ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY
ON APPEAL FROM THE FULL COURT
OF THE FEDERAL COURT OF AUSTRALIA

No. B58 of 2012

Between:

LEO AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP
Appellant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

STATE OF QUEENSLAND
Second Respondent

NEIL WADE
Third Respondent

MARKIM HOLDINGS T/A BARRIER REEF LIVE CRAY
Fourth Respondent

ROBERT JOHN STEFAN STANDEN
Fifth Respondent

BARRY WILSON
Sixth Respondent

MARK WILLIS
Seventh Respondent

TASMANIAN SEAFOODS PTY LTD
Eighth Respondent

KAREN SKUDDER
Ninth Respondent

BRUCE ROSE
Tenth Respondent

QUEENSLAND ROCK LOBSTER ASSOCIATION
Eleventh Respondent

THEOPHANIS PETROU
Twelfth Respondent

ELFREDA PETROU
Thirteenth Respondent

PETER J PAHLKE
Fourteenth Respondent

ALISON NEWBOLD
Fifteenth Respondent

RAYMOND MOORE
Sixteenth Respondent

MABEL MOORE
Seventeenth Respondent

HIGH COURT OF AUSTRALIA
FILED
06 FEB 2013
THE REGISTRY CANBERRA

APPELLANT'S AMENDED REPLY TO FIRST & SECOND RESPONDENTS

Filed on behalf of the Appellant by
Peter Krebs
Torres Strait Regional Authority
Torres Haus, Victoria Parade
Thursday Island, QLD 4875

Date of document: 6 February 2013
Telephone: (07) 4069 0700
Facsimile: (07) 4069 2582
Email: Peter.KREBS@tsra.gov.au

MARK MILLWARD
Eighteenth Respondent

KENNETH JAMES MCKENZIE
Nineteenth Respondent

JOHN STEWART MCKENZIE
Twentieth Respondent

STEVEN MACDONALD
Twenty First Respondent

M G KAILIS PTY LTD
Twenty Second Respondent

ROBERT BRUCE LOWDEN
Twenty Third Respondent

NOEL LOLLBACK
Twenty Fourth Respondent

BOB LAMACCHIA
Twenty Fifth Respondent

RICHARD LAURENCE JONES
Twenty Sixth Respondent

PHILLIP JOHN HUGHES
Twenty Seventh Respondent

ROBERT GEORGE GIDDINS
Twenty Eighth Respondent

LARRY HUDSON
Twenty Ninth Respondent

PAMELA HUDSON
Thirtieth Respondent

DIANNE MAREE HUGHES
Thirty First Respondent

AUSTRALIAN MARITIME SAFETY AUTHORITY
Thirty Second Respondent

BARRY EHRKE
Thirty Third Respondent

DENNIS FRITZ
Thirty Fourth Respondent

JENNY TITASEY
Thirty Fifth Respondent

AUGUSTINUS TITASEY
Thirty Sixth Respondent

GEOFFREY DONALD MCKENZIE
Thirty Seventh Respondent

ZIPPORAH GEAGEA
Thirty Eighth Respondent

PETER GEAGEA
Thirty Ninth Respondent

ROBERT GARNER
Fortieth Respondent

TROPICAL SEAFOOD OPERATION PTY LTD
Forty First Respondent

DIAKEN PTY LTD
Forty Second Respondent

CARL DAGUIAR
Forty Third Respondent

JIMMY ALISON
Forty Fourth Respondent

DANNY BROWNLOW
Forty Fifth Respondent

BEVERLEY JOAN BRUCE
Forty Sixth Respondent

GUY STEWART BRUCE
Forty Seventh Respondent

KIWAT LUI
Forty Eighth Respondent

TORRES STRAIT REGIONAL AUTHORITY
Forty Ninth Respondent

APPELLANT'S AMENDED REPLY TO SUBMISSIONS OF THE FIRST & SECOND RESPONDENTS

Part I: Certification as to form

1 This submission is in a form suitable for publication on the internet.

Part II: Reply

2 **Extinguishment issue.** For the First Respondent, the key proposition is that, though a statutory licensing regime may be concerned in a general way to regulate rather than prohibit fishing, that does not preclude a finding that a native title right to take fish commercially is inconsistent with specific provisions of the legislative regime because, viewed narrowly, there is inconsistency: First Respondent's Submission para 21 ("**1RS 21**") and see also the Second Respondent's Submission para 19 ("**2RS 19**"). The proposition depends on the existence of a true statutory prohibition of the activity of commercial fishing, necessary implication, or the authorisation of activities which would be abrogated by the exercise of the native title right: *Wik Peoples v Queensland* (1996) 187 CLR 1 (***Wik***), per Gummow J 185.5-186.5. None is present here. The resulting regime merely requires a native title holder to obtain a licence. The (licensed) exercise of the native title right is not physically inconsistent with the exercise of the statutory licence.

