

OFFSHORE NATIVE TITLE IN AUSTRALIA

- [The context of offshore sea rights](#)
- [The Mabo case and the Native Title Act](#)
- [The Croker Island case – Yarmirr v Commonwealth](#)
- [The Blue Mud Bay Case – Gumana v Northern Territory of Australia](#)
- [The Wellesley Island Case – The Lardil Peoples v State of Queensland](#)
- [The Torres Strait Regional Sea Claim](#)
- [Future Implications?](#)

The context of offshore sea rights

In Australian native title law, there has been no recognition of exclusive rights to sea country and, until the Croker Island case in 2001, there was no recognition of any form of native title over the sea. The Croker Island case recognised some limited native title rights and interests over sea country but did not recognise any form of exclusive native title rights. In that decision by the High Court, Justice Kirby argued that exclusive native title over the sea may be possible, but the majority judges did not believe that the public rights of fishing and navigation, as well as the internationally recognised rights of innocent passage, could exist alongside any form of exclusive possession by Indigenous peoples.

This paper examines how the decision in the Croker Island case has affected the outcomes of sea country cases that have followed, such as the Wellesley Island and Blue Mud Bay cases. This paper also examines how these cases are likely to affect future sea country decisions, especially those currently awaiting finalisation by the courts, as well as the likelihood of Indigenous peoples gaining exclusive possession of sea country.

The *Mabo* case and the *Native Title Act*

The *Mabo* case¹ involved a claim by the Meriam people of the Murray Islands in the Torres Strait over their traditional lands but not their sea country. The High Court decided that where an Indigenous group has continuously possessed their land and there has been no action by the Crown which could destroy native title (such as the grant of a freehold title), Indigenous land rights can be recognised by the common law. The High Court decision in the *Mabo* case acknowledged that when Australia was settled by British colonists, the Indigenous peoples held a native title to their countries and that native title is now a burden upon the radical title of the Crown. This means that, while the Crown is able to alienate land within Australia, any land that has not been alienated by the Crown may be claimed through the native title process by the Indigenous people of that land. The Meriam people were given exclusive possession of their land on the Murray Islands except for those places where freehold had been granted to land holders.

The Commonwealth *Native Title Act* was enacted in 1993 as a response to the *Mabo* decision and Indigenous groups are able to apply for exclusive native title over their country, where native title has not been extinguished by legitimate acts of government. Section 223 of the *Native Title Act* makes clear the criteria to be met by Indigenous peoples in applying for recognition of native title:

- that they are an identifiable group;
- with traditionally held rights and interests;
- with a connection to land or waters; and
- those rights and interests are recognisable by the common law.

The Act explicitly recognises that native title rights may be held 'in relation to land or waters', where waters are defined to include the 'sea ... a tidal inlet, a bay, an estuary, a harbour or subterranean waters' and 'the bed or subsoil under, or airspace over, any waters' as well as 'the shore ... between the high and low water mark'². In the Croker Island case, the Commonwealth tried to argue that, while a right to land rights over water was acknowledged in the Act, the important aspect was that the rights should be recognised by the common law and that the common law had no jurisdiction over the sea. This argument was not accepted by the High Court.

The *Native Title Act* itself is extended to 'the coastal sea of Australia ... and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*'.³ Under this definition, Australia's sovereign territory extends to twelve nautical miles from the low-tide mark. However, the first sea country cases found that Indigenous peoples may be able to argue for possession of sea country up to three miles from the Australian coast but no right to argue with regard to seas beyond this point (since overturned in the Croker Island case).⁴

Further, some native title rights, such as to hunt or fish, may be recognised while others may not, such as the ability to exclude people from the native title determination area. Traditional fishing rights are considered a native title right but the right is not considered as being over the waters; it is considered as a right to access the traditional sea country for the purpose of fishing (non-commercially).⁵

The *Native Title Act* has provided a structure for Indigenous groups to apply for the recognition of their rights to traditional lands and sea country, but the factors to be considered, in an application, can be extremely limiting and some have been interpreted quite narrowly by the courts. For example, where a direct and continual link with regard to traditional usage of land cannot be established, a native title claim is likely to fail. In the *Yorta Yorta* case, the courts considered that where an interruption has occurred in the cultural continuum, whether by the Indigenous group concerned or because of outside influence, native title cannot be granted even when the applicants have reconnected with their traditional land and culture.⁶

The Croker Island case – *Yarmirr v Commonwealth*

Croker Island is located off the north-western tip of Arnhem Land in the Northern Territory. The peoples who made the application were an amalgamation of Croker Island inhabitants including the Madilarri-Ildugij, Mangalarra, Muran, Gadurra, Minaga, Ngayndjagar and Mayorram peoples. The Croker Island case application was over both the waters in the intertidal zone (between the high and low water marks) and beyond, and the sea-bed beyond the low tide mark.

