

JURISDICTIONAL PATCHWORK: LAW OF THE SEA AND NATIVE TITLE ISSUES IN THE TORRES STRAIT

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[The Torres Strait is the region where mainland Australia most closely approaches another state; where the northernmost Australian islands are a few kilometres off the Papua New Guinean coast. By virtue of its location, configuration and people, the Strait is also the focus of a surprising range of international and domestic legal issues. This article examines the law of the sea and native title issues presently impacting upon the Strait. It identifies the pressing legal concerns of the region, including one of the world's most complex maritime boundary arrangements which has been in operation for over 15 years; the impact of the operation of the 1982 United Nations Convention on the Law of the Sea on the Strait, most particularly the navigational regime; and the operation of the domestic offshore legal regime, including recent developments in the application of native title to offshore areas.]

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I INTRODUCTION

In terms of sovereignty and jurisdictional issues, the Torres Strait region presents a number of challenges that are unique within Australia. Firstly, it is the point where mainland Australian territory most closely approaches that of another state, and the only place where the territorial sea of Australia touches another state's territorial waters. The Torres Strait region raises issues of the exercise of jurisdiction over individuals moving from one state to another and of

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THE TORRES STRAIT

Map taken from Stuart Kaye, 'Regulation of Navigation in the Torres Strait: Law of the Sea Issues' in Donald Rothwell and Sam Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 119, 135. Reproduced with the kind permission of *Kluwer Law International*.

national control over territorial waters. Secondly, the *Torres Strait Treaty*¹ is applicable to the region. It is one of the most complex maritime boundary delimitation treaties in operation, where jurisdiction over seabed and fisheries are separated, and a Protected Zone, designed to further both the interests of the indigenous communities of the region and environmental protection, exists. Thirdly, across the Strait are a scattering of numerous reefs, islands and cays. In the context of Australia's offshore arrangements, these present one of the more complicated geographical contexts for the operation of the Offshore Constitutional Settlement² dividing jurisdiction between the Commonwealth and the States. Fourthly, the Torres Strait is an international strait for the purposes of the 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS').³ Consequently, significant issues are raised in the application of Australian law to vessels passing through the Strait. Finally, the issue of native title in offshore areas is particularly relevant in the Torres Strait because Australia's first successful native title claim originated there, albeit that the maritime part of the claim was withdrawn.⁴ This article will briefly explore the jurisdictional and sovereignty issues applicable to the Torres Strait, including native title, and place them in perspective.

II EVOLUTION OF JURISDICTION

The complexity of the present arrangements in the Torres Strait can best be appreciated in light of the manner in which those arrangements came about. Historical events have played a substantial role in determining the present structure of both the sovereignty and the exercise of jurisdiction in the region. It is useful to examine these events briefly.

¹ *Treaty between Australia and the Independent State of Papua New Guinea Concerning the Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters*, opened for signature 18 December 1978, 1985 ATS 4 (entered into force 15 February 1985).

² For more detailed discussions of the Offshore Constitutional Settlement, see Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13 *Marine Policy* 334; Richard Cullen, *Federalism in Action: The Canadian and Australian Offshore Disputes* (1990) 104–29; Michael Crommelin, 'Offshore Mining and Petroleum: Constitutional Issues' (1981) 3 *Australian Mining and Petroleum Law Journal* 191; Brian Opeskin and Donald Rothwell, 'Australia's Territorial Sea: International and Federal Implications of its Extension to 12 Miles' (1991) 22 *Ocean Development and International Law* 395, 408–10; Richard Cullen, 'Canada and Australia: A Federal Parting of the Ways' (1989) 18 *Federal Law Review* 53, 75–7; Richard Cullen, 'The Encounter between Natural Resources and Federalism in Canada and Australia' (1990) 24 *University of British Columbia Law Review* 275, 297–8. See also editorials in (1979) 53 *Australian Law Journal* 605; (1976) 50 *Australian Law Journal* 206.

³ Opened for signature on 10 December 1982, 450 UNTS 82, 21 ILM 1261 (entered into force 16 November 1994).

⁴ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('Mabo').

The first step is to examine the means by which British sovereignty was asserted over Australia and the legal mechanisms used to accomplish it.⁵ The principal means used in the legal acquisition of Australian territory was the proclamation of Letters Patent. The Letters Patent, issued to the Governor of the particular colony in his Commission, described what the limits of the colony were for the purpose of the exercise of the Governor's powers. The description of territory in the Letters Patent is important to the present discussion because it was subsequently used by the colonial courts to delimit the boundaries of the Colony of New South Wales, and the later colonies created out of it.⁶ As the present day Commonwealth of Australia, exclusive of the external territories, is a federation created from these colonies, the limits of Australian sovereignty in the present are, by and large, circumscribed by the old colonial instruments.

The Torres Strait Islands are currently part of the State of Queensland, and given that the State's boundaries have remained unaltered since Federation, the Islands were part of the Colony of Queensland in 1900.⁷ The Colony of Queensland was itself created out of the Colony of New South Wales by Letters Patent in 1859.⁸ These Letters Patent provided that Queensland succeeded all the New South Wales territory north of the boundary that still separates the two States, and east of 141° East longitude.⁹ Significantly, they also included 'all and every the adjacent islands and appurtenances in the Pacific Ocean'.¹⁰ Consequently, the boundaries of New South Wales in 1859 must be ascertained.

The 1859 boundaries of New South Wales can be found, *inter alia*, in three Letters Patent issued in 1786,¹¹ 1787¹² and 1855.¹³ The first two Letters Patent indicated that New South Wales included all the territory between Cape York

⁵ At this point, consideration of native title in this context is not necessary. In *Mabo*, the High Court of Australia indicated that the existence of native title did not detract from the ultimate validity of the State and Federal governments in Australia. Accordingly, since the boundaries of an Australian State determine the jurisdictional reach of a State government, the manner in which these boundaries are determined is an important exercise. See *Mabo* 175 CLR 1, 2 (Mason CJ, Brennan and McHugh JJ). Native title will be considered in Part VII below.

⁶ See, eg, the High Court's consideration of the issue in *Wacando v Commonwealth* (1981) 148 CLR 1.

⁷ This can be said with certainty because the *Australian Constitution* in ss 111 and 123 requires certain procedures to be followed in the event that a State surrenders territory or changes its boundaries. See discussion by Richard Lumb, 'Legal Aspects of the Torres Strait Treaty' in Peter Boyce and Michael White (eds), *The Torres Strait Treaty: A Symposium* (1981) 51, 52. These procedures have not been used in Queensland, so it follows that the limits of the State have remained static since Federation.

⁸ Colony of Queensland, 'Letters Patent Constituting the Colony of Queensland', *Government Gazette*, Proclamation No 1, 10 December 1859. The Letters Patent were issued pursuant to s 7 of the *New South Wales Constitution Act 1855* (Imp) which permitted the creation of a new colony in the north.

⁹ Colony of Queensland, 'Letters Patent Constituting the Colony of Queensland', *Government Gazette*, Proclamation No 1, 10 December 1859.

¹⁰ *Ibid.*

¹¹ Frederick Watson (ed), *Historical Records of Australia*, (1914) series 1, vol 1, 1–2.

¹² *Ibid* 2–16.

¹³ Daniel O'Connell and Ann Riordan, *Opinions on Imperial Constitutional Law* (1971) 247.

and South Cape in Tasmania¹⁴ and ‘all the islands adjacent in the Pacific Ocean’¹⁵ with the latitudes of those features. The reference to islands adjacent was particularly vague, which is not surprising, given the limited geographical knowledge of the time, and was used as a justification for the incorporation of Lord Howe and Norfolk Islands, and even New Zealand, into the colony.¹⁶ However, they cannot be used to incorporate any of the Torres Strait Islands since these were north of Cape York Peninsula, which was expressly stated to be the colony’s northernmost point.¹⁷ Nevertheless, in the 1855 Letters Patent, the last issued before the separation of Queensland, reference to Cape York was removed and the term ‘colony’ was used to refer to all British territory in Australia between 129° East and 154° East longitude (excluding South Australia and Victoria) and adjacent islands.¹⁸ These limits could potentially include the islands of the Torres Strait, as well as those of the Great Barrier Reef, assuming they were sufficiently near the mainland to be regarded as adjacent.¹⁹

The very question of when an island could be regarded as adjacent was soon raised by the new Queensland Government in 1863. Requests from New South Wales and Tasmanian residents for guano licences for islands on the Great Barrier Reef led the Queensland Governor to make enquires of the Colonial Office as to which islands were subject to his jurisdiction.²⁰ The matter was referred to the Law Officers, whose response was that all islands south of the Torres Strait, as far east as the 154th meridian, were part of Queensland if they were subject to British occupation or were within three miles of the mainland.²¹ Within the Torres Strait the situation was essentially the same. All islands in the Strait within three miles of the mainland were part of the Colony of Queensland, as were any islands where there had been ‘British occupation’ or islands within three miles of such occupied islands.²² In 1855 there were no islands where any British occupation had taken place. This meant that only the islands in the extreme south of the Strait were part of Queensland.²³

These reports disturbed the Queensland Government and led it to seek an extension of its jurisdiction from the British Government in 1872.²⁴ This request

¹⁴ At the time it was erroneously believed that Tasmania was connected to the Australian mainland: see Richard Lumb, *The Maritime Boundaries of Queensland and New South Wales* (1964) 5.

¹⁵ Colony of Queensland, ‘Letters Patent Constituting the Colony of Queensland’ *Government Gazette*, Proclamation No 1, 10 December 1859.

¹⁶ Lumb, *The Maritime Boundaries*, above n 14, 4.

¹⁷ *Ibid* 5.

¹⁸ Lord Howe Island does not fall between these two meridians, but was expressly included as part of New South Wales. Norfolk Island had been separated from the Colony of New South Wales in the 1840s: *ibid* 5.

¹⁹ Richard Lumb, ‘The Torres Strait Islands’ (1990) 19 *Federal Law Review* 154, 155–7.

²⁰ O’Connell and Riordan, above n 13, 265–6.

²¹ *Ibid*.

²² *Ibid* 266.

²³ See Lumb, ‘The Torres Strait Islands’, above n 19, 158.