3 The First Respondent seeks to attribute to the Appellant the contention that nothing short of absolute prohibition is capable of extinguishing native title: 1RS 34. No such contention is necessary; a prohibition which only has the effect of requiring licensing is not an absolute prohibition. Anything short of prohibition *simpliciter* leaves some room for the activity otherwise prohibited: see 2RS 42-43. The prohibitions in the by-laws held to extinguish native title at common law in *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) were "absolute": *Ward* at 152 [265]. Further, accepting that regulation may shade into prohibition (*Yanner v Eaton* (1999) 201 CLR 351 (***Yanner***) [37], and see IRS 20 and 2RS 18), in the final analysis, legislation prohibits an activity or it does not; it is prohibitory in character in relation to an activity or it is not; it is inconsistent with exercise of a right or it is not. Plainly, it is only *unlicensed* commercial fishing that is inconsistent with, and prohibited by, the legislative schemes in question: cf 2RS 43. There is no difficulty in discerning that the activity of commercial fishing is regulated, but not prohibited, by the statutory mechanisms in question.

4 Both Respondents' submissions depend upon distinguishing *Yanner*: 1RS 34-39; 2RS 50-53; and both rely on *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (***Harper***) [1RS 22-32, 37; 2RS 46-48].

5 The Second Respondent seeks to distinguish *Yanner* only by reference to there being more than a licensing exemption from the prohibition in that case: 2RS 50-53. However, in

identifying the prohibition in *Yanner* as having only "apparent generality" the majority of the Court mentioned the exemption in favour of the holder of a licence in s 54(1)(a) of the *Fauna Conservation Act 1974* (Qld) as well as the exemptions in s 54(1)(b): *Yanner* at 364 [13]; cf 2RS 51. It is clear enough logic that one exception is sufficient to deny true generality. More than one makes no qualitative difference. The juxtaposition of the prohibition and the licensing exemption merely identifies both as integral to a statutory mechanism which, to use the language of the concession by the State, "merely imposes control": *Yanner* 355.1. Neither the concession (made first to Hayne J and then to McHugh J: *Yanner* at 354.9-355.1) nor the confirmation of its correctness were dependent on the presence of exemptions beyond the integral licensing exemption: *Yanner* at 371.2 [31]; cf 2RS 52. The prohibitions here cannot be regarded differently except by ignoring the obvious licensing exemptions. Once the exemptions are acknowledged, any argument which depends on the presence of true prohibitions evaporates.

6 The First Respondent seeks to distinguish *Yanner* by asserting without explaining that the provisions there and their context were "very different": 1RS 36; and that the Court there was not asked to grapple with a prohibition in a scheme like the present: 1RS 37. However, the statutory purpose of preserving a public resource from a public right is comparable and the prohibitions against the unlicensed activity are in essentially the same form.

7 The submissions of the First and Second Respondents seek assistance from *Harper*: 1RS 22-33; 2RS 44-48. *Harper* it is not authority for a principle that a compulsory licence to fish is necessarily to be regarded as the only source of entitlement to fish and in no circumstances as an instrument that renders lawful that which would otherwise be unlawful or so as shield the licensee from prosecution: cf 1RS 30. Even if it was, the principle would need to be shown to have precedence over the principle that a clear and plain intention is required to extinguish native title. No dichotomy is introduced by the licensing regime on the Appellant's argument: cf 1RS 31. The regime merely requires all commercial fishers to be licensed. That different pre-existing rights might be affected in different ways by a law of general application is unremarkable.

