

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

PART TWO — *YARMIRR* AND BEYOND

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[This two part article examines the legal nature of the Crown's title to the sea (including the inter-tidal 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 considered the position before the High Court's decision in Commonwealth v Yarmirr and this Part 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 this Part 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 they are inconsistent with the public rights of fishing and navigation. It will be seen that both authority and sound legal principle support two propositions. First, the Crown's title derived from sovereignty, whether to land or sea, is analogous and should 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.]

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I INTRODUCTION

It was seen in Part One of this article¹ that, before the High Court's decision in *Commonwealth v Yarmirr* ('*Yarmirr*'),² the courts had drawn a distinction between the Crown's title to land,³ the Crown's title to the territorial sea and solum, and the Crown's title to the continental shelf beyond the territorial sea. However, while it was clear 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, pre-*Yarmirr*, three different classifications of the Crown's title to the territorial sea had emerged: a statutory radical title,⁴ common law sovereign rights,⁵ and a common law radical title.⁶

¹ Ulla Secher, 'The Crown's Radical Title and Native Title: Lessons from the Sea — Part One — The Position before *Yarmirr*' (2011) 35 *Melbourne University Law Review* 523.

² (2001) 208 CLR 1.

³ Although this appeared to include the Crown's title to land up to low-water mark, it will be seen that, post-*Yarmirr*, the Federal Court distinguished between title to land and to the 'intertidal zone': see text accompanying below nn 131–134, 150. See also the definition of 'intertidal zone' in Part One of this article, Secher, 'Lessons from the Sea — Part One, above n 1, 524 n 1:

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]).

⁴ While the majority of the Full Federal Court in *Commonwealth v Yarmirr* (2000) 101 FCR 171 ('*Yarmirr FCAFC*') agreed with Brennan CJ in *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 ('*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: see Secher, 'Lessons from the Sea — Part One', above n 1, 534–5.

⁵ Although Merkel J, dissenting in *Yarmirr FCAFC* (2000) 101 FCR 171, also followed Brennan CJ's decision in *WMC* (1998) 194 CLR 1 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: see Secher, 'Lessons from the Sea — Part One', above n 1, 537–8.

⁶ In *WMC* (1998) 194 CLR 1, Kirby J expressly, and Gummow J implicitly, attributed to the Crown a radical title to the territorial sea: see Secher, 'Lessons from the Sea — Part One', above n 1, 539–42.

It was also seen in Part One that, pre-*Yarmirr*, there was considerable authority for the proposition that the legal nature of the Crown's title to the territorial sea was the same irrespective of the classification of the Crown's title. In this Part it will be seen that uncertainty about the Crown's title to the territorial sea was finally resolved by the High Court in *Yarmirr*. While the *Yarmirr* High Court did not address the intertidal zone,⁷ it was seen in Part One that the Full Federal Court in *Commonwealth of Australia v Yarmirr* ('*Yarmirr FCAFC*')⁸ attributed a statutory extension of radical title in respect of the whole area to which the *Native Title Act 1993* (Cth) ('*NTA*') applies, including the intertidal zone. Furthermore, since the Full Federal Court acknowledged that the common law operated to low-water mark, the Crown acquired a radical title to the intertidal zone at common law. In this Part, it will also be seen that in *Lardil Peoples v Queensland* ('*Lardil*')⁹ and *Gumana v Northern Territory* ('*Gumana*')¹⁰ the Federal Court made some important observations regarding the common law status of the Crown's title to the intertidal zone. Crucially, the developments in *Gumana* further support the proposition that the legal nature of the Crown's title to the sea is analogous to the Crown's title to land. Further support for this proposition is also provided by the Federal Court's most recent decision relating to native title to the sea, *Akiba v Queensland [No 2]* ('*Akiba*'),¹¹ in the context of the Crown's acquisition of sovereignty to the Exclusive Economic Zone ('EEZ') beyond the territorial sea.

Both authority and sound legal principle support the proposition that the Crown's title derived from sovereignty, whether to land or sea, is analogous and should operate equally in relation to native title. It will be seen, however, that different tests have developed for initial recognition of native title vis-a-vis land and sea because of the perceived distinction between the legal nature of the Crown's title to land and to sea. Accordingly, while the decisions considered in this second Part of the article all support the non-recognition of exclusive native title rights to the sea on the basis that they are inconsistent with public rights of fishing and navigation, there are four grounds for rejecting non-recognition of exclusive native title rights to the sea, whether relating to the territorial sea, intertidal zone or beyond the territorial sea.

II *YARMIRR*: THE HIGH COURT

It was seen in Part One that the majority in *Yarmirr FCAFC* upheld the trial judge's finding that native title did exist in relation to the territorial sea.¹² In *Yarmirr*, the Commonwealth contended that the Full Court 'erred in that it wrongly construed the [*NTA*] so as to provide the basis for recognition of native

⁷ *Yarmirr* (2001) 208 CLR 1, 60 [73] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See the definition of 'intertidal zone' in above n 3.

⁸ (2000) 101 FCR 171.

⁹ [2004] FCA 298 (23 March 2004).

¹⁰ (2005) 141 FCR 457.

¹¹ (2010) 270 ALR 564.

¹² Secher, 'Lessons from the Sea — Part One', above n 1, 533.

title beyond the limits of the Northern Territory.¹³ By a majority of 5 to 2, the High Court dismissed the Commonwealth's appeal.¹⁴ A joint judgment by Gleeson CJ, Gaudron, Gummow and Hayne JJ constituted the principal majority judgment, while the other member of the majority, Kirby J, delivered a separate judgment.¹⁵

A Principal Majority Judgment

1 Territorial Reach of the Common Law

The principal majority made it clear that the common law can extend to the territorial sea. In this context, the common law's classification of actions as either local or transitory¹⁶ was crucial in two respects. This distinction underpinned, first, the common law's attitude to crimes committed outside the jurisdiction and, secondly, the often-criticised decision of the House of Lords in *British South Africa Co v Companhia de Moçambique* ('*Moçambique*'),¹⁷ where it was held that an action to recover damages for trespass to foreign land could not be brought in an English court. The majority explained that *R v Keyn* ('*Keyn*')¹⁸ 'established that, absent statutory authority, a criminal court cannot punish as criminal, conduct which happens beyond the low-water mark on vessels flying the flag of a foreign state.'¹⁹ The majority also explained that *Moçambique*, rather than having broader reach, merely 'established that the civil courts will not entertain (at least some) actions in respect of immovables in a foreign country or "a dispute involving the title to foreign land".'²⁰

Crucially, for the majority, the *Moçambique* principle demonstrated that the common law does *not* have a limited territorial operation.²¹ Rather, the principle showed that local actions of the kind embraced by the principle were designed to resolve problems resulting from the intersection of two competing systems of law. It had no relevance where, in relation to events occurring and places lying beyond low-water mark, there were two systems of law that can and do operate together. Thus, the majority explained that *Keyn* and *Moçambique* merely provided examples of actions, about status and rem respectively, in which the common law did not extend beyond low-water mark because of the particular questions intruding in those cases:

¹³ (2001) 208 CLR 1, 146 [331] (Callinan J).

¹⁴ See text accompanying below nn 48–97.

¹⁵ Although both McHugh J and Callinan J dissented, only McHugh J expressly held that the 'common law does not operate outside the realm': *Yarmirr* (2001) 208 CLR 1, 91 [179]. See also at 69 [104], 89 [174].

¹⁶ *Yarmirr* (2001) 208 CLR 1, 44 [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). This distinction was explained at 92 [183] (McHugh J).

¹⁷ [1893] AC 602. See *Yarmirr* (2001) 208 CLR 1, 44 [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁸ (1876) 2 Ex D 63.

¹⁹ *Yarmirr* (2001) 208 CLR 1, 43 [30] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

²⁰ *Ibid* 45 [33] (citations omitted).

²¹ *Ibid* 46 [35].

the fact ... that the events occurred outside Australia does not of itself, and without more, bar relief. Questions may intrude in actions about status or in actions in rem of a kind which do not arise in personal actions. As *Keyn* demonstrates, other questions do intrude in criminal matters. But, importantly, the *Moçambique* principle demonstrates that the common law does not have only a limited territorial operation.²²

The majority did not, therefore, go as far as Merkel J in *Yarmirr FCAFC*, who held that the common law applies in respect of the territorial sea. Rather, the majority adopted an incremental approach: although the common law does not necessarily end at low-water mark, whether the common law extends to the territorial sea must be determined on a case-by-case basis.

Accordingly, the majority had to determine if the common law applied to the territorial sea in the factual situation before them. Since the Court was dealing with rights in relation to both the sea and seabed beyond low-water mark, the principle in *Moçambique* was distinguished:

It is inappropriate to see the present issues as engaging the common law rules of choice of laws because the [*NTA*] requires no resolution of any conflict or competition between two systems of law. The [*NTA*] presupposes that, so far as concerns native title rights and interests, the two systems — the traditional law acknowledged and traditional customs observed by the relevant peoples, and the common law — can and will operate together.²³

There was nothing, therefore, in the facts of the present case to deny that the common law applied beyond low-water mark.²⁴ Thus, the majority only had to consider the narrower question: ‘whether the common law will “recognise” native title rights and interests in respect of areas beyond the low-water mark.’²⁵

Noting that the central issue for debate in *Mabo v Queensland [No 2]* (*Mabo*)²⁶ was whether there was inconsistency between the common law and the relevant native title rights and interests, the majority stated:

If the two are inconsistent, it was accepted in [*Mabo*] that the common law would prevail. ... If, as was held in [*Mabo*] in relation to rights of the kind then in issue, there is no inconsistency, the common law will ‘recognise’ those rights.²⁷

Thus, it appears that the High Court has established a two-stage test for determining whether the common law applies in relation to rights beyond low-water mark: first, (in order to distinguish *Moçambique*) there must be some law which is derived from a system of law which does not compete with the common law

²² Ibid.

²³ Ibid 46–7 [37].

²⁴ The majority found it unnecessary to explore further the territorial reach of the common law: ibid 47 [39].

²⁵ Ibid.

²⁶ (1992) 175 CLR 1.

²⁷ *Yarmirr* (2001) 208 CLR 1, 49 [42] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

system;²⁸ and secondly, such law must be capable of recognition by the common law — that is, the common law must be consistent with such law.²⁹

2 *Radical Title versus Common Law Sovereign Rights*

The majority considered the role of radical title in the process of examining one of the fundamental principles underlying the Commonwealth's submissions: that native title could not exist without the Crown having radical title to the area in respect of which the native title was claimed. For the Commonwealth, the legal concept of radical title had a 'controlling role'.³⁰ Such a role was, however, rejected by the majority. Instead, the majority drew a distinction, not unlike that drawn by Merkel J, between 'radical title to land' and 'sovereign rights to the territorial sea'. The majority explained that since native title is neither created by nor derived from the common law, radical title is not a necessary prerequisite to the conclusion that native title exists. Rather, the concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and native title coexist.³¹ The concept of radical title is, therefore,

a tool of legal analysis which is important in identifying that the Crown's rights and interests in relation to land can co-exist with native title rights and interests. But it is no more than a tool of analysis which reveals the nature of the rights and interests which the Crown obtained on its assertion of sovereignty over land.³²

For the majority, it did not follow that it was 'essential, or even appropriate, to use the same tool in analysing the altogether different rights and interests which arose from the assertion of sovereignty over the territorial sea.'³³ Rather,

[t]he inquiry must begin by examining what are the *sovereign rights and interests* which were and are asserted over the territorial sea. Only then can it be seen whether those rights and interests are inconsistent with the native title rights and interests which ... are claimed.³⁴

Thus, although radical title is a concomitant of sovereignty over land, the High Court majority identified 'sovereign rights and interests' as a concomitant of sovereignty over the territorial sea: 'sovereign rights and interests' is a common law concept which, it will be seen, is not dissimilar to the concept of common law sovereign rights identified by Merkel J. Nevertheless, the majority found it unnecessary to attempt a comprehensive definition of the powers, rights and interests which Australia claims, or the Imperial authorities claimed, in respect of

²⁸ See below Part II(A)(2).

²⁹ The High Court's examination of the effect of the various assertions of sovereignty over the territorial sea revealed an inconsistency with the continued existence of any exclusive rights. See below Part II(A)(2).

³⁰ *Yarmirr* (2001) 208 CLR 1, 51 [49] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

³¹ *Ibid* 51 [48].

³² *Ibid* 51 [49]. See also *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 441 [38] (Gleeson CJ, Gummow and Hayne JJ).