²⁴ O’Connell and Riordan, above n 13, 266.

was acceded to, and Letters Patent²⁵ were issued purporting to create a new colony consisting of all the islands within 60 miles of the coast of Queensland and appointing the Governor of Queensland the Governor of the new jurisdiction. The only act performed by the Governor was to surrender the colony to Queensland, which took place in 1872.²⁶

Queensland was still not satisfied with the annexation of all the islands within 60 miles of the mainland, as this was insufficient to give it control over the whole of the Torres Strait or jurisdiction over any part of the island of New Guinea. Given Queensland's reliance upon the sea route through the Torres Strait, it was deemed essential that the Strait and the southern coast of New Guinea not be controlled by a foreign power.²⁷ In response to pressure from Queensland, the British Government indicated that it was prepared to accept the incorporation of the remainder of the Torres Strait Islands into Queensland, but not any part of New Guinea.²⁸ Further Letters Patent,²⁹ specifying a new northern boundary of the colony skirting the Papuan coast, were proclaimed and then implemented by the Queensland Parliament through the *Queensland Coast Islands Act 1879* (Qld). The validity of these last two extensions to Queensland's jurisdiction was subsequently questioned, as there was some doubt over the method used in the Letters Patent.³⁰ This supposed problem was subsequently rectified with the passing of the *Colonial Boundaries Act 1895* (Imp).³¹ In 1981 the incorporation of the Islands into the State was confirmed by the Australian High Court in *Wacando v Commonwealth*.³²

The result of this annexation by the Letters Patent and the enactment of the domestic legislation was that in 1900 all of the islands in the Torres Strait virtually up to the New Guinean coast were part of the Colony of Queensland, and have remained part of the State of Queensland since Federation. Although

²⁵ *Queensland Statutes* (1963) Vol 2, 712.

²⁶ This method was first used to annex the Penguin Islands off the coast of present day Namibia to the Cape Colony in 1866. Based on an opinion given to the Colonial Office known as the 'Rolt-Bovill Opinion' it was also used to annex the Kermadec Islands to New Zealand. Doubts over the validity of the opinion led to the passing of the *Colonial Boundaries Act 1895* (Imp), in order to cure any possible invalidity. See O'Connell and Riordan, above n 13, 274–5, 281–2.

²⁷ Stuart Kaye, *The Torres Strait* (1997) 35–8.

²⁸ Ibid 35.

²⁹ *Queensland Statutes* (1963) Vol 2, 716.

³⁰ The Queensland Supreme Court ruled this acceptance was valid in *R v Gomez* (1880) 5 QSCR 189, 190–1 (Lilley CJ, Harding J concurring). See also Kaye, *The Torres Strait*, above n 27, 37–8.

³¹ See copies of the relevant Colonial Office circulars concerning this issue, reprinted in O'Connell and Riordan, above n 13, 299–300.

³² (1981) 148 CLR 1. Three members of the High Court took the view that the Letters Patent and further acceptance by Queensland were sufficient to incorporate the territory: 16 (Gibbs CJ), 28 (Aickin J), 24 (Mason J). Two members felt the *Colonial Boundaries Act 1895* (Imp) was sufficient: 27–8 (Murphy J), 30 (Wilson J). Brennan J held that the mere existence of the *Colonial Boundaries Act 1895* (Imp) was sufficient, and made consideration of the validity of the Letters Patent unnecessary: at 30.

Papua was annexed as British New Guinea in 1884,³³ and transferred to Australian control in 1906, no adjustment to jurisdiction over the islands took place. Queensland retained sovereignty over all the islands even after the independence of Papua New Guinea ('PNG') in 1975.³⁴

III BOUNDARIES UNDER THE *TORRES STRAIT TREATY*

With the approach of PNG's independence in 1975, the Australian Government was obliged to consider jurisdiction in the Torres Strait. While Papua was an Australian territory, all the waters in the Strait were subject to Australian jurisdiction. An independent PNG meant that the Torres Strait would become a border area, and ascertaining which State would have jurisdiction in areas throughout the region became a great concern.

Negotiations with the Government of the Papuan territory began in 1973 and continued after independence in 1975.³⁵ Little progress was made initially, as there were a number of diverse interests to take into account that proved difficult to reconcile. First, PNG was unhappy with Queensland retaining sovereignty over all the islands in the Strait. The presence of these islands so close to the Papuan coast would have the effect of largely excluding PNG from making any claim to the economic resources of the Strait. Furthermore, Queensland was keen to retain the islands, and indicated that its Parliament would not consent to any transfer of territory. For any land to be ceded to PNG, the *Australian Constitution* required, at the very least, the approval of the Parliament of any State affected.³⁶ In this, Queensland had the support of the Torres Strait Islanders who preferred to remain Australian. They were of the view that the economic opportunities and the provision of services within Australia would be significantly better than in PNG. Further, many of the Islanders had served in the Australian Army during World War II and were reluctant to abandon their Australian citizenship. Finally, the Australian Government was anxious to retain strategic control over the Strait, as it was perceived to be of significance to Australia's defence.³⁷

Ultimately, all these diverse interests were reconciled in the *Torres Strait Treaty*, which was concluded in 1978. The principal issue surrounding the negotiation of the *Torres Strait Treaty* was the location of the maritime boundary

³³ Kaye, *The Torres Strait*, above n 27, 38. In an effort to extend British control over New Guinea, Queensland attempted unilaterally to annex the south-eastern quadrant of the island in 1882. This action was subsequently repudiated by the British Government: Geoffrey Bolton, *A Thousand Miles Away* (1970) 140–2.

³⁴ Three islands, thought until 1974 to be part of Queensland, were subsequently 'discovered' to never have been brought into the colony by the 1878 Letters Patent. This action, and its ramifications, are discussed in Stuart Kaye, 'The Torres Strait Islands: Constitutional and Sovereignty Questions Post-Mabo' (1994) 18 *University of Queensland Law Journal* 38.

³⁵ Joint Parliamentary Committee on Foreign Affairs and Defence, Commonwealth of Australia, *The Torres Strait Treaty: Report and Appendices* (1979) 2–3.

³⁶ *Australian Constitution* s 123.

³⁷ See Henry Burmester, 'The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement' (1982) 76 *American Journal of International Law* 321, 323–9.

between Australia and PNG.³⁸ PNG was seeking a readjustment southward, while Australia was seeking a maintenance of the status quo, hence no simple solution was possible. A provisional seabed line passing through the central portion of the Strait had been tentatively agreed to during the negotiations, but Australia was insistent on retaining sovereignty over the islands north of the line and to the fisheries around them. PNG wanted the islands or, failing that, rights over the sea and seabed north of the seabed line. Accordingly, a creative approach to the delimitation was necessary to accommodate both these positions, at least to some extent.³⁹

While the *Torres Strait Treaty* provides for the entire maritime boundary between Australia and PNG, only the elements relevant to the Torres Strait need be considered here. First, the *Torres Strait Treaty* deals with the sovereignty of the islands of the Torres Strait. With the exception of three small islands immediately adjacent to the Papua New Guinean coast, all islands remain Australian territory.⁴⁰ This avoids the potential constitutional difficulties Australia would face in the ceding of the islands.⁴¹ PNG's objections to the impact of Australian sovereignty over the islands were dealt with by the separation of the seabed and fisheries jurisdiction boundary lines. Near the centre of the Strait, the seabed boundary runs along a course well south of the inhabited islands of Saibai, Dauan and Boigu, and a number of small uninhabited cays.⁴² It runs northward of the course that a median line between the two mainlands would travel, taking account of the southern Australian islands in the centre of the Strait.

The fisheries jurisdiction line, which is level with the seabed boundary for most of its course, separates from the seabed line and turns sharply northward to enclose the three northern inhabited islands. However, it does not enclose many of the small uninhabited islands and sand cays at the eastern and western ends of the Strait, even though the *Torres Strait Treaty* itself confirms them as being under Australian jurisdiction. The separation of seabed and fishery jurisdictions has been described as looking like a 'top hat' and is designed to accommodate PNG's wishes for a share of the exploitable resources of the Torres Strait, while preserving the right of the Torres Strait Islanders to enjoy the fisheries surrounding their islands.⁴³ The fact that the fisheries line does not enclose the eastern and western uninhabited islands demonstrates that the rights of the

³⁸ *Torres Strait Treaty*, above n 1, art 2.

³⁹ Burmester, above n 37, 326–9.

⁴⁰ *Torres Strait Treaty*, above n 1, art 2.

⁴¹ The three islands confirmed as Papua New Guinean were the subject of Commonwealth research which attempted to show that they had never been part of Queensland. While the validity of this research has been called into question, it is clear that international law would recognise PNG's sovereignty over them at the present time: see James Griffin, 'Territorial Implications in the Torres Strait' in Peter Boyce and Michael White (eds), *The Torres Strait Treaty: A Symposium* (1981) 92; Kaye, 'The Torres Strait Islands', above n 34, 49.

⁴² See map.

⁴³ The reference to the area between the seabed and fisheries boundaries as a 'top hat' was first made by Burmester, and has been taken up by others: Burmester, above n 37, 338; Opeskin and Rothwell, above n 2, 399–401.

Torres Strait Islanders to fish ceased to be a factor in the drawing of the fisheries line. As no Islander interests were directly at stake, the fisheries in these areas could be allocated to PNG, thus meeting PNG's objectives of securing as many rights as possible as far south as possible, without damaging perceived Australian interests.

Although expressly recognised by the International Court of Justice as a legitimate technique in maritime boundary delimitation,⁴⁴ the use of multiple maritime boundaries is not commonly used by states. Nor is the separation of seabed and water column jurisdiction easily accommodated under UNCLOS. Although rights to the continental shelf are restricted to the seabed and subsoil, Exclusive Economic Zone ('EEZ') rights take in the seabed *and* superjacent waters.⁴⁵ Accordingly, in the areas where one state's seabed underlies the other state's waters, only a fishing zone and not a full EEZ can be claimed, and arrangements must exist to clarify the management and regulation of the diverse activities that may take place in such areas. The separation of the two boundaries creates some jurisdictional problems, which the *Torres Strait Treaty* attempts to deal with. There are a number of Australian islands in waters north of the seabed boundary between Australia and PNG. As a result these islands have a three mile territorial sea that is completely surrounded by PNG's seabed. As such the islands are enclaved.

While some of the northernmost Australian islands are on the PNG side of both the fisheries and seabed boundaries, the *Torres Strait Treaty* provides that sovereignty over islands includes sovereignty over the territorial sea and rights to the seabed and subsoil.⁴⁶ This leaves pockets of Australian jurisdiction around these islands surrounded by the Papua New Guinean EEZ. The northern reserve islands of Saibai, Dauan and Boigu are enclaved by the Papua New Guinean seabed, although as they are southward of the fisheries line, the fisheries beyond the territorial sea are under Australian jurisdiction. In the central area of the Strait, north of the seabed line, both states agreed that they would limit their territorial seas to three nautical miles, even if international law permitted the extension of the territorial sea or if either state chose to extend their territorial seas for the rest of their territory. PNG had asserted a territorial sea of 12 nautical miles for its territory in 1977 but agreed that the extension would not apply to the waters in the vicinity of the Torres Strait.⁴⁷ Similarly, when Australia extended its territorial sea to 12 miles in 1990, the islands north of the seabed line in the Torres Strait were specifically exempted in the proclamation.

⁴⁴ *North Sea Continental Shelf* [1969] ICJ Rep 3; *Continental Shelf (Tunisia v Libya)* [1982] ICJ Rep 18; *Gulf of Maine* [1984] ICJ Rep 246; *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13. For a discussion of these cases, see Stuart Kaye, 'The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice' (1998) 19 *Australian Yearbook of International Law* 56–61.

