

# THE CROWN'S RADICAL TITLE AND NATIVE TITLE: LESSONS FROM THE SEA

## PART ONE — THE POSITION BEFORE *YARMIRR*

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*[The High Court's decision in Commonwealth v Yarmirr raised the important question of whether the Crown's acquisition of sovereignty over the territorial sea was accompanied by the vesting of radical title which could thus be burdened by native title. Prior to this decision, the High Court in Commonwealth v WMC Resources Ltd had considered the Crown's title to the continental shelf beyond the territorial sea and, in doing so, declared that the Crown's radical title does not exist below low-water mark. Consequently, in Yarmirr, the majority of the High Court drew a distinction between the Crown's radical title to land and the Crown's 'sovereign rights and interests' to the territorial sea. Nevertheless, the Yarmirr High Court indicated, without deciding, that as a result of legislation effecting the offshore constitutional settlement, radical title may now be the appropriate 'tool' with which to analyse the Crown's rights to the territorial sea. Indeed, as a member of the Full Federal Court in Yarmirr, Merkel J specifically referred to Brennan CJ's key reference to radical title in WMC, and suggested that the two concepts, radical title and 'sovereign rights and interests', are analogous. This two part article, therefore, examines the legal nature of the Crown's title to the sea (including the intertidal zone and the territorial sea as well as the continental shelf and the Exclusive Economic Zone beyond the territorial sea) to determine whether any analogy can be drawn between such title and the Crown's title to land. Part One considers the position before the High Court's decision in Yarmirr and Part Two examines the Yarmirr High Court decision and beyond, including the Federal Court decisions in Lardil Peoples v Queensland, Gumana v Northern Territory and Akiba v Queensland [No 2]. The decisions considered in Part Two are significant from a native title perspective because they have consistently denied recognition of exclusive native title rights to the sea on the basis that these rights are inconsistent with the public rights of fishing and navigation. It will be seen, however, that both authority and sound legal principle support recognition of exclusive native title rights to the sea, including the intertidal zone and Exclusive Economic Zone.]*

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## I INTRODUCTION

This article examines the legal nature of the Crown's title to the sea, including the intertidal zone,<sup>1</sup> the territorial sea and both the Exclusive Economic Zone and continental shelf beyond the territorial sea,<sup>2</sup> to determine whether any analogy can be drawn between such title and the Crown's radical title to land. The principal question sought to be answered is: does the juridical nature of the title acquired by the Crown upon acquisition of sovereignty beyond high and low-water mark, and its concomitant effect on native title, assist in elaborating the nature of the title acquired by the Crown upon acquisition of sovereignty over land? Two fundamental propositions emerge. First, the Crown's title derived from sovereignty, whether to land or to the sea, is analogous and should therefore operate equally in relation to native title. Secondly, and contributing to a paradigm shift in the conventional understanding of native title, it may be possible to recognise *exclusive* native title rights to the sea.

The article is published in two parts: Part One considers the position before the High Court's decision in *Commonwealth v Yarmirr* ('*Yarmirr*'),<sup>3</sup> and Part Two examines the *Yarmirr* decision and beyond.<sup>4</sup> Although the *Yarmirr* High Court did not address the intertidal zone, it will be seen that the Full Federal Court in *Commonwealth v Yarmirr* ('*Yarmirr FCAFC*')<sup>5</sup> held that the enactment of the *Native Title Act 1993* (Cth) ('*NTA*') gave recognition to the Crown's acquisition of sovereignty and radical title over the whole area to which the *NTA* applied, including the intertidal zone.<sup>6</sup> While this amounted to a statutory extension of radical title to the intertidal zone, the subsequent Federal Court decisions in

<sup>1</sup> The 'intertidal zone' refers to the area of the shore between high and low-water marks and that part of rivers and estuaries that is affected by the tides: *Gumana v Northern Territory* (2005) 141 FCR 457, 462 [3], 469 [31] (Selway J). It includes 'the foreshore' (the shore between high and low-water marks: at 469 [31], 476 [61]) and the 'arms of the sea' ('estuaries and rivers capable of navigation and subject to the ebb and flow of the tide': at 477 [66]).

<sup>2</sup> The 'territorial sea' refers to all areas below low-water mark. Australia's Exclusive Economic Zone extends from the outer edge of the territorial sea up to 200 nautical miles from the territorial sea baseline. The outer limit is less than 200 nautical miles in some areas in accordance with agreements with neighbouring countries. Although coastal states are not obliged to claim the Exclusive Economic Zone, Australia has: *Akiba v Queensland [No 2]* (2010) 270 ALR 564, 724–5 [691] (Finn J).

<sup>3</sup> (2001) 208 CLR 1.

<sup>4</sup> See Ulla Secher, 'The Crown's Radical Title and Native Title: Lessons from the Sea — Part Two: *Yarmirr* and Beyond' (2011) 35 *Melbourne University Law Review* (forthcoming).

<sup>5</sup> (2000) 101 FCR 171.

<sup>6</sup> See below Part IV(B)(1).

*Lardil Peoples v Queensland*<sup>7</sup> and *Gumana v Northern Territory*<sup>8</sup> have contributed to the common law analysis of the Crown's title to the intertidal zone. Furthermore, in the most recent case recognising native title in respect of a major part of the sea area of Torres Strait, *Akiba v Queensland [No 2]*,<sup>9</sup> the Federal Court made some important observations about the implications of the Crown's acquisition of sovereignty beyond the territorial sea in relation to the Exclusive Economic Zone and the continental shelf. These developments are considered in Part Two for their contribution to identifying the rights of the Crown upon acquisition of sovereignty.

From a native title perspective, the significance of the decisions considered in Part Two is that they have consistently denied recognition of exclusive native title rights to the sea, on the basis that such rights are inconsistent with public rights of fishing and navigation.<sup>10</sup> It will be seen that this is because different tests exist for initial recognition of native title vis-a-vis land and sea: the *Yarmirr* High Court introduced a 'double' inconsistency of incidents test for the purpose of the territorial sea which is incompatible with Brennan J's fundamental statement of recognition of native title in *Mabo v Queensland [No 2]* ('*Mabo*').<sup>11</sup> It was possible for these different tests to develop because of the perceived distinction between the legal nature of the Crown's title to land and title to the territorial sea. Crucially, however, it will be seen that both authority and sound legal principle support a consistent approach to characterising the legal nature of the Crown's title to both land and sea: the rights and powers acquired over land and sea upon assumption of sovereignty are equivalent, conferring a bare legal title on the Crown. Not only does this approach raise important implications for the Crown's beneficial rights to unalienated land which is not subject to native title, it also highlights four distinct, yet interrelated, grounds for supporting recognition of exclusive native title rights to the sea (including to the intertidal zone and Exclusive Economic Zone).

## II THE CONCEPT OF RADICAL TITLE

Although the notion of radical title had emerged in *Mabo*, its conceptual content remained unclear.<sup>12</sup> In particular, it was not unequivocally clear whether

<sup>7</sup> [2004] FCA 298 (23 March 2004).

<sup>8</sup> (2005) 141 FCR 457.

<sup>9</sup> (2010) 270 ALR 564.

<sup>10</sup> See Jason Behrendt, '*Lardil Peoples v State of Queensland* [2004] FCA 298' (2004) 6(2) *Indigenous Law Bulletin* 14, 16–17.

<sup>11</sup> (1992) 175 CLR 1. This article is derived from ch 5 of the author's PhD thesis, Ulla Secher, *A Conceptual Analysis of the Origins, Application and Implications of the Doctrine of Radical Title of the Crown in Australia: An Inhabited Settled Colony* (PhD Thesis, The University of New South Wales, 2003), which is under contract for publication as a monograph by Routledge-Cavendish.