The Croker Island claimants have continuously observed their traditional customs in relation to the sea country since sovereignty, as required under the *Native Title Act*. Their traditional customs include hunting, fishing and gathering as well as a requirement of peoples from other Indigenous groups to gain permission to enter that sea country.⁷ This is exclusive possession but this right was not recognised by the High Court because the Croker Island peoples did not exclude the European colonists. However, as Justice Kirby argued in that case, it is unlikely that exclusive possession could continue against an armed invader⁸. The level of exclusion that was maintained since colonisation was in fact based on a continued 'assertion of rights to be consulted in decisions concerning access to, and use of, the claimants country'⁹. This was not recognised as a relevant form of exclusion by the majority judgement and the Croker Island peoples were given limited native title over their sea country, which did not 'confer possession, occupation, use and enjoyment of the sea and the sea-bed within the claimed area to the exclusion of all others'.¹⁰

At times, the Commonwealth government has given land back to Indigenous groups through land grants under the *Aboriginal Land Rights (Northern Territory) Act 1976*, and such a grant had occurred with regard to the lands of the Croker Island groups. However, even where these land grants specifically state that the Indigenous group has ownership of the land and sea-bed to the low-tide mark, and any waters upon it, to the exclusion of all others, the Croker Island decision by the High Court dismissed the ability of Indigenous people to exclude anyone from the intertidal waters (between the low and high tide water marks) of their countries. Even those grants of freehold to the low-tide mark were considered by the Court to only recognise exclusive ownership of the sea-bed to the low-tide mark, not the waters above the sea-bed.¹¹ Exclusive possession of any part of the ocean waters was found to be inconsistent with the public rights of fishing and navigation, as well as inconsistent with the internationally recognised right of innocent passage through international waters.¹²

In the Croker Island case, it was successfully argued that native title can exist over the sea. However, it was also found that the Crown did not have a radical title over the sea and, although the common law was traditionally not thought to extend beyond the land of Australia, the *Seas and Submerged Lands Act* created a sovereign space of 12 nautical miles into the seas around Australia and that native title could therefore extend to the point of Australian sovereignty. It is internationally recognised that the 'high seas' are not owned by any country and are considered 'part of the common heritage of humanity',¹³ therefore native title over sea country can only be recognised to extend as far as the sovereign territory of Australia.

It is interesting to note that the exclusive possession over the sea-bed enjoyed by groups such as oyster growers was not considered by the majority in the Croker Island case. However, it should have been mentioned because these businesses can enjoy exclusive possession of the sea-bed and qualified exclusive possession of the waters above that sea-bed while accommodating the public right of navigation and the international right of innocent passage, but not the public right to fish which does not stand against such possession (therefore the exclusive possession is qualified).¹⁴ These arguments were not considered in the Croker Island case, except by Justice Kirby, who argued that qualified exclusive possession was possible while accommodating the important public and international rights because statutory rights of such a nature already exist for sea-located businesses.¹⁵

Eventually the High Court held that the Croker Island groups had limited native title rights with regard to their sea country. These rights included the right to fish, hunt and gather for non-commercial purposes in the claimed area of sea and sea-bed. The rights also included a right to access the sea and sea-bed to travel, to take care of areas of spiritual significance and to safeguard spiritual knowledge. It was explicitly found that these rights were not to be considered possession to the exclusion of all others, therefore the rights are not exclusive.¹⁶

For a summary of resources, commentary and cases [click here](#).

The Blue Mud Bay Case – *Gumana v Northern Territory of Australia*

The Blue Mud Bay case involved sea country located in a small bay off the eastern shores of Arnhem land, 50km north-west of Groote Eylandt. The land had already been granted in fee simple to the Indigenous groups in the area as part of the Arnhem Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The claimants are from different groups that all identify as Yolngu clans. Initially the groups claimed exclusive possession over waters in the intertidal zone as well as exclusive possession over the entire claim area.

However, at the outset of the hearing, the claimants conceded that exclusive possession of sea country beyond the low-tide mark was not a possibility, due to the Croker Island decision.¹⁷ They continued to argue for exclusive rights with regard to certain issues, specifically with regard to exclusive possession over waters above the sea-bed, which was a freehold grant, and over sites of spiritual significance.¹⁸ This is a 'qualified exclusive possession argument' that is similar to that put forward by Justice Kirby in the Croker Island Case.

Since the rejection of the exclusive possession of sea country in the Croker Island cases, other Indigenous groups claiming native title over the sea have used the 'qualified exclusive possession argument'. Much like any sea-located business requiring some form of exclusion, the claimants in the Blue Mud Bay case (and the Wellesley Island case¹⁹) argued that exclusive possession should be granted for all rights and interests in sea country, except where the rights and interests conflict with the public rights of fishing and navigation or the international right of innocent passage. In this way, the traditional owners could exclude some people from their sea country while accepting those people genuinely exercising their public or international rights.