⁴⁵ *Torres Strait Treaty*, above n 1.

⁴⁶ *Ibid* art 2.

⁴⁷ Papua New Guinea, *Government Gazette*, 4 February 1983.

PNG also agreed not to proclaim any archipelagic baselines in the vicinity of the Strait.⁴⁸

As the Saibai, Dauan and Boigu Islands lie within six miles of PNG territory, the *Torres Strait Treaty* delimits a territorial sea boundary between them with what appears to be a median line. To ensure there is no confusion as to which waters near the islands are under Australian jurisdiction, the annexes to the *Torres Strait Treaty* specify the basepoints to be used to delimit the territorial seas of the individual Australian islands north of the seabed line, and include maps of the territorial sea of each feature north of the seabed line. This is done with an extraordinary degree of detail and is best exemplified in the case of Turnagain Island which, although less than seven miles long and a mile wide, has some 74 basepoints for the calculation of its territorial sea.⁴⁹

Only islands north of the seabed line are subject to the limitation of their territorial seas to three nautical miles. Islands to the south of the seabed line are entitled to the full territorial sea currently claimed by Australia, that is 12 nautical miles. This gives rise to some unusual results. For example, Pearce Cay, one of the islands specified in annex 3, is within three miles of the seabed line, so has a three mile territorial sea to its north, and a 12 mile territorial sea from its southern coast, producing what has been described as a 'flying saucer-shaped' territorial sea.⁵⁰

The unstable nature of the Papua New Guinean coast, and the strength of the tides in the central Torres Strait, mean that there is some probability that over time new islands may form in the region. While such features are almost certainly to be small and relatively insignificant, it was recognised that they could engender problems. Any feature clear of the sea at high tide has the potential to generate a 12 nautical mile territorial sea, and the formation of a new island could conceivably upset the delicate balance sought in the *Torres Strait Treaty*. The parties foresaw as much, and accordingly they provided that new islands would fall under the jurisdiction of the state on whose side of the seabed line they formed. Further, the territorial seas of the Australian islands north of the seabed line were fixed, regardless of future changes to the configurations of the coasts of these islands.⁵¹

While the principal elements of sea use relate to fisheries and the exploitation of the seabed, they are by no means the only jurisdictional issues that have to be considered. The separation of continental shelf and fisheries jurisdictions made it necessary for the parties to consider where the boundary would lie for other more unusual facets of jurisdiction. The *Torres Strait Treaty* sets down a definition of 'residual jurisdiction' to cover such activities as preservation of the marine environment, marine scientific research, energy production from water,

⁴⁸ Opeskin and Rothwell, above n 2, 399–400; Kwame Mfodwo and B Martin Tsamenyi, *Enforcement of Marine Fisheries Law and Regulations: A Case Study of Papua New Guinea in International and Comparative Perspective* (1992) 134.

⁴⁹ John Prescott, *Australia's Maritime Boundaries* (1985) 69.

⁵⁰ See Opeskin and Rothwell, above n 2, 400–1.

⁵¹ *Torres Strait Treaty*, above n 1, art 3(2).

currents or winds, and seabed and fisheries jurisdiction not directly related to the exploration or exploitation of resources.⁵² In the area between the seabed line and the fisheries line, the parties have agreed that neither shall exercise residual jurisdiction without the concurrence of the other and that they shall consult on this question.⁵³ In other areas, residual jurisdiction is exercised by either Australia or PNG, depending on which side of the fisheries line the activity is taking place.

Jurisdiction over wrecks within the Strait is based upon title to the seabed, although it is qualified in three ways of varying importance. Firstly, if a wreck is located in the Strait that is of historical or special significance to one state, but the seabed in which it rests belongs to the other state, then there is a duty on both to consult towards an agreed course of action with respect to the wreck. Secondly, whatever the impact of the article dealing with the issue, it is expressed to be without prejudice to each state's domestic courts in relation to maritime causes of action. Thirdly, a security clause has been inserted stating that the article has no application to military aircraft or vessels for either Australia or PNG after the entry into force of the *Torres Strait Treaty*.⁵⁴

IV THE PROTECTED ZONE AND THE EXERCISE OF FISHERIES JURISDICTION

The separation of the maritime boundary between the two states was only one mechanism employed to meet the various concerns which the *Torres Strait Treaty* was designed to overcome. One revolutionary aspect of the *Torres Strait Treaty* was the establishment of a 'Protected Zone' in the northern third of the Strait. The Protected Zone surrounds all of the Australian islands north of the seabed line, as well as most of the Australian islands in the central part of the Strait, midway between the two mainlands.⁵⁵ In fact, only the southern Australian islands, those adjacent to Cape York peninsula, are not within the Protected Zone. In this way, all the islands where the indigenous inhabitants maintain their traditional lifestyle are within the Protected Zone.⁵⁶

The Protected Zone incorporates more than just the islands within its area. The *Torres Strait Treaty* provides that the Protected Zone includes all land, water, airspace, seabed and subsoil within the defined area.⁵⁷ Furthermore, it would be incorrect to say that the Protected Zone only affected Australian islands or waters subject to Australian jurisdiction. The Protected Zone also includes Kawa, Mata Kawa, Kussa and Yapere Islands, which the *Torres Strait Treaty* confirmed as being part of PNG. The northern boundary of the Protected Zone is defined as that portion off the southern coast of the mainland of PNG for

⁵² *Ibid* art 4(3). See also Mfodwo and Tsamenyi, above n 48, 135–6.

⁵³ *Torres Strait Treaty*, above n 1, art 4(3).

⁵⁴ *Ibid* art 9.

⁵⁵ See map.

⁵⁶ K W Ryan and M W D White, 'The Torres Strait Treaty' (1981) 7 *Australian Yearbook of International Law* 87, 103.

⁵⁷ *Torres Strait Treaty*, above n 1, art 10.

most of the area adjacent to the fisheries line.⁵⁸ As such, the Zone encompasses land and water subject to the jurisdiction of both states bordering the Strait.

The Protected Zone serves a number of functions in relation to jurisdiction and the traditional inhabitants. Most importantly, it provides an area expressly designated to protect the traditional way of life and livelihoods of the people living in the Protected Zone.⁵⁹ This objective includes the rights to pursue traditional fishing and freedom of movement throughout the Protected Zone, without prejudice to other mechanisms the parties might choose.⁶⁰

One way this objective is pursued is through the guarantee of freedom of movement between the states for traditional activities.⁶¹ This is achieved through the absence of customs and quarantine control for visitors from either state engaged in traditional activities.⁶² However, the intention of the parties is not to create a customs free zone. Immigration control is to be preserved for all non-traditional activities, but not applied to inconvenience those engaged in more traditional enterprises. There is also recognition of the Strait as a possible point of entry of disease or pests, so both states retain the right to reassert their quarantine controls in the face of any perceived threat, temporary or otherwise.⁶³

In addition, both states are to preserve any traditional rights of use and access of the nationals of the other state, on at least as favourable conditions as its own nationals.⁶⁴ This raises questions of consistency with the *Papua New Guinean Constitution*, which provides that only Papua New Guineans can hold title to land, but as yet this has not caused any significant difficulties.⁶⁵ The *Torres Strait Treaty* also expressly guarantees the priority of traditional fishing over commercial fishing.⁶⁶

The secondary purpose of the Protected Zone is to act as a marine environment reserve, where the flora and fauna of the region can be protected and preserved. The *Torres Strait Treaty* does not impose specific standards for environmental protection, but rather encourages cooperative measures between the parties on a range of subjects. These fall into two broad categories. Firstly,

⁵⁸ Article 12 of the *Torres Strait Treaty* extends the protection of traditional customary rights to those areas ‘in or in the vicinity of the Protected Zone’, widening the area of application from merely the Protection Zone itself.

⁵⁹ *Torres Strait Treaty*, above n 1, art 10.

⁶⁰ *Ibid* art 11.

⁶¹ *Ibid* art 11(1).

⁶² *Ibid* art 16.

⁶³ *Ibid*.

⁶⁴ *Torres Strait Treaty*, above n 1, art 12.

⁶⁵ Section 56 of the *Constitution of Papua New Guinea* provides that only Papua New Guinean nationals are permitted to hold freehold land. Accordingly, if a Torres Strait Islander could establish native title over land in Papua New Guinean territory, within the Protected Zone, PNG would be in breach of their obligations under article 12 of the *Torres Strait Treaty*. See D C Anderson, ‘Implementation of the Torres Strait Treaty: A PNG Perspective’ in Peter Boyce and Michael White (eds), *The Torres Strait Treaty: A Symposium* (1981) 62, 67. Notably, in over 15 years of operation, the *Torres Strait Treaty* has not seen any such claims by Torres Strait Islanders to land in PNG.

⁶⁶ *Torres Strait Treaty*, above n 1, art 20. See also Mfodwo and Tsamenyi, above n 48, 148–51.

cooperation to bring about the identification and protection of indigenous animal and plant life that is under threat, and for control of noxious pests, both animal and plant, is encouraged.⁶⁷ Secondly, measures to prevent and limit pollution from vessels, sea installations, riverine and other land based sources are to be sought, regardless of whether the pollution originates in the Protected Zone.⁶⁸ While specific standards are not imposed by the *Torres Strait Treaty*, the parties are expressly urged to take into account relevant international agreed rules and recommended practices in framing their own legislative responses.⁶⁹

Another function of the Protected Zone is to provide a system of marine-living resource allocation that PNG would accept as providing a more equitable result than any delimitation possible, given the territorial configuration of islands in the Strait. In terms of fisheries, the Protected Zone which functions as a Joint Development Zone ('JDZ'), is by no means a typical example of such a zone. To begin with, all commercial fishing activity in the Protected Zone is subordinate to traditional fishing. This not only limits the states with regard to the level of catches, but also the manner in which fishing may be conducted, ensuring that traditional fisheries are not damaged or restricted. Even conservation measures imposed upon fishing ventures in the Protected Zone must, as far as possible, not restrict the activities of Islanders or Papuans in pursuance of their traditional livelihoods.⁷⁰

Once traditional fishing has been taken into account, a complex catch-sharing procedure is outlined. It begins with the establishment of an overall quota for stocks in the Protected Zone. The *Torres Strait Treaty* provides that the total allowable catch is to be the 'optimum sustainable yield', and this figure is to be determined by the states jointly.⁷¹ Cooperation and consultation are urged upon both states, even to the extent of negotiating subsidiary catch agreements for individual fisheries if that is thought to be appropriate, and a notification procedure is provided for in the event that one party takes the view that stocks in the Protected Zone requires a cooperative management approach. Such cooperation on fisheries is pursued through the Protected Zone Joint Council, whose functions and structure are considered below.

