statutory provisions to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.<sup>15</sup>

Thus a majority of the Court considered that compensatory damages are not payable. The question of compensation is not discussed in any detail by these majority judges, however. The application of section 51(xxxi) of the Australian Constitution (which requires the Commonwealth to compensate for Commonwealth property acquisition) to Commonwealth extinguishment of TNPR, although referred to by Deane and Gaudron JJ, was not discussed in detail.<sup>16</sup> The majority simply said that they disagreed with the argument of the other three judges that compensation may be payable for extinguishment of TNPR in some circumstances.

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9 *Mabo 1992*, id at 69-71.

10 *Id* at 68. Given that it is only since 3 June 1992 that we have known (with legal certainty) that TNPR exist in Australia, this approach is hardly surprising. Where no TNPR existed in a given area prior to asserted Crown sovereignty, it seems the Crown acquired both radical title and absolute beneficial title: see Deane and Gaudron JJ, id at 86.

11 *Id* at 118-20. See also *Western Australia v Commonwealth*, above n8 at 431-2. Webber has recently described this process as the "jurisprudence of regret". He argues that *Mabo 1992* does more than rely on some combination of British colonial law, equality concepts in the common law, and a review of the application of concepts such as terra nullius. He says that the High Court was cognisant of the "moral presence" of the past in making its judgment. Bearing this moral dimension in mind, Webber claims that the majority judges dramatically reconstructed the law, and that it was inappropriate for them to do otherwise. Webber argues that this sort of remaking of the law is squarely within the common law tradition. See above n4 at 26-8.

12 *Mabo 1992*, *ibid*.

13 *Id* at 100.

14 *Id* at 111-2 and 119 per Deane and Gaudron JJ and at 216 per Toohey J.

15 *Id* at 15.

16 *Id* at 111.

A series of recent High Court cases have considered section 51(xxxi). Briefly, the section was held to apply in *Georgiadis v Australian and Overseas Telecommunications Corporations*<sup>17</sup> by a bare majority of 4:3. This case involved a Commonwealth law extinguishing a cause of action. However, four other recent cases have seen the High Court decline to apply section 51(xxxi).<sup>18</sup> The case law on the operation of section 51(xxxi) continues to make an argument in favour of Commonwealth compensation being payable pursuant to this provision, where actions of the Commonwealth have extinguished TNPR, at least problematic. The majority statement in *Mabo 1992* on the issue of compensation reinforces that view. Until the High Court applies section 51(xxxi) in a clear TNPR context, however, this compensation issue remains highly debatable.<sup>19</sup>

### B. Some Specific Findings

It seems clear from *Mabo 1992* that certain aspects of TNPR are now relatively settled in Australia, at least with respect to land-based TNPR. These can be summarised as follows.<sup>20</sup>

- i TNPR survived the assertion of Crown sovereignty with respect to the land mass of Australia.
- ii The Crown's acquisition of radical title did not, of itself, disturb TNPR.
- iii TNPR arise from the connection of a particular Aboriginal group to particular land.
- iv The survival of TNPR to contemporary times requires the survival of the particular group (as recognised within the group) and a remaining general connection between that group and the particular land pursuant to the laws and customs of that group.
- v TNPR will be lost "naturally" with the death of the last of the members of the relevant group or clan, or by severing of connection between the

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17 (1994) 119 ALR 629.

18 For example: *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 119 ALR 557 (considering whether a certain tax refund Act was an acquisition of property); *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 119 ALR 655 (considering whether an order for forfeiture was an acquisition of property); *Health Commission v Peverill* (1994) 119 ALR 675 (considering whether a retrospective reduction of Commonwealth medical benefits was an acquisition of property); and *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 121 ALR 577 (considering whether a statutory conferral of exclusive intellectual property rights was an acquisition of property). The High Court decided unanimously that s51(xxxi) did not apply in any of these cases.

19 See further: Hanks, P J, *Constitutional Law in Australia* (1991) at 403-9; Howard, C, *Australian Federal Constitutional Law* (3rd edn, 1985) at 441-59; and Cullen, R, *Federalism in Action* (1990) at 125-7. See also Kennett, G, "Individual Rights, the High Court and the Constitution" (1994) 19 *Melb ULR* 581 at 585. Kennett takes a more optimistic view of the scope of s51(xxxi), although he still notes the limitations on what amounts to acquisition. It is understood that the application of s51(xxxi) has been raised (in a TNPR context) in *The Wik Peoples v Queensland* (Revised Statement of Claim) Federal Court proceedings No. QG 104 of 1993.

20 Most of the numbered propositions following are drawn from the judgment of Brennan J in *Mabo 1992*. The main difference Deane, Gaudron and Toohey JJ have with Brennan J is on the compensation point discussed above.

- group and the particular land through the group ceasing to observe the laws and customs of that group.
- vi It is immaterial, however, that the laws and customs of the particular group have undergone some change. TNPR can survive such modifications.
  - vii TNPR generally are inalienable although they may be voluntarily surrendered to the Crown.
  - viii The nature of TNPR may vary, in common law terms, from usufructuary<sup>21</sup> to proprietary.<sup>22</sup>
  - ix An example of usufructuary rights might well be fishing rights such as those enjoyed by the Murray Island natives involved in *Mabo 1992*.<sup>23</sup>
  - x Subject to particular group laws and customs, TNPR usually will be communal title.
  - xi A subgroup or an individual member of such a group nevertheless would have a sufficient interest to protect or enforce the communal title.<sup>24</sup>
  - xii The precise bounds of given TNPR are to be ascertained according to the laws and customs of the particular group which has connection with that particular parcel of land.<sup>25</sup>
  - xiii Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with the continuation of TNPR in a given case, the TNPR are extinguished to the extent of the inconsistency.<sup>26</sup>
  - xiv The valid granting of a leasehold interest is generally sufficient to extinguish TNPR.<sup>27</sup>
  - xv The valid grant of lesser interests, however, for example, authorities to prospect for minerals, may not extinguish TNPR.<sup>28</sup>
  - xvi Neither the creation of Aboriginal reserves nor the appointment of "trustees" to control reserves would extinguish TNPR.<sup>29</sup>
  - xvii TNPR continue where waste lands have not been appropriated, or where the appropriation and use is consistent with the concurrent enjoyment of native title over the land (for example, where land is set aside for a national park).<sup>30</sup>
  - xviii A law merely regulating the enjoyment of TNPR or which creates a regime of control which is consistent with the enjoyment of TNPR will not extinguish TNPR.<sup>31</sup>

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21 "The right of using or taking the fruits of something belonging to another" Burke, J, *Osborn's Concise Law Dictionary* (6th edn, 1976).

22 "Rights of ownership", *ibid*.

23 *Mabo 1992* above n2 at 72.

24 *Id* at 62. See also *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 and *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

25 *Mabo 1992*, *id* at 70.

26 *Id* at 69-70.

27 *Id* at 69 and 72-3, but see below n104.

28 *Id* at 69.

29 *Id* at 66.

30 *Id* at 70.

31 *R v Sparrow* (1990) 70 DLR (4th) 385.

- xix The extinguishment of TNPR does not depend on the intention of the Crown in making the grant but on the *effect* which the grant has on the right to enjoy the native title.<sup>32</sup>
- xx The effect of limitation of actions legislation on TNPR claims was discussed but not decided.<sup>33</sup>
- xxi Until 1975, the States appear to have enjoyed significant power to extinguish TNPR. Since the passage of the *Racial Discrimination Act* 1975 (Cth), the ability of the States to extinguish TNPR has been significantly curtailed. *Mabo 1988* makes it clear that any post-1975 attempt by the States explicitly or via practical effect, to target TNPR for extinguishment will be constitutionally invalid.<sup>34</sup>

### 3. *The Australian Offshore Zones*<sup>35</sup>

#### A. *Introduction*

The following discussion summarises the pre-Mabo 1992 position in the offshore. It considers both the case law and the political settlement reached, in 1979, between the Commonwealth and the States.<sup>36</sup> The discussion of the case law includes references to some of the leading Canadian offshore cases. A central-regional offshore legal dispute began unfolding in Canada shortly before the same process commenced in Australia. The findings in these Canadian cases are considered as they provide some assistance in understanding the important process by which offshore rights have been held to accrue. The cases also shed some light on the timing of that process of accrual. Finally, they arose from a comparable dispute and from within a comparable jurisdiction.

#### B. *Judicial Decisions on Australian Offshore Rights*

The pivotal case, the *Seas and Submerged Lands Case*, dates from 1975.<sup>37</sup> There are a significant number of other relevant cases which predate and post-

32 *Western Australia v Commonwealth*, above n8 at 422.