³³ *Yarmirr* (2001) 208 CLR 1, 51 [50] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

³⁴ *Ibid* 51–2 [501] (emphasis added).

the territorial sea.³⁵ Although inquiries about those powers, rights and interests are usually expressed in terms of ‘sovereignty’, the majority noted that ‘sovereignty’ is a ‘notoriously difficult concept which is applied in many, very different contexts’.³⁶

Nonetheless, and despite it distinguishing *Keyn* to hold that the common law does not necessarily end at low-water mark, the majority relied on *Keyn* to deny ‘that the sovereignty claimed amounted to a claim that the area was “owned” by the Crown.’³⁷ There was, however, no doubt that, as a matter of municipal law, the Imperial authorities claimed the right to legislate in respect of the territorial sea of both Britain and its colonies.³⁸ The majority accepted

that the claimed authority over the area extended, if thought appropriate, to a power to legislate for the grant of ownership or lesser rights in respect of the area, but no such legislation was enacted and no grants of ownership were made.³⁹

In order to support their conclusion that sovereignty over the territorial sea does not confer beneficial title, the majority considered aspects of both international and municipal law. The acquisition of sovereignty over the territorial sea occurred by international law because Britain was the internationally recognised nation holding sovereignty over the adjoining land mass.⁴⁰ ‘As a matter of international law’, stated the majority, ‘the right of innocent passage is inconsistent with any international recognition of a right of ownership by the coastal state of territorial waters.’⁴¹ It was clear, therefore, ‘that at no time before federation did the Imperial authorities assert any claim of ownership to the territorial sea or sea-bed’.⁴²

By municipal law, the acquisition of sovereignty was a claim made in exercise of the prerogative.⁴³ The majority observed, however, that the Crown’s prerogative rights in relation to the territorial sea were limited in some important respects:

The most relevant of those limitations were the public rights of fishing in the sea and in tidal waters and the public right of navigation. ... Whatever may be the origins of those rights, no party or intervener disputed their existence and no party or intervener submitted that the sovereign rights asserted in 1824 [(when Britain acquired sovereignty over the Northern Territory)] did not acknowledge the continuation of those rights.⁴⁴

³⁵ Ibid 52 [52].

³⁶ Ibid 52–3 [52].

³⁷ Ibid 54 [55], also stating that *Keyn* (1876) 2 Ex D 63 had held that ‘the sea within three nautical miles of the coast, although internationally recognised as territorial sea subject to British sovereignty, is not within the territory of England’.

³⁸ *Yarmirr* (2001) 208 CLR 1, 54 [55] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

³⁹ Ibid.

⁴⁰ Ibid 55 [59].

⁴¹ Ibid 54 [57].

⁴² Ibid 55 [59].

⁴³ Ibid 55 [60].

⁴⁴ Ibid 55–6 [60] (citations omitted).

Accordingly, the majority concluded that the nature of sovereignty asserted in 1824 was such as ‘to show that at that time (subject to [the] important qualification [of public rights of navigation and fishing]) there was no *necessary* inconsistency between the rights and interests asserted by Imperial authorities and the continued recognition of native title rights and interests.’⁴⁵ The majority explained that the qualification was required because

the rights and interests asserted at sovereignty carried with them the recognition of public rights of navigation and fishing and, perhaps, the concession of an international right of innocent passage. Those rights were necessarily inconsistent with the continued existence of any right under Aboriginal law or custom to preclude the exercise of those rights.⁴⁶

In all other respects, however, the majority found that there was no necessary inconsistency and, importantly, there was no need to ‘resort to notions of radical title to explain why that [was] so.’⁴⁷ Before examining the *Yarmirr* High Court’s treatment of ‘radical title’, it is important to note that the qualification on the recognition of native title rights in *Yarmirr* was crucial: it presented a ‘fundamental difficulty standing in the way of the claimants’ assertion of entitlement to exclusive rights of the kind claimed.’⁴⁸

(a) *Introduction of a ‘Double’ Inconsistency of Incidents Test to Deny Exclusive Native Title to the Sea*

The High Court’s analysis proceeded on the assumption that common law public rights to fish/navigate and the international right of innocent passage are rights which cannot coexist with any rights to exclude all others.⁴⁹ Although accepting that neither the public right to navigate nor the right of innocent passage require free access to every part of the territorial sea,⁵⁰ the High Court nevertheless observed that

the tension between, on the one hand, the rights to ‘occupy, use and enjoy the waters of the determination area to the exclusion of all others’ and ‘to possess’ those waters to the exclusion of all others ... and, on the other, the rights of fishing, navigation and free passage is self-evident.⁵¹

By focusing on the nature and extent of the inconsistency between the asserted native title rights and the relevant common law principles,⁵² the High Court concluded that ‘[t]he two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international

⁴⁵ Ibid 56 [61] (emphasis in original).

⁴⁶ Ibid. The common law recognises public rights of fishing/navigation: at 68 [98]–[100]; *Western Australia v Ward* (2002) 213 CLR 1, 187 [388] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 593 (Olney J).

⁴⁷ *Yarmirr* (2001) 208 CLR 1, 56 [61] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁴⁸ Ibid 67 [94]. See also at 63–5 [86]–[88], 66–7 [93].

⁴⁹ Ibid 67 [94].

⁵⁰ Ibid 67 [96].

⁵¹ Ibid 67–8 [96]. See *NTA* s 225 for what is included in a determination of native title.

⁵² *Yarmirr* (2001) 208 CLR 1, 68 [97] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

rights.⁵³ With respect, however, this conclusion fails to appreciate the pre-*Magna Carta* position in relation to Crown grants of *exclusive* fisheries which were made subject to public rights of fishing/navigation.

(b) *Two Objections to Non-Recognition of Exclusive Native Title Rights to the Sea*

(i) *Pre-Magna Carta Grants of Exclusive Fisheries*

Public rights of fishing/navigation evolved before *Magna Carta* and are, therefore, distinct in origin from the right of innocent passage in international law.⁵⁴ Nevertheless, before the grant of several or exclusive fisheries was prohibited by *Magna Carta* it was clear that the bed of the sea, ‘and a fortiori the beds of tidal navigable rivers, [could] be granted by the Crown to the subject.’⁵⁵ In such a case, however, the grantee’s rights had to be reconciled with the public rights:

no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation ... It is also true that no such grant can, since *Magna Charta* [sic], operate to the detriment of the public right of fishing.⁵⁶

This is because public rights of fishing/navigation ‘qualify the Crown’s rights in respect of the seabed and the space above it’.⁵⁷ Crucially, however, there was no objection to the Crown granting exclusive rights to the sea provided they were made subject to the public rights:

Anterior to *Magna Charta* [sic], by which such grants [(of several or exclusive fishery)] were prohibited, a several fishery in an arm of the sea or navigable river, might have been granted by the Crown to a subject. ... And the grant might include a portion of the soil for the purpose of the fishery. But this, like every other grant, whenever made must have been subject to the public right of navigation ...⁵⁸

In the context of the territorial sea, therefore, since the Crown’s title is subject to public rights of fishing/navigation as well as native title the rights of native title holders would appear to be stronger than those of a mere Crown grantee. That is, if the public rights are consistent with a Crown grant of exclusive rights, a fortiori, they are consistent with pre-existing exclusive native title rights. Thus, although pre-existing native title rights cannot curtail the public rights, they can

⁵³ Ibid 68 [98].

⁵⁴ *Yarmirr FCAFC* (2000) 101 FCR 171, 224–5 [217] (Beaumont and von Doussa JJ); *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 533, 593 (Olney J).

⁵⁵ *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139, 167 (Parker J).

⁵⁶ Ibid, cited in *Yarmirr FCAFC* (2000) 101 FCR 171, 225 [218] (Beaumont and von Doussa JJ). See also the authorities cited in *Gumana* (2005) 141 FCR 457, 476 [64] (Selway J).

⁵⁷ *Risk v Northern Territory* (2002) 210 CLR 392, 436 [127] (Callinan J), summarising the content of the public fishing/navigation rights in *Yarmirr*.

⁵⁸ *Gann v Free Fishers of Whitstable* (1865) 11 HL Cas 192, 209; 11 ER 1305, 1312 (Lord Westbury LC).

exist subject to them; any inconsistency is not such that the two sets of rights cannot stand together.⁵⁹

(ii) *Inconsistency with Mabo's Presumptive Recognition of Native Title*

The *Yarmirr* principal majority conceded that the inconsistency between native title and public rights of fishing/navigation 'does not arise as a result of the exercise of sovereign power (as is the case where a grant in fee simple extinguishes native title)'.⁶⁰ This is because

[t]he successive assertions of sovereignty over what now are territorial waters, without any further or other act of the executive or legislature, brought with them, and gave to the public, the public rights that have been mentioned. ... Assertion of sovereignty, on *those* terms, is not consistent with the continuation of a right in the holders of a native title to the area for those holders to say who may enter the area.⁶¹

Although the inconsistency does not arise as a result of the exercise of sovereign power, the majority held that it 'is of no different quality'⁶² because

[a]t its root, [it] lies not just in the competing claims to control who may enter the area but in the expression of that control by the sovereign authority in a way that is antithetical to the continued existence of the asserted exclusive rights.⁶³

With respect, by focusing on inconsistency at sovereignty this analysis is the very antithesis of Brennan J's presumptive recognition of native title in *Mabo*.⁶⁴ Inconsistency at sovereignty is not relevant to initial recognition of native title rights; inconsistency is only relevant to the subsequent question of extinguishment of the presumptively recognised rights. The *Yarmirr* High Court has, therefore, effectively introduced a new inconsistency of incidents test for initial recognition of native title which is in addition to, and distinct from, the conventional inconsistency of incidents test for extinguishment of native title.

The scope of this double inconsistency of incidents test appears to be limited to the sea, because the long-recognised common law public rights of way and common in respect of land have not precluded initial recognition of exclusive native title rights to land. The test is nevertheless inconsistent with the Crown's undoubted power (pre-*Magna Carta*) to grant exclusive fisheries provided they

⁵⁹ Indeed, this is the very conclusion reached by Kirby J in *Yarmirr*: see text accompanying below n 98.

⁶⁰ *Yarmirr* (2001) 208 CLR 1, 68 [100] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶¹ *Ibid* 68 [99] (emphasis in original).

⁶² *Ibid* 68 [100].

⁶³ *Ibid*.

⁶⁴ See the effect of the doctrine of 'continuity *pro-tempore*' developed by the author and cited with approval by the Federal Court in *Gumana* (2005) 141 FCR 457, 493 [121] (Selway J), citing Ulla Secher, 'The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of *Continuity Pro-Tempore*' (2004) 27 *University of New South Wales Law Journal* 703, 720-3. For further criticism of the *Yarmirr* High Court's treatment of the inconsistency of incidents test, see Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009) ch 5; Alexandra Grey, 'Offshore Native Title: Currents in Sea Claims Jurisprudence' (2007) 11(2) *Australian Indigenous Law Review* 55, especially at 66.

were made subject to public rights of fishing/navigation. Indeed, does the distinction, based upon the legal nature of the Crown's title to 'land' and 'sea', support different tests for initial recognition of native title? Is a distinction based on whether the Crown has radical title or common law sovereign rights to an area supported by legal principle?

This is crucial: although the principal majority's treatment of 'sovereign rights' was essentially the same as Merkel J's in *Yarmirr FCAFC*, it is not clear whether they also equate such sovereign rights with 'radical title'. Significantly, however, since the majority emphasised that 'radical title' is not relevant for analysing the rights which the Crown obtained upon acquisition of sovereignty over the territorial sea,⁶⁵ those aspects of the majority's judgment which discuss the role of radical title at common law are mere obiter. Nevertheless, such obiter purport, on the one hand, to simply accept the analysis of radical title as exemplified in existing authorities, suggesting that radical title amounts to a full unfettered proprietary right except to the extent of native title. On the other hand, the majority's obiter comments on the effect of legislative vesting of title to the territorial sea/seabed suggest that radical title is a bare legal title.

In the context of the definition of radical title, the majority referred to the Privy Council decisions in *St Catherine's Milling & Lumber Co v The Queen*,⁶⁶ *Amodu Tijani v Secretary (Southern Nigeria)*⁶⁷ and *Attorney-General (Quebec) v Attorney-General (Canada)*⁶⁸ and the High Court decision in *Mabo*,⁶⁹ observing that a similar analysis of radical title was applied in all of these cases.⁷⁰ For the majority, this analysis demonstrated how native title survived the Crown's acquisition of sovereignty over land, by

revealing that when the Crown acquired sovereignty over land it did not acquire beneficial ownership of that land in the same way as a subject may, by grant from the Crown, acquire beneficial ownership. What the Crown acquired was a 'radical title' to land, a 'substantial and paramount estate, underlying the [native] title'.⁷¹

Thus, the majority of the High Court appeared to accept that, as a legal concept, radical title amounts not to a bare legal title, but rather to a full unfettered proprietary right except to the extent of native title.⁷² The majority did not, however, refer to the most authoritative decision on the juridical nature of radical title, *Wik Peoples v Queensland* ('*Wik*').⁷³ Both Kirby J and Gummow J's

⁶⁵ *Yarmirr* (2001) 208 CLR 1, 51–2 [49]–[50] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶⁶ (1888) 14 App Cas 46.