<sup>12</sup> See, eg. Nicolette Rogers, 'The Emerging Concept of "Radical Title" in Australia: Implications for Environmental Management' (1995) 12 *Environmental and Planning Law Journal* 183. Although cases decided in other colonial jurisdictions before *Mabo* had recognised the Crown's radical title, the meaning of the term was not definitively explained: see Ulla Secher, 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained — Part 1' (2005) 11 *Australian Prop-*

Brennan J, as author of the principal judgment in *Mabo*,<sup>13</sup> regarded radical title as a bare legal title or as conferring full and unfettered beneficial rights except to the extent of native title.<sup>14</sup> Indeed, three aspects of Brennan J's reasoning support the interpretation of radical title as a bare legal title to land, investiture of which creates no automatic beneficial entitlement to the land to which it relates. First, considering the 'royal prerogative' basis for the proposition of absolute Crown ownership, Brennan J observed that the passing of the management and control of the waste lands of the Crown to the colonial governments by imperial legislation was not a transfer of title, but rather a transfer of political power or governmental function.<sup>15</sup> Crucially, Brennan J expressly confirmed that the requirement that the Crown take further steps to become owner of land is not limited to land in respect of which native title exists:

if the Crown's title is merely a radical title — no more than a postulate to support the *exercise* of a sovereign power within the familiar feudal framework of the common law — the problem of the vesting of the absolute beneficial ownership of colonial land does not arise: absolute and beneficial Crown ownership *can be acquired, if at all, by an exercise of the appropriate sovereign power.*<sup>16</sup>

Secondly, Brennan J's analysis of the 'patrimony of the nation' basis for absolute Crown ownership also indicates that radical title is merely in the nature of a governmental power — enabling the Crown to create interests in land in itself and others — rather than a proprietary right.<sup>17</sup> Although Brennan J agreed that 'it is right to describe the powers which the Crown ... exercised with respect to colonial lands as powers conferred for the benefit of the nation as a whole',<sup>18</sup> he did not agree it followed that those powers were proprietary as distinct from political powers.<sup>19</sup> Furthermore, despite acknowledging that 'the nation obtained its patrimony by sales and dedications of land',<sup>20</sup> Brennan J observed that this did not mean 'the patrimony was realized by sales and dedications of land owned absolutely by the Crown.'<sup>21</sup> Brennan J clarified that what the Crown acquired was 'a radical title to land and a sovereign political power over land, the sum of which is not tantamount to absolute ownership of land.'<sup>22</sup>

*erty Law Journal* 179; Ulla Secher, 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained — Part 2' (2005) 11 *Australian Property Law Journal* 209.

<sup>13</sup> As Brennan J's reasons were adopted by Mason CJ and McHugh J, his judgment is seen to represent a fundamental restatement of the legal nature of the Crown's title in Australia.

<sup>14</sup> *Mabo* (1992) 175 CLR 1, 48, 50. Cf Samantha Hepburn, 'Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*' (2005) 29 *Melbourne University Law Review* 1, 18, 20, 23; Samantha Hepburn, 'Feudal Tenure and Native Title: Revising an Enduring Fiction' (2005) 27 *Sydney Law Review* 49, 74, 79, 82.

<sup>15</sup> *Mabo* (1992) 175 CLR 1, 53.

<sup>16</sup> *Ibid* 54 (emphasis added).

<sup>17</sup> *Ibid* 52–3.

<sup>18</sup> *Ibid* 52.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid* 53.

<sup>22</sup> *Ibid*.

The third aspect of Brennan J's decision which supports the proposition that radical title does not confer a plenary title on the Crown is the holding that

[t]he dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists.<sup>23</sup>

Brennan J concluded that it was only the fallacy of equating sovereignty and beneficial ownership of land that had given rise to the notion that native title was extinguished by the acquisition of sovereignty: 'The notion that feudal principle dictates that the land in a settled colony be taken to be a royal demesne upon the Crown's acquisition of sovereignty is mistaken.'<sup>24</sup>

Although these aspects of Brennan J's reasoning clearly support the proposition that radical title is a bare legal title to land, there are four other aspects of Brennan J's decision that, prima facie, suggest a more generous interpretation of radical title: as conferring full unfettered beneficial rights except to the extent of native title. Not only did Brennan J suggest that in the case of unoccupied lands at settlement the Crown would be the absolute beneficial owner of the land because 'there would be no *other* proprietor',<sup>25</sup> he also attributed to the Crown an automatic expansion of radical title in three other situations: where native title expires;<sup>26</sup> where native title is surrendered to the Crown;<sup>27</sup> and on the expiration of the term of a lease which has been granted by the Crown ('reversion expectant' theory).<sup>28</sup> However, since the issues of property in uninhabited unalienated land and residuary rights to land previously alienated did not arise directly for determination in *Mabo*, Brennan J's comments in this context are merely obiter.

Nevertheless, in *Wik Peoples v Queensland* ('*Wik*')<sup>29</sup> one of the main legal arguments — whether the grant of a pastoral lease over land subject to native title changed the underlying title of the Crown by creating a reversion expectant, thereby converting the Crown's underlying title from mere radical title to full beneficial title, such that upon expiry of the term of the pastoral lease, full beneficial ownership would revert to the Crown — was based on Brennan J's 'reversion expectant' theory.<sup>30</sup> Brennan J was in the minority in *Wik*. The

<sup>23</sup> Ibid 58. See also at 103–9 (Deane and Gaudron JJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 433–4 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>24</sup> *Mabo* (1992) 175 CLR 1, 52. See also at 45.

<sup>25</sup> Ibid 48 (emphasis in original).

<sup>26</sup> Ibid 60.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 68. See also text accompanying below n 118. For a detailed discussion of the 'reversion expectant' theory, see the author's articles: Ulla Secher, 'The Legal Nature of the Crown's Title on the Grant of a Common Law Lease Post-*Mabo*: Implications of the High Court's Treatment of the "Reversion Expectant" Argument — Part 1' (2006) 14 *Australian Property Law Journal* 1; Ulla Secher, 'The Legal Nature of the Crown's Title on the Grant of a Common Law Lease Post-*Mabo*: Implications of the High Court's Treatment of the "Reversion Expectant" Argument — Part 2' (2006) 14 *Australian Property Law Journal* 31.

<sup>29</sup> (1996) 187 CLR 1.

<sup>30</sup> See *ibid* 154 (Gaudron J).

majority (Toohey J, Gaudron J, Gummow J and Kirby J) denied that the Crown acquired a beneficial reversionary interest upon the grant of the relevant pastoral leases, with the result that the underlying title of the Crown continued to be radical title.<sup>31</sup> Indeed, it will be seen that the *Wik* majority judgments provide considerable support for the proposition that radical title is a bare nominal title which does not confer any beneficial entitlement to land.<sup>32</sup>

Both *Mabo* and *Wik* concerned the nature of the Crown's title to land within Australia. Subsequently, the High Court's decision in *Yarmirr* raised the important question of whether the Crown's acquisition of sovereignty over the territorial sea was accompanied by the vesting of radical title which could thus be burdened by native title. Prior to this decision, the High Court had, in *Commonwealth v WMC Resources Ltd* ('*WMC*'),<sup>33</sup> considered the Crown's title to the continental shelf beyond the territorial sea and, in doing so, had made some important observations regarding the Crown's title to the territorial sea and seabed. Indeed, it will be seen in Part IV(A) that, as author of the principal judgment in *WMC*, Brennan CJ had declared that the Crown's radical title does not exist below low-water mark. Consequently, as will be seen in Part Two of this article, the majority of the High Court in *Yarmirr* drew a distinction between the Crown's radical title to land and the Crown's 'sovereign rights and interests' to the territorial sea.

Nevertheless, the *Yarmirr* High Court indicated, without deciding, that as a result of legislation effecting the offshore constitutional settlement, radical title may now be the appropriate 'tool' with which to analyse the Crown's rights to the territorial sea. Indeed, as a member of the Full Federal Court in *Yarmirr FCAFC*<sup>34</sup> Merkel J specifically referred to Brennan CJ's key reference to radical title in *WMC*, and suggested that the two concepts, radical title and 'sovereign rights and interests', are analogous.<sup>35</sup> It is, therefore, to the legal nature of the Crown's title to the sea that we now turn.<sup>36</sup>

<sup>31</sup> Ibid 128–9 (Toohey J), 155–6 (Gaudron J), 189–90 (Gummow J), 244–5 (Kirby J).