33 *Mabo 1992*, above n2 at 112.

34 *Ibid.* The operation of the *Racial Discrimination Act* on the Commonwealth is discussed further below. See also Hanks, P, "Can the States Rewrite *Mabo* (No 2): Aboriginal Land Rights and the *Racial Discrimination Act*" (1993) 15 *Syd LR* 247.

35 I have written in some detail on the dispute between the Commonwealth and the States over Australia's offshore areas and also about the comparable dispute in Canada. See Cullen, above n19; Cullen, R, *Australian Federalism Offshore* (2nd edn, 1988); Cullen, R, "The Encounter Between Natural Resources and Federalism in Canada and Australia" (1990) 24 *U Brit Columbia LR* 275; and Cullen, R, "Bass Strait Revenue Raising: A Case of One Government Too Many?" (1988) 6 *Journal of Energy and Natural Resources Law* 213. Detailed discussion of aspects of these disputes can also be found from a variety of other sources, including: Rothwell, D R and Haward, M, "Federal and International Perspectives on Australia's Maritime Claims" (1996) 20 *Marine Policy* 29; Opekin, B R and Rothwell, D R, "Australia's Territorial Sea: International and Federal Implications of its Extension to 12 Miles" (1991) 22 *Ocean Development and International Law* 395; Waugh, J, *Australia Fisheries Law* (1988); and Haward, M, "The Australian Offshore Constitutional Settlement" (1989) 13 *Marine Policy* 334.

36 References to the States in the text following should be read as including the Northern Territory (and the Australia Capital Territory with respect to Jervis Bay) unless otherwise stated.

37 *New South Wales v Commonwealth* (1975) 135 *CLR* 337.

date the *Seas and Submerged Lands Case*, however. For a complete understanding of the judicial position they need to be consulted.<sup>38</sup>

Essentially, the High Court of Australia, like the Supreme Court of Canada,<sup>39</sup> has consistently found for the Central Government in the offshore cases. The Court decided (5:2) in the *Seas and Submerged Lands Case* that the Commonwealth government enjoyed sovereignty over internal waters and the territorial sea and (unanimously) sovereign rights over the continental shelf. No subsequent cases have disturbed these fundamental findings, though they have provided some clarification.

In the *Seas and Submerged Lands Case*, the High Court considered, inter alia, the effectiveness of the *Seas and Submerged Lands Act 1973* (Cth). Section 6 of the Act reads as follows:

It is by this Act declared and enacted 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 11 of the Act provides that:

It is by this Act declared and enacted that the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purposes of exploring it and exploiting its natural resources are vested in and exercisable by the Crown in right of the Commonwealth.

The Court found that these sections correctly stated the position of the Commonwealth. All the majority judges either explicitly or implicitly noted and sanctioned the Commonwealth's claims over internal waters being those waters on the landward side of the baseline drawn for the other offshore zones.<sup>40</sup>

It is interesting that the sections above use the words "it is ... declared and enacted". The previous case law, particularly the 19th century British case law deemed relevant by the court, left some uncertainty about how coastal nations acquired offshore areas.<sup>41</sup> This wording appears designed, inter alia, to deal with that uncertainty. To the extent that acquisition of offshore areas depends on a legislative claim thereto, the *Seas and Submerged Lands Act* so claims. To the extent that offshore areas have accrued to Australia by some other means then the *Seas and Submerged Lands Act* declares that that has happened.

38 These cases are discussed in chs 3 and 4 of Cullen, above n19. The Australian cases are: *Bonser v La Macchia* (1969) 122 CLR 177; *R v Bull* (1974) 131 CLR 203; *Pearce v Florenca* (1976) 135 CLR 507; *Oteri v The Queen* (1976) 11 ALR 142; *Bistricic v Rokov* (1976) 135 CLR 552; *Raptis v South Australia* (1977) 138 CLR 346; *Robinson v Western Australian Museum* (1977) 138 CLR 283; and *Li Chia Hsing v Rankin* (1978) 141 CLR 182. Cases which are related to the offshore dispute in so far as they discuss relevant Commonwealth and State powers which may apply in the offshore include: *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417; *Commonwealth v Tasmania* (1983) 46 ALR 625; *Kirmanji v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351; *Richardson v Forestry Commission* (1988) 62 ALJR 158; *Union Steamship Company of Australia Pty Ltd v King* (1988) 62 ALJR 645; and *Port MacDonnell PFA Inc v South Australia* (1989) 63 ALJR 671.

39 And the Supreme Court of the United States: Cullen, *id* at 3.

40 *Id* at 87. A clear distinction ought be drawn between "internal waters" (waters linked to the territorial sea) and "inland waters" (which may be waters of the sea but whose connection is with the surrounding land). *Id* at section 2.1.02 and at 102.

41 *R v Keyn* (1876) 13 Cox CC 403. *Id* at sections 2.1.01 and 3.2.02.



The High Court findings support the proposition, I believe, that both the territorial sea<sup>42</sup> and the continental shelf<sup>43</sup> accrued to the Commonwealth without need of any legislative assertion of offshore rights. They accrued through a process of absorption of customary and treaty international law principles into Australian municipal law.<sup>44</sup> The Canadian case law supports this argument also, in my view.<sup>45</sup> Alternative views on this process of accrual have been expressed but they cannot easily be reconciled with both the Australian and Canadian case law. The principal alternative view has been argued by Harrison. It leaves several important practical questions related to accrual unanswered and it does not sit well with the Australian case law, especially.<sup>46</sup> Although international law does not become municipal law in Australia without, usually, an express adoption of international law by municipal law, what was happening here was a conferral of rights rather than a transfer of legal doctrine. This process involved an "accepting" rather than an "adopting".

The Court was unclear about when absorption occurred. It appears the earliest this could have happened in the case of Australia was 1901. Basically, the Court said that there had to be a recognised international entity, being a coastal State, which could so absorb the territorial sea. In the case of Australia, no such entity existed until Federation in 1901.<sup>47</sup> The earliest suggested date for Canada seems to be 1919.<sup>48</sup> In the case of Newfoundland, the Court of Appeal in Newfoundland found that, at some time prior to 1934, offshore rights in the territorial sea had accrued to Newfoundland (prior to its joining Canada in 1949).<sup>49</sup> The Supreme Court of Canada has not offered an opinion on this question.<sup>50</sup>

It also is clear that Newfoundland never acquired any offshore rights with respect to the continental shelf as, inter alia, these were not able to be acquired by Newfoundland prior to its joining Canada in 1949.<sup>51</sup> In the *Seas and Submerged Lands Case* it would appear that the earliest the Court saw Australia as having acquired rights over the continental shelf was 1958.<sup>52</sup>

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42 For ease of reference, the term territorial sea is used to include both the territorial sea and inland waters in the text unless otherwise stated. I do not include inland waters within the term. See also above n40.

43 This term is used in its legal sense, rather than its geophysical sense, to encompass the legal continental shelf offshore of Australia. For further explanation, see Cullen, above n19 at Part 2.2.

44 *Id* at 52-8.

45 *Ibid*.

46 See Harrison, R J, *Jurisdiction over Offshore Installations in Canada*, Paper presented to International Bar Association Seminar on Offshore Petroleum Installation, Boston, May 1985; and Harrison, R J, "Jurisdiction over the Canadian Offshore: A Sea of Confusion" (1979) 17 *Osgoode Hall LJ* 469. The range of alternative views are discussed in *id* at 57-8.

47 Cullen, *id* at 56-7. The Court did not consider in any detail the position of the United Kingdom, with respect to the Australian Offshore Zones, prior to 1901. In the event that some rights accrued to the UK these would have been transferred to Australia in 1901 or sometime thereafter.

48 *Ibid*.

49 See *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983) 145 DLR (3d) 9; and *id* at section 5.3.02.

50 See *Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984) 5 DLR (4th) 385.

51 *Id* at 406.

