IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY 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

APPELLANT'S SUBMISSIONS

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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 SUBMISSIONS

Part I: Certification as to form

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

Part II: Issues

2 **Extinguishment issue**. Is a "clear and plain intention" to extinguish a native title right to engage in an activity manifested by legislation the overall purpose of which is the regulation of that activity and which prohibits that activity save pursuant to a licence; and has a native title right to take fish and other aquatic life for trade or sale been extinguished by the 'fisheries' legislation of the State of Queensland (**the State**) and the Commonwealth which prohibit commercial fishing save pursuant to a licence?

10 3 **Reciprocal rights issue**. Are rights to access, use and to take resources from an area, native title rights or interests within the meaning of subsec 223(1) of the *Native Title Act 1993* (Cth) (**NTA**) where those rights are held under traditional laws and customs on the basis of a 'reciprocal relationship' with a holder of 'occupation based' native title rights?

Part III: Certification as to Section 78B of the *Judiciary Act 1903*

4 The appellant has considered whether any notice should be given in compliance with sec 78B of the *Judiciary Act 1903* (Cth) and concluded that this is not necessary.

Part IV: Citations

5 The reasons for judgment of the Federal Court are reported at *Akiba and Another v Queensland and others (No 3)* (2010) 204 FCR 1 ("**FC**").

20 The reasons for judgment of the Full Court of the Federal Court are reported at *Commonwealth v Akiba and another* (2012) 204 FCR 260 ("**FFC**").

Part V: Facts

6 By a native title determination application dated 23 November 2001, the Applicant sought a determination of native title on behalf of the living descendants of identified apical Torres Strait Islander ancestors being in aggregate the persons identified in *Mabo v Commonwealth (No 2)* (1992) 175 CLR 1 (***Mabo [No 2]***) and numerous consent determinations over islands in the Torres Strait.

7 In 2008 parts of the south of the claim area were covered by overlapping applications filed by Kaurareg and Gudang peoples. Finn J ordered the original application be split into

30 Parts A and B, the latter consisting of the overlap areas. Part A was heard over 44 days between September 2007 and March 2009, with reasons for judgment published on 2 July 2010 and final orders made on 23 August 2010.

8 The determination of native title made by the primary judge ("**DNT**") included rights to access, to remain in and to use the native title areas; and subject to orders 6 and 9, the right to access and to take for any purpose resources in the native title areas: DNT 5(a), (b). DNT 6 and 9 deal specifically with mineral and petroleum resources. DNT 8 provides that the native title rights and interests are subject to and exercisable in accordance with the traditional laws and customs of the native title holders and the laws of the State and the Commonwealth including the common law. DNT 10 and Schedule 6 identify (co-existing) 'other interests', including licences under fisheries legislation in question.

10 **9** An appeal and cross appeal were heard by the Full Court between 16 and 18 May 2011, and on 14 March 2012 the Full Court allowed the appeal by majority and unanimously dismissed the cross appeal. In the result, the DNT was varied by the Full Court by the addition of the following words after clause 5(b): "This right does not, however, extend to taking fish and other aquatic life for sale or trade" {FFC 308 [145]}.

10 **Extinguishment issue.** The existence of traditional 'commercial fishing rights' – but for any extinguishment - was not challenged in the Court below. No party contended that the right to take fish was generally extinguished or that at any time native title holders had been legislatively precluded from applying for licences to fish for commercial purposes. The primary judge observed that there was evidence to the contrary from the nineteenth century
20 onwards {FC 210 [844], FFC 273 [38]}.

11 The primary judge reviewed the State fisheries legislation from 1877 until 1994 {FC 195-201 [780]-[802]}, the Commonwealth fisheries legislation from 1952 to 1991 {FC 201-205 [807]-[827]} and the *Torres Strait Fisheries Act 1984* (Cth) {FC 205-208 [828]-[838]}; in a manner adopted with approval by Keane CJ and Dowsett J {FFC at 275-283 [42], [44] and [45]}, and by Mansfield J {FFC 315 [190]-[191] and see 318-321 [204]-[218]}.

12 The primary judge found that the legislative regimes, while of evolving complexity, were regulatory and not prohibitory in character in relation to commercial fishing {FC 190, 214-215 [765], [859]}, did not evince a clear and plain intention to extinguish {FC 190, 215 [765], [861]}, and were consistent with the continued enjoyment of, native title {FC 190, 214-
30 215 [765], [859]}. Mansfield J in the Court below agreed {FFC 312, 318, 321-322 [168], [203]-[204], [220]-[222], [226]}.