⁶⁷ [1921] 2 AC 399.

⁶⁸ [1921] 1 AC 401.

⁶⁹ (1992) 175 CLR 1.

⁷⁰ *Yarmirr* (2001) 208 CLR 1, 49–51 [44]–[46] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁷¹ *Ibid* 51 [47] (citations omitted).

⁷² The author has, however, shown that the pre-*Mabo* Privy Council decisions are not authority for the proposition that the Crown must have a present proprietary estate underlying any pre-existing title: Ulla Secher, 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained — Part I' (2005) 11 *Australian Property Law Journal* 179; Ulla Secher, 'The Meaning of Radical Title: The Pre-*Mabo* Authorities Explained — Part 2' (2005) 11 *Australian Property Law Journal* 209.

⁷³ (1996) 187 CLR 1.

examinations of the concept of radical title in *Wik*⁷⁴ support the interpretation of radical title as a bare legal title which creates no beneficial entitlement to land. Although the judgments of both Toohey J and Gaudron J, as the other members of the majority in *Wik*, also support this interpretation,⁷⁵ Kirby J and Gummow J's approach not only represents the majority of the majority in *Wik*⁷⁶ — Gummow J is also the only member of the *Wik* High Court who remains a member of the currently constituted Court.

Significantly, although the *Yarmirr* High Court did not address *Wik*, other aspects of the *Yarmirr* High Court's analysis are consistent with the *Wik* interpretation of radical title. In discussing the effect of legislative vesting of title to the seas and seabed in the Northern Territory, the majority identified s 4 of the *Coastal Waters (Northern Territory Title) Act 1980* (Cth) as critical. That section relevantly provided:

- (1) By force of this Act, ... there are vested in the Territory ... the same right and title to the property in the sea-bed beneath the coastal waters of the Territory ... and the same rights in respect of the space (including space occupied by water) above that sea-bed, as would belong to the Territory if that sea-bed were the sea-bed beneath waters of the sea within the limits of the Territory.⁷⁷

Although the majority stated that it was unnecessary to decide what was the right and title that vested in the Territory as a result of s 4(1) of the Act, they observed:

If it is appropriate to speak of that right and title in the language of the real property lawyer, the right and title thus vested in the Territory was no more than a radical title; it was *not* full ownership of the sea-bed or space above it.⁷⁸

Furthermore, the majority noted that, although the Act identified the title which was vested in the Territory as 'the same right and title the Territory had over the sea-bed beneath waters of the sea within the limits of the Territory',⁷⁹ '[i]t was not submitted that the right and title to areas of the latter kind was any greater than radical title to land.'⁸⁰ The majority emphasised, however, that they did not need to decide whether it was appropriate to adopt such terms as 'radical title' in this context.⁸¹

⁷⁴ See *ibid* 244–5 (Kirby J), 186–9 (Gummow J).

⁷⁵ See *ibid* 127–9 (Toohey J), 155–65 (Gaudron J).

⁷⁶ Kirby J and Gummow J's approach represents the majority of the majority because both justices held that no reversion was created by the relevant pastoral leases, and the rationale underlying their decisions was the same, based exclusively on the nature of the Crown's title to land. See *ibid* [244–5] (Kirby J), [189] (Gummow J). Cf the different rationales underlying Toohey J and Gaudron J's judgments, which held that although a reversion was created, it did not confer full beneficial ownership: see 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, 4–5.

⁷⁷ Cited in *Yarmirr* (2001) 208 CLR 1, 57 [64] (Gleeson CJ, Gaudron and Gummow JJ).

⁷⁸ *Ibid* 59 [70] (emphasis added).

⁷⁹ *Ibid* 59 [71].

⁸⁰ *Ibid*.

⁸¹ *Ibid* 59 [70].

Two critical points emerge from the majority's reasoning: first, since the legislation containing the relevant vesting provision related to the entire territorial sea, rather than simply the area encompassing the native title claim, the majority's failure to distinguish between the Crown's title to the area *generally* and to such of the area *as was subject to native title* indicates they considered that the title did not, irrespective of the presence of native title, equate with full beneficial ownership. Secondly, by suggesting that the title to the seabed beneath inland waters may be 'greater than radical title to land',⁸² the majority indicated the possible direction the future development of radical title will take. That is, by drawing a distinction between title to 'land within Australia' and title to 'land beneath inland waters', the majority suggested that although the Crown does not acquire full beneficial title to land by operation of law, it may do so in respect of the seabed beneath inland waters.

In any event, the majority made it clear that the common law is, *prima facie*, coextensive with sovereignty, such that the common law may extend to the territorial sea. Indeed, on the facts of *Yarmirr*, the common law did extend to the territorial sea. Although there is no doubt that radical title is a concomitant of sovereignty, the new element introduced by the *Yarmirr* majority was the qualification that radical title is only a concomitant of sovereignty over land, the concept of 'sovereign rights' being concomitant of sovereignty over the territorial sea. Accepting the High Court's distinction between the Crown's title upon acquisition of sovereignty over land and over the territorial sea, it is, nevertheless, difficult to discern any legal principle to explain why the nature of the two titles is different. That is, if the Crown's sovereign rights do not automatically confer beneficial ownership of the territorial sea/seabed, why would the Crown's radical title to land have this effect?

The Crown's acquisition of title derived from sovereignty, whether to land or the territorial sea/seabed, should operate equally in relation to native title. Thus, since recognition of sovereign rights, as a concomitant of sovereignty over the territorial sea, does not confer property rights on the Crown even in the absence of native title, neither should recognition of radical title, as a concomitant of sovereignty over land. Indeed, although the majority cautioned that care must be exercised when identifying the Crown's sovereign rights in respect of the territorial sea because 'the earliest understandings of sovereign authority over the sea grew out of the then state of legal development, and the absence of any clear distinction between sovereignty and ownership',⁸³ this concern is equally applicable to the understanding of sovereign authority over land before *Mabo*.⁸⁴

The suggestion by the majority in *Yarmirr* that public rights of fishing/navigation and the international right of innocent passage were necessarily inconsistent with any recognition of a right of ownership by the coastal state of

⁸² Ibid 59 [71] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See above n 80.

⁸³ Ibid 52 [51].

⁸⁴ Moreover, the sovereign rights argument is consistent with the author's consideration of the pre-*Mabo* authorities on the nature of the Crown's title to land subject to pre-existing title: see above n 72.

territorial waters⁸⁵ fails to appreciate the fact that, before the practice was prohibited by *Magna Carta*, there was no objection to the grant of exclusive rights to the sea provided they were made subject to public rights of fishing/navigation.⁸⁶ Moreover, since the common law has long recognised public rights of way and common in respect of land,⁸⁷ it would be incongruous for public rights of fishing/navigation to operate so as to distinguish the nature of the Crown's title to the territorial sea from the nature of the Crown's title to land.⁸⁸ Indeed, as Kirby J has noted, '[a] recognition of a public right of access would be unsurprising in relation to certain (exclusive) common law land tenures.'⁸⁹ Furthermore, even on the pre-*Mabo* assumption that the Crown originally owned all land, including unalienated land, rights of common existed over waste lands;⁹⁰ any conveyance of the lands to which such rights belonged comprised such rights of common.⁹¹ It is suggested, therefore, that Merkel J's approach in *Yarmirr FCAFC* is preferable to that of the High Court majority: the concept of radical title is a tool of legal analysis which identifies the rights the Crown acquires upon assertion of sovereignty over land, and the concept of sovereign rights is the tool for analysing the rights which arise from the Crown's assertion of sovereignty over the territorial sea. 'Whilst [sovereign rights] 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.'⁹²

3 *Statutory Extension of Radical Title to the Territorial Sea?*

Whether or not the content of the two concepts, radical title and sovereign rights, is the same, it is clear that the *Yarmirr* majority treated the two concepts as having distinct spheres of operation at common law: the former restricted to land, the latter restricted to the territorial sea. Nevertheless, the majority suggested that subsequent legislative vesting of title to the territorial sea has conferred a 'radical title-like' title on the Crown: in other words, that there was a statutory extension of radical title to the territorial sea.⁹³ The crucial point is, however, that whether the Crown's title to the territorial sea was regarded as amounting to sovereign rights or radical title, the same result was achieved.⁹⁴ For present purposes, the significance of equating radical title with sovereign rights is that such equation necessarily rejects the proposition that, in the absence of

⁸⁵ *Yarmirr* (2001) 208 CLR 1, 54 [57], 56 [61] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁸⁶ See text accompanying above n 54.

⁸⁷ Joshua Williams, *Principles of the Law of Real Property* (Sweet & Maxwell, 23rd ed, 1920) 31; Sir Robert Megarry and H W R Wade, *The Law of Real Property* (Stevens & Sons, 5th ed, 1984) 843–7.

⁸⁸ Rights of common include turbary, pasture and piscary: Williams, above n 87, 461.

⁸⁹ *Yarmirr* (2001) 208 CLR 1, 125 [281] (citations omitted).

⁹⁰ Williams, above n 87, 462.

⁹¹ Deane and Gaudron JJ's observation in *Mabo* (1992) 175 CLR 1, 101 that, upon acquisition of sovereignty, it was 'conceivably' the whole of the lands of Australia that were affected by native title would also deny automatic beneficial ownership of any land in Australia.

⁹² *Yarmirr FCAFC* (2000) 101 FCR 171, 285–6 [494] (Merkel J) (emphasis added). See also quote accompanying above n 80.

⁹³ *Yarmirr* (2001) 208 CLR 1, 56–61 [63]–[76] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁹⁴ *Ibid* 60–1 [76].

native title, radical title confers beneficial ownership.⁹⁵ Although the principal majority in *Yarmirr* found it unnecessary to decide whether it was appropriate to adopt such terms as radical title in the context of the legislative vesting of title to the territorial sea/seabed,⁹⁶ Kirby J, as the other member of the majority, adhered to his views in *WMC*: not only is radical title relevant to defining the Crown's title to the territorial sea but the basis for such extension of radical title can be found in the common law.⁹⁷

4 *Kirby J, the Other Majority Judge: Common Law Extension of Radical Title to the Territorial Sea Revisited*

Although Kirby J agreed with the principal majority that the common law could recognise native title rights below low-water mark, he disagreed with them on the question of whether the claimants' native title rights over the territorial sea were exclusive in nature, and attributed a 'qualified exclusive' nature to the rights.⁹⁸ It has been seen that the principal majority held that common law public rights to fish/navigate in tidal waters and the right of innocent passage under international law precluded recognition of exclusive native title rights to the sea.⁹⁹ Nevertheless, in line with the pre-*Magna Carta* authorities on Crown grants of exclusive fisheries subject to public rights of fishing/navigation, Kirby J was prepared to acknowledge that exclusive native title rights, subject to the public rights, could exist in relation to the territorial sea: there was an exception to exclusive native title rights in favour of public rights of fishing/navigation. More importantly for present purposes, however, his analysis of the role of radical title vis-a-vis the territorial sea departs from that of the principal majority.

Kirby J's analysis focused on the *NTA*.¹⁰⁰ He observed that s 223 expressly provided for the recognition of native title rights in respect of the sea country of the claimants¹⁰¹ and that s 6 expressly extended the Act's application to the territorial sea.¹⁰² Although it appears that Kirby J indicated that the *NTA* has extended the reach of the common law, he clarified his position by explaining:

⁹⁵ See paragraph accompanying above nn 83–84.

⁹⁶ *Yarmirr* (2001) 208 CLR 1, 59 [70] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁹⁷ *Ibid* 116 [259]. See also Secher, 'Lessons from the Sea — Part One', above n 1, 539 (text accompanying n 108).

⁹⁸ *Yarmirr* (2001) 208 CLR 1, 121 [273]. For further discussion of the need to re-examine the concept of exclusivity in the context of native title to the sea, see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008), especially at 388–401. Young argues that the first step in correcting the restrictive interpretation of native title in Australian case law requires a re-examination of the concept of exclusivity and its logical implications. While this exercise began in *Yarmirr*, it remains incomplete.

⁹⁹ Regarding common law public rights to fish/navigate in tidal waters, see *Yarmirr* (2001) 208 CLR 1, 67 [94] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) See also at 124 [278] (Kirby J); text accompanying above nn 49–53. Regarding the right of innocent passage under international law, see *Yarmirr* (2001) 208 CLR 1, 67 [94] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also at 121–2 [272]–[273] (Kirby J).