Division of the catch is dependent upon the part of the Protected Zone in which the fish are actually caught. In areas south of the fisheries jurisdiction line, that is to say areas under Australian jurisdiction, Australia is to receive 75 per cent of the total allowable catch and PNG is to receive 25 per cent. In the territorial seas surrounding the small uninhabited Australian islands north of the fisheries line (those areas under Australian jurisdiction that are enclaved within waters subject to Papua New Guinean jurisdiction), the entitlement to the catch is split 50 per cent each. Finally, in those waters subject to Papua New Guinean

⁶⁷ *Torres Strait Treaty*, above n 1, art 14.

⁶⁸ Ibid art 13.

⁶⁹ Ibid art 13(1) states that the parties must have regard to 'internationally agreed rules, standards and recommended practices'.

⁷⁰ Ibid art 20.

⁷¹ Ibid art 23.

jurisdiction, which is most of what is to the north of the fisheries line, the ratios taken from south of the line are reversed with PNG receiving 75 per cent and Australia 25 per cent of the allowable catch.⁷²

However, even these complicated arrangements are subject to further qualification. It was felt that in order to encourage the commercial exploitation of barramundi by the peoples of the Western Province of PNG, the fishery should be exempted from the operation of a portion of the division process. This gives Papuans complete and unshared access to the barramundi fisheries subject to Papua New Guinean control.⁷³ By virtue of this anomaly, the *Torres Strait Treaty* notes that the barramundi fishery is also not to be considered in statistical consideration of the Protected Zone fisheries as a whole.⁷⁴

Some flexibility is built into the system. By permitting individual agreements to be reached on individual stocks, the *Torres Strait Treaty* recognises that different fisheries may become more important for the nationals of a particular state. For example, the depressed price of pearl shell and the costs involved in its collection militate against a revival of this industry among Torres Strait Islanders or mainland Australians. However, the marked lower labour costs present in PNG may permit Papuans to collect shell in an economically viable way. Similarly, the prawn industry is more capital intensive and usually requires vessels to have on-board freezing capabilities. Trawlers with on-board freezers are expensive and it might be expected that the industry would be dominated by Australian interests that generally have easier access to the capital required. Article 23(7) of the *Torres Strait Treaty* allows the states to vary the apportionment of the catches between them, but subject to the proviso that the ratios for the entire fishing effort ought to still be in the same proportions as those outlined above.

Flexibility is also built into the management of particular stocks. Provision is made for the negotiation of subsidiary conservation and management arrangements for individual commercial fisheries. Either party can elect to nominate a Protected Zone fishery as one appropriate for consideration in such an individual agreement, and the other must enter into negotiations upon that subject within 90 days of the nomination. Such supplementary arrangements can include resources related to a fishery as well as to the fishery itself.⁷⁵ This allows the two states to tailor their management practices to best fit the demands of a particular stock in order to produce the most suitable result for all concerned.

Cooperation between Australia and PNG is the key to a number of other provisions in relation to fisheries in the Strait. In the context of a third state

⁷² Ibid art 23(4). See also Burmester, above n 37, 344–5; Mfodwo and Tsamenyi, above n 48, 151–7.

⁷³ *Torres Strait Treaty*, above n 1, art 23(5). The only Australian barramundi fishery in the Protected Zone is found in the territorial seas around Saibai, Dauan and Boigu Islands. There is no commercial fishing for barramundi from these islands, although small sales are made locally: *Torres Strait Protected Zone Joint Authority, Torres Strait Protected Zone Joint Authority Annual Report 1993/94* (1995) 24–5.

⁷⁴ *Torres Strait Treaty*, above n 1, art 23(8).

⁷⁵ Ibid art 22.

conducting commercial fishing in the Protected Zone, both states accept a duty to consult in the event that either is presented with a proposal for such fishing to take place. This is the case whether third state involvement is in terms of vessels flying their flags, vessels carrying predominantly third state crews, or even where third state equity is involved in fisheries ventures in the Protected Zone. Such activities must be approved by both Australia and PNG before they can be authorised to take place.⁷⁶ Such a policy is consistent with the objective of the *Torres Strait Treaty* of being for the benefit of the inhabitants of the Strait and western Papua, as it allows either state to discourage the influx of foreign labour into the principal industry of the region.

Cooperation is also sought with regard to inspection and enforcement.⁷⁷ The means by which the parties can seek to achieve these objectives expressly include the exchange of fisheries personnel. Regular consultation is also required by article 28, to ensure that the legislative mechanisms which the two states may use to achieve the effective protection of the fisheries are consistent and that the penalties are analogous for the same offences.

Licensing is also the subject of joint arrangements.⁷⁸ While both states can maintain their own licensing systems, they are required to make it an offence under their own legislation for their nationals to fish in those portions of the Protected Zone under the jurisdiction of the other state if the vessel concerned is not licensed by that other state. Further, it must also be an offence for a duly licensed vessel fishing in the other state's waters to be in breach of that state's regulations.⁷⁹ This ensures domestic enforcement of either state's fisheries laws before the courts of the other state for activities taking place in the Protected Zone, thus strengthening the regulatory impact of the *Torres Strait Treaty*.

The exercise of jurisdiction may also be altered by agreement. The parties may agree to flag state enforcement of the fisheries laws of either party, regardless of where the alleged breach took place. Thus, under such an arrangement, Australia may arrest and detain an Australian vessel for breaches of Papua New Guinean fisheries law that occurred in areas under PNG's jurisdiction and vice versa. However, such arrangements must not detract from the enforcement of fisheries laws. Both states have acknowledged that such arrangements are not to be used as a loophole to allow offenders against Australian or Papua New Guinean law to go unpunished.⁸⁰

Actual enforcement of the relevant fisheries law is also referred to in the *Torres Strait Treaty* to deal with the potential problems caused by overlap. Where the nationals of one state fish in the other state's jurisdiction within the

⁷⁶ Ibid art 27.

⁷⁷ Ibid art 28.

⁷⁸ Ibid art 26.

⁷⁹ Ibid art 28.

⁸⁰ Ibid.

Protected Zone, the *Torres Strait Treaty* also provides that ‘corrective action’⁸¹ be taken by the state of the transgressors.⁸²

While the raison d’être for the Protected Zone would seem to be to preserve both the natural and traditional human environments in the region, the treatment of fisheries indicates that the Zone also functions as a JDZ. Far greater flexibility in the placement of the fisheries line is possible by allocating portions of the commercial catch in the Protected Zone, allowing a more northerly fisheries line to placate Queensland and Islander concerns,⁸³ while at the same time implicitly recognising PNG’s moral claim to some proportion of the resources of the Strait. The nature of the *Torres Strait Treaty* also places great stress on cooperative measures, rather than allocating areas of specific responsibility, which may militate against potential jurisdictional disputes. The Protected Zone provides a useful example of how a JDZ may be utilised in maritime boundary delimitation agreements in order to open a range of options to deal with competing interests, which may provide a more workable solution in the long term.

In preparation for the implementation of the *Torres Strait Treaty* in 1985, the Australian Federal Parliament passed the *Torres Strait Fisheries Act 1984* (Cth). This Act created the Torres Strait Protected Zone Joint Authority (‘the Joint Authority’)⁸⁴ which was given responsibility for management of the Australian portions of the Protected Zone.⁸⁵ This covers all of the waters south of the fisheries jurisdiction line within the Protected Zone and the territorial seas of the northernmost Australian islands.⁸⁶ Beyond the Protected Zone, jurisdiction is shared between the Federal Government — for those waters beyond three nautical miles — and the Queensland Government — for waters within three nautical miles and for internal waters.⁸⁷

The Joint Authority is a small body composed of Federal and Queensland Ministers who have responsibility for fisheries matters.⁸⁸ It has several specialist advisory committees made up of representatives of the various stakeholders in the Torres Strait fishing industry.⁸⁹ This ensures decision making is retained at a ministerial level, while competent advice and feedback on decisions can come

⁸¹ Ibid art 28(5). ‘Corrective action’ is defined as including the arrest, prosecution and punishment of an offender.

⁸² Ibid art 28(6)–(16). These sub-articles provide for dealing with a variety of situations that might arise in this context.

⁸³ Joint Parliamentary Committee on Foreign Affairs and Defence, above n 35, 25–6.

⁸⁴ *Torres Strait Fisheries Act 1984* (Cth) s 30(1).

⁸⁵ *Torres Strait Fisheries Act 1984* (Cth) s 31(1).

⁸⁶ *Torres Strait Treaty*, above n 1, annex 5.

⁸⁷ Although Australia proclaimed a 12 nautical mile territorial sea in 1990, the Australian States only have jurisdiction out to a distance of three nautical miles from the territorial sea baselines. A Federal territorial sea exists between three and 12 nautical miles, and beyond that is the Australian Exclusive Economic Zone (‘EEZ’). As such, State governments only retain fisheries jurisdiction to a distance of three miles: see Opeskin and Rothwell, above n 2, 395–8, 406–10. Any exercise of jurisdiction beyond three miles by an Australian State is extraterritorial, and to be successful will need a nexus between the State and the matter regulated: see *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 2.

⁸⁸ Torres Strait Protected Zone Joint Authority, above n 73, 8.

⁸⁹ Ibid 9.

from those with the greatest interest in a harmonious and an effectively managed fishery. The Joint Authority is also responsible for the negotiation and maintenance of healthy cooperative arrangements with PNG.⁹⁰

Regulation of the Protected Zone fisheries under PNG's jurisdiction is achieved under the *Fisheries (Torres Strait Protected Zone) Act 1984* (PNG) chapter 411. The Act was passed in 1984, prior to the entry into force of the *Torres Strait Treaty*, and provides for a licensing system to regulate commercial fishing in the Protected Zone. Approval of licences is done at the ministerial level, as well as liaisons with Australian authorities in respect of management decisions. The Act also prescribes penalties for illegal fishing, including Papua New Guinean vessels fishing illegally in Australian waters. Foreign vessels can be forfeited for certain offences, and if the matter is dealt with on indictment rather than summarily, a prison term of up to one year can be imposed on those fishing illegally on a foreign vessel. This last provision would seem to be contrary to article 73 of *UNCLOS*.⁹¹

Articles 22 and 23 of the *Torres Strait Treaty* encourage both Australia and PNG to cooperate on matters relating to the conservation and management of the fisheries in the Protected Zone.⁹² To meet these objectives a number of cooperative arrangements have been agreed upon and these have covered a variety of subject areas. It was quickly determined that the most effective way to give effect to catch-sharing arrangements in the *Torres Strait Treaty* was to permit access by a limited number of vessels from one state to the fisheries under the other state's control, attempting to ensure a consistent overall balance. This has resulted in the granting of seven Papua New Guinean vessels access to the Australian portions of the Protected Zone to fish for prawns, five Australian vessels to fish for pearl shell in the Papua New Guinean portions of the Protected Zone, and 27 Papua New Guinean dinghies to fish for rock lobster in the Australian sectors.⁹³ Joint monitoring and continuing consultation have also been agreed to in relation to certain targeted species including the dugong, the Spanish mackerel and the turtle.⁹⁴

V DOMESTIC JURISDICTION

Aside from the problems inherent in any international border region, the geography of the Strait also highlights some practical difficulties in Australia's domestic offshore legislative arrangements. By virtue of Australia being a Federation, there is a necessary division of power and responsibility between the Commonwealth and the States. Legislative power offshore was expressly considered by the High Court of Australia in 1975 in *New South Wales v*

⁹⁰ Ibid 10–11.