13 The majority in the Full Court accepted that "it may be correct to describe the licensing regimes as concerned, in a general way, to regulate fishing" {FFC 287 [63], also 295 [84]}, but allowed the appeal on the reasoning that the provisions prohibiting fishing for

commercial purposes without a licence were inconsistent with the native title in question {FFC 295 [84], [85]}, and ordered that the DNT be varied as referred to above.

14 Reciprocal rights issue. Native title rights were claimed on dual bases on which rights and interests are held traditionally in marine territory: first, "ancestral occupation based rights" or "emplacement based rights", which are held by people who are the living descendants of the socially recognised prior occupying ancestors of areas and the wives of those living descendants {FC 34 [69]}; and secondly, "reciprocal relationship based rights" or "reciprocity based rights" which are held by persons who have a relevant reciprocal relationship with an ancestral occupation based rights holder {FC 34 [70], 127 [493]}. These rights are here called "reciprocal rights". A reciprocal relationship is one which the traditional laws or customs associate with reciprocal obligations, including an obligation to provide access to one's own marine territory and resources.

15 The primary judge accepted that the Islanders' society has a body of laws and customs founded upon the principle of reciprocity and exchange and that that principle is dominant and pervasive in relationships in general {FC 61 [194], 129 [505]}. His Honour found that there have been, and are, laws and customs which regulate rights and obligations between parties in certain "reciprocal relationships" and that such relationships have created, and do create, a network of inter-island relationships {FC 34 [71]}. His Honour found that the evidence clearly establishes a regime of traditional laws and customs across Torres Strait dealing with marriage and affinal relationships {FC 67 [222]} and he noted, for example, that the evidence concerning reciprocal obligations arising between families from a marriage included commitment to generosity and sharing to maintain good family relationships, including giving access to fishing grounds {FC 67 [221]}.

16 At trial, the Second Respondent denied that reciprocal rights are "rights" at all, arguing that they are simply "expectations" {FC 128 [494]}. The primary judge rejected this argument and likewise the proposition that they are privileges or interests. He held that they are properly described as rights and obligations that are recognised and are expected to be honoured or discharged under Islander laws and customs. His Honour agreed with Professor Scott, save only that the rights in question are *not* rights and interests in relation to land or waters {FC 130 [508]}. Professor Scott had given the following evidence about reciprocal rights {FC 60 [190}:

(1) Reciprocity rights, while inferior to ancestral occupation based rights, were themselves fundamental: to deny a partner in reciprocity without valid reasons was effectively to end the relationship.

(2) It would be a highly disjunctive social order for persons to deny routinely reciprocal rights that their affines and *tebud / thubud* partners were entitled to in the view of that system.

(3) Reciprocal rights holders were numerically significant in number.

17 His Honour was not satisfied that the laws and customs regulating the reciprocal relationships are generative of rights and interests in land and waters, save in relation to a wife in marriage {FC 34 [71]}. Later in his reasons, the primary judge concluded that {FC 119 [452], see also 130 [508]}:

> ... reciprocity-based rights are properly to be regarded as rights possessed under laws and customs. However, I do not consider them to be rights "in relation to" land and waters for NT Act purposes. This said, they are nonetheless an important component in the body of laws and customs in Torres Strait.

The primary judge's characterisation of reciprocal rights as rights possessed under laws and customs was not challenged on appeal.

18 The primary judge added that, if he was wrong about the "in relation to" point, there would, as the Commonwealth contended, be considerable difficulties involved in accommodating reciprocal rights within the scheme of the NTA, but said no more about that {FC 131 [510]}.

19 Before the Full Court, the Commonwealth filed a notice of contention in the cross-appeal to the effect that the primary judge's conclusion that the reciprocal rights are not native title rights should be affirmed on the basis that the holders of the reciprocal rights do not have a connection with the land and waters under traditional laws and customs as required by para 223(1)(b) of the NTA {FFC 271 [28]}.

20 The Full Court appears to have upheld both grounds {FFC 305-6 [127]-[132]}, as well as placing reliance on the terms of the 22 consent determinations of native title since *Mabo [No 2]* in relation to land in the Torres Strait {FFC 306 [133]}.

Part VI: Argument

21 **Extinguishment issue.** In *Yanner v Eaton* (1999) 201 CLR 351 ***(Yanner)***, Gleeson CJ, and Gaudron, Kirby and Hayne JJ said at 373 [38]:

> ... saying to a group of Aboriginal peoples, "You may not hunt or fish without a permit", does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.