52 Cullen, above n19 at 88-9.

It also is clear that the High Court recognised there were land-adjacent waters of the sea over which the Commonwealth did *not* acquire offshore rights. These were inland waters of the sea which, for various reasons, remained within the geographic boundaries of the States.<sup>53</sup> These are not great in area and we do not know their precise extent. We do have some guidance as to how they may be ascertained, however.<sup>54</sup> The Canadian Supreme Court has concluded that similar reservations prevail in that offshore jurisdiction, although that Court's interpretation of inland waters seems to have been more generous than that of the High Court.<sup>55</sup>

These rights over the territorial sea are described as "sovereignty" in respect of the territorial sea and the airspace over it and the seabed and subsoil beneath it in both the *Seas and Submerged Lands Act* and the Convention on the Territorial Sea and The Contiguous Zone 1958 (the Territorial Sea Convention).<sup>56</sup> In the *Seas and Submerged Lands Case*, four of the five majority judges (on the territorial sea issue) made observations indicating they equated the interest acquired by the Commonwealth in the territorial sea as being both jurisdictional and proprietary.<sup>57</sup> These statements are not entirely unambiguous. The division of title between *radical* and *beneficial* elements, a crucial concept in *Mabo 1992*, was not discussed. Nevertheless, the tenor of the judgments suggests the majority saw the Commonwealth interest as encompassing both property in, and jurisdiction over, the territorial sea. The process of accretion, the unusual interaction of international and municipal law appears to have involved:

- i a gradual clarification, at international law, of (national) offshore jurisdictional and proprietary rights in the territorial sea;
- ii a stipulation, at international law, that only an internationally recognised sovereign state could enjoy these rights; and
- iii a conferral (recognised by municipal law) of all these rights, in Australia's case, on the Commonwealth.

With respect to the continental shelf, a similar process has occurred, although later in time. The Convention on the Continental Shelf 1958 (the Continental Shelf Convention) grants (the Commonwealth) "sovereign rights" to "explore and exploit" all natural resources, marine and mineral.<sup>58</sup> This

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53 Id at 87-8; also above n40.

54 See *Raptis v South Australia* (1977) 138 CLR 346; id at 94-7.

55 See *Re Strait of Georgia etc* [BC] (1977) 1 BCLR 97; and *Re Attorney-General of Canada and Attorney-General of British Columbia* (1984) 8 DLR (4th) 161. Also Cullen, id at section 5.1.02.

56 See s6 *Seas and Submerged Lands Act* 1973 (Cth) and arts 1 and 2 of the Territorial Sea Convention. The *Seas and Submerged Lands Act* was amended by the *Maritime Legislation Amendment Act* 1994 (Cth) which replaced the reference to the Territorial Sea Convention with a reference to the relevant articles of the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

57 Above n37 at 358, 372-3 per Barwick CJ, 472 per Mason J, 487 per Jacobs J and 502, 506 per Murphy J.

58 Art 2 of the Continental Shelf Convention. See also above n56 with respect to amendments to the *Seas and Submerged Lands Act* 1973 (Cth). The *Maritime Legislation Amendment Act* 1994 (Cth) has replaced the reference to the Continental Shelf Convention with reference to the relevant articles of the UNCLOS.

wording makes explicit what is left implicit in the Convention on the Territorial Sea — the fact that proprietary rights to explore and exploit are being transferred.

A contrary view was expressed by Mason J (as he then was) in *Robinson v Western Australia Museum*.<sup>59</sup> He stated that he did not agree that the *Seas and Submerged Lands Act* had conferred proprietary rights on the Commonwealth. This view was expressed, in dissent, in the particular context of deciding ownership of a Dutch shipwreck. Recently, Ryan J expressed a similar view in *Western Mining v Commonwealth*<sup>60</sup> with respect to the continental shelf. These views seem, however, to sit awkwardly with the findings (including those of Mason J) in the *Seas and Submerged Lands Case*.<sup>61</sup>

In summary, the High Court has decided, with respect to Australia's offshore areas, that:

- i although the States retain their inland waters, they enjoy no property or property-like rights over other offshore areas;
- ii the Commonwealth enjoys sovereignty in the territorial sea which may equate with proprietorial rights in the seabed, subsoil, sea and air space; and
- iii the Commonwealth enjoys sovereign rights to explore and exploit the continental shelf. These sovereign rights may include proprietary rights.

The precise dimensions of these offshore areas are a matter to be decided by reference to both municipal and international law.<sup>62</sup> Australia had a territorial sea of only three nautical miles at the time of the *Seas and Submerged Lands Case*.<sup>63</sup>

Although the rights finally conferred on the Commonwealth have been described as plenary,<sup>64</sup> those rights are subject to certain limited express and implied constitutional restraints.<sup>65</sup> The relationship between these rights enjoyed by the Commonwealth and the muddled recognition by the High Court in *Bonser v La Macchia*,<sup>66</sup> of States' rights to regulate fisheries within the (narrow) traditional, three nautical mile territorial sea remains less than clear.<sup>67</sup> The disorder in the reasoning on how these rights to regulate near-offshore fisheries have come to be enjoyed by the States remains a curious feature of the judicial resolution of the Federal-State dispute over the offshore zones and their resources.<sup>68</sup>

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59 (1976) 138 CLR 283 at 337.

60 (1994) 121 ALR 661 at 694.

61 Above n57.

62 Cullen, above n19 at Parts 2.1 and 2.2.

63 The extension of Australia's territorial sea to 12 nautical miles in 1990 and the proclamation of Australia's 200 nautical mile Exclusive Economic Zone (EEZ) in 1994 are discussed below.

64 Above n37 at 360 per Barwick CJ and at 470 per Mason J.

65 Cullen, above n19 at 102-3.

66 Above n38.

67 The matrix of Federal and State regulation of offshore fisheries is discussed in detail in Waugh, above n35. See also Cullen, above n19 at 85-6 and 104.

68 Cullen, *ibid*.

### C. *The 1979 Australian Offshore Settlement*

The offshore jurisdictional map in Australia has been markedly changed by the political settlement reached by the States and the Commonwealth in the aftermath of the *Seas and Submerged Lands Case*.<sup>69</sup> In brief, the Commonwealth agreed to hand jurisdiction back to the States over an offshore area termed "coastal waters" which equates to the traditional three nautical mile territorial sea together with internal waters. Coastal waters do not extend to encompass Australia's new 12 nautical mile territorial sea.<sup>70</sup> The device used to achieve this change was the 1979 Australian Offshore Settlement which included a package of legislation, some of it unique.<sup>71</sup> Its constitutional validity has since received High Court endorsement.<sup>72</sup> The essential elements of the settlement are the *Coastal Waters (State Powers) Act* 1980 (Cth) and the *Coastal Waters (State Title) Act* 1980 (Cth). The former grants the States legislative powers over coastal waters as if coastal waters were within the geographic boundaries of the States.<sup>73</sup> It also grants the States certain legislative powers beyond coastal waters.<sup>74</sup> The latter vests title in the coastal waters of a State in each State. In section 4, it states that:

there are vested in each State ... the same right and title to the property in the seabed beneath the coastal waters of the State ... and the same rights in respect of the space (including space occupied by water) above that seabed, as would belong to the State if that seabed were seabed beneath waters of the sea within the limits of the State.

The section goes on to provide various savings including that the rights just granted are:

subject to — any right or title to the property in the seabed beneath the coastal waters of the State of any person ... subsisting immediately before the date of commencement of this Act.

Rights conferred on States also are made subject to the operation of the *Great Barrier Reef Marine Park Act* 1975 (Cth).<sup>75</sup>

The interaction of *Mabo* 1992 and the offshore settlement is discussed shortly. At this point it is worth noting that all of the legislation so far discussed in Part 3 is Commonwealth legislation. The *Seas and Submerged Lands Act* predates the *Racial Discrimination Act* by two years. Section 10 of the latter Act provides that it applies to Commonwealth laws. When one applies the findings in *Mabo* 1988 with respect to the operation of the *Racial Discrimination Act*, it is difficult to construct an argument that the *Seas and Submerged Lands Act* infringes the *Racial Discrimination Act*. There also remains some

69 *Id* at Part 4.3. Similarly, in Canada there have been major politically driven modifications of the judicial decisions on the offshore. *Id* at section 5.3.03 and Part 5.4.

70 See ss4(1) and (2) *Coastal Waters (State Powers) Act* 1980 (Cth) and s3(1) *Coastal Waters (State Title) Act* 1980 (Cth).

71 The package is described in detail in Cullen, above n19 at Part 4.3.

72 See *Port MacDonnell PFA* above n38. See also *id* at 114–7.

73 See s5.

74 *Ibid*.