In the first instance ruling of the Blue Mud Bay case, Justice Selway acknowledged that he must follow the Croker Island decision, as he was after all bound by it, but believed that

because the Commonwealth Parliament had granted land to Indigenous groups as a fee simple grant, the Parliament therefore intended for exclusive possession to the low tide mark as stated in the grant, and also the waters above the granted sea-bed.²⁰

In this case, the claimants were recognised to hold native title rights and interests similar to those found in the Croker Island case and any form of exclusive possession over sea country was rejected.²¹

The decision in the appeal of the Blue Mud Bay case was handed down by the Full Court of the Federal Court in March 2007. The appeal related to the interests of the Yolngu claimants in the sea-bed, where they have freehold given the original land grant by the Commonwealth, and the need for the recognition of exclusive possession of not only the sea-bed but the waters above it. The appeal was partially successful with regard to the exclusive possession of the land in the intertidal zone and the waters above that land but only in connection with commercial fishing licences granted by the Northern Territory government.²² The Yolngu people of Blue Mud Bay can now deny access to the intertidal zone by privately licensed commercial fishers. The Court noted that 'a fishing licence is, for the purposes of the *Aboriginal Land Rights Act*, an estate or interest in respect of land'²³ therefore the *Fisheries Act* (NT) could not be used by the Northern Territory government to grant a private interest to anyone in freehold land held by the Yolngu land trust. The decision is not a native title decision. The decision simply recognises the rights of the Blue Mud Bay Yolngu as the freehold title land owners of the intertidal zone as granted by the *Land Rights Act*. The Full Court did not in anyway restrict the rights of the public to continue to fish in the intertidal zone of Blue Mud Bay or to innocently navigate the area.²⁴ This decision is sure to be appealed by the Northern Territory government to the High Court.

The Croker Island decision is not binding upon the High Court; however, it is highly persuasive as a precedent decision and may lead to continued recognition of only non-exclusive rights against the public with regard to waters, even where the sea-bed is held in freehold by the traditional owners.

The Wellesley Island Case – *The Lardil Peoples v State of Queensland*

The Wellesley Island group of islands is located in the Gulf of Carpentaria. The claimed area covered the islands and sea country, including the waters around the islands and extending to the nearby Queensland coast. The claimants acted as one group and included the Lardil, Kaiadalit, Yangkaal and Gangalidda peoples.

The Wellesley Island case was heard by the Federal Court in 2004 where the applicants claimed exclusive possession over their sea country. The decision strongly reiterated the stance of the Australian federal courts with regard to any form of exclusive possession of sea country: 'Control of access to the land and waters of the intertidal zone and the territorial seas with the right of exclusion, albeit a traditional right or custom acknowledged and observed at sovereignty, will not be recognised by the common law of Australia'.²⁵

The Wellesley Island case has been held to give qualified rights and interests over sea country following the Croker Island decision. The rights and interests recognised in the Wellesley Island case included rights to access, fish, hunt and gather, to take fresh drinking water, access for spiritual purposes and the right to maintain rock fish traps. The decision to recognise this latter right to maintain rock fish traps was unusual in that it suggests that exclusion from the area could occur, however it was established by the Federal Court that the traps were in a state of disrepair and their use did not amount to a form of ownership that would support exclusion.²⁶ None of the wide-ranging rights to sea country found in the decision confer any possessory right or right of exclusion due to the continued application of the Croker Island decision.

The Torres Strait Regional Sea Claim

The Torres Strait Regional Sea claim covers approximately 42,000 square kilometres of sea country between mainland Cape York and Papua New Guinea. The claimants are all holders of native title over islands in the Torres Strait and are hoping that their exclusive possession of land will also be recognised over the waters of their sea countries. The claimants are diverse groups but all identify as Torres Strait Islander people. Respondent parties interested in the outcome of the decision so far include fishing, government and Indigenous interests as well as Papua New Guinean interests. As noted by the Torres Strait Regional Authority (TSRA): 'This will be the first time that Australian Courts will be asked to consider the interests of foreign nationals in the context of a native title determination'.²⁷

At this time, the Torres Strait Regional Sea Claim is progressing through the National Native Title Tribunal mediation process. It is unlikely that, when the case reaches the Federal Court, exclusive possession will be granted because of the importance of the area on international shipping routes as well as its close proximity to a foreign country. The Blue Mud Bay appeal decision may also only have a limited effect because of the qualified exclusivity claimed by the TSRA, and the importance of the area to Queensland and Australian fisheries. Interpretation of the affective *Land Rights Act* and *Fisheries Act* may also affect the likelihood of exclusive possession against licensed fishers of the intertidal zone. The TSRA will be arguing, however, for recognition of the exclusive rights of the claimants to the waters of the Torres Strait. TSRA Board Member and past Chairperson, Terry Waia has been quoted as stating that 'it is our intent to pursue the native title rights of Torres Strait Islanders over the sea to the very highest extent recognised by the law and to attempt to broaden the application of the law'.²⁸

Future implications?