22 Gummow J said at 397 [115] (and see also the majority at 372-3 [37]):

> The exercise of the native title right to hunt was a matter within the control of the appellant's indigenous community. The legislative regulation of that control, by requiring an indigenous person to obtain a permit under the Fauna Act in order to

> exercise the privilege to hunt, did not abrogate the native title right. Rather, the regulation was consistent with the continued existence of that right.

23 Whether legislation has extinguished native title is a question of statutory interpretation. That the relevant interpretive principle is that the legislature must manifest a clear and plain intention to extinguish is well established by *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 213.9 per Brennan, Toohey and Gaudron JJ, 224.6 per Deane J; *Mabo [No 2]* at 175 CLR 64.4 per Brennan J (Mason CJ and McHugh agreeing), 111.3 per Deane and Gaudron JJ, 138.3 per Dawson J, 195.8 per Toohey J; *Western Australia v Commonwealth* (1995) 183 CLR 373 at 423.3; *Wik Peoples v Queensland* (1996) 187 CLR 1 (***Wik***) at 168.7, 185.6 per Gummow, 247.6 per Kirby J; *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. The clear and plain intention requirement was identified by Brennan J in *Mabo No 2* at 64.9 as "patently the right rule" and identified its rational at 64.5 as flowing from:

> the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land ... .

For a recent application of this requirement, see *Brown v State of Western Australia* (***Brown***) [2012] FCAFC 154 at [61] per Mansfield J, at [286], [288]-[289], [291], [293], [374] per Greenwood J and at [442], [479] per Barker J.

24 Also well-established is that such an intention is not indicated where a legislative regime taken as a whole is regulatory in character or establishes a regime of control which is consistent with the continued enjoyment of native title: *Mabo [No 2]* at 64.8; *Yanner* 201 CLR at 372, 397 [37], [115]. Further, such an intention is not indicated unless upon objective inquiry: *Ward* 89 [79], there is inconsistency involving "necessary curtailment of the exercise of the native title right such that the conclusion of abrogation is compelled": *Yanner* at 396 [109] per Gummow J, or, in relation to the grant of statutory rights, unless there is clear, plain and distinct authorisation by the relevant grant of acts "necessarily inconsistent" with the native title right in question: *Wik* 187 CLR 1 at 193.9 and 203.1 per Gummow J and see *Ward* at 166.5 [308], 174.8 [333]. For recent consideration of the necessary inconsistency requirement, see *Brown* at [50], [63], [82], [83] per Mansfield J, at [267], [273], [276]-[277], [283], [293], [298], [322], [324], [424] per Greenwood J and at [442]-[444], per Barker J.

25 The Full Court was in error in allowing the appeal. The error complained of is that the majority misapplied, and misunderstood the relationship between, the correct interpretative tools for resolving questions of extinguishment of native title by legislation; the "clear and

plain intent" principle, and the indicators involving consideration of the characterisation of legislation as "regulatory or prohibitory", and whether there is relevant "inconsistency" with the native title rights. Further, the majority misunderstood the reasoning in *Yanner* as to the relationship between extinguishment by inconsistency by a statutory regime and the operation of sec 211 of the NTA.

26 Typically, the scheme of the legislation in question includes a provision which prohibits (or enables the prohibition of) a person from engaging in the taking for commercial purposes (as variously defined) of fish (as variously defined) from an area (variously the area to which the legislation extends or a proclaimed or other part of such area) unless the person is the holder of a licence or permit issued pursuant to the legislation. For example, the *Fisheries Act 1952* (Cth) (considered by the primary judge at {FC 201-203 [807]-[814]}), para 13(a) as originally enacted provided:

> A person shall not – in an area of proclaimed waters, engage in the taking of fish unless he is the holder of a licence in force under section 9 of this Act authorizing him to do so.

27 The primary judge noted {FC 202 [808]} that proclamations were issued pursuant to sec 7 of that Act which embraced the claim area.

28 By way of further example, sec 13 of the *Queensland Fisheries Act of 1887* (the long title of which Act was "An Act to make better Provision for Regulating the Fisheries in Queensland Waters") (which Act was considered by Mansfield J {FFC 318 [204]}) provided in part:

> It shall not be lawful for any person to engage in taking fish for sale unless he has obtained from the Treasurer a license for that purpose, for which an annual fee of ten shillings shall be paid.

29 While the scheme of the various statutory regimes in question includes a provision in a comparable form, such provision is by no means the only measure in any of the Acts. For example, sec 8 of the *Fisheries Act 1952* (Cth) provides that the Minister may, by notice published in the *Gazette* - prohibit either at all times or during a period specified, the taking of fish of a specified species or not exceeding a specified size, or by a specified method or equipment. By subsec 8(2), such a notice may provide for exemptions from the prohibition contained in the notice. Examples of other measure in the *Queensland Fisheries Act of 1887* include: sec 4, which limited net sizes; sec 7, which provided for the setting of minimum fish weights for specified species; sec 12, which required the licensing of boats employed in taking fish for sale; and sec 16, which made it an offence to use any explosives with the intent

to take fish. Many of the measures applied to the taking of fish generally, not just to commercial fishing.