75 The operation of this Act in the light of *Mabo* 1992 is not discussed in this paper. It should be noted, however, that Brennan J said in *Mabo* 1992 (at 70) that land-based TNPR may survive where the Crown has appropriated and set aside land for use as a national park.

doubt about the effect of the *Racial Discrimination Act* on Commonwealth Acts which *predate* it.<sup>76</sup>

The *Coastal Waters (State Powers) Act* and the *Coastal Waters (State Title) Act* both were enacted after the *Racial Discrimination Act*. Unless the latter enjoys some sort of quasi-constitutional status, however, the *Coastal Waters (State Powers) Act* and the *Coastal Waters (State Title) Act* probably are not subject to it. This is because of the operation of the doctrine of implied repeal. The general rule of the common law for resolving conflicts between two laws of the same legislative body is that the latter law impliedly repeals the former to the extent of any inconsistency.<sup>77</sup> It is unlikely that the *Racial Discrimination Act* enjoys any quasi-constitutional status.<sup>78</sup> Even if it does, it is difficult to see how a breach of the Act could be argued from the enactment of the *Coastal Waters (State Powers) Act* and the *Coastal Waters (State Title) Act*, based on the decision in *Mabo 1988*. In the event, it now appears the High Court has advised that the *Racial Discrimination Act* has no such status.<sup>79</sup>

#### D. Commonwealth Offshore Proclamations

In November 1990, the Commonwealth issued a proclamation extending Australia's territorial sea to 12 nautical miles pursuant to section 7 of the *Seas and Submerged Lands Act*.<sup>80</sup> The proclamation took effect on 20 November 1990. In July 1994, the Commonwealth issued a proclamation declaring an Exclusive Economic Zone (EEZ) of 200 nautical miles for Australia pursuant to section 10B of the *Seas and Submerged Lands Act* and section 4 of the *Acts Interpretation Act 1901 (Cth)*.<sup>81</sup> The EEZ was declared to take effect from 1 August

76 There is an argument that the *Racial Discrimination Act* may not be effective to override prior Acts of the Commonwealth, notwithstanding s10. The statutory *Canadian Bill of Rights* SC 1960 (the Bill of Rights) has been interpreted so as to have such an overriding power after much discussion. The wording of s2 in the Bill of Rights lends some weight to this conclusion, however. See further Hogg, P W, *Constitutional Law of Canada* (2nd edn, 1985) at 640-2. There is no equivalent to s2 of the Bill of Rights in the *Racial Discrimination Act*. It is conceivable (though not likely) that the High Court might find that the *Racial Discrimination Act* provides a rule of construction for interpreting other Commonwealth Acts so that they ought be construed so as not to conflict with it, but that it lacks the power to override inconsistent Commonwealth Acts.

77 Hogg, id at 643. See also *Pareroutja v Tickner* (1993) 117 ALR 206 at 220.

78 Again, the Canadian experience is useful. In a limited sense, it could be said that some such status was afforded the *Canadian Bill of Rights* so that it could prevail over subsequent Acts of the Federal Parliament. There are some judicial assertions to this effect. Hogg sees it as, at best, imposing a "manner and form" requirement on later legislation: id at 643-5. In the case of the *Racial Discrimination Act*, it lacks explicit words to support such a "manner and form" requirement. Moreover, there is a strong argument that the Commonwealth Parliament cannot impose "manner and form" procedures on itself as this would infringe the clear reservation of all constitutional change power in Australia to s128 of the Australian Constitution: see Hanks, above n19 at 99-102.

79 *Western Australia v Commonwealth* above n8 at 62. The Court also held that the *Racial Discrimination Act* did apply to invalidate the *Land (Titles and Traditional Usage) Act 1993 (WA)*.

80 "Proclamation by Governor General of Australia", *Commonwealth Government Gazette* no S297, 13 November 1990.

81 "Proclamation of the Governor-General of Australia", *Commonwealth of Australia Gazette*, 26 July 1994.

1994. These proclamations somewhat belatedly assert Australia's rights contemplated by the United Nations Convention on the Law of the Sea (UNCLOS).<sup>82</sup> The significance of these two proclamations is discussed further below.<sup>83</sup>

#### 4. *Mabo 1992 and the Australian Offshore Zones*

##### A. *The Accrual of Traditional Native Property Rights Offshore*

The conclusion to be drawn from the offshore case law is that offshore rights, be they over the territorial sea or the continental shelf, accrue only to recognised international entities. In other words, a coastal State must be a State or Nation recognised at international law. The lack of this international status proved fatal to the claims of both the Australian States and the Canadian Provinces during the judicial phase of the offshore disputes in each country.

It is true that the High Court has recognised that the Australian States nowadays enjoy wide powers to legislate with effect in the offshore.<sup>84</sup> These powers still require a connection or "nexus" with a given State. The *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK) both declare that the States enjoy extraterritorial law-making powers but it is likely that these enactments underpin the general law position rather than confer any additional powers on the States.<sup>85</sup> These powers to legislate are quite separate from the enjoyment of any property rights in the offshore. To the extent that the States do enjoy property rights in the offshore (beyond inland waters) they do so pursuant to the 1979 Australian Offshore Settlement.

The first hurdle for establishing marine TNPR thus is the accrual one. It may be surmountable but the problem is not addressed in *Mabo 1992*. The difficulty is that offshore rights appear to be the product of the interaction of international law and municipal law, and that interaction is of quite recent origin. It seems the earliest date at which it may have taken effect in Australia was 1901. If marine TNPR were found to require some sort of similar interaction it is difficult to construct a strong argument, based on the existing offshore case law, supporting the existence of marine TNPR. What needs to

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82 For a discussion of the rights contemplated by the UNCLOS and the reasons for Australia's delayed assertion of these rights see Rothwell and Haward, above n35. The *Seas and Submerged Lands Act* was amended by the *Maritime Legislation Amendment Act 1994* (Cth) as part of this assertion of rights contemplated by the UNCLOS.

83 At this point it is worth noting that, although these two proclamations post-date the *Racial Discrimination Act*, they are executive actions and not legislative measures. They also have been made pursuant to legislation which predates the *Racial Discrimination Act*. The safer view is to regard them as being subject to this Act. Based on the view of the operation of s10 of the *Racial Discrimination Act* expressed in *Mabo 1988*, they are likely not to be in conflict with the *Racial Discrimination Act*.

84 See *Union Steamship Company of Australia Ltd v King* (1988) 62 ALJR 645 and *Port MacDonnell PFA*, above n38. See also Cullen, above n19 at Part 4.4.

85 Section 2 of each *Australia Act* provides that the States enjoy full power to make law having extra-territorial effect for the "peace, order and good government" of each State. This wording restates the formula on which the 'nexus doctrine' is built. See further Cullen, *ibid*. This is essentially the view of these powers taken by Rothwell and Haward, above n35 at 33. For a contrary view see Moshinsky, M, "State Extraterritorial Legislation and the *Australia Act 1986*" (1987) 61 ALJ 779.

be stressed here is that the process of accrual of offshore rights by sovereign nations described above is different, legally, to the process whereby title over land accrues. The case law makes this clear. It is this process which would be likely to influence the question of accrual of marine TNPR. It is conceivable that a court could decide differently but this would appear to require a significant departure from the offshore case law. The process which denied any offshore rights (radical or beneficial) to the States would have to be reconciled with a granting of rights to peoples who, prima facie, suffer from the same sort of limitations as the States in this context.<sup>86</sup> Some would rightly answer that *Mabo 1992* has already blazed the trail for radical departures in this area of law. In the case of marine TNPR, however, what needs to be reconciled is a series of High Court decisions on the offshore which happen to be backed up by some important Canadian case law. Moreover, a distinction in modes of accrual of rights onshore and offshore was recognised by Brennan J, in passing, in *Mabo 1992*. He commented that international law concepts were relevant in "determining title to the territorial sea, seabed and air space and continental shelf and incline" although they did not have this same relevance onshore.<sup>87</sup> If the accrual problem proves insurmountable then, according to Deane and Gaudron JJ in *Mabo 1992*, where there is no pre-existing native title, the Crown's title carries with it full and unfettered proprietary rights.<sup>88</sup> One further comment on this accrual problem is worth noting. In *Mabo 1992* it was recognition of TNPR by the common law that was crucial. In the *Seas and Submerged Lands Case*, Barwick CJ argued that the common law during the colonial era ended at the low water mark.<sup>89</sup>

Assuming that marine TNPR can be established, the next question to consider is, what might be their nature? In *Mabo 1992*, reference is made to the fishing rights enjoyed by Murray Island natives.<sup>90</sup> Similar sorts of rights were considered by the Canadian Supreme Court in *R v Sparrow*.<sup>91</sup> The most readily

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86 One possible strategy (although difficult to argue in an orthodox international law context) could be to claim that international law should now retrospectively recognise the international entity Aboriginal Australia. This approach is hinted at (in a different, New Zealand context) in Jackson, M, "Changing Realities: Unchanging Truths" (1994) 10 *AJLSoc* 115. (Some further support for this approach might be drawn from the current debate as to whether international law is gradually shifting from its traditional emphasis on effectiveness and territorial control as a test of statehood. See Basta, L R, *Constitutions and Peace within States: Minorities, Human Rights and the Welfare State*, Paper presented to the Fourth World Congress of the International Association of Constitutional Law, Tokyo, September 1995, at 31-2.) If accepted, such an argument would differentiate marine TNPR from the States' failed offshore claims. Wootten seems to be advocating a variation on this approach. His recently expressed view suggests that Aboriginal customary law may "trump" the common law on the question of TNPR: see Donaghy, B, "Lawyer Looks to Anthropologists" *Campus Review*, 5 October 1995 at 6. Kirby P (in *Mason v Tritton* (1994) 34 NSWLR 572 at 594) is, in contrast, quite clear that the courts cannot choose to apply inconsistent Aboriginal law. They must apply the laws of Parliament. See also the summary of Webber's views, above n11.