<sup>32</sup> See text accompanying below nn 109–113 (discussing the judgment of Kirby J), 125–127 (discussing the judgment of Gummow J).

<sup>33</sup> (1998) 194 CLR 1.

<sup>34</sup> (2000) 101 FCR 171.

<sup>35</sup> Ibid 285–6 [494].

<sup>36</sup> It is important to note at this juncture that a primary object of this article is to remedy a deficiency in scholarship on the legal nature of the Crown's title to the sea and that title's concomitant implications for native title. The literature on offshore recognition of native title has focused on the implications of specific judicial pronouncements for native title holders rather than examining the underlying legal nature of the Crown's title to offshore areas and thus identifying a principled approach vis-a-vis the implications for affected native title: see, eg, Lisa Strelein, 'Native Title Offshore — *Commonwealth v Yarmirr*; *Yarmirr v NT*' (2001) 5 *Native Title News* 78; Ron Levy, 'Native Title and the Seas: The Croker Island Decision' (1999) 4(17) *Indigenous Law Bulletin* 20; Graham Hiley, 'The Croker Island Appeals' in Bryan Keon-Cohen (ed), *Native Title in the New Millennium* (Aboriginal Studies Press, 2001) 213; Alexandra Grey, 'Offshore Native Title: Currents in Sea Claims Jurisprudence' (2007) 11(2) *Australian Indigenous Law Reporter* 55; Jacinta Ruru, 'Claiming Native Title in the Foreshore and Seabed' in Louis A Knafla and Haijo Westra (eds), *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (UBC Press, 2010) 185, especially at 196–8; Shaunnagh Dorsett, 'An Australian Comparison on Native Title to the Foreshore and Seabed' in Andrew Ereuti and Claire Charters (eds), *Maori Property Rights and the Foreshore and Seabed: The Last Frontier*

### III THE CROWN'S TITLE TO THE TERRITORIAL SEABED AND BEYOND: THE POSITION BEFORE *MABO*

Before *Mabo*, it was generally accepted that the foreshores and territorial seabed were presumed to be owned by the Crown by prerogative right.<sup>37</sup> Historically, however, the foreshore and territorial sea have been treated differently from other lands: while the fiction of original Crown ownership applied, the fiction of Crown grants did not.<sup>38</sup> Consequently, statutes of limitation apart, a subject claiming title to such land had to allege a Crown grant.<sup>39</sup> It has been suggested that the reason for this rule is that, unlike other lands, since the foreshore and seabed were not granted to subjects by the King, original title was retained.<sup>40</sup> Although the general rule is that the Crown's title must be a matter of record before the Crown can be in possession of lands, because the Crown was presumed to be in possession of the foreshore and territorial seabed, no record was necessary.<sup>41</sup>

Nevertheless, in 1876, the Privy Council suggested in *R v Keyn* ('*Keyn*')<sup>42</sup> that although the Crown was admitted to be the owner of the foreshore, Crown property did not extend further seaward than low-water mark. This suggested limitation on the Crown's dominion was, however, rejected by the Privy Council in *Secretary of State for India v Chelikani Rama Rao* ('*Chelikani*').<sup>43</sup> Indeed, there is considerable authority, including *Chelikani*, for the proposition that,

(Victoria University Press, 2007) 59. Furthermore, while the legal nature of the Crown's radical title post-*Mabo* has been examined by other authors (notably McNeil and Hepburn), such examinations have been largely confined within a land framework: see, eg, Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181, reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, University of Saskatchewan, 2001) 357; Hepburn, 'Disinterested Truth', above n 14; Hepburn, 'Feudal Tenure and Native Title', above n 14. Indeed, for Hepburn, the High Court's recognition of the Crown's radical title 'foreshadows the eventual destruction of feudal tenure in Australia': Hepburn, 'Disinterested Truth', above n 14, 23. Hepburn's main argument in the context of recognition of radical title is that in order to promote a pluralist property culture, the complete abolition of the feudal doctrine of tenure and its replacement with an allodial system of landholding is necessary.

<sup>37</sup> Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989) 103–4, especially the authorities cited at 104 n 113; Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) 206–8; *Yarmirr* (2001) 208 CLR 1, 102 [213]–[214] (McHugh J). See also, inter alia, *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139, 166–7 (Parker J); *Secretary of State for India v Chelikani Rama Rao* (1916) 43 LR Ind App 192. There was no doubt that the Crown had property over the seabed municipally for an indeterminate distance from the shore and internationally for three miles therefrom: *Foreman v Free Fishers and Dredgers of Whitstable* (1869) 4 LR HL 266.

<sup>38</sup> Where a subject is in possession the law generally deems a Crown grant: McNeil, *Common Law Aboriginal Title*, above n 37, 82.

<sup>39</sup> *Yarmirr* (2001) 208 CLR 1, 102 [213] (McHugh J); *Lardil Peoples v Queensland* [2004] FCA 298 (23 March 2004) [221] (Cooper J); *ibid* 104.

<sup>40</sup> Chitty, above n 37, 207; McNeil, *Common Law Aboriginal Title*, above n 37, 104.

<sup>41</sup> McNeil, *Common Law Aboriginal Title*, above n 37, 103–5.

<sup>42</sup> (1876) 2 Ex D 63.

<sup>43</sup> (1916) 43 LR Ind App 192.

post-*Keyn*, there was no doubt that the Crown had property rights over the territorial seabed.<sup>44</sup>

The High Court of Australia had, however, expressed divergent views on this issue. In *New South Wales v Commonwealth* ('*Seas and Submerged Lands Case*'),<sup>45</sup> Gibbs J, Stephen J and Jacobs J concluded that the Crown did own the seabed;<sup>46</sup> Barwick CJ observed that 'any conclusion on [the] question may be fraught with considerable uncertainty';<sup>47</sup> and Mason J emphasised that the cases relied upon to establish Crown ownership of the territorial seabed failed to acknowledge that the territorial sea was a distinct concept from land.<sup>48</sup> Subsequently, therefore, it was possible for Mason J, in *Robinson v Western Australian Museum*, to reject a submission that the High Court in the *Seas and Submerged Lands Case* had held that the *Seas and Submerged Lands Act 1973* (Cth) ('*Seas and Submerged Lands Act*') conferred on the Crown 'proprietary rights in the sea bed.'<sup>49</sup> Nevertheless, the majority of the Court in the *Seas and Submerged Lands Case* agreed that the common law operated only in the realm which ended at the low-water mark.<sup>50</sup> Of the four majority judges on this issue, however, only three referred to *Chelikani*,<sup>51</sup> and of these, only two expressly distinguished it.<sup>52</sup>

Thus, before *Mabo*, while it was not entirely clear whether the Crown had property rights below low-water mark, if it did the source of the title was not the common law. Indeed, although divergent views on the question of the Crown's property rights below low-water mark (if any) and their source continued to be expressed until the law was eventually clarified by the *Yarmirr* High Court, the new element introduced into the debate post-*Mabo* was the concept of 'radical title'.

#### IV THE CROWN'S TITLE TO THE TERRITORIAL SEABED AND BEYOND POST-*MABO*: *WMC* AND *YARMIRR FCAFC*

##### A *WMC*: Brennan CJ's Judgment — Radical Title versus Statutory Sovereign Rights

In *WMC*, four of the six High Court justices who decided the case referred, either expressly<sup>53</sup> or impliedly,<sup>54</sup> to the concept of radical title and all six justices

<sup>44</sup> See, eg, *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139. See also *Yarmirr* (2001) 208 CLR 1, 156 [358] (Callinan J); *A-G (British Columbia) v A-G (Canada)* [1914] AC 153, 174, where Viscount Haldane LC (for Viscount Haldane LC and Lords Atkinson and Moulton) specifically left this question open.

<sup>45</sup> (1975) 135 CLR 337.

<sup>46</sup> *Ibid* 397–400 (Gibbs J), 433 (Stephen J), 487 (Jacobs J).