⁹¹ See generally *Fisheries (Torres Strait Protected Zone) Act 1984* (PNG) ch 411; *Fisheries (Torres Strait Protected Zone) Regulations 1987* (PNG). See also Mfodwo and Tsamenyi, above n 48, 131–3.

⁹² *Torres Strait Treaty*, above n 1, arts 22–3.

⁹³ *Torres Strait Protected Zone Joint Authority*, above n 73, 10–11.

⁹⁴ Ibid.

Commonwealth ('*Seas and Submerged Lands Case*').⁹⁵ The Court held that all legislative power and title to the sea and seabed was vested in the Commonwealth, and the States' jurisdiction effectively ended at the low-water mark.⁹⁶ With the exception of internal waters, such as bays and river estuaries, all the seas and seabeds were under the Commonwealth's control.⁹⁷

The *Seas and Submerged Lands Case* came as an unpleasant shock to the States, and a change of government in Canberra saw the Commonwealth and State governments commence negotiations on jurisdiction in offshore areas.⁹⁸ The Fraser Government reacted strongly against centralism, and sought an agreement with the States to provide a more cooperative arrangement and to restore the situation widely assumed to have existed prior to the enactment of the *Seas and Submerged Lands Act 1973* (Cth). In 1979 the negotiations concluded in the Offshore Constitutional Settlement.

The Offshore Constitutional Settlement confirmed the High Court's view and the *Seas and Submerged Lands Act 1973* (Cth) position that sovereignty over all offshore areas (aside from those that were part of a State at the time of Federation) was vested in the Commonwealth. However, the Offshore Constitutional Settlement vested in the States jurisdiction over the sea and seabed within three miles of the baselines of the territorial sea. This allowed the States to maintain the traditional control they had enjoyed over the territorial sea prior to the *Seas and Submerged Lands Act 1973* (Cth), without the necessity of altering State boundaries which would have contravened s 123 of the *Australian Constitution*.⁹⁹

The Offshore Constitutional Settlement was enacted through a series of statutes passed by the Commonwealth and the States.¹⁰⁰ The two principal acts of legislation were the *Coastal Waters (State Powers) Act 1980* (Cth) and the *Coastal Waters (State Title) Act 1980* (Cth). The former Act provides that a State is to be given legislative power over the territorial sea within three miles of its coast as if those waters were within its limits.¹⁰¹ The latter Act grants the States title to the same belt of sea, subject to certain limitations,¹⁰² as if the waters were

⁹⁵ (1975) 135 CLR 337.

⁹⁶ This of itself would not preclude a State's legislation applying offshore, but such legislation would necessarily be extraterritorial and have to comply with the requirements for valid extraterritorial legislation: see Peter Hanks, *Constitutional Law in Australia* (1996) 216–24.

⁹⁷ *Seas and Submerged Lands Case* (1975) 135 CLR 337, 373 (Barwick CJ), 377–8 (McTiernan J), 470–1 (Mason J), 480–1 (Jacobs J).

⁹⁸ See above n 2.

⁹⁹ Section 123 of the *Australian Constitution* requires that where the limits of a State are altered, there must be approval from that State's Parliament and from a majority of electors in that State.

¹⁰⁰ The Commonwealth enacted some 14 separate pieces of legislation to implement the Offshore Constitutional Settlement after each of the states had passed legislation requesting the Commonwealth to introduce laws in agreed terms: Opeskin and Rothwell, above n 2, 408.

¹⁰¹ *Coastal Waters (State Powers) Act 1980* (Cth) s 5.

¹⁰² *Coastal Waters (State Title) Act 1980* (Cth) s 4. These limitations relate largely to the preservation of Commonwealth rights in respect of navigation, defence, and petroleum pipelines, and of pre-existing rights of individuals.

within the limits of the State. Essentially the Commonwealth granted its legislative power and title to the offshore areas, without vesting these areas in the States.

The situation was further complicated in 1983 when the Governor-General proclaimed territorial sea baselines around the Australian continent.¹⁰³ These lines, used to close the mouths of various bays, and around offshore reefs and islands, mark the point from which the territorial sea was measured. In the Torres Strait the baselines extend north from Cape York Peninsula, enclosing all the southern groups of islands and making a portion of the waters of the south central Strait internal waters of Queensland.¹⁰⁴

In the context of the Torres Strait, the Offshore Constitutional Settlement and baseline proclamation mean that waters within three miles of any Australian island or within three miles of a baseline are territorial waters under the jurisdiction of Queensland. Waters up to 12 nautical miles beyond these Queensland waters are part of the Commonwealth's territorial sea. Beyond these waters from 12 to 24 miles is the Commonwealth's 'Contiguous Zone', proclaimed in 1994.¹⁰⁵ Within the Contiguous Zone international law permits a state to apply fiscal, immigration, sanitation and customs regulations upon vessels, although at the present point in time Australia has not proceeded much beyond the mere proclamation of the zone. Within the Torres Strait, the area covered by the Contiguous Zone is small, as the presence of so many islands militates against areas of sea being more than 12 miles from land.

A recent addition to the jurisdictional patchwork has been the entry into force of the *Crimes at Sea Act 2000* (Cth). This legislation provides for the consolidation of a new national scheme for the application of the criminal law to Australia's offshore. While the totality of the arrangements need not be considered here, it is sufficient to state that all the waters under Australian jurisdiction in the Torres Strait are deemed to be in adjacent waters to the State of Queensland,¹⁰⁶ and, where it has application, the *Criminal Code Act 1899* (Qld) is the appropriate crimes legislation.¹⁰⁷ This is confirmed by s 14A of the Act.

VI JURISDICTION OVER TRANSITING VESSELS

UNCLOS did not merely clarify the width and nature of the various maritime zones that states could claim, but attempted to deal exhaustively with the issues affecting international straits. The *UNCLOS* provisions on the question of

¹⁰³ Commonwealth of Australia, *Government Gazette*, Proclamation No S29, 9 February 1983.

¹⁰⁴ Whether such waters were internal waters of Queensland at the time of Federation is an interesting question. Certainly, for the purposes of the Offshore Constitutional Settlement, waters landward of territorial sea baselines are subject to the jurisdiction of the adjacent State, and from the perspective of international law, they are internal waters. The baselines in this case are considered by Prescott, above n 49, 64.

¹⁰⁵ See Commonwealth of Australia, *Government Gazette*, Proclamation No S148, 14 April 1994.

¹⁰⁶ *Crimes at Sea Act 2000* (Cth) sch 1, cl 14.

¹⁰⁷ See *Crimes at Sea Act 2000* (Cth) sch 1, cls 2, 14.

international straits are to be found in part III of the Convention. It deals with four categories of strait:

- 1 Straits which are subject to international conventions of long-standing;¹⁰⁸
- 2 Straits subject to the regime of ‘transit passage’;¹⁰⁹
- 3 International straits with other routes of similar convenience (the so-called ‘Messina Exception’);¹¹⁰ and
- 4 Straits which provide access between the high seas or an EEZ and the territorial sea of a foreign state.¹¹¹

The three categories other than transit passage are all ultimately subject to innocent passage rules which are essentially the same as those under the *Convention on the Territorial Sea and the Contiguous Zone*,¹¹² which was in force at the time the regime in the Torres Strait was negotiated. Under the first category, *UNCLOS* was designed to protect well established arrangements, like those in relation to the Turkish Straits, from being brought into question. However, such arrangements are most unusual and are not of general application. The third category practically downgrades certain international straits to the status of mere territorial waters. This can occur where the strait does not serve as a significant route for international navigation. The rationale behind it is that if international shipping will not be inconvenienced by the potential withdrawal of an international strait, then there is little reason for the affected coastal state to be burdened with having to care for it.

The principal focus of part III of *UNCLOS* is the content of the transit passage regime. Such passage is defined as taking place when vessels navigate through an international strait from one part of the high seas or EEZ to another part of the high seas or EEZ.¹¹³ Transit passage does not preclude entering or leaving a state bordering the strait, subject to the entry requirements of such a state.¹¹⁴ Passage must be without delay, threat, use of force, or any other activities apart from those necessary for normal ship (or aircraft) operation.¹¹⁵ Article 39(2) of *UNCLOS* also requires compliance with general international regulations pertaining to safety and control of pollution.

Coastal state rights applicable to transiting vessels are very limited. Bordering states are entitled to set up traffic separation schemes subject to their presentation to the ‘competent international organisation’, in this instance the

¹⁰⁸ *UNCLOS*, above n 3, art 35(c).

¹⁰⁹ Ibid arts 37–44.

¹¹⁰ Ibid art 38(1). See generally Lewis Alexander, ‘Exceptions to the Transit Passage Regime: Straits with Routes of “Similar Convenience”’ (1987) 18 *Ocean Development and International Law* 479, 484–6.

¹¹¹ *UNCLOS*, above n 3, art 37. See generally Donald Rothwell, ‘International Straits and UNCLOS: An Australian Case Study’ (1992) 23 *Journal of Maritime Law and Commerce* 461, 467–9.

¹¹² Opened for signature 29 April 1958, 7477 UNTS 516 (entered into force 10 September 1964).

¹¹³ *UNCLOS*, above n 3, art 37.

¹¹⁴ Ibid art 37(2).

¹¹⁵ Ibid art 39.

International Maritime Organization. In addition, littoral states may make laws with respect to pollution, fishing, and breaches of fiscal, customs, immigration or sanitary controls.¹¹⁶

Most significant, however, is article 44 of *UNCLOS* which provides that transit passage shall not be hampered or suspended. This provision was designed to meet the objective of the maritime powers to ensure that key international straits could not be subject to closure. It makes clear that under no circumstances can a coastal state block vessels from an international strait, although transiting ships must comply with such regulations that can be validly applied to them.¹¹⁷

Although the Torres Strait is considerably more than 24 miles wide, it clearly qualifies as an international strait. This is evident from figure 1, which shows the impact of the extended 12 mile territorial sea on the Australian fringing reefs and islands scattered across the Strait. Any vessel passing through the Torres Strait, regardless of its draught or the route it takes, must pass through the territorial sea. As such, it is appropriate to examine the impact of part III of *UNCLOS* on the Torres Strait in order to determine to what extent it impinges upon the ability of the two coastal states to regulate activities within the region.