87 *Mabo 1992*, above n2 at 67.

88 *Id* at 86.

89 Above n37 at 368-9. See also, however, *Halsbury's Laws of England* (4th edn, 1984) vol 49 at par 286 where certain public rights of navigation and fishing are said to exist in the offshore.

90 *Mabo 1992*, above n2 at 72.

91 (1990) 70 DLR (4th) 385.

recognisable rights are somewhat limited, usufructuary rights. Other rights may exist, for example commercial fishing rights.<sup>92</sup> Certainly, State government regulators see the potential for significant marine TNPR claims affecting offshore industries such as pearling.<sup>93</sup> It is also possible that some Aboriginal groups may be able to assert sacred, cultural or other rights offshore.

In *Mason v Tritton*,<sup>94</sup> Kirby P argued that marine TNPR claimed by the appellant in that case were established according the principles in *Mabo 1992* but the appellant failed to demonstrate that he had been exercising such rights at the relevant time.<sup>95</sup> President Kirby's arguments were detailed, extensive and innovative. They are not entirely convincing, however. In *Mason v Tritton*, the appellant was seeking to avoid prosecution for a New South Wales fisheries offence by asserting that he was exercising his lawful marine TNPR when apprehended. His Honour suggested that fishing type, usufructuary rights might provide evidence of a wider proprietary interest. This was his strongest statement of what rights might constitute marine TNPR.<sup>96</sup> In making this finding, Kirby P appears to have accepted the basic premise of the appellant's argument in the particular case that no relevant distinction ought be drawn between dry land and land covered by water.<sup>97</sup> This is likely to be the case with respect to land covered by waters clearly within States, such as rivers and inland lakes. It is also likely to be so with respect to waters of the sea found within State boundaries, such as Sydney Harbour.<sup>98</sup> For the reasons explained above, it is less clear that this is so in the case of other land-adjacent waters of the sea. Exactly what sort of waters were involved in *Mason v Tritton* is not clear, although they were waters of the ocean.<sup>99</sup> What is clear, is that the possibility of any special problems with respect to the accrual of marine TNPR vis-a-vis TNPR is left unexamined in this case. Priestley JA (with whom Gleeson CJ agreed) may have been aware of this issue when he commented, after finding against all the appellant's arguments, that any claim by the applicant under the *Native Title Act*<sup>100</sup> might encounter difficult legal questions he had not had to consider.<sup>101</sup> *Mason v Tritton* is discussed further, shortly.

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92 Meyers, G D, "Aboriginal Rights to the Profits of the Land: Traditional Fishing and Hunting Rights in the Context of Native Title" in Bartlett, R H and Meyers, G D (eds), *Native Title Legislation in Australia* (1994) at 213, 229.

93 Summerfield, P, "Implications of Native Title Legislation for Fisheries Management and the Fishing Industry in Western Australia" in Bartlett and Meyers, id at 231, 249.

94 Above n86.

95 The two other judges hearing the case in the Court of Appeal (like the judge at the prior hearing) failed to find that marine TNPR had been established.

96 *Mason*, above n86 at 582. There do seem to be some problems with such a proposition. Kirby P did not say only Aboriginal people can claim such rights, although this was clearly implied. Suppose, however, that non-Aboriginal groups of people have exercised such rights in offshore areas where no-one else has done so. The argument, as put, seems to leave open the theoretical possibility that such a group (or an individual member thereof) could claim some sort of marine TNPR.

97 Id at 580-2.

98 That is, inland waters. See above n40 and accompanying text.

99 *Mason*, above n86 at 595 per Priestley JA.

100 This Act is described in some detail below.

101 *Mason*, above n86 at 604.



It appears to be the case that, for reasons referred to earlier,<sup>102</sup> rights with respect to fishing in the near-offshore comprise an exception to the otherwise thoroughgoing hegemony of the Commonwealth in the offshore. Accordingly, establishing near-shore fishing marine TNPR may be easier than establishing other marine TNPR. Economically it is the area beyond the traditional territorial sea that has proved to be of greatest importance amongst the offshore zones. This is where most offshore oil and gas production occurs.<sup>103</sup>

### **B. Commonwealth Extinguishment of Marine Traditional Native Property Rights**

Based on the discussions of what does and does not (or may not) extinguish land-based TNPR in *Mabo 1992* set out above, the *Seas and Submerged Lands Act* may have extinguished any marine TNPR which might be established. The case law suggests that an interaction of international and municipal law has conferred jurisdictional and proprietary rights on the Commonwealth. The *Seas and Submerged Lands Act* has asserted claims to those same rights statutorily. This statutory vesting of sovereignty in the territorial sea, its seabed and subsoil and air space is arguably a sufficient alienation of all the offshore rights by the Crown (to itself) to satisfy the *Mabo 1992* extinguishment test.<sup>104</sup> It might be possible to argue that that assertion was not inconsistent with the continuation of any marine TNPR, but the assertion of sovereignty in the *Seas and Submerged Lands Act* does seem plenary. The same reasoning applies to the continental shelf and the position is reinforced by the claim there to sovereign rights to explore and exploit its natural resources. Moreover, the likelihood of marine TNPR extending significantly onto the continental shelf appears slim. Finally, it appears there are no "savings provisions" in the *Seas and Submerged Lands Act* which could be applied to marine TNPR.

The further assertion of Commonwealth rights in the *Coastal Waters (State Powers) Act* and the *Coastal Waters (State Title) Act* in the Australian Offshore Settlement regime may provide an instance of "back-up" (or double) extinguishment. In the latter, in particular, the Commonwealth vested property rights in coastal waters (essentially the three nautical mile territorial sea) in the States. Section 4(2)(a) vests those rights, inter alia, subject to the rights of any other person. However, even if it could be argued that marine TNPR had existed and survived the assertion of Commonwealth rights in the *Seas and Submerged Lands Act*, section 4(2)(a) only saves the "right or title [of another person] to the property in the seabed". This saving clause looks of limited use with respect to preserving marine TNPR which appear most likely

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102 See above nn67-8 and accompanying text.

103 Cullen, above n19 at Part 3.4 and at 106, 132.

104 *Mabo 1992*, above n2 at 69-70, although see *Pareroulja* above n77 at 218, where Lockhart J noted that "[a]n intention to extinguish traditional native title is not to be inferred lightly". The most pressing extinguishment question with respect to TNPR relates to so-called pastoral leases. A majority of the High Court declined to address this question in *North Ganalanja Aboriginal Corporation for and on behalf of the Waanyi People v Queensland* FC 96/007 (unreported at the time of writing). The court resolved this case by relying on a procedural point. See, also, Farley, R, "The political imperatives of native title" *Australian*, 15 May 1996 at 13.

to be related to the *sea* rather than to the *seabed*.<sup>105</sup> This possible example of extinguishment is subject to an important qualification, however. The *Coastal Waters (State Title) Act*, pursuant to the wording in section 4(2)(a), may have conferred property rights on the States subject to the operation of TNPR, as it refers to the same rights and title as would belong to the States were the waters in question within the limits of a State. However, it is still conceivable that the *Coastal Waters (State Title) Act* may amount to an alienation of rights and title in the offshore by the Commonwealth in a manner which is inconsistent with marine TNPR surviving. This might be so if the qualifying words in section 4(2)(a) are interpreted as placing a limit on any Commonwealth continuing interest in the rights and title transferred rather than interpreted as defining or limiting the content of the rights and title actually transferred. At the time that the Offshore Settlement was being implemented, the former interpretation would have been uncontroversial. Since *Mabo 1992*, however, it is clearly less certain that it would prevail.