<sup>47</sup> *Ibid* 367.

<sup>48</sup> *Ibid* 465–6.

<sup>49</sup> (1977) 138 CLR 283, 337.

<sup>50</sup> (1975) 135 CLR 337. The majority judges were Barwick CJ, McTiernan J, Mason J and Jacobs J.

<sup>51</sup> *Ibid* 465–6 (Mason J), 487 (Jacobs J), 421, 423, 427, 448 (Stephen J).

<sup>52</sup> *Ibid* 465–6 (Mason J), 448 (Stephen J).

<sup>53</sup> *WMC* (1998) 194 CLR 1, 18–19 [20]–[21] (Brennan CJ), 87 [236], 94 [242], 95 [244] (Kirby J).

<sup>54</sup> *Ibid* 37–8 [84] (Gaudron J), 61–2 [161] (Gummow J).



referred to the concept of ‘sovereign rights’.<sup>55</sup> *WMC* concerned the continental shelf beyond the territorial sea. Section 11 of the *Seas and Submerged Lands Act* relevantly provided that

the sovereign rights of Australia ... in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth.

At this point, discussion is restricted to Brennan CJ’s ‘key majority’<sup>56</sup> judgment for two reasons: first, although giving their own separate reasons, the majority of the High Court in *WMC* agreed with the orders proposed by the Chief Justice;<sup>57</sup> and, secondly, as a member of the Full Federal Court in *Yarmirr FCAFC*, Merkel J, whose approach most closely resembles the High Court’s approach on appeal, specifically referred to Brennan CJ’s judgment.<sup>58</sup>

Brennan CJ found that, although the petroleum exploration permit and *WMC Resources Ltd*’s interest could be classified as proprietary rights,<sup>59</sup> holders of offshore petroleum permits did not have a proprietary interest protected by s 51(xxxi) of the *Constitution*.<sup>60</sup> The rights were the creatures of statute, namely of the *Petroleum (Submerged Lands) Act 1967* (Cth) (*‘Petroleum (Submerged Lands) Act’*),<sup>61</sup> and their continued existence depended upon the continued existence of their statutory support.<sup>62</sup>

Speaking of the source of the rights of permit holders under the *Petroleum (Submerged Lands) Act*, the Chief Justice observed that there was a distinction between the Crown’s title to land and the Crown’s title to the relevant area of the continental shelf:

It is erroneous to regard the [*Petroleum (Submerged Lands) Act*] as the offshore equivalent of those provisions which, in Australia, authorise the Crown to alienate interests in the waste lands of the Crown (provisions which I shall call ‘Land Acts’). If it were the equivalent of Land Acts, it would be arguable that the extinguishing of a permittee’s proprietary rights relieves the Commonwealth of a reciprocal burden on its title to land within the permit area and thus constitutes an acquisition of property.<sup>63</sup>

He explained that this was because what he described as the ‘Land Acts’ ‘assume the existence of the Crown’s radical title to land lying above the low water

<sup>55</sup> *Ibid* 10–11 [3]–[5] (Brennan CJ), 21 [28]–[29], 22–4 [32]–[33], [35]–[36] (Toohey J), 32 [69], 33 [71], 37–8 [84]–[85] (Gaudron J), 40–1 [94]–[96] (McHugh J), 61–3 [158]–[163] (Gummow J), 77–8 [212]–[213], 82 [226], 84 [227], 87 [236], 95 [243]–[244], 96 [246] (Kirby J).

<sup>56</sup> Pat Brazil, ‘The Protection of Resource Rights below Low Water’ (2000) 19 *Australian Mining and Petroleum Law Journal* 16, 18.

<sup>57</sup> (1998) 194 CLR 1, 39 [88] (Gaudron J), 58 [151] (McHugh J), 75 [205] (Gummow J).

<sup>58</sup> See, eg, *Yarmirr FCAFC* (2000) 101 FCR 171, 285 [492].

<sup>59</sup> *WMC* (1998) 194 CLR 1, 16 [14].

<sup>60</sup> *Ibid* 20 [24].

<sup>61</sup> *Ibid* 16 [14].

<sup>62</sup> See *ibid*, where Brennan CJ stated that the question was: ‘If the statute [was] amended so that the rights [were] diminished, [did] the diminution amount to an acquisition of property?’

<sup>63</sup> *Ibid* 18 [20].

mark'.<sup>64</sup> Brennan CJ did not, however, expand on his views on the nature of radical title, simply stating that he had examined the concept in *Mabo* and it was unnecessary to repeat it.<sup>65</sup> Nonetheless, he made it clear that the position in relation to interests in the continental shelf was different: the Crown's radical title did not exist below low-water mark. In this context, Brennan CJ cited *Keyn* as authority for the proposition that

[t]he colonists inherited the common law: but it operated only in the realm which ended at low-water mark. ... Thus, property in and power over the territorial seas could not have come by the common law.<sup>66</sup>

His Honour accepted, however, that the power to make laws for the peace, order and good government of a colony was wide enough to enact laws applying to territorial waters and beyond.<sup>67</sup> Thus, he drew a distinction between a proprietary interest in the territorial sea and beyond and its seabed, on the one hand, and legislative power and jurisdiction over them, on the other. Accordingly he concluded:

The [*Petroleum (Submerged Lands) Act*] is a law passed in exercise of the legislative powers of the Commonwealth and a person who seeks and obtains the grant of a permit or licence under that Act cannot deny the authority of the Commonwealth to make the grant, but that is not to say that the Commonwealth has any proprietary interest in the continental shelf or the seas above it.<sup>68</sup>

Although by municipal law the Commonwealth had power to legislate in respect of the exploration and exploitation of the resources of the continental shelf, it had no property in the continental shelf at common law.<sup>69</sup> Thus, Brennan CJ recognised that, in relation to the continental shelf beyond the territorial sea, the Crown has power to grant interests and this power is divorced from any concept of Crown ownership of the underlying estate. Furthermore, the grantee still acquires a proprietary interest. Although this is reminiscent of the conception of radical title as a bare legal title, Brennan CJ's conclusion that the common law of Australia stops at low-water mark meant that so did the concept of radical title. Instead, the Crown's interest below low-water mark was statutory in origin and did not confer any beneficial title on the Crown.

Brennan CJ's analysis in this respect is puzzling because it is the very antithesis of his approach in *Wik*, when he dealt with the statutory power of alienation under the *Land Act 1910* (Qld). Although the rights under the two legislative regimes are of a similar order, in *Wik* Brennan CJ was of the view that the *Land Act* treated the Crown as having not only the power to grant a lease, but also 'the reversionary interest which, under the ordinary doctrines of the common law, a

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* 18–19 [21], quoting Barwick CJ in the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 368–9.

<sup>67</sup> *WMC* (1998) 194 CLR 1, 19 [21], quoting Mason J in the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 468–9.

<sup>68</sup> *WMC* (1998) 194 CLR 1, 19 [22].

<sup>69</sup> *Ibid* 20 [23].

lessor had to possess in order to support and enforce the relationship of landlord and tenant.<sup>70</sup> Thus, although dealing with a statutory power of alienation, Brennan CJ considered it essential that the Crown have, on exercise of the power of alienation, the full legal reversionary interest. In light of the majority decision in *Wik*,<sup>71</sup> Brennan CJ's conclusion in *WMC* that the Crown does not have beneficial ownership of the sea and solum below low-water mark is to be preferred to his conclusion in *Wik* that the Crown has a full reversionary interest.

Indeed, as held by the majority in *Wik*, the absence of Crown ownership does not necessarily mean that the grantee is denied a full proprietary interest.<sup>72</sup> In any event, Brennan CJ's observations on the application of radical title below low-water mark but within the territorial sea are merely obiter: the question for determination in *WMC* related to permit areas within the continental shelf beyond the territorial sea. Brennan CJ's decision is, therefore, only authority for the Crown's radical title not extending to the continental shelf beyond the territorial sea.