First, it is clear that the Torres Strait does not fall into the category of a strait that is the subject of an international convention of long-standing. The *Torres Strait Treaty* was signed in 1978 and only entered into force in 1985, which would seem to be an insufficient time to achieve the status of a 'convention of long-standing'. Further, the *Torres Strait Treaty* was negotiated to be consistent with the provisions of *UNCLOS*.¹¹⁸ It would be strange to categorise the *Torres Strait Treaty* as an exception to the provisions dealing with international straits under this category when the text of the *Torres Strait Treaty* itself sought to bind the parties to these very provisions. Consequently, it is reasonable to assume that the Torres Strait does not fall within the ambit of article 35(c) of *UNCLOS*.

Second, it is unlikely that the 'Messina Exception'¹¹⁹ for international straits where routes of similar convenience exist would have any application to the Torres Strait. Certainly, the basic geography of the Strait, being formed between a continental land mass (Australia) and an offshore island (New Guinea), might fit the requirements of article 38(1) of *UNCLOS*, but the use of the Messina Exception is inappropriate for a number of reasons. Most obviously, the island of New Guinea is not Australian territory, and therefore the article can have no application to it. Further, although all of the smaller islands in the Strait itself are Australian territory, there is no route of similar convenience seaward of any of these islands.¹²⁰ Consequently, this category has no relevance to the Torres Strait.

¹¹⁶ Ibid arts 41–2.

¹¹⁷ John Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 *American Journal of International Law* 77, 102–5.

¹¹⁸ *Torres Strait Treaty*, above n 1, art 7.

¹¹⁹ See generally Alexander, above n 110.

¹²⁰ See map.

Third, it is also clear that the Torres Strait does not provide access to the territorial sea of a third state. It is not possible to transit the Torres Strait and proceed directly from the Australian territorial sea to the territorial sea of another state without passing through an EEZ. Even vessels proceeding from west to east through the Strait, with Daru in PNG as their destination, must enter the Papua New Guinean EEZ at some point.¹²¹

This leaves the application of the transit passage regime to the Torres Strait. Clearly, at least some of the vessels passing through the Torres Strait are proceeding from the Pacific Ocean into the Arafura Sea or vice versa, hence they are transiting from one area of the EEZ to another. The Strait is used by vessels of a variety of states, so it clearly meets the criteria of an international strait under article 37 of *UNCLOS*, and under the *Corfu Channel Case (Merits)*.¹²²

As the coastal state through whose territorial sea and internal waters transiting ships must pass when using the Torres Strait, Australia has limited legislative competence at international law to deal with non-Australian flagged vessels using the Strait.¹²³ Within its competence, it may designate sea lanes and traffic separation schemes, regulations pertaining to pollution control, fishing vessels and customs, immigration, fiscal and sanitation measures. Subject to these limitations, Australia and PNG have liaised with the International Maritime Organization to promote the voluntary use of pilots in the Strait.¹²⁴

VII NATIVE TITLE ISSUES

One of the most significant elements in the mix of considerations affecting the Torres Strait is the impact of native title on jurisdictional questions in the region. It is worth noting that the original native title case — *Mabo* — which established the concept in Australian common law, originated in the Murray Islands in the eastern Torres Strait. Since that time, a number of Torres Strait Islander communities have sought to extend claims under the *Native Title Act 1993* (Cth) ('*Native Title Act*') to the adjacent waters around their islands, on the basis that these waters have been used for traditional exploitation for centuries.

Before examining the domestic situation of indigenous rights in the Strait, it is useful to provide an international context for the discussion. Over the past two decades, Torres Strait Islanders have increasingly called for a greater degree of control over their own affairs and resources.¹²⁵ From an international law perspective, these calls are consistent with developments towards the Draft

¹²¹ Ibid.

¹²² [1949] ICJ Rep 4.

¹²³ See, eg, *Crimes of the Sea Act 2000* (Cth).

¹²⁴ *Use of Pilotage Services in the Torres Strait and the Great North East*, International Maritime Organization Res A.710 (17th mtg), adopted 6 November 1991. See also Kaye, *The Torres Strait*, above n 27, appendix B.

¹²⁵ See, eg, statement of Terry Waia, Chairperson of the Torres Strait Regional Authority (Statement made at Marine Summit, Torres Strait, 22 March 2001) <http://www.tsra.gov.au/sbc_summit_speech.pdf> at 13 September 2001 (copy on file with author).

Declaration on the Rights of Indigenous People,¹²⁶ and notions of self-determination arising out of a series of international instruments and cases.¹²⁷

While Torres Strait Islanders have only briefly flirted with the idea of independence,¹²⁸ international definitions of self-determination can be consistent with a greater degree of control over administration and resources, short of the creation of a new state.¹²⁹ International practice in this regard varies, but notably in Canada the creation of Nunavut provides an example of what many Islanders aspire to — that is, the creation of a separate Commonwealth territory.¹³⁰ In practical terms, such a move is not currently on the political agenda, nor is there significant international pressure upon Australia to reconstitute itself politically. Nevertheless, it is important to note that the Islanders' position domestically is buttressed by a sound claim in international law to have their culture and resources under their own control.

On the domestic front, the issue of native title offshore has been considered by the Federal Court of Australia,¹³¹ and, at the time of writing, is before the High Court.¹³² In *Yarmirr v Northern Territory*,¹³³ Olney J in the Federal Court addressed the issue of whether waters in the vicinity of Croker Island in the Northern Territory¹³⁴ could be subject to native title. On 3 December 1999 the Full Federal Court dismissed an appeal against the judgment in the first instance.¹³⁵ The ramifications of that appeal, and the attitude of the Full Federal Court to the judgment of Olney J will be considered below.

A Establishing the Claim

The most fundamental proposition Olney J was obliged to consider in the case was whether native title rights could exist offshore. His Honour had to consider

¹²⁶ The Draft Declaration on the Rights of Indigenous People is presently before a Working Group established by the United Nations Commission on Human Rights: Commission on Human Rights Res 1995/32, UN Doc E/CN.4/RES/1995/32 (1995), see <<http://www.unhchr.ch/html/menu2/10/cind/wg6session.htm>> at 13 September 2001. The text of the Draft Declaration is contained in the Subcommission on Prevention of Discrimination and Protection of Minorities Resolution 1994/45, UN Doc E/CN.4/SUB.2/RES/1994/45 (1994).

¹²⁷ See, eg, *Western Sahara Case (Advisory Opinion)* [1975] ICJ Rep 12; *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90; *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (1993), 32 ILM 1661; *Bolivia–Brazil–Colombia–Ecuador–Guyana–Peru–Surinam (Amazon) Declaration*, UN Doc A/44/275, E/1989/79, 28 ILM 303, annex.

¹²⁸ See Kaye, *The Torres Strait*, above n 27, 151–2.

¹²⁹ See discussion in S James Anaya, *Indigenous Peoples in International Law* (1996) 75–125. See also Nico Schrijver, *Sovereignty over Natural Resources* (1997) 311–19.

¹³⁰ See, eg, Anaya, above n 129, 85–8. See generally Rebecca Tsosie, 'Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics and Traditional Ecological Knowledge' (1996) 21 *Vermont Law Review* 225.

¹³¹ *Yarmirr v Northern Territory* (1998) 156 ALR 370; *Commonwealth v Yarmirr* (1999) 168 ALR 426.

¹³² *Yarmirr v Northern Territory* (D9/2000, HCA, judgment pending).

¹³³ (1998) 156 ALR 370.

¹³⁴ See map.

¹³⁵ *Commonwealth v Yarmirr* (1999) 168 ALR 426.

the question on two levels. The first issue was whether the *Native Title Act*, under which the claim was brought, permitted claims to be made over submerged lands and waters. The second issue was related to the first, namely whether the common law permitted the assertion of a native title claim offshore. This second question was relevant because the extent of the *Native Title Act* is directly dependent upon the common law, and would not permit the maintenance of a claim if such a claim could not be sustained at common law.¹³⁶

In respect of the first issue, the principal legislation was directed at the rights of Aboriginal and Torres Strait Islanders under indigenous law. While the *Native Title Act* is clearly directed at land, it is by no means restricted to it. Section 223 provides for a definition of native title that includes rights and interests applicable to both land and waters.¹³⁷ Waters are defined to include sea areas, as well as internal waters, but s 253 of the Act does not seek to extend native title to areas beyond Australian jurisdiction. Section 6 expressly indicates that the Act applies only to coastal waters and waters over which Australia asserts jurisdiction under its offshore legislation. This offshore legislation was overhauled in 1994 to bring it into compliance with UNCLOS.¹³⁸

Olney J confirmed, as was generally expected, that the *Native Title Act* certainly purported to apply to waters subject to Australian jurisdiction.¹³⁹ His Honour noted that this point was admitted by the Commonwealth. In relation to the second question, Olney J held native title should not be subject to a territorial restriction. The *Native Title Act* was not intended to mirror the concept of native title as set down by the High Court in *Mabo*,¹⁴⁰ but rather to ‘extend and enhance the common law concept of native title’. His Honour stated:

It would be entirely inconsistent with the thrust of the legislation if the requirement expressed in section 223(1)(c) of the *Native Title Act* that the rights and interests which constituted native title or native title rights and interests must be rights and interests that are recognised by the common law of Australia were to be construed as imposing a territorial limit in relation to the recognition of native title.¹⁴¹

In the event that an appeal court overturned his judgment, Olney J undertook an examination of the territorial limits of the Northern Territory. This analysis relied heavily upon the High Court’s judgment in *Raptis & Son v South Australia*.¹⁴² Interestingly, *Raptis* itself, and all the other cases his Honour made

¹³⁶ *Native Title Act 1993* (Cth) s 223(1)(c).

¹³⁷ Eg, s 223(2) indicates ‘rights and interests’ can include fishing rights.

¹³⁸ See *Maritime Legislation Amendment Act 1994* (Cth); *Coastal Water (NT Title) Act 1980* (Cth) s 7; *Seas and Submerged Lands Act 1973* (Cth) s 7.

¹³⁹ *Yarmirr v Northern Territory* (1998) 156 ALR 370, 387–8. The operation of the *Native Title Act 1993* (Cth) is expressed to extend to the coastal sea of Australia and its external territories, as well as waters over which Australia asserts sovereign rights: s 6.

¹⁴⁰ (1992) 172 CLR 1.

¹⁴¹ *Yarmirr v Northern Territory* (1998) 156 ALR 370, 388–9.