8 The Appellant accepts on the authority of *Harper* that (public) rights held by native title holders in their capacity as members of the public may be abrogated by the legislation in this case. *Harper* has not been applied to native title rights or proprietary rights under private law: cf 1RS 25. In applying *Harper* in the context of the *Fisheries Act 1952* (Cth) in *Minister v Davey* (1993) 47 FCR 151 (***Davey***), Black CJ and Gummow J, referring to *Harper* at 325, 330 and 335, drew particular attention to the nature of the public right, stating (at 160B), "The right

to fish within territorial waters is an attribute of the Commonwealth's sovereignty, rather than a proprietary right available under private law".

9 In the passages from *Harper* referred to in *Davey*, the majority in *Harper* drew attention to the peculiar capacity of the holders of the public right to "deprive [the] right of all content": *Harper* at 325.6 per Mason CJ, Deane and Gaudron JJ; and Brennan J noted that the public right "is not limited by the need to preserve the capacity of a fishery to sustain itself": *Harper* at 330.8 and see 335.3. The intention of the parliament was seen in *Harper* as saving the abalone fishery from the inherent capacity of the public right to destroy it. No such consideration applies to the native title right, which not only is narrowly held, but is also exercisable subject to traditional rules relating to conservation as the primary judge found: {FC 71.1 [235]}. It is sufficient to achieve the statutory objective that the holders of such rights be required to obtain a licence. No necessary implication of extinguishment arises from the generality of the licensing regime: cf 1RS 29; 2RS 42-44. Any inconsistency that can be alleviated within the terms of the statutory regime is not "necessary inconsistency". AB848

10 **Reciprocal rights issue – Reply to First Respondent.** The First Respondent refers repeatedly to the expression "a real relationship, or connection" used by Kirby J in *Ward* at 246.2 [577] (1RS 55, 57, 60, 61). This reflects Kirby J's view about what is required by the words "in relation to", though at [580], he also described the claimed right as being "sufficiently connected". The expression does not appear in the NTA. It was not used or endorsed by any other member of the Court. Further, at 1RS 60, there is an impermissible slide from Kirby J's expression "a real relationship, or connection" to the expression '*the* "real relationship, or connection"' (emphasis added).

11 The First Respondent's reference at 1RS 55 to the definition of "interest" in sec 253 is misplaced, given the primary judge's unchallenged finding that reciprocal rights are rights and obligations, not privileges, interests etc {FC 130 [508]}. 1RS 57 misstates the relevant question, which is: Are reciprocal rights, rights in relation to land or waters? AB929

12 Attention is drawn at 1RS 58, 61 to what is said to be a "sharp contrast" between reciprocal rights and occupation based rights. This also diverts attention from the relevant question. It is not relevant that another category of rights has different characteristics. The can be said of the comparisons made at 1RS 59.

13 As to 1RS 48.2, the quotation attributed to Professor Scott is in fact a quotation from Professor Beckett {FC 61 [193]}. AB836

14 As to 1RS 63, a requirement of "direct connection" is not supported by the text of subsec 223(1), nor the passages from *Commonwealth v Yarmirr* (2001) 208 CLR 1 (*Yarmirr*)

or *Ward* cited. As to 1RS 64, whether the requisite connection could be satisfied merely by a relationship with a primary rights holder did not arise in *Yarmirr*, a claim made on behalf of, and determined in favour of, clan members only: *Yarmirr v Northern Territory* (1998) 82 FCR 533 at 538D, 602E. The Full Court determination in *Ward* included as native title holders, members of neighbouring estate groups and spouses of estate group members: *Attorney-General (NT) v Ward* (2003) 134 FCR 16 at 19 [clauses 4(a) & (b) of the proposed determination], 23 [15]. Spouses' rights are the direct result of a relationship with a primary rights holder. Neighbours' rights are likely also to be a result of such a relationship.

15 As to 1RS 67-68, while the para 223(1)(b) inquiry may be area specific (*Bodney v Bennell* (2008) 167 FCR 84 at 130-1 [175], [179]), the primary judge found that connection was established in respect of the whole of the determination area {FC 166 [656]} and that in some measure the laws and customs address the Islanders' use and occupation of their own *and others'* areas {FC 166 [655]}. If it is necessary to consider the reciprocal rights holders as individuals for the purposes of para 223(1)(b) (see [20] below), their connection to particular areas is by laws or customs that require, at least in ordinary circumstances, occupation based rights holders to give them access to those areas and resources. There is also evidence of the use by reciprocal rights holders of the areas of their occupation based rights counterparts (see, for example, Nelson Gibuma at Ex 1A, 8 [18]-[20], at tx105 (L36) -106 (L23); Kapua Gutchen at 16A, 100-101 [348]-[353]; Mr Murphy at tx4998 (L32-47), tx5000 (L1-20, 31-40), tx5003 (L30-42), tx5004 (L12-18); Professor Scott at Ex 45A, 154 [382]). AB978 AB977 AB442 AB444,434 AB456