Thus, a tripartite distinction emerges between the Crown's title to land within Australia,<sup>73</sup> the Crown's title to the territorial sea/solum, and the Crown's title to the continental shelf beyond the territorial sea. It will be seen that interests in land within Australia and within its territorial sea are granted out of the Crown's title derived from its sovereignty over Australia. Since the Crown has 'statutory sovereign rights', rather than sovereignty, over the continental shelf beyond the territorial sea,<sup>74</sup> a title derived from sovereignty does not support any interest in this area. Nevertheless, it will be seen that while the Crown's 'statutory sovereign rights' beyond the territorial sea and the Crown's title to the territorial sea do not constitute radical title, there is authority to suggest that the three titles are equivalent.

## B Yarmirr FCAFC

*Yarmirr FCAFC* involved two appeals against the judgment of the primary judge, Olney J, which had determined that, although native title existed in the sea and seabed in offshore areas in the vicinity of Croker Island in the Northern Territory, the evidence failed to establish exclusive native title rights to possess, occupy, use and enjoy the subject waters.<sup>75</sup>

The claimants appealed against the rejection of the claim to exclusive possession of the area. The Commonwealth, supported by the Northern Territory and fishing industry parties, appealed on the ground that native title in the offshore areas claimed was not recognised or protected under Australian law. Relying

<sup>70</sup> (1996) 187 CLR 1, 93. Brennan CJ was the author of the minority judgment; the judgments of Kirby J and Gummow J, representing the majority of the majority, are considered in the text accompanying below nn 109–113 and 125–127 respectively.

<sup>71</sup> See text accompanying above n 31.

<sup>72</sup> See text accompanying above n 31 and text accompanying below nn 109–113 and 125–127.

<sup>73</sup> Including the Crown's title to land up to low-water mark.

<sup>74</sup> *Seas and Submerged Lands Act* s 11. See also text accompanying above n 66 and text accompanying below n 108.

<sup>75</sup> See *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533.

upon *Keyn*, counsel for the Commonwealth argued that because the common law did not apply beyond low-water mark, native title in the territorial sea was not capable of recognition by the common law as required by s 223(1)(c) of the *NTA*.

1 *The Majority: Statutory Extension of Radical Title and Selective Operation of the Common Law*

The majority judges, Beaumont and von Doussa JJ, were of the opinion that the appeal failed essentially for the reasons given by the primary judge. They agreed with Olney J that native title in respect of the claimed area was a statutory title brought into existence upon the enactment of the *NTA*, rather than a native title recognised and protected at common law and, therefore, by the *NTA*.<sup>76</sup> Thus, the Commonwealth's exercise of legislative power in enacting the *NTA* gave statutory recognition to native title in the coastal sea provided the conditions for recognition in s 223(1) of the *NTA* had been met. And this is the critical point: both Olney J and the majority of the Full Court held that, for the purposes of s 223(1)(c), it was sufficient that the common law recognise only the *type or kind* of right or interest claimed as a native title right and interest.<sup>77</sup> This meant that it was not relevant that, as a result of *Keyn*, the common law could not recognise, give effect to or protect that interest beyond low-water mark.

For the majority, the enactment of the *NTA* gave recognition to the Crown's acquisition of sovereignty and radical title over the whole area to which the *NTA* applied. Thus, although the majority found that the common law operated only to low-water mark, they concluded that there was a statutory extension of radical title to the whole area to which the *NTA* applies. The majority's insistence on a statutory basis for offshore recognition of native title, however, produces an anomaly when read in the context of their judgment as a whole. Inherent in the majority's consideration of the nature of common law public rights to fish/navigate in tidal waters is their acceptance that certain rights in tidal waters and the high seas have a common law basis.

In explaining the nature of the public right to fish, the majority referred to the common law position detailed by the High Court in *Harper v Minister for Sea Fisheries* ('*Harper*').<sup>78</sup> Accepting that the English common law right in each member of the public to fish in tidal waters was received into Australia, the majority quoted Brennan J's explanation, in *Harper*, of the potential regulation of the right to fish:

Although there is authority for the view that the public right of fishing is sustained by the Crown's title to the subsoil ... the competence of a State legislature to make laws regulating a right of fishing in such waters is not dependent upon the State's possession of a proprietary right in the bed of the seas or rivers

<sup>76</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 192–3 [56]–[62], especially at 193 [62].

<sup>77</sup> *Ibid* 193 [60], 193 [62] (Beaumont and von Doussa JJ); *Yarmirr v Northern Territory* [No 2] (1998) 82 FCR 533, 551 (Olney J).

<sup>78</sup> (1989) 168 CLR 314.

over which such waters flow. ... '[T]here is a broad distinction between proprietary rights and legislative jurisdiction' ...<sup>79</sup>

Referring to the nature of the common law right to navigate, the majority agreed with the statement of Olney J that

[t]he common law ... recognises a public right of navigation ... This right evolved before *Magna Carta* and is therefore a right distinct in its origin from the right of innocent passage in international law.<sup>80</sup>

If the operation of the common law extends to the territorial sea in these situations, any legal basis for denying its extension to other areas of the law, including the law relating to native title, must be expressed in unequivocal terms.<sup>81</sup> However, having found that there is a statutory extension of radical title to the territorial sea, the question whether the common law applied below low-water mark was irrelevant. The majority's judgment, like Brennan CJ's in *WMC*, is, therefore, not authority for the proposition that radical title does not extend to the territorial sea/seabed. Nonetheless, the distinction which the majority drew between 'proprietary rights and legislative jurisdiction' in the context of the Crown's title to the seabed suggests that the concept of radical title (at least in its statutorily extended form) does not confer property rights. Indeed, such a distinction was also drawn by Brennan CJ in *WMC* vis-a-vis 'statutory sovereign rights' beyond the territorial sea.<sup>82</sup> In the context of its statutory extension to the territorial sea, therefore, radical title is merely legislative jurisdiction. Indeed, the statutory extension of radical title to the territorial sea indicates that, apart from statute, radical title is equivalent to the Crown's title to the seabed: a proposition unequivocally adopted by Merkel J.

## 2 *Merkel J: Common Law Sovereign Rights Equivalent to Radical Title*

In his dissenting judgment, Merkel J embraced a different construction of s 223(1) of the *NTA*: it remained an essential element in establishing native title that the rights claimed in relation to a particular area of land or waters were rights recognised by the common law of Australia.<sup>83</sup> According to this approach, if there was no common law recognition of native title below low-water mark, there would be no basis under the *NTA* for recognition of native title beyond low-water mark. Notwithstanding this conclusion, however, Merkel J rejected the contention that this necessarily entailed the consequence that recognition of native title offshore was prevented by *Keyn*.<sup>84</sup> In doing so, he considered the role

<sup>79</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 223 [208] (Beaumont and von Doussa JJ), quoting *ibid* 330. The words 'there is a broad distinction between proprietary rights and legislative jurisdiction' are from *A-G (Canada) v A-G (Quebec)* [1898] AC 700, 709 (Lord Herschell).

<sup>80</sup> *Yarmirr v Northern Territory* (1998) 82 FCR 533, 593, quoted in *Yarmirr FCAFC* (2000) 101 FCR 171, 224 [216] (Beaumont and von Doussa JJ).

<sup>81</sup> See the approach of the majority of the High Court in *Yarmirr* (2001) 208 CLR 1, discussed in Secher, 'Lessons from the Sea — Part Two', above n 4.

<sup>82</sup> See text accompanying above n 68.

<sup>83</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 266 [396].