In the Croker Island case, Justice Kirby argued that it should be possible for Indigenous peoples claiming native title over sea country to have exclusive possession over areas of sea that are inaccessible or where it is unnecessary for navigation rights to be upheld. The subsequent Blue Mud Bay decision is, however, detrimental to this argument as the public rights to navigation and fishing were upheld even in unnavigable waters, although the recognition of the right to exclude private fishers from the intertidal zone has been a successful step. Justice Mansfield (concluding the decision at first instance after the death of Justice Selway during determinations) did recognise that '[t]he public right to navigate is necessarily confined to tidal waters which are navigable'²⁹ but did not confine public fishing rights to those areas. It has already been mentioned that the public right to fish, which was of such importance to the majority in the Croker Island case, can be removed from areas where a statutory grant has been made. It follows that a common law grant should be able to do the same. If certain areas of the ocean are out of bounds for recreational fishers due to businesses, why not also exclude them from certain areas due to native title?

In total, exclusive possession of sea country remains unlikely following the decisions in the Croker Island case. However, the arguments of Justice Kirby, the views of Justice Selway and the decision in the Blue Mud Bay appeal have opened an area for future argument with regard to exclusive possession. In time, Indigenous peoples may be able to hold some power over their sea country apart from the limited rights and interests that are currently available.

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¹ *Mabo v Queensland [No2]* (1992) 175 CLR 1.

² Native Title Act 1993 (Cth) section 253 on 'waters'.

³ Native Title Act 1993 (Cth) section 6.

⁴ See for example, *Jones v Queensland* [1998] QSC 11.

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- ⁵ National Native Title Tribunal, 'Fishing and Native Title: What Rights Apply?' (2003) Native Title Fact Sheet 1. See also *Mason v Tritton* (1994) 34 NSWLR 572; see also *Yanner v Eaton* (1990) 201 CLR 351 for discussion of the native title rights of Indigenous groups to hunt and fish non-commercially.
- ⁶ *Members of the Yorta and Yorta Aboriginal Community v Victoria* [2002] 214 CLR 422.
- ⁷ *Yarmirr v Commonwealth* (2001) 208 CLR 1 [85], [86] Gleeson CJ, Gaudron J, Gummow J, Hayne J.
- ⁸ *Ibid* [309] Kirby J.
- ⁹ *Ibid*.
- ¹⁰ *Ibid* [2] Gleeson CJ, Gaudron J, Gummow J, Hayne J.
- ¹¹ *Ibid* [17].
- ¹² *Ibid* [70]. The United Nations Convention on the Law of the Sea (1982) entered into force in 1994 in the Seas and Submerged Lands Act 1973 (Cth). This finding has been partially avoided in the Blue Mud Bay Appeal decision heard in the Full Federal Court but only with regard to fishing licences granted by the Northern Territory Government.
- ¹³ *Yarmirr v Commonwealth* (2001) 208 CLR 1[277] Kirby J.
- ¹⁴ *Ibid* [283] Kirby J.
- ¹⁵ *Ibid* [290] Kirby J.
- ¹⁶ *Ibid* [2] Gleeson CJ, Gaudron J, Gummow J, Hayne J.
- ¹⁷ *Gumana v Northern Territory of Australia* [2005] FCA 50 [38].
- ¹⁸ *Ibid* [41].
- ¹⁹ *The Lardil Peoples v State of Queensland* [2004] FCA 298.
- ²⁰ *Gumana v Northern Territory of Australia* [2005] FCA 50 [69].
- ²¹ *Ibid* [275].
- ²² *Gumana v Northern Territory of Australia* [2007] FCAFC 23 [105].
- ²³ *Ibid* [16].
- ²⁴ *Ibid* [30].
- ²⁵ *The Lardil Peoples v State of Queensland* [2004] FCA 298 [164] Cooper J.
- ²⁶ *Ibid* [226].
- ²⁷ Torres Strait Regional Authority, *Native Title Over the Sea – Regional Sea Claim* (2001).
- ²⁸ Torres Strait Regional Authority, 'Exclusive Sea Rights Should Exist' (Media Release, 19 October 2001).
- ²⁹ *Yarmirr v Commonwealth* (2001) 208 CLR 1 [31].