¹⁰⁰ *Ibid* 111–12 [249].

¹⁰¹ *Ibid* 112 [250].

¹⁰² *Ibid* 113 [252].

recognition of native title ‘by the common law’ is shaped, and, if necessary, extended, by the [NTA’s] application to sea waters. ... Thus, s 223(1)(c) cannot, in its context, be read as implying a geographical restriction on the recognition of native title. If the reach of the common law is so limited (which may be doubted ...) it must nevertheless give way to the application of the [NTA] to such areas of the seas.¹⁰³

Two crucial points emerge: first, Kirby J doubted that there was a territorial restriction on the reach of the common law. Secondly, even if the common law’s reach was subject to a geographical restriction, the *NTA* extended the common law’s application to the territorial sea. Thus, Kirby J considered it unnecessary to examine the additional analysis offered by the principal majority to demonstrate that the proposition that the common law does not extend beyond low-water mark was unacceptably wide.¹⁰⁴ Although Kirby J reserved his opinion on that analysis in *Yarmirr*, it is clear that his Honour’s analysis in *WMC* assumed that, upon acquisition of sovereignty, the Crown acquired a common law radical title in respect of the territorial sea/seabed.¹⁰⁵ Kirby J’s analysis in *WMC* also made it clear that the Crown acquired common law ‘sovereign rights’ to the sea/seabed beyond the territorial sea.¹⁰⁶ Furthermore, like Merkel J in *Yarmirr FCAFC*, Kirby J considered that while ‘sovereign rights’ do not constitute radical title, the two concepts are equivalent.¹⁰⁷ Since these principles are not inconsistent with Kirby J’s reasoning in *Yarmirr*, his judgment in *Yarmirr* implicitly incorporates the proposition that the Crown’s acquisition of sovereignty over the territorial sea was accompanied by the vesting of a common law radical title.

While the *Yarmirr* High Court did not address the intertidal zone,¹⁰⁸ it has been seen that the Full Federal Court in *Yarmirr FCAFC* attributed a statutory extension of radical title in respect of the whole area to which the *NTA* applies, including the intertidal zone.¹⁰⁹ 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. It will be seen in the next section that, although Cooper J’s decision in *Lardil* denied this result (purporting to apply the principal majority’s decision in *Yarmirr*), in *Gumana*, Selway J expressly embraced it, holding that the Crown acquired a radical title to the intertidal zone sea.

¹⁰³ Ibid 116 [259] (citations omitted).

¹⁰⁴ Ibid.

¹⁰⁵ See Secher, ‘Lessons from the Sea — Part One’, above n 1, 539 (text accompanying n 108).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ *Yarmirr* (2001) 208 CLR 1, 60 [73] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁰⁹ See Secher, ‘Lessons from the Sea — Part One’, above n 1, 533–5.

III POST-YARMIRR DEVELOPMENTS

A *The Intertidal Zone: Lardil and Gumana*1 Lardil: *Judicial Confusion of Sovereignty and Property*

The Lardil, Kaiadilt, Yangkaal and Gangalidda peoples sought a determination of native title in respect of the land and waters below high-water mark in an area of sea adjacent to the Wellesley Islands and adjacent to the coast of Queensland between Massacre Inlet and the Leichhardt River in the Gulf of Carpentaria.¹¹⁰

Delivering the judgment of the Federal Court, Cooper J recognised that, although the applicants held native title to the claim area, these rights were limited to rights of access for the purposes allowed by their traditional laws/customs: inter alia, rights to fish, hunt and gather living and plant resources, and the right to access the land and waters below high-water mark ‘for the purposes allowed under their traditional laws and customs for religious or spiritual purposes’.¹¹¹

Cooper J relied on the decision in *Yarmirr* to hold that exclusive native title rights were fundamentally inconsistent with the Crown’s sovereignty over the territorial sea, which included public rights of fishing/navigation and the right of innocent passage.¹¹² It has been seen, however, that both authority and legal principle support the recognition of exclusive native title rights subject to the public rights (‘qualified exclusive rights’).

Moreover, there is a fundamental contradiction in Cooper J’s treatment of the Gangalidda peoples’ claim to control access to, and conduct in, the Albert River, a navigable tidal river. The area of the river claimed fell within the boundaries of a reserve for public purposes. In this context, Cooper J accepted the submission, based on *Western Australia v Ward* (‘*Ward*’),¹¹³ that the reservation for public purposes extinguished any exclusive rights in respect of the waters, bed and banks of the river, including rights to control use and access.¹¹⁴ Nevertheless, Cooper J also found that

the same outcome was produced by the operation of the common law with respect to the Crown prerogative in relation to the foreshore and the banks and beds of navigable rivers ... [and] by the operation of the *Harbour Boards Act 1892* (Qld) and the *Harbours Act 1955* (Qld).¹¹⁵

With respect to the Crown prerogative basis, Cooper J emphasised that

[t]he common law recognised, in respect of the foreshores and beds of tidal rivers, a full beneficial title in the Crown in such lands by virtue of the Crown prerogative. The title of the Crown was presumed and any person claiming title to

¹¹⁰ *Lardil* [2004] FCA 298 (23 March 2004) [1] (Cooper J).

¹¹¹ *Ibid* [245].

¹¹² *Ibid* [164]–[168], [171], [188]–[189].

¹¹³ (2002) 213 CLR 1.

¹¹⁴ *Lardil* [2004] FCA 198 (23 March 2004) [160], quoting *ibid* 138 [219] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹¹⁵ *Lardil* [2004] FCA 198 (23 March 2004) [161].

the foreshores or to the beds of tidal rivers had to prove a prior grant from the Crown ... The Crown title to the foreshore and the beds of tidal rivers was not a radical title but an absolute one.¹¹⁶

It is clear, however, that the *Yarmirr* High Court did not attribute to the Crown an absolute beneficial title to any land or waters: with respect to land, the Crown acquired a radical title; with respect to the territorial sea, the Crown acquired common law sovereign rights. Although the High Court did not expressly decide whether the concepts of radical title and common law sovereign rights were equivalent, it is clear that neither concept confers a beneficial title upon the Crown where the relevant land/water is subject to pre-existing native title. The *Yarmirr* majority also indicated that there may be a statutory extension of radical title to the territorial sea. Furthermore, while *Yarmirr* did not consider the legal regime applying in the intertidal zone, not only does the approach in *Yarmirr* *FCAFC* support both a statutory and common law extension of radical title to the intertidal zone, since *Ward*, the position with respect to inconsistency between public rights to fish/navigate and native title in the intertidal zone is no different from that with respect to the territorial sea.¹¹⁷ The nature of the Crown's title does not, therefore, automatically confer beneficial ownership to any land/water subject to pre-existing title.

Indeed, if the Crown did automatically acquire absolute ownership of the foreshore/beds of tidal rivers upon assumption of sovereignty, such title would extinguish all native title rights, not just those rights exclusive in nature. Consequently, there would be no need for an independent test of non-recognition based upon inconsistency between public rights of fishing/navigation and native title. Cooper J's decision is, therefore, an example of judicial confusion of sovereignty and property: although the Crown's prerogative confers power to deal with land/water, it does not confer proprietary rights to land/water.

With respect to the statutory basis of his decision, Cooper J observed:

The underlying common law position as to the Crown's title to the foreshore and the beds of tidal rivers was given statutory expression in [s 77 of the *Harbours Act 1955* (Qld)]. It had been assumed in the [*Harbour Boards Act 1892* (Qld)] which provided that nothing in the Act was to affect any right or prerogative of the Crown: s 6.¹¹⁸

For Cooper J, therefore, s 77 of the *Harbours Act* had the effect of extinguishing any native title right, if it had not been extinguished at sovereignty, which was inconsistent with the Crown's title and right 'in the land in the foreshore (inter-tidal zone) or land lying under the sea within Queensland waters or lying under any harbour of (including any tidal river in) Queensland.'¹¹⁹

The statutory basis of Cooper J's decision is, therefore, subject to the same criticism as the prerogative basis: the Crown's acquisition of a beneficial title to

¹¹⁶ *Ibid* [221] (citations omitted).

¹¹⁷ *Ward* (2002) 213 CLR 1, 187 [388] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 251 [594] (Kirby J), 366 [880] (Callinan J), 213 [472] (McHugh J).

¹¹⁸ *Lardil* [2004] FCA 198 (23 March 2004) [222].

¹¹⁹ *Ibid* [224].

the foreshore/beds of tidal rivers would necessarily extinguish all (not just exclusive) native title rights, irrespective of whether public rights of fishing/navigation are otherwise inconsistent with those rights. Although this is the very antithesis of the decision in *Yarmirr*, Cooper J clearly thought that, notwithstanding the prerogative and statutory bases of his decision, the case was also governed by the principles in *Yarmirr*:

Further, as a navigable river, [the area is one] where the public retains the common law public right to fish and navigate. It thus falls within the reasoning in *Yarmirr* and *Ward* which denies the continued existence of a right to control access or use within such an area after sovereignty.¹²⁰

Cooper J thus contradicts his own reasoning: the Crown cannot acquire beneficial title, on the one hand, and ‘common law sovereign rights’ as defined in *Yarmirr*, on the other. It will be seen in the next section that, in *Gumana*, Selway J recognised the inchoate nature of the Crown’s property rights upon acquisition of sovereignty over the intertidal zone and sea; indeed, like Kirby J in *WMC* and *Yarmirr*, he attributed to the Crown a radical title in this context.

2 *Gumana: Further Support for Common Law Extension of Radical Title to the Sea*

The applicants were members of the Yolngu people and the claim area consisted of land and waters in Blue Mud Bay in north-east Arnhem Land. In 1980, pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*‘Land Rights Act’*), a grant of fee simple was made to the Arnhem Land Aboriginal Trust over land which included the ‘land’ area of Blue Mud Bay. The seaward boundary of the relevant land was defined as low-water mark.¹²¹ In the mid 1990s, members of the Yolngu people became aware of fishing activities in the water of Blue Mud Bay and brought two Federal Court proceedings to control such fishing. The first, commenced in 1997, sought declarations that the Director of Fisheries did not have power to grant fishing licences in the tidal waters within the land grant.¹²² The second, initiated in 1998, involved an appeal regarding a determination of native title in the waters of Blue Mud Bay and adjacent land.¹²³

In *Gumana*, two further proceedings were heard together before Selway J, both initiated by the applicants to refine the issues in dispute.

- 1 A determination of native title under the NTA was sought in respect of a reduced area: nine spiritually significant sites (‘djalkiri’) located in the tidal foreshore and waters (the ‘native title proceedings’).¹²⁴ This involved a claim of a right of exclusive occupation over the whole claim area including land and sea.¹²⁵

¹²⁰ *Ibid* [162].

¹²¹ *Gumana* (2005) 141 FCR 457, 465–6 [19]–[20] (Selway J).

¹²² *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1.

¹²³ *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488.

¹²⁴ *Gumana* (2005) 141 FCR 457, 517 [221]–[222] (Selway J).

¹²⁵ *Ibid* 471 [41].

- 2 The applicants also sought a declaration under the *Judiciary Act 1903* (Cth) of their rights under the land grant, and orders restraining the Director of Fisheries from issuing fishing licences in relation to the intertidal zone and sea around the djalkiri sites (the ‘land rights proceedings’).¹²⁶ This involved a claimed right to exclude from the whole area, including a right to exclude persons fishing/navigating in the intertidal zone, tidal rivers and estuaries.¹²⁷

Although the applicants conceded that following *Yarmirr* they could not succeed in their claim to exclusive possession of all the area seaward of low-water mark, this concession was qualified in relation to ‘two or maybe three areas’ of spiritual significance.¹²⁸ Thus, the key issue was whether the applicants had a native title right of exclusive possession of the intertidal zone and sea.¹²⁹ It will be seen that, although Selway J held that the applicants had non-exclusive rights to the sea and intertidal zone similar to those identified in *Yarmirr* and *Lardil*,¹³⁰ his treatment of the nature of the Crown’s property rights to the intertidal zone (which includes the ‘foreshore’ and the ‘arms of the sea’)¹³¹ does not align with the analysis in either *Lardil* or the principal majority judgment in *Yarmirr*.¹³² Indeed, Selway J’s analysis most closely resembles that of Kirby J in both *WMC* and *Yarmirr* and Merkel J in *Yarmirr FCAFC*.