<sup>84</sup> *Ibid* 269 [411].

of international and municipal law in relation to the territorial sea<sup>85</sup> and concluded:

by 1930 the common law [of Australia] had adopted and received the principles of international law that a coastal state had sovereignty over its territorial sea, of *at least* three nautical miles, and that sea formed part of the territory of the adjacent coastal state.<sup>86</sup>

Merkel J added that if he was in error in so concluding, then the territorial sea fell under Australia's sovereignty at the latest in 1973 upon the enactment of the *Seas and Submerged Lands Act*.<sup>87</sup> In reaching this conclusion, Merkel J accepted that 'a state's sovereignty, legal competence and jurisdiction, including the operation of its common law is, *at least*, coextensive with the state's territory including its territorial sea.'<sup>88</sup>

For Merkel J:

As the sovereignty of the Commonwealth of Australia, whether under the common law or pursuant to [the *Seas and Submerged Lands Act*], extended to the territorial sea the Commonwealth made its common law 'extend over the territorial sea'. Thus, subject to two qualifications, as and when sovereignty vested in and was exercisable by the Crown in right of the Commonwealth in the territorial sea, the common law applied within the same boundaries.<sup>89</sup>

The first qualification is particularly relevant for present purposes.<sup>90</sup> Pursuant to it, 'the application of the common law is subject to abrogation of, or modification to, the common law in relation to the territorial sea by statutes of the Commonwealth, the States and the Northern Territory.'<sup>91</sup> Merkel J explained that some statutory provisions, including the s 9 of the *Petroleum (Submerged Lands) Act* and the s 428 of the *Offshore Minerals Act 1994* (Cth), provided for the common law to apply in the territorial sea subject to the conditions that they laid down. Although such statutes regulate how the common law is to apply, they do not evidence a legislative intent to exclude the common law from otherwise applying.<sup>92</sup> This analysis has significant implications when considered against Brennan CJ's reasoning in *WMC*. In *WMC*, Brennan CJ distinguished between the *Petroleum (Submerged Lands) Act* and the various state and territory Land Acts on the ground that only the Land Acts assumed the existence of the Crown's common law radical title.<sup>93</sup> Although, *prima facie*, it appears that Merkel J's approach of extending the common law to the territorial sea would entail the consequence that the Crown acquired a radical title to the territorial sea, it will be seen that this is not the case. Nevertheless, it will also be seen that Merkel J's

<sup>85</sup> Ibid 269–78 [412]–[455].

<sup>86</sup> Ibid 278 [456] (emphasis in original).

<sup>87</sup> Ibid 279 [457], 280 [463].

<sup>88</sup> Ibid 282 [481] (emphasis in original).

<sup>89</sup> Ibid 283 [483].

<sup>90</sup> For the second qualification, see *ibid* 284 [487].

<sup>91</sup> Ibid 283 [484].

<sup>92</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 283 [484].

<sup>93</sup> *WMC* (1998) 194 CLR 1, 18 [20]. See also text accompanying above n 65.

approach achieves the very result that would be achieved if the Crown's radical title did extend to the territorial sea.

Merkel J articulated his views on radical title when considering the Commonwealth's contention that, since the Crown has no radical title in respect of the territorial sea, the basis for recognition of native title by the common law vis-a-vis the sea is absent.<sup>94</sup> His Honour described radical title as 'the bundle of ultimate or paramount rights or powers acquired over land by the sovereign upon acquiring sovereignty.'<sup>95</sup> The rights so acquired were 'a concomitant of the supreme legal authority in and over the territory over which sovereignty had been acquired.'<sup>96</sup> Merkel J also observed that the rights fell short of absolute beneficial ownership if burdened by pre-existing native title.<sup>97</sup> Although this observation appears to suggest that, except to the extent of native title, radical title amounts to absolute beneficial ownership of land, Merkel J's subsequent analysis denies such a view.

Referring to Brennan J's judgment in *WMC*, Merkel J explained:

Putting to one side the seabed, under international *and* municipal law the sovereign does not acquire radical title to the territorial sea or to the internal waters upon the acquisition of sovereignty over that area ... However, subject to the constraints of international law the Crown's enjoyment of supreme authority results in the sovereign enjoying the bundle of ultimate or paramount rights or powers acquired over the sea upon acquisition of sovereignty ... Whilst those rights and powers do not constitute radical title they are *equivalent* to the ultimate and paramount rights and powers gained over land by the sovereign upon gaining sovereignty.<sup>98</sup>

Although this conclusion was based on statutory recognition of native title in respect of the sea, Merkel J expressly observed that he would have arrived at the same conclusion at common law:

In my view the Crown's paramount title in respect of land and its paramount rights in respect of the sea are so closely related for the purposes of native title that I do not accept that there is any valid reason for the common law recognising native title in respect of land but not in respect of the sea.<sup>99</sup>

Thus, it was only because of Brennan CJ's declaration in *WMC* that the Crown did not acquire a radical title beyond low-water mark that Merkel J distinguished between the Crown's radical title to land and the Crown's paramount or 'sovereign right'<sup>100</sup> to the sea.<sup>101</sup> Nonetheless, the crucial point is that Merkel J's

<sup>94</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 285 [491] (Merkel J).

<sup>95</sup> *Ibid* 285 [493].

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*. See also at 254 [339], 267 [399], 281 [471].

<sup>98</sup> *Ibid* 285–6 [494] (emphasis of 'and' in original, emphasis of 'equivalent' added), citing in support of the first sentence *WMC* (1998) 194 CLR 1, 17–18 [18]–[20] (Brennan J) and in support of the second sentence the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 364 (Barwick CJ), 475 (Mason J).

<sup>99</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 286–7 [500].

<sup>100</sup> Merkel J uses this expression at *ibid* 254 [339], 267 [399], 267 [401], 281 [471], 287 [505].

observations on the juridical nature of the Crown's 'sovereign rights' also apply to the Crown's radical title. In this context, Merkel J found that it was unnecessary to determine whether the Crown had ownership or proprietary rights in the territorial seabed. He did note, however, that this was a question on which divergent views had been expressed.<sup>102</sup> Furthermore, he concluded that since

native title can burden the Crown's sovereign rights in respect of the territorial sea it must follow that it can likewise burden these rights in respect of the underlying solum whether or not the Crown has ownership or proprietary rights in either. The burden on the 'sovereign rights' of the Crown in respect of the territorial sea and internal waters is no different qualitatively or quantitatively to the burden on the Crown's radical title in respect of land with the consequence that native title rights in the sea and waters, although enforceable, are as vulnerable to legislative and executive extinguishment as are rights in the land ...<sup>103</sup>

Merkel J neglected to mention another, arguably more important, consequence following from the equation of the Crown's 'sovereign rights' and the Crown's radical title: if the Crown's 'sovereign rights' do not necessarily confer ownership on the Crown, neither does radical title.

Although Merkel J technically denies that the Crown acquires a radical title to the territorial sea/seabed, his analysis achieves the same result. Moreover, given Merkel J's conclusion that the common law applies in respect of the territorial sea, there appears to be no legal justification for denying that, by the common law, the Crown acquires a radical title to this area. Nevertheless, according to Merkel J, the *Petroleum (Submerged Lands) Act* regulates the common law and thus assumes the existence of the Crown's 'sovereign rights' to land lying below low-water mark. Since the Crown's 'sovereign rights' are equivalent to the rights and powers that constitute radical title, the concept of 'sovereign rights' is necessarily sufficient to support the alienation of interests in the territorial seabed and to found the Crown's beneficial title to that land: the absence of Crown ownership in the context of the Crown's radical title or 'sovereign rights' does not weaken the property rights acquired by a grantee. In contradistinction to Brennan CJ's conclusion in *WMC*, therefore, the *Petroleum (Submerged Lands) Act* could be regarded as an offshore equivalent to the various Australian Land Acts.

Indeed, Merkel J's approach is consistent with Brennan CJ's treatment in *Wik* of the Crown's statutory power of alienation relating to land. Furthermore, in *WMC*, Brennan CJ was of the view that because the *Petroleum (Submerged Lands) Act* did not purport to declare the Crown's property in the continental shelf (either within the territorial sea or beyond), the Crown did not have ownership of that area as a result of having 'sovereign rights' to the area — but

<sup>101</sup> 'Sovereign rights' is also used in a broader sense to designate all of the Crown's rights as sovereign, which include the Crown's radical title to land.

<sup>102</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 287 [502]–[505], citing *A-G (British Columbia) v A-G (Canada)* [1914] AC 153, 174 (Viscount Haldane LC), the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 397–400 (Gibbs J), 433 (Stephen J), 487 (Jacobs J), 367–8 (Barwick CJ), 465–6 (Mason J) and *Robinson v Western Australian Museum* (1977) 138 CLR, 337 (Mason J).