There does not seem to be a strong argument that the assertion of rights in the *Seas and Submerged Lands Act* and the Australian Offshore Settlement legislative regime could be categorised as the marine equivalent of simply setting aside land for, say, a national park.<sup>106</sup> Nor is there a compelling argument that the assertion of rights in the *Seas and Submerged Lands Act* meant that the Crown was acquiring sovereignty and the "radical" title only.<sup>107</sup> As noted above, the history of the development of these offshore "tenures" and their modes of acquisition differ from the process of the Crown acquiring sovereignty and radical title to the land mass of Australia described in *Mabo 1992*. Briefly, a process of a developing interaction of international law and municipal law had the effect of vesting sovereignty over the territorial sea and sovereign rights over the continental shelf in the Commonwealth according to the *Seas and Submerged Lands Case*. This process did not begin to generate municipally recognised legal rights in the offshore until 1901, at the earliest. A principal reason for the delay in the development of the law on accrual of offshore rights relates to delayed recognition of their value until the technological means of exploitation emerged. For reasons already explained, these offshore rights which the Commonwealth enjoys appear to be both jurisdictional and proprietary.

It must be remembered that it is Australian municipal law which now recognises TNPR.<sup>108</sup> This recognition (which does not rely on acknowledgment for its effectiveness) arises from doctrines of land law developed from the regulation of land usage in feudal England.<sup>109</sup> The process responsible for accrual of offshore rights to the Commonwealth does not appear to incorporate any such similar recognition mechanism for marine TNPR. It is possible that marine TNPR existed without any such recognition but this presents the need

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105 Even living resources, such as abalone and mussels, which are attached (or usually attached) to the seabed may not be part of the seabed: see *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 333.

106 *Mabo 1992*, above n2 at 70. Brennan J thought such reservations may not be effective to extinguish TNPR.

107 *Id* at 69 and see Part 3 Section B above.

108 *Id* at 15 and *Pareeroutja*, above n77 at 213.

109 *Mabo 1992*, *id* at 46-52 per Brennan J.

for, at least, a variation on the line of reasoning found in *Mabo 1992*. With respect to TNPR, we know from *Mabo 1992* that mechanisms of recognition have existed for hundreds of years. They have their source in the feudal land law doctrines just referred to. If similar recognition of marine TNPR is required, the processes thus far identified for recognition of title and rights in offshore zones did not clarify until after 1901, it would seem. In particular, the international law component in the recognition process crucially excluded the States from accruing any rights due to their lack of any identity recognised at international law.<sup>110</sup> One judge in the *Seas and Submerged Lands Case* also claimed that the common law (crucial to the recognition process in *Mabo 1992*) ended at the low water mark.<sup>111</sup> These factors seem to present some problems with respect to recognition of marine TNPR.

It was noted above that the Commonwealth has also made proclamations declaring a 12 nautical mile territorial sea (in 1990) and a 200 nautical mile EEZ (in 1994). However the wording of these proclamations does not satisfy the tests for extinguishment established in *Mabo 1992*. The proclamations, in themselves, only refer to the limits of the two offshore zones rather than any rights being claimed with respect to those zones. Any rights related to the proclamations are Australia's rights contemplated by the UNCLOS.<sup>112</sup>

For the reasons explained in Part 3, it does not seem likely that the *Racial Discrimination Act* would apply to attenuate the extinguishing effects of the *Seas and Submerged Lands Act*, the *Coastal Waters (State Powers) Act* or the *Coastal Waters (State Title) Act*. The *Racial Discrimination Act* does not enjoy a constitutional status beyond that of an ordinary Commonwealth statute. The *Seas and Submerged Lands Act* does not appear to be in conflict with it and the *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* both post-date the *Racial Discrimination Act* (and also do not appear to be in conflict with it). It is also unlikely that proclamations thus far made under the *Seas and Submerged Lands Act* are in conflict with the *Racial Discrimination Act*.

Further, the extinguishment of marine TNPR would not depend, any more than land-based TNPR, on the intention of the Crown in right of the Commonwealth. It would depend on the effect of Commonwealth action.<sup>113</sup> That is, the lack of specific intention in the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* to extinguish marine TNPR is not the issue. The question is, what is their effect? There is a possibility that they may have had an extinguishing effect with respect to any previously existing marine TNPR.

In *Mason v Tritton* Kirby P implied that the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* had had no extinguishing effect. In that case, he examined, in obiter, the issue

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110 See Cullen, above n19 at Parts 2.2, 2.3 and 3.2.

111 Above n37 at 368-9 per Barwick CJ.

112 Rothwell and Haward, above n35 at 30.

113 *Mabo 1992*, above n2 at 68. Brennan J notes that it is not necessary for an actual intention to extinguish TNPR to be demonstrated by governments. It is necessary to demonstrate that the effect of any government action has been truly extinguishing, however. This reasoning makes sense. It is only since 1992 that we have known, definitely, of the existence of TNPR.

of extinguishment in some detail.<sup>114</sup> He found that the relevant New South Wales fisheries legislation (and regulations) had not had any extinguishing effect. Kirby P discussed the *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* in the context of considering the law-making powers of the State of New South Wales. He also referred to the *Seas and Submerged Lands Case*.<sup>115</sup> He did not discuss the *Seas and Submerged Lands Act*. He did not discuss the extinguishing potential of any of these three Acts. Their extinguishing potential is by no means certain but this question would appear to be a live issue in this latest phase in resolving rights in the offshore.

## 5. *The Native Title Act 1993 (Cth) and the Australian Offshore Zones*

### A. *Introduction*

So far, the discussion has concentrated on the position with respect to the effect of *Mabo 1992* on the historically developed position over control of natural resources in the offshore in Australia. In the process of dealing with the effects of *Mabo 1992*, much discussion has taken place amongst the various stakeholders including Federal and State governments, Aboriginal peoples and commercial and other interest groups. The principal outcome from that dialogue is the *Native Title Act 1993 (Cth)*. It sets out to do the following things:

- i recognise TNPR and set down some basic principles in relation to native title in Australia;
- ii provide for the validation of past acts which may be invalid because of the existence of TNPR;
- iii provide for a future regime in which TNPR are protected and conditions imposed on acts affecting native title on land and in waters;
- iv provide a process by which TNPR can be established and compensation for derogation from TNPR determined, and by which determinations can be made as to whether future grants can be made or acts done with respect to native title over land and waters; and
- v provide for a range of other matters, including the establishment of a national Aboriginal and Torres Strait Islander Land Fund (ATSILF).<sup>116</sup>

The *Native Title Act* is a complex piece of legislation. In view of the summary of aims just listed, this is not surprising. It is said to be a key component in the rebuilding of the relationship of the nation of Australia with its indigenous people.<sup>117</sup> The *Native Title Act* was recently held to be substantially constitutionally valid.<sup>118</sup> My purpose here, with respect to the Act, is quite

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114 *Mason*, above n86 at 590-4.

115 Above n37.

116 This summary draws heavily on *Native Title: Legislation with Commentary by the Attorney General's Legal Practice* (1994) at C9. The ATSILF is now established under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cth)*.

117 *Id* at iii.

118 *Western Australia v Commonwealth*, above n8. In the same case, the *Land (Titles and Traditional Usage) Act 1993 (WA)* was held to be invalid to the extent of its inconsistency with the *Racial Discrimination Act*.

limited. What I wish to do is look at how it has changed the position so far outlined in this article. That is, I wish to examine its effect on the offshore legal position, post-*Mabo* 1992.

### ***B. The Effect of the Native Title Act on the Australian Offshore Zones***

Section 14 of the *Native Title Act* provides that any past act attributable to the Commonwealth is a valid act but this statement of validity is subject to qualification, as we shall see. Section 15 goes on to explain that there are four categories of acts which may be attributed to the Commonwealth — categories A, B, C and D. Different consequences concerning the extinguishment of native title arise from acts being classified under different categories. Section 17 stipulates that compensation for extinguishment can apply in the case of acts under categories A and B and, in certain circumstances, under categories C and D. Such compensation is payable by the Commonwealth under section 17(4).<sup>119</sup> The real explanation of how these provisions affect matters in the offshore is contained in Part 15 of the Act which explains a number of key concepts.

Section 228(1) defines a “past act” as an act prior to 1 July 1993 which consisted of making, amending or repealing legislation in relation to particular land or waters, which act was invalid to any extent (due to the existence of TNPR). This definition is quite wide. To understand its impact we need to look elsewhere in the Act. Section 229 explains what sort of acts fall into category A. For the purposes of this article, it may be significant that a category A act does not include a grant of a freehold estate by the Crown in any capacity to the Crown or to a statutory authority of the Crown in any capacity, according to section 229(2)(b)(i). Section 5 of the Act stipulates that the Act binds the Crown in right of the Commonwealth and in right of the States and the Territories. There is no actual definition of the term Crown for the purposes of section 229. It seems reasonable, however, to assume that it includes the Crown in right of any entity be it Commonwealth, State or Territory. On this reading, the legislation examined earlier, namely the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act*, could not fall within category A in section 229 assuming that some “grant of a freehold estate” may have been effected by some of these Acts. If no such grant is involved then these Commonwealth Acts cannot fall within Category A. Category B past acts, which are set out in section 230, comprise the granting of certain leases (not covered in category A). In section 231, a category C past act is defined as the grant of a mining lease. The Commonwealth legislation referred to above affecting the offshore does not fall into either of categories B or C. Section 232 defines a category D past act as any past act that is not a category A, B or C past act.