For Selway J, although the Crown had property in the soil of the foreshore between high and low-water marks pursuant to the prerogative,¹³³

[t]he Crown’s prerogative rights in the soil of the foreshore did not confer full rights of dominion over the land and waters. The Crown did not have a fee simple over the foreshore — if its rights can be usefully described in terms of the theory of tenure, they were analogous to a radical title ...¹³⁴

Selway J expressly contrasted his characterisation of the Crown’s rights to the foreshore — as analogous to a radical title — with the positions adopted by the *Yarmirr* principal majority and Cooper J in *Lardil*.¹³⁵ It has been seen that although the *Yarmirr* principal majority attributed to the Crown common law sovereign rights in respect of the territorial sea, such rights are nevertheless analogous to the Crown’s radical title in respect of land. The *Yarmirr* principal majority also attributed a statutory extension of radical title to the territorial sea. *Yarmirr* did not, however, consider the legal regime applying in the intertidal zone. Nevertheless, purporting to rely on *Yarmirr* and *Ward*, Cooper J, in *Lardil*, attributed to the Crown an absolute, rather than radical, title in respect of both

¹²⁶ *Ibid* 469 [29].

¹²⁷ *Ibid* 469 [31].

¹²⁸ *Ibid* 470 [36].

¹²⁹ *Ibid* 471 [44].

¹³⁰ *Ibid* 462 [3].

¹³¹ *Ibid* 475 [61], 477 [66]. For definitions of ‘foreshore’ and ‘arms of the sea’, see above n 3.

¹³² *Ibid* 476 [62].

¹³³ *Ibid* 476 [61].

¹³⁴ *Ibid* 476 [62].

¹³⁵ *Ibid*.

the intertidal zone and the territorial sea. Since the decision in *Ward* followed *Yarmirr* in this regard,¹³⁶ Cooper J's decision is inconsistent with both High Court authorities. With respect to the common law position relating to the intertidal zone, therefore, Selway J's decision has the most precedential value: at common law, the Crown's title to the intertidal zone, including the foreshore and the arms of the sea, is analogous to a radical title.

Indeed, although the majority in *Yarmirr FCAFC* did not deal with tidal waters in the arms of the sea, by acknowledging the common law's operation to low-water mark its approach appears to entail the consequence that the Crown also acquired a radical title to the intertidal zone at common law. In any event, the *Yarmirr FCAFC* majority made it clear that this is the result of the statutory position: 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, including the intertidal zone.¹³⁷

With respect to the territorial sea, Kirby J in *WMC* and *Yarmirr* expressly and implicitly, respectively, attributed to the Crown a radical title at common law. While the *Yarmirr* principal majority attributed to the Crown common law sovereign rights in this context, in *Yarmirr FCAFC*, Merkel J had made it clear that the sovereign rights acquired by the Crown over the sea upon acquisition of sovereignty 'are equivalent to the ultimate and paramount rights and powers gained over land by the sovereign upon gaining sovereignty.'¹³⁸ Thus, the two concepts, 'common law sovereign rights' and 'radical title', are analogous.

It appears, therefore, that just as Selway J was 'unable to discern any sustainable distinction' between the application of public rights to fish/navigate in the foreshore or in respect of other tidal waters, whether such waters are in estuaries, in rivers or elsewhere,¹³⁹ there is also no distinction between the nature of the Crown's title to these areas: whatever its categorisation (radical title/common law sovereign rights), the Crown does not thereby acquire beneficial ownership.¹⁴⁰

Because Selway J felt bound by the decision in *Yarmirr FCAFC*, he found that the applicants' exclusive rights to occupy the area seaward of low-water mark were not recognised by the common law as at 1788 because they were inconsistent with public rights to fish/navigate.¹⁴¹ Nonetheless, Selway J acknowledged that the Crown could grant land within the foreshore subject to public rights to fish/navigate.¹⁴² Indeed, Selway J was of the view that 'those public rights are best understood as restrictions on the Crown's prerogative powers.'¹⁴³ Moreover, his Honour recognised 'at least four qualifications to the rule that the Crown's

¹³⁶ *Ward* (2002) 213 CLR 1, 187 [388] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also text accompanying above n 120.

¹³⁷ See Secher, 'Lessons from the Sea — Part One', above n 1, 534–5.

¹³⁸ *Yarmirr FCAFC* (2000) 101 FCR 171, 286 [494]. See also *ibid* 537 (text accompanying n 98).

¹³⁹ *Gumana* (2005) 141 FCR 457, 486 [87].

¹⁴⁰ Cf *Lardil* [2004] FCA 198 (23 March 2004) [221]. See text accompanying above n 116.

¹⁴¹ *Gumana* (2005) 141 FCR 457, 520 [233] (Selway J).

¹⁴² *Ibid* 476 [64].

¹⁴³ *Ibid* 480 [69].

prerogative rights in the soil in the foreshore ... were subject to the public rights to fish and to navigate'.¹⁴⁴ In particular, 'an exclusive right to fish in a class of the public could be established by proof of custom from "time immemorial"'¹⁴⁵ and 'exclusive private rights to take fish could be established by prescription.'¹⁴⁶

This is crucial: if the Crown could grant exclusive rights to the foreshore subject to public rights of fishing/navigation, and customary or prescriptive exclusive rights to the foreshore can *override* the public rights, why are exclusive native title rights inconsistent with the public rights? Indeed, it is arguable that, if the matter were free from authority, Selway J would have reached the same conclusion as Kirby J in *Yarmirr* in this regard: that 'qualified exclusive' native title rights could exist notwithstanding the public rights.¹⁴⁷

Although Selway J found that the applicants had non-exclusive native title rights similar to those identified in *Yarmirr* and *Lardil*, before final orders were made, his Honour died. Accordingly, Mansfield J completed the hearing for the purpose of making final orders, in both the land rights and native title proceedings, to reflect the reasons for judgment of Selway J. There were a number of matters upon which the parties made further submissions, including 'whether the public right to fish extended to non-navigable sections of the inter-tidal zone, so that non-exclusive native title rights only could be exercised in those areas'.¹⁴⁸ In *Gumana v Northern Territory [No 2]* ('*Gumana [No 2]*'),¹⁴⁹ Mansfield J considered this matter, and it is to that analysis that this article now turns.

3 *Gumana [No 2]: Implicit Acceptance of Common Law Extension of Radical Title to the Sea*

The applicants accepted Selway J's findings that they had non-exclusive native title rights in respect of the intertidal zone¹⁵⁰ and the arms of the sea.¹⁵¹ The question was whether the wider expression 'tidal waters', connoting any waters affected by tides, whether navigable or not, was used by Selway J to convey the full extent of the public right to fish, or whether that right was confined to the arms of the sea, tidal waters that are navigable.¹⁵² Mansfield J concluded:

in my view [Selway J's] reasons for judgment indicate that the public right to fish ... was exercisable in the inter-tidal zone, including tidal waters, whether

¹⁴⁴ Ibid 476 [65].

¹⁴⁵ Ibid, citing *Goodman v Saltash Borough Corporation* (1882) 7 App Cas 633, 651–2, 654–5 (Lord Blackburn).

¹⁴⁶ *Gumana* (2005) 141 FCR 457, 476 [65] (Selway J).

¹⁴⁷ Indeed, Selway J suggested that, if the matter were free of authority, he would have reached a different conclusion when considering whether the grant of a fee simple estate in the foreshore pursuant to the *Land Rights Act* is qualified in that the rights conferred do not include rights to exclude those exercising public rights to fish or navigate: ibid 483–6 [73]–[85]. The Full Federal Court agreed with Selway J's analysis: *Gumana v Northern Territory* (2007) 158 FCR 349, 372 [90]–[91] (French, Finn and Sundberg JJ). Cf the High Court's position outlined below in Part III(A)(4)(b).

¹⁴⁸ *Gumana v Northern Territory [No 2]* [2005] FCA 1425 (11 October 2005) [6] (Mansfield J).

¹⁴⁹ Ibid.

¹⁵⁰ *Gumana* (2005) 141 FCR 457, 476 [61] (Selway J).

¹⁵¹ Ibid 477 [66].

¹⁵² *Gumana [No 2]* [2005] FCA 1425 (11 October 2005) [24] (Mansfield J).

those waters are navigable or not. The public right to navigate is necessarily confined to tidal waters which are navigable.¹⁵³

The public right to fish is not, therefore, confined to tidal navigable waters.¹⁵⁴ Although Mansfield J did not express any view on the legal nature of the Crown's title to the intertidal zone and sea, his decision implicitly adopted Selway J's view that it is analogous to a radical title, because it was common ground that Mansfield J should proceed from and give full effect to the judgment of Selway J.¹⁵⁵ The Full Federal Court in *Gumana v Northern Territory* ('*Gumana FCAFC*'), however, expressly refrained from considering the question of the Crown's title to the sea.¹⁵⁶

4 *Gumana FCAFC: Two Further Objections to Non-Recognition of Exclusive Native Title Rights to the Sea*

In the context of considering the question whether a statutory grant of a fee simple estate to the intertidal zone would be sufficient to give the grantee the right to exclude persons who previously had a public right to fish/navigate in that zone, the Full Federal Court declared that it was unnecessary to enter upon the debate fanned by Selway J as to whether public rights to fish/navigate are, strictly, 'common law rights or "are best understood as restrictions on the Crown's prerogative"'.¹⁵⁷ They did, nevertheless, note that it is unsurprising 'that in different ages the rights have been ascribed differing provenances'.¹⁵⁸ Moreover, they emphasised that what needs to be said about public rights is that 'it is not possible to make, with any degree of confidence, a complete and exhaustive statement of the common law rights of the public in relation to tidal waters and the foreshore.'¹⁵⁹ The Full Court also quoted Bonyhady's observation that 'the legal basis of this right is unclear[,] and there are also significant limitations on the manner in which the right may be exercised.'¹⁶⁰

The Court's obiter observations have two important implications.

(a) *Public Rights to Fish and Navigate as Restrictions on the Crown's Prerogative*

First, if public rights to fish/navigate are merely restrictions on the Crown's prerogative — a proposition also supported by *Yarmirr*¹⁶¹ and the pre-*Magna*

¹⁵³ Ibid [31].

¹⁵⁴ See ibid [29].

¹⁵⁵ *Gumana v Northern Territory* (2007) 158 FLR 349, 354 [9] (French, Finn and Sundberg JJ).

¹⁵⁶ Ibid 372 [88]–[89].

¹⁵⁷ Ibid 372 [89], quoting *Gumana* (2005) 141 FCR 457, 478 [69] (Selway J).

¹⁵⁸ *Gumana FCAFC* (2007) 158 FLR 349, 372 [89] (French, Finn and Sundberg JJ).

¹⁵⁹ Ibid, quoting *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534, 557 [84] (Barrett J).

¹⁶⁰ *Gumana FCAFC* (2007) 158 FLR 349, 372 [89] (French, Finn and Sundberg JJ), quoting Tim Bonyhady, *The Law of the Countryside: The Rights of the Public* (Professional Books, 1987) 240.

¹⁶¹ (2001) 208 CLR 1. See above n 44 and accompanying text. See also *Risk v Northern Territory* (2002) 210 CLR 293, 436 [127] (Callinan J), summarising the content of the public fishing/navigation rights in *Yarmirr*.

Carta authorities¹⁶² — then these public rights have no significance for any title not derived from Crown grant. Native title holders would, therefore, be in a stronger position than previously identified. Rather than the suggestion that ‘although pre-existing native title rights [including exclusive rights] cannot curtail public rights, they can exist subject to them’,¹⁶³ any question of inconsistency between pre-existing native title rights (including exclusive rights) and public rights would only arise if the Crown exercised its prerogative power (subject to the public rights) to deal with the foreshore/sea. The existence of public rights as a restriction on the Crown’s prerogative could not, of itself and without further executive act, preclude recognition of exclusive native title rights.

(b) *Not Possible to Precisely Determine Content of Public Rights to Fish and Navigate*

Secondly, since it is not possible to make a complete, exhaustive statement of public rights to fish/navigate, and since there are significant limitations on the manner in which these rights may be exercised, it is inherently impossible to conclude that the public rights are inconsistent with exclusive native title rights. Indeed, the courts have consistently held that it is not possible to decide the question of inconsistency between native title rights and the rights of Crown grantees until the rights constituting the native title are determined;¹⁶⁴ a fortiori, the precise content of public rights must be determined before any question of inconsistency with native title arises.

Although the Full Federal Court’s decision was mostly upheld by the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust*,¹⁶⁵ the High Court majority there explained that the premise underlying the Federal Court’s decision was wrong. Rather than proceeding from the premise that the question was whether there was any competition between the common law public right to fish and the rights conferred by grants under the *Land Rights Act*,¹⁶⁶ the joint majority judgment held that the common law right to fish had been abrogated by the *Fisheries Act 1988* (NT)¹⁶⁷ and that the relevant question was whether there was any competition between rights derived from the *Fisheries Act* and the *Land Rights Act*.¹⁶⁸

Crucially, the High Court’s decision does not disturb the principle that native title existing before statutory abrogation of the public right to fish can include ‘qualified exclusive’ rights to the sea. Moreover, after statutory abrogation of the public right to fish, there is no impediment to recognising *full* exclusive native title rights to the sea. Since the joint majority confined their judgment to the

¹⁶² See text accompanying above nn 55–58.