<sup>103</sup> *Yarmirr FCAFC* (2000) 101 FCR 171, 287 [505].



that, nevertheless, the Crown had an undoubted power to grant interests in the area. Thus, Brennan CJ's conception of statutory 'sovereign rights' is analogous to Merkel J's conception of common law 'sovereign rights', which is itself equivalent to radical title.<sup>104</sup> It will be seen that Kirby J's analysis in *WMC*, where he was one of the dissenting judges, assumes that, upon acquisition of sovereignty, the Crown acquires a radical title to the territorial sea and seabed.<sup>105</sup>

C *WMC: The Other High Court Judges — Common Law Extension of Radical Title to the Territorial Sea*

It is important to note that Merkel J's analysis in *Yarmirr FCAFC* was limited to the territorial sea, whereas *WMC* concerned statutory sovereign rights exercised by Australia in the continental shelf *beyond* the territorial sea. Furthermore, Merkel J's conception of the Crown's 'sovereign rights' has both a common law and a statutory basis, whereas Brennan CJ's reference to 'sovereign rights' in *WMC* only presupposes a statutory basis. For these reasons and because of the tripartite distinction between the Crown's title to land, the territorial sea/seabed and the sea/seabed beyond the territorial sea, the dissenting judgment of Kirby J in *WMC*, supported by the tenor of the judgments of Toohey J,<sup>106</sup> Gaudron J and Gummow J,<sup>107</sup> provides a principled approach.

For Kirby J, the true legal position was that:

By international law relevant 'sovereign rights' devolved upon Australia. By valid municipal law, the Parliament provided for the exercise of such sovereign rights for the purpose for which they were given, namely exploration and exploitation of the resources of the sea and seabed. Also by valid municipal law, the Parliament enacted that the sovereign rights were vested in and exercisable by the Crown in right of the Commonwealth. It was out of that vested right that the [exploration] permits were granted ... The vesting of such rights was sufficient to sustain the validity of the permits without the need to posit a fiction of feudal land law or to expand the *Crown's radical title beyond the territorial sea into the continental shelf*. The absence of this fiction does not weaken the property rights acquired by a permittee. Those rights derived their character from the terms in which they were expressed in the Act creating them [(the *Petroleum (Submerged Lands) Act*)].<sup>108</sup>

Thus, Kirby J assumed that radical title extends to the territorial sea and that the concept of 'statutory sovereign rights' is only relevant in respect of the sea/seabed beyond the territorial sea. Nevertheless, it appears that, like Merkel J, Kirby J equated the two concepts, his approach regarding the juridical nature of

<sup>104</sup> There is, therefore, no justification for using the absence of radical title to deny holders of offshore petroleum permits a proprietary interest protected by the *Constitution*: Brazil, above n 56, 20.

<sup>105</sup> See text accompanying below n 108. Merkel J's analysis accords with older colonial and English authorities that supported the common law's extension to the territorial sea: see above nn 43–44 and accompanying text.

<sup>106</sup> As the other dissenting judge: see *WMC* (1998) 194 CLR 1, 29–30 [53]–[58].

<sup>107</sup> As members of the majority: see *ibid* 61–2 [158]–[161], 68–75 [179]–[204] (Gummow J), 35–9 [78]–[87] (Gaudron J).

<sup>108</sup> *Ibid* 95 [244] (emphasis added).

the concept of ‘statutory sovereign rights’ conforming with his approach in *Wik* regarding the juridical nature of radical title. In *Wik*, Kirby J explained that the relevant grant of leases was regulated by the Queensland Land Acts<sup>109</sup> and these Acts did not expressly confer on the Crown the estate necessary to grant a lease.<sup>110</sup> Consequently, Kirby J was of the view that

[t]o invent the notion, not sustained by the actual language of the [Queensland Land Acts], that the power conferred on the Crown to grant a pastoral leasehold interest was an indirect way of conferring on the Crown ‘ownership’ of the land by means of the reversion expectant [involved] a highly artificial importation of feudal notions into Australian legislation.<sup>111</sup>

According to Kirby J, rather than inventing such a purpose by a new legal fiction and retrospectively attributing it to the Queensland Parliament so that it could be read into the Queensland Land Acts, the fact that the Parliament had said the Crown’s power to make such a grant existed was sufficient.<sup>112</sup> Kirby J was of the view that to import into the Land Acts notions of the common law apt for tenurial holdings under the Crown and attribute them to the Crown itself ‘piles fiction upon fiction’ and, unless expressed in legislation, should not be introduced.<sup>113</sup>

Similarly, in *WMC*, Kirby J’s conception of ‘sovereign rights’ allowed the Crown to grant exploration permits in the absence of any Crown ownership of the continental shelf beyond the territorial sea. For Kirby J, however, in the context of both ‘radical title’ and ‘statutory sovereign rights’, the absence of Crown ownership did not detract from the property rights acquired by a grantee.<sup>114</sup> Nevertheless, like Merkel J, Kirby J considered that the question whether or not the Commonwealth had ownership rights in the seabed was irrelevant.<sup>115</sup> He made it clear that where the Crown has ‘sovereign rights’, the Crown has a vested interest. Although not proprietary, such interest is vested in interest rather than vested in possession. It will only become vested in possession upon the appropriate exercise of sovereign power.<sup>116</sup> Importantly, Kirby J’s

<sup>109</sup> Although the Crown’s radical title supported its sovereign powers at common law to grant interests in land and to appropriate unalienated land for public purposes, these prerogatives have since been displaced by statutory powers: see the observations of Jacobs JA in *A-G (NSW) v Cochrane* (1970) 91 WN (NSW) 861, 865. The Crown’s radical title may, therefore, no longer be central to its powers to grant interests in land. Nevertheless, radical title remains central to *characterising the nature* of the Crown’s title to land as well as the title of some Crown grantees.

<sup>110</sup> *Wik* (1996) 187 CLR 1, 244.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid* 244–5.

<sup>113</sup> *Ibid* 245.

<sup>114</sup> *WMC* (1998) 194 CLR 1, 95 [244]. Kirby J’s analysis of the *Petroleum (Submerged Lands) Act* in *WMC* demonstrated that ‘the clear object of the Act was to afford permittees the kind of stable “title” to property rights which ... would be necessary if investors were to be attracted to risk substantial venture capital’: at 93–4 [241].

<sup>115</sup> *WMC* (1998) 194 CLR 1, 97 [247].

<sup>116</sup> On this issue, see Secher, ‘The Legal Nature of the Crown’s Title — Part 1’, above n 28, 7–8 (text accompanying nn 28–34).

approach in *WMC* is consistent with that of Gummow J who, as a member of the majority, implicitly attributed to the Crown a radical title to the territorial sea.<sup>117</sup>

Before considering Gummow J's analysis in *WMC*, it is important to note that both Kirby J and Gummow J were members of the *Wik* High Court majority which rejected an argument based on the 'reversion expectant' theory that Brennan J had espoused in *Mabo*.<sup>118</sup> The High Court majority denied that the Crown acquired a beneficial reversionary interest upon the grant of the relevant pastoral leases in *Wik*, with the result that the Crown's title to the land retained its essential character; it continued to be a mere radical title. For present purposes the important point is that, in *WMC*, both Kirby J and Gummow J (explicitly and implicitly respectively) organically extend their analysis of the legal nature of the Crown's title to land in *Wik* to the legal nature of the Crown's title to the sea: the Crown has a bare legal title sufficient merely to support its right to acquire and confer title.