Could the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* qualify as category D past acts?<sup>120</sup>

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119 All references to sections in this Part of the article are to sections in the *Native Title Act*, unless otherwise stated.

120 I have not considered the position of the proclamations with respect to the 12 nautical mile territorial sea and the 200 nautical mile EEZ under the *Native Title Act*, as, for the reasons

Before that question is considered, let us assume that they could so qualify and consider the consequences. Section 17(2) provides that native title holders are entitled to compensation (from the Commonwealth) for category D past acts if the acts concern, to some extent, an "offshore place". The term, "offshore place" (as a result of its definition and the operation of section 6) makes it clear that the *Native Title Act* applies to all waters over which Australia asserts sovereign rights and sovereignty under the *Seas and Submerged Lands Act*. This means that, to the extent that marine TNPR existed and have been affected by any invalid aspects of the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* or *Coastal Waters (State Title) Act*, compensation for any loss which can be established will have to be paid by the Commonwealth in accordance with the *Native Title Act*. By creating and defining the term offshore place, the *Native Title Act* clearly anticipates the possibility of marine TNPR existing (and being subject to the Act). This anticipation does not, of course, establish the existence (or extent or duration) of marine TNPR.

Sections 17 and 51(1) provide that any compensation with respect to an offshore place is to be on just terms to compensate for any loss, diminution, impairment or other effect of the Act on marine TNPR. The question of which principles to apply, if compensation is payable, remains a difficult one, however. Conventional economic loss calculations may be inadequate.<sup>121</sup> There is also the issue of proving TNPR generally under the *Native Title Act*. It is unclear yet what standards of proof will apply. It may be that the standards ultimately applied will not easily be satisfied.<sup>122</sup> There is also potential for this problem to be aggravated by competing claims to the same title by different Aboriginal groups.<sup>123</sup> It now appears that all binding determinations of TNPR will be made judicially rather than through the National Native Title Tribunal established under the *Native Title Act*.<sup>124</sup>

The issue of compensation is only part of the picture, however. The next question is, could the *Native Title Act* restore any extinguished marine TNPR in addition to stipulating compensation? As was explained earlier, the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* or *Coastal Waters*

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given earlier, it seems unlikely they could qualify as having any extinguishing effect under the *Mabo 1992* tests.

- 121 Orr, R, "Compensation for Loss of Native Title Rights" in Bartlett and Meyers, above n92 at 110, 120.
- 122 McIntyre, G, "Proving Native Title" in Bartlett and Meyers, id at 121, 156. See also Neal, T, "The Forensic Challenge of Native Title" (1995) 69 *LLJ* 880; and *Mason*, above n86 at 584 per Kirby P.
- 123 *Pareroutja*, above n77 involved a dispute between two groups of traditional owners over certain TNPR in the Northern Territory. This dispute was over the best way to assert TNPR — via the common law or by using the Northern Territory statutory land rights regime. The operation of this regime is reviewed in Cullen, R, "Mineral Revenues and Australian Aboriginal Self Determination" (1991) 25 *U Brit Columbia LR* 153.
- 124 See the Native Title Amendment Bill 1995 (Cth) introduced into Parliament in late 1995 but not debated prior to the 1996 Federal election. See also Attorney-General's Department, *News Release*, 19 September 1995. This announcement by the Attorney-General's Department was prompted by the decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 69 *ALJR* 191. The High Court, in that case, applied the well established separation of powers doctrine as it has developed to deny the right of a Federal tribunal to make binding determinations. Only courts can do this. The doctrine is explained in detail in Hanks, above n19 ch 12.

(*State Title*) Act may fall within the definition of extinguishing behaviour established in *Mabo 1992*. The *Native Title Act*, however, provides that, if they did have this extinguishing power once, it may now have been removed. If this Commonwealth offshore legislation falls within category D, section 15(1)(d) explains that the "non-extinguishment principle" will apply. Section 238, in turn, explains what the non-extinguishment principle means. For our purposes it provides that, where a category D act applies, any marine TNPR are not extinguished. Section 238(6) goes on to provide that, if the act or its effects are later removed or wholly cease to operate, marine TNPR again have full effect. Section 238(7) makes similar provisions in the case of partial removal or cessation. Section 238(3), however, provides that if the category D act is wholly inconsistent with the continued existence of marine TNPR, then marine TNPR have no effect whilst the category D act remains in force. Section 238(4) makes similar provisions when there is a partial cessation effect with respect to marine TNPR.

At first glance, the combined effect of sections 15 and 238 looks potentially quite dramatic. The practical effect is less so. Category D acts continue to suspend all marine TNPR whilst they prevail. That is, unless the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* are repealed or amended (assuming one or more of them are category D acts) they continue to have the effect of suspending the contents of any marine TNPR.

The previous discussion assumes that the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* qualify as past acts under section 228. In fact, I do not believe it is likely that they do so qualify. Section 228(2)(a) applies to legislative acts before 1 July 1993 and to any other acts before 1 January 1994. Section 228(2)(b) says that only when such acts in relation to land or waters (where native title existed) were invalid to some extent, apart from through the operation of the *Native Title Act*, will they qualify as past acts. Based on the case law to date, none of the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* pass this test in section 228(2)(b). That is, they are not invalid in some way within the meaning of the section. The *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* (and by implication, the *Coastal Waters (State Title) Act*) have all been found by the High Court of Australia to be valid Acts of the Commonwealth Parliament.<sup>125</sup> And, as explained above, they either do not conflict with or could not be in conflict with the *Racial Discrimination Act*, another potential source of invalidity. Accordingly they do not qualify as past acts. This, in turn, means they are not caught by section 232 as category D past acts. If this analysis is correct, the *Native Title Act* does not alter the general law position with respect to offshore resources. As explained in Part 4, the general law position, post-*Mabo 1992*, is that establishing the existence of marine TNPR presents difficulties not applicable on land. And one or more of the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* or *Coastal Waters (State Title) Act* may have extinguished any previously existing marine TNPR.

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<sup>125</sup> See above n72 and accompanying text.

An important qualification needs to be added here, however. If the High Court were to find that these three Acts involved an acquisition of property (namely, marine TNPR) not on just terms, in contravention of section 51(xxxi) of the Constitution this very likely would bring one (or more) of the Acts within section 228(2)(b). In practical terms, this might not make a great deal of difference. The Acts would continue to suspend marine TNPR until repealed or amended, as explained above. Compensation would be available under the *Native Title Act* but also, more directly, pursuant to section 51(xxxi) itself. The problem of establishing the applicability of section 51(xxxi) in the context of marine TNPR remains significant, of course.<sup>126</sup>

## 6. *Offshore Applications Under the Native Title Act*

At the time of writing<sup>127</sup> numerous marine TNPR claims under the *Native Title Act* had been lodged with the National Native Title Tribunal. Some of these claims are not only marine TNPR claims but a combination of TNPR and adjacent marine TNPR claims.<sup>128</sup> Some claims appear to relate only to marine TNPR.<sup>129</sup> Some marine TNPR claims are comparatively small, in terms of area, although not necessarily in terms of significance.<sup>130</sup> The largest claim ranges from inland to far offshore along the majority of Western Australia's southern coastline.<sup>131</sup> Some of the claims appear to be confined to inland waters of the respective States. Others extend no further than the coastal waters transferred to the States under the *Coastal Waters (State Title) Act*.

A review of a sample of marine TNPR claims under the *Native Title Act* shows a reliance on the general principles outlined in *Mabo 1992* for establishing TNPR. The sample applications do not appear to address the issue of the different method of accrual of rights which, thus far, has applied in the offshore, vis-a-vis accrual of rights on land. It is worth recalling that Brennan J did note, in *Mabo 1992*, that different concepts may apply to the issue of determining title offshore to those applying to onshore determinations of title.<sup>132</sup> If all the applications for marine TNPR have chosen to approach both marine TNPR and TNPR claims using the same arguments this is not necessarily a crucial omission as is explained in the Conclusion. Prudence would suggest, however, that marine TNPR applications ought specifically address this issue where they have not done so already.