¹⁶³ See the conclusion reached above in Part II(A)(2)(b)(i).

¹⁶⁴ See, eg, *Wik* (1996) 187 CLR 1, 212–13 (Kirby J).

¹⁶⁵ (2008) 236 CLR 24.

¹⁶⁶ *Ibid* 55–6 [19] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹⁶⁷ *Ibid* 58 [27].

¹⁶⁸ *Ibid* 58 [30].

statutory position under the *Land Rights Act*,¹⁶⁹ the decision also has no significance for the Crown's common law title to land/sea.

However, it will be seen in the next section that the Federal Court's decision in *Akiba*¹⁷⁰ provides further support for the proposition that the legal nature of the Crown's title upon acquisition of sovereign rights beyond the territorial sea is analogous to the Crown's radical title to land: it confers only legislative power and jurisdiction, not property rights. *Akiba* also supports the proposition that there are degrees of statutory sovereign rights, with the Crown's statutory sovereign rights to the territorial sea being stronger than the Crown's statutory sovereign rights beyond the territorial sea. Although the Federal Court did not decide in *Akiba* whether there had been any statutory abrogation of the public right to fish by the relevant Queensland and Commonwealth fisheries legislation, the decision perpetuates the erroneous assumption that the common law will only recognise non-exclusive native title rights to the sea.

B *Beyond the Territorial Sea Revisited — The Exclusive Economic Zone and the Continental Shelf: Akiba*

Akiba concerned an application for determination of native title in a major part of the sea area of Torres Strait beyond Australia's territorial seas (in its EEZ). This involved (inter alia) addressing two important questions: first, can native title be recognized in the EEZ? Secondly, had any commercial native title right to fish in the claim area that existed at sovereignty been extinguished by relevant Queensland and Commonwealth fisheries legislation?

It is worth noting at this juncture that it was in *Mabo*¹⁷¹ that native title was first accepted and recognised in relation to the Murray Islands in Torres Strait. As a result of *Mabo* and 22 subsequent consent determinations made under the *NTA*, native title has been recognised in all of the inhabited islands and most of the uninhabited islands of interest in *Akiba*.¹⁷² Although the issue for determination in *Akiba* related to seawater areas of Torres Strait, Finn J, delivering the judgment of the Federal Court, noted that the 'land Determinations are of some contextual importance in this proceeding' and emphasised that, 'to the Islanders, land and sea are seamlessly and culturally associated: there is no "sea-land dichotomy"'.¹⁷³

In answering the question whether native title can be recognized in the EEZ of the claim area, Finn J noted the history of the steps taken by which British and then Australian sovereignty 'was acquired over distinct areas of territorial seas, the airspace over them and their respective seabeds and subsoil'.¹⁷⁴ This history

¹⁶⁹ Cf *ibid* 68–70 [67]–[71] (Kirby J).

¹⁷⁰ (2010) 270 ALR 564.

¹⁷¹ (1992) 175 CLR 1.

¹⁷² *Akiba* (2010) 270 ALR 564, 574 [7] (Finn J).

¹⁷³ *Ibid* 574 [8]. This principle is consistent with the argument advanced regarding the legal nature of the Crown's title to land and sea.

¹⁷⁴ *Ibid* 724 [687].

spanned over 130 years and involved five separate dates, from 1872 to 2006.¹⁷⁵ In addition to the ‘progressive extension’ of Australia’s territorial seas, in 1994 a proclamation under the *Seas and Submerged Lands Act 1973* (Cth) (‘*Seas and Submerged Lands Act*’) set the outer limits of the EEZ beyond the territorial sea in Torres Strait.¹⁷⁶ Thus, Australia’s sovereignty over its territorial seas and its ‘sovereign rights and rights of control’ beyond the territorial sea are recognised and regulated by the *Seas and Submerged Lands Act* and by the 1982 *United Nations Convention on the Law of the Sea* (‘*UNCLOS*’),¹⁷⁷ articles of which are implemented or otherwise given effect in the *Seas and Submerged Lands Act*.¹⁷⁸

The *Seas and Submerged Lands Act* declares and enacts Australia’s sovereignty in respect of the territorial sea (which extends up to 12 nautical miles from the baselines from which the breadth of the territorial sea is measured).¹⁷⁹ As Finn J explained:

Beyond the limits of the territorial sea, the [*Seas and Submerged Lands Act*] recognizes that new zones of functional and resource jurisdiction can be declared or exist consistently with the provisions of the [*UNCLOS*]. These, as they radiate outwards, are the Contiguous Zone, the EEZ and the Continental Shelf ...¹⁸⁰

Australia’s contiguous zone is adjacent to its territorial sea, extending up to 24 nautical miles from its territorial sea baseline.¹⁸¹ Australia’s EEZ extends from the outer edge of the territorial sea up to 200 nautical miles from the territorial sea baseline.¹⁸² By s 10A of the *Seas and Submerged Lands Act*, ‘the rights and jurisdiction of Australia in its exclusive economic zone are vested in and exercisable by the Crown in right of the Commonwealth’. These ‘rights and jurisdictions’ are provided in art 56 of the *UNCLOS* and relevantly include:

sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the *waters superjacent to the seabed and of the seabed and its subsoil*, and with regard to

¹⁷⁵ Ibid.

¹⁷⁶ Ibid 724 [689].

¹⁷⁷ Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

¹⁷⁸ *Akiba* (2010) 270 ALR 564, 724–5 [690]–[691] (Finn J).

¹⁷⁹ Ibid 724 [690]. Due to the proximity of Papua New Guinea, the territorial sea around certain Torres Strait islands is only three nautical miles wide, in accordance with *Treaty concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters*, Australia–Papua New Guinea, signed 18 December 1978, 1429 UNTS 207 (entered into force 15 February 1985) art 3 (‘*Torres Strait Treaty*’).

¹⁸⁰ *Akiba* (2010) 270 ALR 564, 724 [691].

¹⁸¹ *UNCLOS* art 33, reproduced in *Seas and Submerged Lands Act 1973* (Cth) sch (‘Parts II, V and VI of the *United Nations Convention on the Law of the Sea*’). In this zone, Australia may exercise the control necessary to prevent or punish infringements of its customs, fiscal, immigration or sanitary laws and regulations.

¹⁸² *Akiba* (2010) 270 ALR 564, 725 [692] (Finn J). 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 EEZ, Australia has: *Akiba* (2010) 270 ALR 564, 725 [691] (Finn J). See also the authorities cited at 725 [691].

other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds ...¹⁸³

Australia's continental shelf is the area of the seabed and subsoil extending beyond the territorial sea for up to 200 nautical miles from the territorial sea baseline and beyond that distance to the outer edge of the continental margin as defined in the *UNCLOS*. Thus, the continental shelf is largely coextensive with the EEZ within 200 nautical miles from the territorial sea baseline.¹⁸⁴ Indeed, art 56 provides that Australia's rights in relation to the *seabed* and *subsoil* in its EEZ are to be exercised in accordance with the continental shelf regime. Importantly, however, the EEZ is not limited to the seabed and subsoil beyond the territorial sea; it extends to the *waters* superjacent to the seabed.

Finn J referred to the joint majority's explanation in *Yarmirr* of 'how the concept of "radical title" could be deployed as a tool to explain how native title to land could survive the Crown's acquisition of sovereignty over land',¹⁸⁵ but noted that that judgment continued:

it is wrong to argue from an absence of radical title in the sea or sea-bed to the conclusion that the sovereign rights and interests asserted over the territorial sea are necessarily inconsistent with the continued existence of native title rights and interests. The inquiry must begin by examining what are the sovereign rights and interests which were and are asserted over the territorial sea.¹⁸⁶

Applying *Yarmirr*, Finn J held that

the sovereignty acquired over the territorial seas was the right and power to govern that part of the globe ... This acquisition occurred by operation of international law and was subject to such qualifications as were necessitated by evolving international law.¹⁸⁷

Turning to the EEZ beyond the territorial sea, Finn J found that the provisions of the *NTA* contemplated that native title might be recognised in the EEZ by the common law.¹⁸⁸ This was reflected by, inter alia, s 6 of the *NTA*, which extended the provisions of the *NTA* 'to any waters over which Australia asserts sovereign rights under the [*Seas and Submerged Lands Act*]'. Such a statutory extension of the *NTA* to the EEZ is consistent with the approach adopted by the *Yarmirr* Full Federal Court to conclude that there was a statutory extension of radical title to the whole of the area to which the *NTA* applies rather than the incremental approach adopted by the *Yarmirr* High Court to determine whether the common law applies and will recognise native title below low-water mark. Finn J's

¹⁸³ *Akiba* (2010) 270 ALR 564, 725 [694] (Finn J) (emphasis in original), quoting *UNCLOS* art 56(1)(a).

¹⁸⁴ There are certain areas between Australia and Papua New Guinea and Australia and Indonesia where they are not coextensive.

¹⁸⁵ *Akiba* (2010) 270 ALR 564, 729 [713], citing *Yarmirr* (2001) 208 CLR 1, 50–1 [46]–[48] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁸⁶ *Akiba* (2010) 270 ALR 564, 729–30 [713], quoting *Yarmirr* (2001) 208 CLR 1, 51 [50] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁸⁷ *Akiba* (2010) 270 ALR 564, 730 [714].

¹⁸⁸ *Ibid* 730 [715].

approach, however, differs from that in *Yarmirr FCAFC* because rather than concluding that there was a statutory extension of radical title to the EEZ, his Honour relied on the *Yarmirr* High Court's explanation that the Crown acquired 'sovereign rights and interests' upon assertion of sovereignty over the territorial sea,¹⁸⁹ and on the fact that Australia's rights in the EEZ under s 10A of the *Seas and Submerged Lands Act* are described in art 56 of the *UNCLOS* as 'sovereign rights', to conclude that the Crown has 'sovereign rights' in relation to the EEZ.¹⁹⁰

Thus, Finn J's approach vis-a-vis the legal nature of the Crown's title to the EEZ beyond the territorial sea contains elements of both the Full Federal Court's approach in *Yarmirr FCAFC* and the High Court's approach in *Yarmirr* vis-a-vis the Crown's rights to the territorial sea. Notably, however, Finn J did not refer to the High Court's analysis in *WMC* of the Crown's rights to the continental shelf beyond the territorial sea.¹⁹¹ Nevertheless, it will be seen that Finn J's observations on this point are consistent with the High Court's analysis in *WMC*.

Having found that non-exclusive traditional laws and customs to access, use and take marine resources were, and are, acknowledged and observed in areas of the EEZ,¹⁹² the question for Finn J was whether the common law would recognise these native title rights in the EEZ.¹⁹³ Finn J noted that it is well-accepted that the EEZ regime is *sui generis*: it is neither an extension of the territorial sea nor a modified version of the high seas regime.¹⁹⁴ Rather, the EEZ is subject to the specific legal regime established in pt V of the *UNCLOS*.¹⁹⁵ Crucially, Finn J emphasised that, in relation to the EEZ, '[f]ull sovereignty was not given to the coastal states.'¹⁹⁶ 'Sovereign rights — something less than "full" sovereignty — were to be afforded coastal States.'¹⁹⁷ Finn J had, however, noted that since art 56(3) of the *UNCLOS* required Australia's rights in relation to the *seabed* and *subsoil* in its EEZ to be exercised in accordance with the continental shelf

¹⁸⁹ Ibid 729 [713], quoting *Yarmirr* (2001) 208 CLR 1, 51 [50] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁹⁰ *Akiba* (2010) 270 ALR 564, 729–30 [713]–[716].

¹⁹¹ See Secher, 'Lessons from the Sea — Part One', above n 1, 530–3.

¹⁹² *Akiba* (2010) 270 ALR 564, 575 [11], 729 [712], 731 [721], 732 [725] (Finn J).

¹⁹³ Ibid 733 [727]. Prior to addressing this issue, Finn J noted that '[t]hese rights are acknowledged by the common law in the native title claim area in Australian territorial waters.'

¹⁹⁴ Ibid 730–1 [719].

¹⁹⁵ Ibid 731 [719].

¹⁹⁶ Ibid. According to David Joseph Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press, 1987) 66, quoted in *ibid* at 731 [719], the EEZ regime attempts to remove the geographic notions inherent in the law of the sea:

The applicable legal regime is no longer dependent on the geographic area in question; rather, it is the activity in question that will determine the operative regime. ... Thus it is possible for different States to have jurisdiction over different activities in the same area; indeed, frequently there will be concurrent jurisdiction, usually for different purposes.