Drawing a distinction between the concept of 'sovereignty' as used in ss 6 and 11 of the *Seas and Submerged Lands Act*,<sup>119</sup> in *WMC* Gummow J concluded that sovereignty referred to in s 6, which deals with sovereignty in respect of the territorial sea, seabed and subsoil, is a stronger term than the term 'sovereign rights' used in s 11, which deals with the continental shelf.<sup>120</sup> Thus, there are degrees of 'sovereignty'.<sup>121</sup> To emphasise the distinction between sovereignty and 'sovereign rights', Gummow J referred to the analogy provided by the distinction which Jacobs J drew in the *Seas and Submerged Lands Case* between the vesting in the Crown, as part of England, of the foreshore between high and low-water and the beds of all waters *intra fauces terrae* over which tidal waters flowed, on the one hand, and the rights asserted by the English Crown over the open seas, on the other.<sup>122</sup> 'In the former case, but not the latter, the foreshore and associated areas were vested in the Crown under the common law and were subject thereto and could be held under rights springing from the common law.'<sup>123</sup>

It appears, therefore, that the various degrees of sovereignty correspond with the application of the common law: where the Crown has sovereignty, as opposed to 'sovereign rights', the common law applies. Thus, since the Crown's

<sup>117</sup> See text accompanying below nn 124–127.

<sup>118</sup> See text accompanying above n 30. This author has also shown that there are a number of fundamental objections to Brennan J's 'reversion expectant' argument: see Secher, 'The Legal Nature of the Crown's Title — Part 1', above n 28; Secher, 'The Legal Nature of the Crown's Title — Part 2', above n 28.

<sup>119</sup> Section 6 provided: '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 provided: 'the sovereign rights of Australia ... in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth'.

<sup>120</sup> (1998) 194 CLR 1, 61 [160].

<sup>121</sup> This approach is supported by Barwick CJ's discussion of these concepts in the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 364.

<sup>122</sup> *WMC* (1998) 194 CLR 1, 61–62 [161], citing *ibid* 486–90.

<sup>123</sup> *WMC* (1998) 194 CLR 1, 62 [161], citing the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 486–7 (Jacobs J).

sovereignty over the foreshore and associated areas has never been doubted, the common law applied to vest these areas in the Crown. Since it is now accepted that the Crown's sovereignty extends to the territorial sea, the common law similarly applies to this area.<sup>124</sup> Because the Crown's sovereignty does not extend beyond the territorial sea, there the Crown acquires 'sovereign rights'.

Although Gummow J did not specifically address the question of whether the rights constituting radical title and 'sovereign rights' are equivalent, he did provide some insight into the juridical nature of these two titles. Gummow J's conception of 'sovereign rights' allows the Crown to grant interests in respect of the continental shelf (as radical title does in respect of land). Moreover, since the concept of sovereignty vis-a-vis the territorial sea is a stronger concept than 'sovereign rights' vis-a-vis the continental shelf, it would necessarily follow that the juridical nature of 'sovereign rights' cannot encompass more than the juridical nature of the title acquired upon acquisition of sovereignty — namely, radical title to land, or Merkel J's 'common law sovereign rights' to the territorial sea, or the majority of the Full Court's statutory extension of radical title to the territorial sea in *Yarmirr*. In accordance with Gummow J's analysis of radical title in *Wik*,<sup>125</sup> therefore, 'sovereign rights' must connote a bare nominal title, 'a postulate to support the exercise of sovereign power', or something less.<sup>126</sup> Thus, absolute beneficial Crown ownership would be established not by the acquisition of 'sovereign rights' but by the subsequent exercise of the authority of the Crown.<sup>127</sup> Furthermore, Gummow J's obiter observation that the permits could give rise to proprietary rights indicates that the Crown can, in exercise of its 'sovereign rights', confer property rights in the absence of Crown ownership.

It will be seen in Part Two of this article that in *Yarmirr*, the most recent High Court decision on the Crown's rights to the territorial sea, the majority of the Court resolved the issue of the legal nature of the Crown's title to the territorial sea in a way that most closely resembles (but does not go as far as) the approach adopted by Merkel J in *Yarmirr FCAFC*.

## V SUMMARY

Part One of this article has focused on the legal nature of the Crown's title to the territorial sea and beyond pre-*Yarmirr*. It has been seen that, before *Mabo*, although it was not entirely clear whether the Crown had property rights below low-water mark, the source of the Crown's title was not the common law. It has also been seen that, after *Mabo*, divergent views on the question of the Crown's

<sup>124</sup> Cf Gummow J's distinction as part of the majority in *Yarmirr* (2001) 208 CLR 1 between radical title to land and sovereign rights to the territorial sea, discussed in Part Two of this article.

<sup>125</sup> See *Wik* (1996) 187 CLR 1, 186–90.

<sup>126</sup> *Ibid* 186.

<sup>127</sup> *Ibid*: 'Absolute and beneficial Crown ownership, a plenum dominium, [is] established not by the acquisition of radical title but by subsequent exercise of the authority of the Crown.' Note that while the grant of a common law lease may extinguish native title because the rights created by grant are inconsistent with native rights, this does not have any significance for the Crown's title: Secher, 'The Legal Nature of the Crown's Title — Part 2', above n 28, 43 (text accompanying n 55).

property rights below low-water mark continued to be expressed in *WMC* and *Yarmirr FCAFC*. What was clear pre-*Yarmirr* was that the courts had drawn a distinction between the Crown's title to: land,<sup>128</sup> the territorial sea/solum; and the continental shelf beyond the territorial sea.

Although there was no doubt that the Crown acquired a radical title to land and 'statutory sovereign rights' to the continental shelf, the description of the Crown's title to the territorial sea was not so clear. Indeed, three different classifications of the Crown's title to the territorial sea had emerged: first, while the majority in *Yarmirr FCAFC* agreed with Brennan CJ in *WMC* that the common law (and thus radical title) does not extend below low-water mark, they nevertheless held that there was a statutory extension of radical title to the territorial sea. Secondly, although Merkel J, dissenting in *Yarmirr FCAFC*, also followed Brennan CJ's decision in *WMC* to deny the Crown a radical title below low-water mark, in contradistinction to the *Yarmirr FCAFC* majority, he applied the concept of common law sovereign rights to describe the Crown's title to the territorial sea. Thirdly, in *WMC* Kirby J expressly, and Gummow J implicitly, attributed to the Crown a radical title to the territorial sea.

Crucially, however, pre-*Yarmirr* there was considerable authority for the proposition that, irrespective of the classification of the Crown's title to the territorial sea, the legal nature of the title was the same: the concepts of 'radical title' and 'sovereign rights', whether common law or statutory, are analogous. In Part Two of this article it will be seen that uncertainty about the Crown's title below low-water mark caused by contradictory decisions rendered both before and after *Mabo* was finally resolved by the High Court in *Yarmirr*. Although the *Yarmirr* High Court did not address the intertidal zone,<sup>129</sup> it has been seen that the *Yarmirr* Full Federal Court attributed a statutory extension of radical title in respect of the whole area to which the *NTA* applies, including the intertidal zone. Indeed, by acknowledging that the common law operated to low-water mark, it appears the Full Court's approach entails the consequence that the Crown also acquired a radical title to the intertidal zone at common law. Furthermore, it will be seen that the Federal Court's decisions in *Lardil Peoples v Queensland*<sup>130</sup> and *Gumana v Northern Territory*<sup>131</sup> (regarding the common law status of the Crown's title to the intertidal zone) and *Akiba v Queensland [No 2]*<sup>132</sup> (regarding the Crown's acquisition of sovereignty to the Exclusive Economic Zone beyond the territorial sea) provide further support for the proposition that the legal nature of the Crown's title to the sea is analogous to the Crown's title to land.

It follows that the Crown's title derived from sovereignty, whether to land or sea, should operate equally in relation to native title. Accordingly, it will also be

<sup>128</sup> Although this appeared to include the Crown's title to land up to low-water mark, we will see that, post-*Yarmirr*, the Federal Court distinguished between title to land and to the 'intertidal zone': see Part Two of this article.

<sup>129</sup> *Yarmirr* (2001) 208 CLR 1, 60 [73] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also the definition of 'intertidal zone' outlined in above n 1.

<sup>130</sup> [2004] FCA 298 (23 March 2004).

<sup>131</sup> (2005) 141 FCR 457.

<sup>132</sup> (2010) 270 ALR 564.

seen in Part Two that there are four grounds for supporting recognition of exclusive native title rights to the sea.