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126 See the discussion in Part 2 A, above. The compensation regimes applied by the *Native Title Act* and according to the case law governing s51(xxxi) are not identical, of course. Different compensation results (and modes) could apply under the *Native Title Act* in particular cases.

127 Early 1996.

128 See for example the QC 95/2 Quandamooka Application; the WC 95/84 Kingfisher Application; the WC 94/5 Ngaluma-Injibandi Application; and the WC 95/48 One Arm Point Application.

129 See for example the TC 95/2 Deal Island Application.

130 The QC 95/2 Quandamooka Claim, for example, traverses areas of the sea, mainland and islands at the mouth of the Brisbane River.

131 See the WC 95/84 Kingfisher Application.

132 *Mabo 1992*, above n2 at 67 and see above nn87-8 and accompanying text.



## 7. Conclusion

The offshore regime for Australia was resolved without any apparent attention being paid to the interests of Aboriginal Australians. The decision in *Mabo 1992*, with its clear endorsement of TNPR, has implications for this regime. An examination of the tests laid down in *Mabo 1992* and the earlier offshore case law suggested, however, that establishing the existence of marine TNPR presents certain difficulties and, to the extent that marine TNPR did exist, there is a possibility that they may have been extinguished by the Commonwealth, in particular through the enactment of one or more of the *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and, possibly, the *Coastal Waters (State Powers) Act*.

The general law position for Australia's offshore zones prior to the *Native Title Act* can be summarised as follows.

- i Jurisdictional and proprietary rights in the territorial sea were only clarified in international law relatively recently, probably during the late 19th and early 20th century.
- ii Jurisdictional and proprietary rights in the continental shelf have been clarified, as a matter of international law, even more recently, probably since World War Two.
- iii In both cases, international law stipulated that these rights could only be conferred on national entities recognised in international law.
- iv In the case of Australia, municipal law recognised the giving or conferral of these rights in international law. Under municipal law, these rights accrued to the Commonwealth (as an international entity) at different times during the 20th century.
- v The lack of any status recognised by international law proved fatal to the claims of the States to these offshore rights.<sup>133</sup>
- vi If offshore rights do depend crucially on this interaction between international and municipal law, this poses some problems for the recognition of any marine TNPR.
- vii The case law suggests that the existence of marine TNPR will have to be demonstrated ultimately by applying Australian municipal law, not Aboriginal law.
- viii The case law suggests that near-shore, fishing-related marine TNPR would be easier to establish than other marine TNPR.<sup>134</sup>
- ix Any marine TNPR which do (or did) exist probably do not extend far distant beyond the traditional three nautical mile territorial sea.
- x The assertion of sovereignty over the territorial sea in the *Seas and Submerged Lands Act* arguably asserted that the Commonwealth enjoys jurisdictional and proprietary rights in the territorial sea.

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133 In a post-*Mabo 1992* context, this meant the States were denied rights to either radical or beneficial title in the offshore.

134 The arguments advanced by Kirby P in *Mason* provide a recent example of the likelihood of this. See above nn67-8, 96 and accompanying text.

- xii The assertion of sovereign rights to explore and exploit the natural resources of the continental shelf in the *Seas and Submerged Lands Act* arguably asserted that all rights, including proprietary rights, vest in the Commonwealth.
- xiii Subsequent proclamations under the *Seas and Submerged Lands Act* may have reinforced the above assertions but by implication only.
- xiii The enactment by the Commonwealth of the *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* has effected a transfer of certain jurisdictional and proprietary rights in defined coastal waters (predominantly the traditional three nautical mile territorial sea) from the Commonwealth to the States.

On the face of it, the *Native Title Act* could affect aspects of this general law position. It appears to offer the possibility of compensation for overridden marine TNPR and their possible restoration. A closer examination of the *Native Title Act* suggests that it probably does not have this effect, however. The *Seas and Submerged Lands Act*, *Coastal Waters (State Powers) Act* and *Coastal Waters (State Title) Act* do not seem to qualify as past acts within the meaning of the *Native Title Act* (although it is conceivable that section 51(xxxi) of the Constitution could trigger this qualification). This means we are left with the general law position, which presents some difficulties establishing extant marine TNPR.

I have not examined in detail the issue of compensation which may be payable under section 51(xxxi) of the Constitution for extinguishment of any marine TNPR. That matter requires further consideration. It is appropriate to observe here, however, that although a clear test of section 51(xxxi) in a TNPR context has yet to emerge, the High Court, in the past, has shown a reluctance to invoke section 51(xxxi) against the Commonwealth except in clear and striking circumstances. We should also note that, in the event of marine TNPR having survived, providing extinguishment is valid, a majority in *Mabo 1992* found that no compensation would be payable.<sup>135</sup> A caution on the issue of compensation is required, however. The majority finding that no compensation is payable was not argued in any detail. Rather, it was an assertion of disagreement with the proposition put by the minority judges (on this point) that compensation could be payable for extinguishment of TNPR in certain circumstances.

This article has reviewed the findings in *Mabo 1992* and applied them to the Australian offshore legal position. This has been done using prevailing methods of analysis. *Mabo 1992* was a groundbreaking case, not least because of the way it departed from legal arguments previously accepted in Australia. The brutal history of Aboriginal repression in Australia and the uninformed treatment of Aboriginal tradition in the past shaped the Court's approach to the legal problems they confronted in *Mabo 1992*. It might also influence the approach taken on the question of marine TNPR. This may mean that the outlook for establishing the contemporary survival of marine TNPR is more optimistic than the "orthodox" analysis suggests.<sup>136</sup> The explanation and justification

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<sup>135</sup> See discussion in Part 2 A above.

<sup>136</sup> Kirby P's judgment in *Mason*, above n86 lends weight to this qualification.

advanced by Webber for the Court's decision in *Mabo 1992*, if correct, suggests that the securing of marine TNPR will turn, inter alia, on the Court's evaluation of the moral presence of the past in the context of marine TNPR.<sup>137</sup> This, in turn, means that applicants (to the National Native Title Tribunal) for marine TNPR may be justified in assuming that the tests for accrual of TNPR in *Mabo 1992* will apply in the offshore, notwithstanding the pre-*Mabo 1992* offshore case law. One way of understanding this possibility is to consider what the dominant factors in any High Court litigation on marine TNPR will be. If *Mabo 1992* dominates rather than influences that litigation, the offshore jurisprudence may be discounted in its importance. If the starting point of any such litigation proves to be the offshore jurisprudence then that jurisprudence may prove quite important.<sup>138</sup>

In assessing the impact of the moral dimension, there is an argument that it would be less compelling with respect to marine TNPR. It is only relatively recently (due to technological developments) that the offshore has assumed major economic significance other than for fishing. In the case of developed littoral states, such as Australia, New Zealand, Canada and the United States of America, which have been the subject of enduring European colonisation, the colonisers' exploitation of offshore rights, though not blemish-free, does not carry the same taint as land-based, colonial exploitation. With respect to the offshore areas, therefore, both the substantive legal arguments, and what might be termed the equitable-redress (or moral) arguments, in favour of marine TNPR are less strong than in the case of land-based TNPR claims in these jurisdictions.

In conclusion, it is arguable that *Mabo 1992* has not significantly disturbed the pre-*Mabo 1992* control of offshore rights and resources (especially seabed resources). This is so either because a different accrual process applies in the offshore and (or) because extinguishment may have occurred. Moreover, subject to the operation of section 51(xxxi) of the Constitution, the *Native Title Act* probably leaves this pre-*Mabo 1992* allocation of control intact. If the High Court were to encounter difficulty in finding for applicants seeking marine TNPR, the Commonwealth clearly enjoys the power in the offshore to recognise marine TNPR, however. Specific Commonwealth legislative action may, in the end, be required to secure marine TNPR. It would seem that this process could only confer marine TNPR to the extent to which international law has conferred rights in the offshore on Australia. The stream cannot rise above its source.

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137 Above n11. Some commentators argue, however, that in *Mabo 1992*, the High Court went beyond a legitimate exercise of judicial power: see for example Partington, G, "Paper Fuels Land Rights Debate" *Campus Review*, 5 October 1995 at 8. Liberal academics are now even suggesting that previously hallowed, break-through civil rights cases in the United States such as *Brown v Board of Education* 347 US 438 (1954) and *Roe v Wade* 410 US 113 (1973) have demonstrated excessive use of judicial power and have been detrimental to the cause of civil rights: see Thomson, J A, "Review Essay — An Australian Bill of Rights: Glorious Promises, Concealed Dangers" (1994) 19 *Melb ULR* 1020 at 1058-61.

138 This still leaves the extinguishment issue to be dealt with of course.