In this context, the native title rights to access and take resources found by Finn J fitted 'squarely within one of the forms of marine activity which are the subject of Australia's sovereign rights under Art 56(1)(a) of the [*UNCLOS*]:' *ibid* at 731 [721].

¹⁹⁷ *Akiba* (2010) 270 ALR 564, 732 [723] (Finn J).

regime, art 77 of the *UNCLOS* (especially para 2) was important as it made the right to exploit the natural resources of the continental shelf ‘exclusive’:¹⁹⁸

- 1 The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
- 2 The rights referred to in paragraph 1 are *exclusive* in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.¹⁹⁹

Since this provision appeared to give an ‘exclusive right’ to the Commonwealth to *take* resources from the *seabed and subsoil* in the EEZ, Finn J’s determination of whether the native title rights in the claim area were recognised by the common law had three elements. First, Finn J addressed native title rights of use, *not involving taking*, and found that they raised no issue because they ‘are not inconsistent with Australia’s sovereign rights’.²⁰⁰ Secondly, Finn J addressed native title rights of *taking* marine resources from the superjacent *waters* in the EEZ and found that they too raised ‘no issue of inconsistency for the common law’.²⁰¹ Thirdly, Finn J addressed the native title right of *taking* resources from the *seabed or subsoil* and noted that, because of art 77(2), it might be thought that an issue of inconsistency at common law would arise.²⁰² However, his Honour denied this result by drawing a distinction between the Crown’s property in the seabed and subsoil in the EEZ, on the one hand, and the Crown’s legislative power and jurisdiction over them, on the other:

[Article 77(2)] gives an apparently ‘*exclusive right*’ to the Commonwealth. That provision, though, would seem, to be in the nature of an emphatic affirmation of the extent of a coastal state’s rights of control over its continental shelf . . . its function being to affirm the extent of its sovereign power. It does not address property rights as such. Hence it does not raise any issue of inconsistency of rights.²⁰³

Crucially, this is the same distinction Brennan CJ drew in relation to the Crown’s rights to the continental shelf in his key majority judgment in *WMC*.²⁰⁴

Thus, Finn J’s judgment confirms that the Crown’s title to the EEZ and continental shelf, although statutory in origin, does not confer beneficial title on the Crown and is therefore analogous to the Crown’s radical title to land. By distinguishing between the Crown’s statutory sovereign rights to the territorial sea and to the EEZ/continental shelf beyond the territorial sea, Finn J’s judgment also supports the proposition that there are degrees of statutory sovereign rights, the Crown’s statutory sovereign rights to the territorial sea being stronger than

¹⁹⁸ *Ibid* 726–7 [699]–[700].

¹⁹⁹ *Ibid* 727 [700] (emphasis in original), quoting *UNCLOS* art 77.

²⁰⁰ *Akiba* (2010) 270 ALR 564, 733 [728].

²⁰¹ *Ibid* 733 [729].

²⁰² *Ibid*.

²⁰³ *Ibid* (emphasis added). See also at 733–4 [730]–[731].

²⁰⁴ See Secher, ‘Lessons from the Sea — Part One’, above n 1, 531–3.

the Crown's statutory sovereign rights beyond the territorial sea.²⁰⁵ This is also consistent with Gummow J's conclusion in *WMC* that the sovereignty referred to in s 6 of the *Seas and Submerged Lands Act* regarding the territorial sea is a stronger term than the 'sovereign rights' used in s 11 of that Act regarding the continental shelf.²⁰⁶ Finn J has made it clear that s 10A of the *Seas and Submerged Lands Act*, regarding the EEZ, confers the lesser rights.

Although Finn J suggests that the Crown's lesser title to the EEZ constitutes an impediment to recognising native title in the EEZ,²⁰⁷ the reverse is true: there is greater scope for recognising native title because native title rights are potentially less likely to be inconsistent with the Crown's title in the EEZ. This is reinforced both by the High Court's emphasis in *Members of the Yorta Yorta Aboriginal Community v Victoria* ('*Yorta Yorta*')²⁰⁸ that the rights and interests which can be recognised under s 223(1) of the *NTA* may not, and often will not, reflect Anglo-Australian conceptions of 'property' and 'belonging'²⁰⁹ and by the High Court's emphasis in *Yarmirr* that neither the use of the word 'title' nor the fact that the rights and interests be 'in relation to' land and waters require identification of the rights and interests as items of 'real property'.²¹⁰

In the context of determining whether native title can be recognised in the EEZ, the Commonwealth also argued that

irrespective of the date when sovereignty was asserted by Australia in geographical parts of the waters of the sea claim area, the capacity of the Islander society to create new laws — and new rights and interests under those laws — ceased upon acquisition of sovereignty over the *land*.²¹¹

In considering whether new native title rights could be created in areas not yet subject to sovereignty but which subsequently came under sovereignty, Finn J referred to the established legal principle that new native title rights could not be recognised over areas where 'territorial sovereignty had previously been acquired.'²¹² As explained by Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta*, this principle applied to both land and water:

Because there could be no parallel law-making system after assertion of sovereignty it also follows that the only rights or interests in relation to *land or waters*, originating otherwise than in the new sovereign order, which will be

²⁰⁵ Although the High Court in *Yarmirr* (2001) 208 CLR 1 held that the Crown's sovereignty over the territorial sea has a common law basis, Finn J only addressed the statutory basis.

²⁰⁶ See Secher, 'Lessons from the Sea — Part One', above n 1, 541.

²⁰⁷ *Akiba* (2010) 270 ALR 564, 732 [723].

²⁰⁸ (2002) 214 CLR 422.

²⁰⁹ *Ibid* 442 [40] (Gleeson CJ, Gummow and Hayne JJ). See also *Akiba* (2010) 270 ALR 564, 680 [497] (Finn J).

²¹⁰ *Yarmirr* (2001) 208 CLR 1, 38 [12] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also *Akiba* (2010) 270 ALR 564, 680 [497] (Finn J). See generally *Bodney v Bennell* (2008) 167 FCR 84, 118–20 [137]–[143] (Finn, Sundberg and Mansfield JJ).

²¹¹ *Akiba* (2010) 270 ALR 564, 734 [733] (Finn J) (emphasis added).

²¹² *Ibid* 734 [735].

recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.²¹³

Yorta Yorta did not, however, address the issue of progressive sovereignty and the creation of new native title rights.²¹⁴ This allowed Finn J to hold that it was possible for a system of laws and customs subsisting from before sovereignty to create new rights and interests in areas beyond the territorial sovereignty of Australia from time to time:

It would be anomalous and unprincipled, in my view, for the common law to require an Aboriginal or Islander society to be faithful to their laws and customs from the time sovereignty was first acquired over some part of their territory if they are to be found today to have rights and interests under those laws and customs in that part, but to refuse to acknowledge a subsequent accretion to those rights and interests in an area not hitherto the subject of Australian territorial sovereignty (that is the emergence of new rights and interests under its traditional laws and customs). If the existence of native title in that later acquired area has to be determined at the time sovereignty is asserted over it, that determination should be made by reference to the situation existing at that time.²¹⁵

Finn J's observations regarding the implications of the Crown's acquisition of sovereignty vis-a-vis native title in the EEZ support the proposition that the Crown's title to the EEZ/continental shelf beyond the territorial sea is a bare legal title which does not confer any beneficial entitlement. This position is further supported by Finn J's observations made in the context of answering the second question identified as important for present purposes: had any commercial native title right to fish in the claim area that existed at sovereignty been extinguished by the relevant Queensland and Commonwealth fisheries legislation?

It was argued that the legislative regimes of Queensland (since 1877)²¹⁶ and of the Commonwealth (since 1952)²¹⁷ concerning fishing evinced an intention to regulate and control all 'fishing' in Queensland and Commonwealth waters respectively (both domestic and commercial). It was also argued that, insofar as fishing for commercial purposes was concerned, the legislation did not merely regulate such activity but abrogated or extinguished any otherwise existing right (whether a native title right or a public right) to fish for commercial purposes, replacing such rights with private statutory rights to engage in commercial fishing activities.²¹⁸

Finn J summarised the principles concerning extinguishment of native title, which included those established (and applied) in the context of native title land claims.²¹⁹ The last principle enumerated was that because the common law right

²¹³ (2002) 214 CLR 422, 444 [44] (emphasis added), quoted in *ibid* 734 [734].

²¹⁴ *Akiba* (2010) 270 ALR 564, 735 [737] (Finn J).

²¹⁵ *Ibid* 735 [738].

²¹⁶ *Ibid* 759–60 [844], citing *Queensland Fisheries Act 1877* (Qld).

²¹⁷ *Akiba* (2010) 270 ALR 564, 751 [807] (Finn J), citing *Fisheries Act 1952* (Cth).

²¹⁸ *Akiba* (2010) 270 ALR 564, 751 [803]–[804] (Finn J). These statutory rights are conferred only upon those who hold the necessary licenses provided for under the legislation.

²¹⁹ *Ibid* 740–745 [766]–[778].

of fishing in the sea and in tidal navigable rivers is a public (rather than a proprietary) right, it is ‘freely amenable to abrogation or regulation by a competent legislature’.²²⁰ Finn J then conducted an extensive survey of the ‘interlocking and complicated legislative regimes which apply in Torres Strait’.²²¹ While Finn J found that the native title right to access and take marine resources was ‘not circumscribed by the use to be made of the resource taken’, he accepted, for present purposes, ‘that a right to take resources for trading or commercial purposes — whether exclusive or non-exclusive — is a discrete and severable characteristic of a general right to take resources’.²²² Accordingly, Finn J rejected the applicant’s submission that it is impermissible to “subdivide” this right’, noting that

[t]he distinction between engaging in an activity for commercial purposes or for non-commercial, private or other purposes is one commonly made. It was from the outset, and remains, a characteristic of the fisheries legislation considered in this matter ... [and is also] reflected in the differentiation of purposes in s 211 of the *[NTA]*.²²³

Finn J further observed that there were ‘two very discernible and evolving features of the fisheries legislation over time’ which were interrelated: first, ‘the expansion of the particular public interests of which account is to be taken in the design and implementation of legislative schemes to regulate and control fisheries’; and secondly, ‘the changing character of the discretions given in the grant (or refusal) of leases and licences under such legislation’.²²⁴ Finn J’s analysis of the legislation demonstrated that there existed ‘increasingly comprehensive — and ... sophisticated — management regimes which had and have as a principal focus, the control and management of commercial fishing’.²²⁵ Thus, the ‘question of interpretation raised by these schemes’ was ‘whether they

²²⁰ Ibid 744 [777], quoting *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314, 330 (Brennan J).

²²¹ *Akiba* (2010) 270 ALR 564, 745–759 [779]–[842]. For ease of exposition, Finn J adopted a threefold approach to considering the relevant legislation, considering, first, Queensland’s legislation up until 1994; secondly, Commonwealth legislation from 1952 to 1991 excluding the *Torres Strait Fisheries Act 1984* (Cth); and, thirdly, the *Torres Strait Fisheries Act 1984* (Cth) and *Torres Strait Fisheries Acts 1984* (Qld). Finn J did, however, confine his attention in two respects:

- (i) although the concept of ‘marine resources’ relied upon by the applicant was more extensive than what is connoted by ‘fish’, because the almost exclusive focus in submissions on fishing consideration was limited to legislation dealing with fishing. ‘Fishing for commercial purposes is, on the evidence, the matter of present controversy’: *Akiba* at 759 [843].
- (ii) the primary focus was on the *Fisheries Act 1952* (Cth) and *Torres Strait Fisheries Act 1984* (Cth) because, except for a narrow area of internal water which is subject to Queensland law and possibly the coastal waters around the islands to the north of the Seabed Jurisdiction Line as defined in the *Torres Strait Treaty*, the law in relation to fisheries that presently applies to the area in which native title was found to exist is the *Torres Strait Fisheries Act 1984* (Cth): *Akiba* at 759 [843].

²²² *Akiba* (2010) 270 ALR 564, 761 [847].

²²³ Ibid.

²²⁴ Ibid 761 [848].

