Native title rights over the sea

The High Court decision on native title over coastal waters off Croker Island in the Northern Territory has implications for more than 100 additional claims lodged across Australia, says AAR Partner David Martino.

The recent High Court ruling over Croker Island, 200 kilometres north-east of Darwin, has affirmed that native title can exist over the sea but that such native title rights cannot confer exclusive ownership and possession of the sea.

The High Court handed down its decision on October 11, after hearing simultaneous appeals by Mary Yarmirr and others representing five Aboriginal clans, the Mandilarri-Ildugij, Mangalarra, Muran, Gadurra, Minaga and Ngayndjagar estate groups and by the Commonwealth.

The clans were seeking exclusive rights over the sea, while the Commonwealth sought to overturn the Federal Court ruling that native title could extend to offshore areas.

The initial decision – the Federal Court

The original claim was lodged in November 1994. The Federal Court began hearing evidence about the claim in April 1997. In July 1998, Justice Olney held that communal native title existed in relation to the sea and sea bed within the claim area. However, he said there was no evidence that the indigenous applicants enjoyed exclusive possession, occupation, use and enjoyment of the waters.

Justice Olney said a right of exclusive possession would be inconsistent with the right of innocent passage and with the public right to navigate and to fish, recognised by the common law. He found there was no native title right to trade in the sea’s resources and that native title rights could coexist and are regulated by fisheries laws.
The Federal Court’s Full Bench decision

In December 1999, a Full Bench of the Federal Court affirmed Justice Olney’s findings. However, Justice Merkel, dissenting, said there was scope within the common law to recognise a surviving native title right to a pre-existing exclusive fishery in the territorial sea.

The latest appeal – the High Court

In this latest decision, the High Court upheld the determination made by Justice Olney that the five Aboriginal groups hold non-exclusive rights to fish, hunt and gather within the sea off the Croker Island region for the purpose of satisfying their personal, domestic or non-commercial communal needs.

Implications of the High Court’s ruling

The High Court’s decision will affect almost 200 native title applications over coastal waters, many which have been on hold, awaiting the outcome of the Croker Island hearing. Around Australia, 120 native title applications have been lodged over areas of sea beyond the low water mark. Another 61 native title applications include areas in the inter-tidal zone, between the high and low water marks.

The right to negotiate and compensation

The High Court’s determination throws up the question of compensation payable to the native title holders. Under the Native Title Act, compensation must be assessed on just terms. There has, however, not yet been a court decision quantifying the value of native title rights and interests.

It’s useful to consider Point 8 of the Federal Government’s ‘10 Point Plan’, which set out principles for amending the Native Title Act 1993 and was implemented in 1997.

Point 8 provided for governments to regulate and manage water and offshore resources, with the rights of those with interests under any such regulatory or management regime to be put beyond doubt. Thus the right to negotiate provisions of the Native Title Act does not apply offshore. Under section 24HA of the Act, a lease, licence, permit or authority granted over an offshore area is valid.

Further, in relation to the activity for which the lease, licence, permit or authority is validly granted:

(a) the non-extinguishment principle applies;

(b) the native title holders concerned are entitled to compensation; and

(c) the compensation is payable by the Commonwealth, State or Territory to which the activity is attributable. However, before activity commences, the person proposing to do it must notify any representative bodies, such as registered native title claimants in relation to the waters that will be affected, that the activity is to take place and to allow them an opportunity to comment.

Cultural and spiritual knowledge and places

Despite the High Court ruling, further questions remain over what native title over the seas means in a practical sense.

In the joint judgment delivered by four of the seven judges, the High Court noted that although Justice Olney in the Federal Court had ruled that the claimants held rights to visit and protect places of cultural or spiritual importance and to safeguard their cultural and spiritual knowledge, there had been no discussion in the course of argument of the appeal about what was meant by those rights or how effect might be given to them.

The High Court judges commented: “We say nothing about such issues.”

It is anticipated that the High Court will deal with these and many other as yet unresolved matters regarding proof, and the nature and extent, of native title when it delivers the Ward decision, expected later this year or early 2002.

(This case involves the Miriuwung-Gajerrong people in the Kimberley region of Western Australia and concerns questions such as whether a merged native title can be held, and whether native title is extinguished by the grant of mining and pastoral leases in Western Australia.)
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