¹⁴² (1977) 138 CLR 346 (*‘Raptis’*).

use of in this context,¹⁴³ predated the proclamation of territorial sea baselines.¹⁴⁴ By virtue of the Offshore Constitutional Settlement, which was expressly upheld by the High Court in *Port MacDonnell Professional Fishermen's Association v South Australia*,¹⁴⁵ the first three miles of the territorial sea are subject to State (or in this case Northern Territory) jurisdiction. The territorial sea is measured from baselines, proclaimed by the Governor-General with effect from 14 February 1983.¹⁴⁶ For the purposes of international law, and those of the Offshore Constitutional Settlement, the waters on the landward side of the baselines are internal waters. However, Olney J's discussion implicitly assumes that the common law offshore limits of the Northern Territory are still determined solely by application of the Letters Patent establishing the Province of South Australia.¹⁴⁷

Such an approach appears to be necessary on two grounds. Firstly, if the common law did not permit the existence of native title beyond the limits of the Territory, all native title rights beyond those limits would have been extinguished on its establishment.¹⁴⁸ Secondly, s 7 of the *Coastal Waters (Northern Territory Title) Act 1980* (Cth) states that nothing in that Act is deemed to alter the limits of the Northern Territory. It could also be assumed that the proclamation of baselines under s 7 of the *Seas and Submerged Lands Act 1973* (Cth) did not alter the limits of the Territory, as to admit that possibility would have meant that similar baselines proclaimed for the States would be invalid by virtue of conflicting with s 123 of the *Australian Constitution*.¹⁴⁹

The essential validity of Olney J's approach was confirmed on appeal. Beaumont and von Doussa JJ carefully reviewed the appropriate tests in establishing native title at common law as drawn from *Mabo*,¹⁵⁰ *Wik Peoples v Queensland*¹⁵¹ and *Fejo v Northern Territory*¹⁵² — and then moved to consider

¹⁴³ *The Fagernes* [1927] P 311; *Direct United States Cable Company v Anglo-American Cable Company* [1877] 2 AC 394; *Adams v Bay of Islands County* [1916] NZLR 65; *Ferguson v Union Steamship Company of New Zealand Ltd* (1968) 119 CLR 191. Interestingly, Olney J made no reference to *Haruo Kitaoka v Commonwealth* (Unreported, Supreme Court of the Northern Territory, Wells J, No 14 of 1937) which considered whether Boucaut Bay was within the limits of the Northern Territory. This omission was rectified by the Full Federal Court upon appeal: *Commonwealth v Yarmirr* (1999) 168 ALR 426, 456–7 (Beaumont and von Doussa JJ).

¹⁴⁴ *Yarmirr v Northern Territory* (1998) 156 ALR 370, 389–95.

¹⁴⁵ (1999) 168 CLR 340.

¹⁴⁶ See *Coastal Waters (States Title) Act 1983* (Cth).

¹⁴⁷ Province of South Australia, 'Letters Patent under the Great Seal of the United Kingdom erecting and establishing the Province of South Australia and fixing the boundaries thereof', *Government Gazette*, Proclamation No SRSA: GRG 2/64, 19 February 1836.

¹⁴⁸ If this is so, then his Honour should have considered the Letters Patent establishing New South Wales, out of which South Australia was subsequently established by its own Letters Patent.

¹⁴⁹ While s 123 of the *Australian Constitution* would not prevent the Commonwealth from legislating to alter the limits of the Northern Territory, it would be bizarre to hold that the same proclamation that altered the limits of the Northern Territory did not alter the limits of any State.

¹⁵⁰ (1992) 175 CLR 1.

¹⁵¹ (1996) 187 CLR 1.

the application of the *Native Title Act*.¹⁵³ While recognising that the application of the act to offshore areas was problematic,¹⁵⁴ the majority ultimately adopted the view of Olney J that the Act did apply, and that it was unnecessary to determine the precise limits of the Northern Territory.¹⁵⁵ They also undertook an exhaustive examination of the limits of the Northern Territory and, while providing more detail than Olney J, were in general agreement with his conclusions.¹⁵⁶

There are territorial sea baselines drawn from Cape York Peninsula to enclose islands in the southern third of the Strait. This means internal waters lie between these islands and Cape York, and from an international law perspective, internal waters largely equate with land. It is extremely unlikely that the baselines would reflect the colonial limits of Queensland, as discussed above in Part II, which would require a review of the relevant historical evidence. This material is not readily accessible, nor is its existence or relevance widely appreciated, potentially creating difficulties in the future.

B Evidentiary Matters

Olney J had a sizeable quantity of evidence to assess, and from his judgment, a number of conclusions can be drawn. Firstly, the credibility of indigenous evidence is fundamental to the success of establishing a claim to customary marine tenure. Clearly, the claimants benefited substantially from the presence of articulate and credible senior members of the community, as this evidence was at the core of much of Olney J's analysis.¹⁵⁷ Secondly, other material, including anthropological reports and historical documents, will be of more limited utility. These can supply a context for direct oral evidence, but in the absence of credible oral evidence will not rectify the deficiency.

As might be expected in an appeal, the Full Federal Court was reluctant to re-examine the trial judge's conclusion with respect to the evidence presented. Beaumont and von Doussa JJ did not seek to overturn any of Olney J's findings with respect to the oral evidence, noting that his Honour had a substantial advantage over them in assessing such evidence.¹⁵⁸ They also expressly rejected an argument put by the indigenous claimants.¹⁵⁹

¹⁵² [1998] HCA 58 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 10 September 1998).

¹⁵³ *Commonwealth v Yarmirr* (1999) 168 ALR 426, 434–9.

¹⁵⁴ This is because the date of acquisition of sovereignty over sea areas followed *R v Keyn* (1876) 2 Ex D 63.

¹⁵⁵ *Commonwealth v Yarmirr* (1999) 168 ALR 426, 439–45 (Beaumont and von Doussa JJ).

¹⁵⁶ *Ibid* 448–71.

¹⁵⁷ *Yarmirr v Northern Territory* (1998) 156 ALR 370, 397.

¹⁵⁸ *Commonwealth v Yarmirr* (1999) 168 ALR 426, 474.

¹⁵⁹ *Ibid* 480–3.

C *Nature of the Rights in Issue*

Given that the claimants were seeking the recognition of a wide range of rights, the case discusses a number of issues relevant to the type of rights that might be asserted. On the most basic level, Olney J addressed the system of offshore native title rights that existed in this case. While the discussion constitutes the heart of the matter, it is of limited utility in other cases as it is apparent that the rights concerned are those generated by the indigenous practices and traditions of the Croker Island region.

Firstly, Olney J sought to clarify what the claimants were entitled to when they asserted 'ownership' of certain areas of the sea.¹⁶⁰ He fixed upon a phrase of Toohey J's in *Mabo* which equated 'ownership' with 'a bundle of rights',¹⁶¹ rather than ascribing an absolute form to the concept.¹⁶² An anthropologists' report was used to support the conclusion that the claim could not include exclusive possession, as it did not expressly assert such a right.¹⁶³ While evidence was adduced that indicated that perhaps other indigenous groups might ask permission before entering another group's offshore estate,¹⁶⁴ there was no evidence to indicate that requirement should be imposed upon non-indigenous people.¹⁶⁵

On the other hand, there was clear evidence that a right to use the resources of the sea in the claimed area did exist. Olney J noted that hunting, gathering and fishing represented the principal reasons why individuals entered the claim area. However, uses as demonstrated in the evidence did not support any claim over the subsoil of the seabed.¹⁶⁶ Isolated examples of trade aside,¹⁶⁷ Olney J was not prepared to state that there was a native title right to engage in trade.

Interestingly, it was held that a right to 'protect' places of importance and to 'safeguard' cultural knowledge did exist. Certainly, Olney J was satisfied that particular places within the claimed area had special significance for the claimants,¹⁶⁸ and that associated with a particular offshore estate was a knowledge of various practices, stories and traditions.¹⁶⁹ Further, his Honour stated that he was also satisfied that these matters were part of the bundle of rights which accrued to native title over the sea area, as they were intimately associated with activities relating to the use of land and waters within the claim. What is frustrating is that Olney J did not indicate clearly what manner of

¹⁶⁰ *Ibid.*

¹⁶¹ (1992) 175 CLR 1, 208.

¹⁶² *Yarmirr v Northern Territory* (1998) 156 ALR 370, 414.

¹⁶³ *Coastal Waters (State Title) Act 1983* (Cth) s 3.

¹⁶⁴ Referred to as 'yuwurrumu' in the judgment.

¹⁶⁵ *Yarmirr v Northern Territory* (1998) 156 ALR 370, 414–22.

¹⁶⁶ *Ibid* 423.

¹⁶⁷ Historical evidence of the relationship between the Aboriginal people and the Macassans was not accepted as suggesting more than trade between the groups, and more recent examples of trade between individuals and mission stations was also insufficient to establish a native title right to trade: *ibid* 424–5.

¹⁶⁸ *Ibid* 425–6.

¹⁶⁹ *Ibid* 426–7.

'protection' the claimants might be entitled to employ to safeguard these sites and cultural knowledge. He noted that community members may be under an obligation to ensure that inappropriate practices in certain 'dangerous areas' do not take place,¹⁷⁰ but he did not describe exactly how this might be accomplished. Consequently it is not clear whether certain areas within the claim give rise to exclusive possession, or alternatively require supervised access, or access following instruction as to what behaviour might be acceptable. This is a question which would appear to require further development.

On appeal, the majority of the Full Federal Court upheld the stance taken by Olney J. They confirmed his findings regarding the rejection of exclusive possession over sea areas asserted by the indigenous people,¹⁷¹ the rejection of exclusivity in the context of access for mining,¹⁷² and hunting and fishing.¹⁷³ They also agreed with Olney J's conclusions with respect to the scope of the right to trade in the resources of the area.¹⁷⁴ Beaumont and von Doussa JJ also rejected an argument put by the Commonwealth that native title rights and the common law public right to fish had merged.¹⁷⁵

In terms of the possibility of an exclusive right to fish arising out of native title, Merkel J disagreed with the majority and Olney J.¹⁷⁶ Merkel J found that the common law had, in other circumstances, been prepared to grant exclusive fishing rights.¹⁷⁷ After reviewing English, New Zealand, American and Canadian authority, Merkel J noted that no skeletal principle of the common law would be fractured by an exclusive grant, and accordingly, such a grant was possible.¹⁷⁸

D Customary Marine Tenure and International Law

Olney J also considered the impact of the claim on Australia's international obligations. While the bulk of the waters in issue were on the landward side of Australia's 1983 proclaimed baselines,¹⁷⁹ and therefore in internal waters, portions of the waters claimed extended into the Australian territorial sea, potentially affecting the rights of foreign vessels pursuant to *UNCLOS*. Before examining Olney J's approach to the problem, it is useful to consider the nature of the rights and obligations in issue.

¹⁷⁰ Ibid 426.

¹⁷¹ *Commonwealth v Yarmirr* (1999) 168 ALR 426, 475 especially [239] (Beaumont and von Doussa JJ).

¹⁷² Ibid 477.

¹⁷³ Ibid 478.

¹⁷⁴ Ibid 440.