²²⁵ Ibid.

disclosed a clear and plain intent to extinguish native title’ or whether they did ‘no more than bring Islander fishing for commercial purposes into an aspect of the regulatory regime applied to commercial fishing’ — in other words, ‘was the legislative intent ... simply to extend the control of commercial fishing ... and not to define “underlining rights”?’²²⁶

Because the relevant legislation did not ‘of its own force seek directly to deny Islander fishing rights for commercial purposes’ and one of its objectives was ‘to acknowledge and protect, as a management priority, the traditional way of life and *livelihood* of traditional inhabitants, including their rights in relation to traditional fishing’,²²⁷ Finn J adopted a ‘constructional choice’ that was ‘more favourable to the retention of the right to fish for commercial purpose[s]’.²²⁸ This choice was reinforced by the ‘distinctive setting’ of the legislation which, assuming native title subsisted in Torres Strait at the time of its enactment, would need to contain ‘particularly strong indications ... that existing rights were intended to be extinguished, given the markedly beneficial and protective intent’ of it and the *Torres Strait Treaty*.²²⁹

Consequently, Finn J concluded that the state and Commonwealth legislative regimes concerning fisheries ‘did not, and do not, severally or together evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes.’²³⁰ Finn J did, however, find that

[t]o the extent that those legislative regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders’ marine estate, or prohibits qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in that estate ... the native title holders must, in enjoying their native title rights, observe *the law of the land*. This is their obligations [sic] as Australian citizens. But complying with those regimes provides them with the opportunity — qualified it may be — to exercise their native title rights.²³¹

This produces an anomaly: although Finn J’s reference to native title holders observing ‘the law of the land’ inherently encompasses statute, common law and custom, Finn J only allows native title to be ‘qualified’ in the statutory context. As a result, Finn J accepts the ‘well established’ principle ‘that the common law will not recognise a native title right to occupy, use and enjoy waters seaward of the high water mark to the exclusion of all others, or a right to possess and control those waters to the exclusion of all others’, because ‘[s]uch rights are inconsistent with the public’s right to fish in, and to navigate over, those waters’.²³² It has been seen, however, that both authority and legal principle

²²⁶ Ibid 762 [850].

²²⁷ Ibid 762 [851] (emphasis in original).

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid 764 [861].

²³¹ Ibid 764–5 [861] (emphasis added).

²³² Ibid 736 [745]. In this context, Finn J held at 575 [11]:

[t]he native title rights I have found are the non-exclusive rights of the group members of the respective inhabited island communities first, to access, to remain in and to use their own

support exclusive native title rights subject to the public rights ('qualified exclusive rights') on a number of grounds and that, after statutory abrogation of the public right to fish, there is no impediment to recognising *full* exclusive native title rights to the sea. Although Finn J expressly observed that, unlike the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust*,²³³ he did not have to determine whether or not the common law public right to fish had been abrogated by the relevant Queensland and Commonwealth fisheries legislation,²³⁴ this does not disturb the principle that native title existing before any statutory abrogation of the public right to fish can include qualified exclusive rights to the sea. Because exclusive native title to the sea is *not* inconsistent with the public right to fish, this principle is distinct from the well-established principle that

[a] native title right which will not be recognised because of inconsistency with a common law right, cannot be saved by the expedient of acknowledging the common law right and by qualifying the native title right by making it subject to the common law right ...²³⁵

Since Finn J made it clear that native title is subject to 'the law of the land', it is not possible to reconcile why it is only subject to statute law but not other aspects of 'the law of the land': the common law and custom. Indeed, in this context, Finn J's judgment provides further support for, at the very minimum, recognising qualified exclusive native title rights to the EEZ/continental shelf and, if there has been statutory abrogation of the public right to fish, recognising *full* exclusive native title rights to the EEZ/continental shelf.

IV CONCLUSION

As a result of the decision in *Yarmirr*, it is clear that the common law can extend to the territorial sea. Although the majority in *Yarmirr* do not go as far as Merkel J in *Yarmirr FCAFC*, who held that the common law applies in respect of the territorial sea, they adopt an incremental approach: while the common law does not necessarily end at low-water mark, whether it extends to the territorial sea must be determined on a case-by-case basis. Nevertheless, the majority also made it clear that although the common law applied, this did not mean the Crown had radical title in respect of the territorial sea.

Pre-*Yarmirr*, the High Court in *WMC* had drawn a distinction between the Crown's title to 'land' and the Crown's title to 'the continental shelf beyond the

marine territories or territories shared with another, or other, communities; and, secondly; to access resources and to take for any purpose resources in those territories. In exercising these rights the group members are expected to respect their marine territories and what is in them. Importantly, and this requires emphasis, none of these rights confer possession, occupation, or use of the waters to the exclusion of others. Nor do they confer any right to control the conduct of others.

²³³ (2008) 236 CLR 24.

²³⁴ *Akiba* (2010) 270 ALR 564, 737 [749], 781 [938].

²³⁵ *Ibid* 736 [746], citing *Yarmirr* (2001) 208 CLR 1, 67-8 [95]-[96], 68 [100] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

territorial sea', radical title and 'statutory sovereign rights' respectively.²³⁶ The new element introduced by the High Court in *Yarmirr* was the distinction, not unlike that drawn by Merkel J, between the Crown's title to 'land' and to 'the territorial sea': although radical title is a concomitant of sovereignty over land, 'common law sovereign rights' are concomitant with sovereignty over the territorial sea. The new element introduced by *Akiba* is confirmation that, like the Crown's title to the continental shelf beyond the territorial sea, 'statutory sovereign rights' are concomitant with sovereignty over the EEZ beyond the territorial sea. Indeed, a fourfold distinction has emerged between the Crown's title to: land; the intertidal zone; the territorial sea/solum; and the EEZ and continental shelf beyond the territorial sea. In respect of land, the Crown has a radical title (*Mabo, Wik*); in respect of the intertidal zone, including the foreshore, there is a statutory extension of radical title (*Yarmirr FCAFC*) and the Crown also has a radical title at common law (*Gumana, Yarmirr FCAFC*); in respect of the territorial sea, the Crown has common law sovereign rights (*Yarmirr*); and in respect of the continental shelf and EEZ, the Crown has 'statutory sovereign rights' (*WMC, Akiba*). The Crown's title is, therefore, described in one of three ways depending on the area of land/sea: namely, 'radical title' or a statutory extension thereof; 'common law sovereign rights'; or 'statutory sovereign rights'.

Importantly, although the Crown's title to land, the intertidal zone and the territorial sea are derived from the Crown's sovereignty over Australia, the Crown's title to the continental shelf and EEZ beyond the territorial sea derives from 'statutory sovereign rights'.²³⁷ The distinction between sovereignty and 'statutory sovereign rights' appears to correspond with the application and non-application of the common law respectively: where the Crown has acquired sovereignty over an area (land or sea), the common law applies (at least *prima facie*); where the Crown has merely acquired 'statutory sovereign rights', the common law does not apply. Thus, while a distinction between the Crown's title derived from sovereignty and 'statutory sovereign rights' might be maintained, there is no sustainable reason for distinguishing between the Crown's title, upon acquisition of sovereignty, to different areas of sea or land. Moreover, the weight of authority suggests that, notwithstanding the classification of the Crown's title to particular areas of sea/land, the legal nature of the title is the same: a bare legal title.

In *Yarmirr FCAFC*, Merkel J expressly declared this to be the legal position with respect to common law sovereign rights and radical title. The majority in *Yarmirr* did not, however, make it clear whether they regarded the concept of radical title as something different from, or equivalent to, the concept of common law sovereign rights. They simply accepted the analysis of radical title as declared by existing authorities. The state of the law pre-*Yarmirr*, therefore, remains relevant to elucidating the meaning of radical title. Indeed, three

²³⁶ See Secher, 'Lessons from the Sea — Part One', above n 1, 530–1 nn 53–55.

²³⁷ *Seas and Submerged Lands Act* s 11. See generally Secher, 'Lessons from the Sea — Part One', above n 1.

members of the majority in *Yarmirr* were also members of the majority in *Wik*, the most authoritative decision on radical title. Crucially, like the conception of radical title in *Wik*, both the High Court's and Merkel J's conceptions of 'common law sovereign rights' in *Yarmirr* and *Yarmirr FCAFC* respectively, and the High Court's conception of 'statutory sovereign rights' in *WMC*, confers no beneficial entitlement to the area to which the rights relate; they merely confer power to grant interests in that area. Thus, the implications of the *Yarmirr* majority's indication that there may be a statutory extension of radical title to the territorial sea may be more procedural than substantive.

It is suggested that a principled approach to identifying the Crown's title to sea/land is that where the Crown has acquired sovereignty (rather than 'statutory sovereign rights') over an area, whether land or sea, the common law, and thus radical title, applies. This approach is supported by Selway J's judgment in *Gumana* (vis-a-vis the Crown's radical title to the intertidal zone) and Kirby J's judgment in *WMC* (which is supported by the tenor of Toohey J, Gaudron J and Gummow J's judgments in *WMC*) and in *Yarmirr* (vis-a-vis the Crown's radical title to the territorial sea). Accordingly, the Crown would be attributed a radical title to land, the intertidal zone and territorial sea, not only in terms of legal nature but in name.

Indeed, the courts have consistently held that the effect upon native title of the Crown's acquisition of sovereignty over the territorial sea and intertidal zone is the same irrespective of the classification of the Crown's title to these areas; the common law will not recognise exclusive native title rights. It has been seen, however, that there are four distinct, yet interrelated, grounds for rejecting this conclusion. First, since there was no objection pre-*Magna Carta* to the Crown granting exclusive rights to the sea provided they were subject to public rights of fishing/navigation,²³⁸ the exclusive rights of native title holders put those holders, at the very least, in the same position as that of a Crown grantee (if not in a stronger position). If the public rights are consistent with a Crown grant of exclusive rights, a fortiori, they are consistent with pre-existing exclusive native title rights.

Secondly, as conceded by the *Yarmirr* majority, the inconsistency between native title rights and public rights of fishing/navigation 'does not arise as a result of the exercise of sovereign power';²³⁹ it arises because of the 'successive assertions of sovereignty over what now are territorial waters, without any further act of the executive or legislature'.²⁴⁰ Inconsistency at sovereignty is, however, the very antithesis of Brennan J's presumptive recognition of native title in *Mabo*.²⁴¹ The High Court has, therefore, effectively introduced a new inconsistency of incidents test for initial recognition of native title which is in addition to the conventional inconsistency of incidents test for extinguishment of

²³⁸ *Gann v Free Fishers of Whitstable* (1865) 11 HL Cas 192, 209; 11 ER 1305, 1312 (Lord Westbury LC).

²³⁹ *Yarmirr* (2001) 208 CLR 1, 68 [100] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

²⁴⁰ *Ibid* 68 [99].

²⁴¹ See above n 64.

native title. Although this double inconsistency of incidents test appears to be limited to the sea, legal principle and authority does not support a distinction based upon the Crown's rights acquired upon acquisition of sovereignty over land and sea.

Thirdly, if, as suggested by Selway J in *Gumana*,²⁴² public rights are in fact restrictions on the Crown's title, the public rights have no significance for any title not derived from Crown grant. Native title holders would, therefore, be in a stronger position than holders of Crown-derived title. Native title, as a non-Crown-derived title, would not be affected by public rights unless and until the Crown exercised its sovereign power to deal with the intertidal zone or sea. In addition to the fact that public rights could not of themselves without further executive act preclude recognition of exclusive native title rights — because it is not possible to make a complete statement of public rights to fish/navigate and there are significant limitations on the manner in which the rights may be exercised — it follows that the fourth ground for rejecting non-recognition of exclusive native title is that it is impossible to conclude that public rights are, in fact, inconsistent with exclusive native title rights. A fortiori, statutory abrogation of such public rights removes any impediment to recognising exclusive native title rights.

Importantly, it has been shown that the concepts of 'sovereign rights' (whether relating to the territorial sea or beyond) and 'radical title' (whether common law or a statutory extension thereof) support the proposition that the Crown's acquisition of title, whether derived from sovereignty or sovereign rights, does not confer a plenary title, irrespective of the original presence of Aboriginal inhabitants. Thus, notwithstanding any suggested analogy between 'sovereign rights' and 'radical title', the analysis in this article supports the proposition that radical title, whether relating to land or sea, is merely a power of alienation rather than a property right; it is a bare legal title which does not automatically confer beneficial ownership to the land/sea to which it relates. Importantly, in the case of land this arguably means that — contrary to previous assumptions²⁴³ — the Crown has to take further steps to become the owner of land even if it is not subject to native title.

²⁴² (2005) 141 FCR 457, 480 [69]. See also *Yarmirr* (2001) 208 CLR 1, 55–6 [60] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (see above n 44); *Risk v Northern Territory* (2000) 210 CLR 392, 436 [127] (Callinan J) (see above n 57); the pre-*Magna Carta* authorities, discussed in above Part II(A)(2)(b)(i).

²⁴³ R D Lumb, 'The *Mabo* Case — Public Law Aspects' in M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution — The Aboriginal Land Rights Decision and Its Impact on Australian Law* (University of Queensland Press, 1993) 1, 11.