16 The primary judge found that reciprocity rights holders have "rights and obligations that are recognised and are expected to be honoured or discharged under Islander laws and customs" {FC 130 [508]}: cf 1RS 74. Nothing said at 1RS 75 detracts from the primary judge's findings cited at para 15 of the Appellant's Submissions filed on 9 November 2012. AB929

17 **Reciprocal rights issue – Reply to Second Respondent.** As to 2RS 58, the relevant right in *Ward* was considered to extend to the restraint of visual or auditory reproductions of what was found on the relevant land or took place there, or elsewhere: *Ward* at [59]. The content of this claimed right and that of the claimed reciprocity rights are not analogous.

18 At 2RS 60, the Second Respondent adopts the inaccurate terms "visitor" (reciprocal rights holder) and "host" (occupation based rights holder) and uses them repeatedly thereafter. These terms and the passages from the primary judge's reasons cited at 2RS 60, 61 relate largely, if not, wholly to *thubud*. The primary judge used the word "host" only in relation to *thubud* {FC 130 [507]}. Neither affines nor *thubud* are mere visitors; on the contrary, they have and have had culturally significant roles to play {FC 66 [219], 67 [221], 68-70 [226]- AB929 AB842,844, 845

[232], 91 [316]}. Affines include husbands and in-laws (fathers, mothers, brothers and sisters-in-law). The Appellant's case was that wives, but not husbands, have occupation based rights in the land and waters of their spouses {FC 34 [69]}. The evidence was that the positions of wives and husbands are somewhat different: tx4998 (L32-47), tx5000 (L1-6) per Mr Murphy. The primary judge appears to have regarded wives as having reciprocal rights in the land and waters of their husbands {FC 34 [71]}. Marriage sets up mutual obligations between the two families concerned: {FC 66 [219]}. AB876 AB798 AB799 AB842

19 The reference at 2RS 60 to a right "to request and receive what he or she requires" (see also 2RS 62, 63) attempts to articulate reciprocal rights at a higher level of abstraction than is claimed. The claimed rights to access the relevant area and its resources are clearly rights "in relation to land or waters". Further, a request for permission is not always required {FC 87-8 [296], [297], [300]} and see also the evidence of Nelson Gibuma at Ex 1A, 8 [18]-[20], tx105 (L36) - 106 (L23); Kapua Gutchen at 16A, 100-101 [348]-[353]; Mr Murphy at tx5000 (L1-20), tx5003 (L7-28); Professor Scott at Ex 45A, 151-5 [376]-[384]. AB870,871, 871

20 The passage at 2RS footnote 95 is *obiter* from a case about communal rights: *Gumana v Northern Territory* (2007) 158 FCR 349 at 392-3 [160], [162]. The Court said at 393 [162] that it need not decide whether the Commonwealth's argument is applicable in a "non-communal" case. In this case, the relevant peoples have group and individual rights {FC 127-8 [493], 137 [543]}. To the extent that the Full Court intended the passage at footnote 95 to apply to a case such as this, it was, with respect, in error. The chapeau of subsec 223(1) is not intended to govern how "connection" is to be established for the purposes of para 223(1)(b). "Connection" is to be considered by reference to the rights holders *as a whole*. At least generally speaking, it is unnecessary for trial judges to decide whether rights are communal, group or individual. The primary judge was unconvinced that it was necessary for him to do so {FC 137 [543]}, as was the Full Court in *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at 302 [44]. Nothing is subsec 223(1) suggests that rights in relation to land may not also be rights in relation to persons: cf 2RS 65. AB925,939 AB939

17 December 2012

	Bret Walker	Robert Blowes	Tom Keely
Phone	(02) 8257 2527	(02) 6249 7828	(03) 9225 8295
Fax	(02) 9221 7974	(02) 6249 1760	(03) 9225 8450
Email	maggie.dalton@stjames.net.au	rblowes@bigpond.com	tpkeely@vicbar.com.au

Counsel for the Appellant