¹⁷⁵ Note the similar approach in *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1, 12–21 (Mansfield J). In this case Mansfield J adopted the reasoning of Olney J in the first instance in *Yarmirr v Northern Territory* (1998) 156 ALR 370 and the Full Federal Court in *Commonwealth v Yarmirr* (1999) 168 ALR 426.

¹⁷⁶ *Commonwealth v Yarmirr* (1999) 168 ALR 426, 547 (Merkel J).

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ *Coastal Waters (State Title) Act 1983* (Cth).

UNCLOS does not recognise indigenous rights. It is concerned with the interests, rights and obligations of states in respect of the seas, and there is very little in it directed towards the rights of individuals or groups. That said, the Third United Nations Conference on the Law of the Sea was attended by a number of national liberation movements and observers representing dependent territories seeking independence.¹⁸⁰ Resolutions III and IV in the annex to the Final Act of the Conference urge that *UNCLOS* be applied for the good of people in territories whose peoples have not attained full independence. It expressly adopts the notion of the ‘common heritage of mankind’ with respect to the ownership of the resources of the deep seabed,¹⁸¹ which also has echoes of providing benefits to individuals rather than states.¹⁸²

Realistically, however, there is little in *UNCLOS* for an indigenous group to take heart in regarding the recognition of special rights and claims of traditional ownership over offshore areas. If anything, the reverse is true. While a state can organise its own internal affairs without interference from other states, it is clear that it cannot use its internal legislative arrangements as an excuse for a dereliction of its international obligations.¹⁸³ *UNCLOS* imposes limitations upon states in terms of their jurisdiction offshore. Such limitations may not be consistent with an unfettered exercise of native title rights over an offshore area. To remain compliant with international law, a state may have to dilute or even negate indigenous rights over offshore areas.

The potential impact of this notion can be seen in the Torres Strait. As an international strait, meeting the criteria for such straits under part III of *UNCLOS*, Australia is not permitted to suspend transit passage of foreign vessels through its waters.¹⁸⁴ The main and only practical channel for shipping through the Strait is in an area that is presently the subject of several native title claims.¹⁸⁵ It is clear that if Australia is to maintain its international obligations that whatever the content of the rights accruing to the Torres Strait Islanders as a result of a successful claim, those rights *cannot* include a right to exclude vessels from transiting their waters. Were a court to hold otherwise, states whose vessels might be prevented from passing through the Strait would be entitled to pursue Australia for a breach of its part III obligations, and be confident of success in doing so. Similarly, the duty to permit freedom of navigation is not restricted only to international straits. Coastal states, aside from a limited non-

¹⁸⁰ *Third United Nations Conference on the Law of the Sea*, UN Doc A/CONF.62/WP.10/REV1 (1979), 18 ILM 686.

¹⁸¹ *UNCLOS*, above n 3, preamble, art 136.

¹⁸² The International Court of Justice had the opportunity to consider whether a maritime boundary treaty had to take into account the rights of a minority in a region adjacent to the maritime area concerned in the *Case Concerning East Timor (Portugal v Australia)* [1994] ICJ Rep 90. The Court did not deem it necessary to consider the issue as a result of the absence of an indispensable third party to the proceedings.

¹⁸³ *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27.

¹⁸⁴ *UNCLOS*, above n 3, pt III, s 2.

¹⁸⁵ Kaye, *The Torres Strait*, above n 27, 141–3.

discriminatory right to suspend access temporarily, must permit innocent passage by all vessels.¹⁸⁶ Permanently closing parts of the territorial sea, subject to indigenous access only, would clearly be in breach of part II article 3 of *UNCLOS*.

Olney J noted that the common law need not conform with international law, but that international law had a legitimate and important influence on its development.¹⁸⁷ His Honour also noted that Australia had a clear and express obligation under *UNCLOS* to allow vessels a right of innocent passage through its territorial sea without notice. To allow a claim for exclusive possession to be upheld would breach this obligation, and was deemed untenable.¹⁸⁸ His Honour's ruling on this point would seem to indicate that the presence of native title claims in areas subject to maritime traffic will produce adverse consequences in so far as international obligations with respect to navigation are concerned.

On appeal, the majority did not feel the need to revisit the status of a right of innocent passage in Australian law in great detail, but rather dealt with the issue by examining a common law right of navigation. In this they reinforced the result reached by Olney J that native title rights were subject to a rule requiring freedom of navigation.¹⁸⁹ What brief mention was made of international law was consistent with Olney J's approach.¹⁹⁰ In dissent, Merkel J considered the issue in greater depth and expressly agreed with Olney J that whatever rights were held by the indigenous people, they were subject to Australia's international law obligations — including a right of innocent passage — and accordingly there could be no exclusive possession.¹⁹¹ These judgments would appear to safeguard Australia's international obligations with respect to transit passage through the Torres Strait.

One matter affecting the Torres Strait that was not dealt with in either of the *Yarmirr* cases was the proximity of the waters of a foreign state. PNG became independent from Australia in 1975, and therefore some of the waters of the

¹⁸⁶ *UNCLOS*, above n 3, pt III, s 3.

¹⁸⁷ *Yarmirr v Northern Territory* (1998) 156 ALR 370, 428–9; cf *The Le Louis* (1817) 2 Dods 210, 251, 254; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616; *Fothergill v Monarch Airlines Ltd* [1981] AC 251. See also Ivan Shearer, *Starke's International Law* (11th ed, 1994) 71.

¹⁸⁸ Olney J also based this finding on the existence of a common law of free navigation on the sea. Such a right was skeletal to the common law and therefore rendered the claim of exclusive possession nugatory: *Yarmirr v Northern Territory* (1998) 156 ALR 370, 430. A similar result was reached by the majority in the Full Court: *Commonwealth v Yarmirr* (1999) 168 ALR 426, 473 (Beaumont and von Doussa JJ).

¹⁸⁹ *Commonwealth v Yarmirr* (1999) 168 ALR 426, 473 (Beaumont and von Doussa JJ).

¹⁹⁰ Ibid 477.

¹⁹¹ Ibid 535 (Merkel J).

Strait are subject to its jurisdiction. It is clear under the *Native Title Act* that native title rights can only apply to waters subject to Australian jurisdiction.¹⁹²

The application of this to the Torres Strait raises some unique problems. Jurisdiction under the *Torres Strait Treaty* is divided between Australia and PNG on different bases for the seabed and water column, creating multiple boundaries. For example, in some areas, the Papua New Guinean seabed would be overlain with Australian fisheries jurisdiction.¹⁹³ Logically, this would appear to terminate native title rights for the seabed, but would not interrupt those native title rights applicable to the waters over the seabed. This issue is yet to be tested by an Australian court. A second question arises in relation to the Protected Zone. It explicitly seeks to preserve traditional rights to exploit the waters of the Strait for individuals on both sides of it. It may be argued that the creation of the Protected Zone preserves native title rights and that they could be asserted even in respect of Papua New Guinean waters.

It is submitted that such an alternative is not possible. Clearly the common law will not permit the assertion of rights over waters or territory that belong to another state. Further, even if native title rights did survive, they would do so subject to Papua New Guinean law and not the regime under the *Native Title Act*. Claims under Papua New Guinean law would be problematic, as the ability of non-Papua New Guinean citizens to hold proprietary rights in freehold land is restricted under the Constitution of that state,¹⁹⁴ and other rights are subject to regulation. A better argument would be that the *Torres Strait Treaty* provides for various rights that are embodied in the domestic legislation of both Australia and PNG. These rights are statutory in nature, and are distinct from any rights existing at common law, or pursuant to the *Native Title Act*. These statutory rights do not displace or extinguish native title rights with respect to Australian waters, but may be all that are left to Torres Strait Islanders with respect to Papua New Guinean waters or seabed. Since the rights are directed towards the same ends as native title rights, the two are analogous, but the statutory rights derived from the *Torres Strait Treaty* cannot be extinguished in the same fashion as native title rights.

E Recent Developments

The High Court is presently considering the outcome of *Yarmirr v Commonwealth*,¹⁹⁵ but the decision has had some interesting by-products. Concurrent in time with *Yarmirr v Northern Territory* are a series of claims to offshore areas around the islands in the Torres Strait, in the Gulf of Carpentaria,

¹⁹² *Native Title Act 1993* (Cth) s 6 provides:

This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth).

¹⁹³ See above Part III.

¹⁹⁴ The *Constitution of Papua New Guinea* s 56 provides that only Papua New Guinean nationals are permitted to hold freehold land.

¹⁹⁵ *Yarmirr v Northern Territory* (D9/2000, HCA, judgment pending).

the Great Australian Bight and other sea areas which are presently before the Native Title Tribunal.¹⁹⁶ As noted above, the *Native Title Act* clearly permits claims to submerged lands subject to Australian jurisdiction, and various Torres Strait Islander communities have taken advantage of this by lodging applications with the Tribunal. The applications were based upon the traditional areas used for fishing by each Islander community. The traditional division of sea areas of the Strait has been documented since the Cambridge Anthropological Expedition to the Torres Strait prior to World War I, although opinions between communities vary as to precisely where boundaries run.¹⁹⁷

In addition, the issue of traditional fishing rights in the Torres Strait Islands has recently drawn national attention. In May 1998 three traditional fishermen from Murray Island observed a commercial vessel fishing in the vicinity of Murray Island. The Islanders had previously concluded a ‘gentlemen’s agreement’ with commercial fishing interests to establish a fishing exclusion zone in the area. Angered by the breach of this arrangement, a confrontation ensued which led to charges against two of the Islanders for robbery of the fish pursuant to s 411 of the *Criminal Code Act 1899* (Qld).¹⁹⁸

After a variety of pre-trial proceedings, the case was brought to the Queensland District Court in January 2001. The jury acquitted the two men of theft and in the subsequent media attention the case has generated claims of a likely ‘fish war’ in the Strait. While significant in political terms, it is submitted that the legal impact of the case is limited, given that it was determined by a jury and defences under the *Native Title Act* were not pleaded.

VIII CONCLUSION

The issues surrounding the exercise of jurisdiction in the Torres Strait region are among the most complex in Australian law and are unlikely to diminish in importance or complexity in the foreseeable future. Bearing this in mind, coordination of jurisdictional responsibility between governments — Commonwealth, State and Papua New Guinean — is vital. This is particularly the case given the growing concerns caused by native title in the region. Ensuring adequate protection of vital resources and the support and maintenance of traditional communities are difficult enough without the presence of an essential international seaway, dangerous waters and a fragile reef ecosystem. Certainly, it represents one of the more complex jurisdictional regimes in the world, and an ongoing challenge for the states on either side of it.

¹⁹⁶ See, eg, *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2001] FCA 414.

¹⁹⁷ Kaye, *The Torres Strait*, above n 27, 61–2.

¹⁹⁸ David Haigh, “‘Fishing’ War in the Torres Strait: The Queen v Benjamin Ali Nona and George Agnes Gesa” (1999) 6 *James Cook University Law Review* 165, 165–8.