30 The majority in the Court below noted the framing of the issue by the primary judge in terms of whether a clear and plain intent to extinguish was disclosed{FFC 284 [50]} {FC 212 [850]}; his characterisation of the licensing regimes as, from their inception, "clearly regulatory and control mechanisms" {FFC 285 [52]} {FC 214 [856]}; and his conclusion {FFC 285 [54]} {FC [859]} with which Mansfield J in the Court below agreed {FFC 318, 321, 322 [204], [220] and [226]} that the licensing regimes were not prohibitory in character or inconsistent with the continued enjoyment of native title. The majority did not disagree with the characterisation of licensing regimes as regulatory {FFC 287 [63]}, but otherwise made clear its disagreement with the conclusions of the primary judge while noting his Honour's reliance on *Yanner* {FFC 287 [63]} {FC 191-192 [771]}.

31 The determination of the issue by the majority rested upon the proposition that the incident of native title comprising the right to take fish for commercial purposes was inconsistent with specific provisions which prohibit the unlicensed engagement in such taking notwithstanding that the overall purpose of the legislation is the regulation of the activity {FFC [84], [85]}. *Yanner* was distinguished as not supporting the proposition that a law which prohibits an activity, save pursuant to a licence, is not, in truth a prohibition of the unlicensed activity {FFC 290, 294 [74], [82]}.

32 The prohibition in *Yanner* is relevantly indistinguishable in form from the prohibitions in the legislation in question. Paragraph 54(1)(a) of the *Fauna Conservation Act 1974* (Qld) (**Fauna Act**) as considered in *Yanner*, provided that:

> A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.

33 It is that form of prohibition about which the statements in *Yanner* at 373 [38] and 397 [115] (set out in paras 21and 22 of this submission) were made. A prohibition in such form does not extinguish native title. The majority in the Court below was wrong to conclude otherwise. The rationale of the legislation in question is patently not the absolute prohibition of commercial fishing.

34 The majority states that, if the statutory prohibitions are not given effect, then the general conservation objectives of the legislation could be easily defeated by the expedient of traders buying fish in commercial quantities from native title holders {FFC 295 [84]}. Their Honours then attribute to the Seas Claim Group the "concession" that native title holders must

obtain a licence under the legislation in order lawfully to engage in commercial fishing, saying that this "concession" was presumably made "in an effort to avoid this difficulty" {FFC 295 [85]}. To the contrary, it was always the Seas Claim Group's case that, if legislation prohibits commercial fishing without a licence, then its members would be required to obtain a licence before engaging in that activity. This does not involve any concession on their part; it merely involves an acknowledgment of the trite legal proposition that native title holders, along with everyone else, are bound by Commonwealth and State laws. This proposition is routinely acted upon in the making of determinations of native title; in the manner adopted in DNT [8]. There is therefore no possibility of the legislative objectives being defeated in the manner raised by the majority.

35 The majority in the Court below misunderstood the reasoning in *Yanner* as to the relationship between extinguishment by inconsistency by a statutory regime and the operation of sec 211 of the NTA {FFC 290, 294-295 [74], [80]-[83]}.

36 Section 211 of the NTA is confined to non-commercial use of resources and has no direct application in this case. However, in the Court below the following statement in *Yanner* at 201 CLR 373 [39] per Gleeson CJ, Gaudron, Kirby and Hayne JJ was followed by Mansfield J {FFC 314 [182]}, but distinguished by the majority {FFC 294-295 [79]}:

> ... the section necessarily assumes that a conditional prohibition of the kind described does not affect the existence of the native title rights and interests in relation to which the activity is pursued.

37 The following statement of the majority in the Court below at {[FFC 294 [82] and see also 290 [74]} requires correction by this Court:

> In *Yanner*, the provisions of the Queensland legislation which ex facie purported to prohibit the activity of taking native fauna without a licence were denied that effect by s 211(2) of the NT Act.

This statement is inconsistent with the reasoning in *Yanner*, which moved from an examination of extinguishment to an examination of whether, when an unextinguished native title right is confronted by a particular State regime, sec 211 operated according to its tenor. As para 211(1)(a) makes clear, sec 211 only has application where the relevant native title rights have not been extinguished.

38 It was not the case that sec 211 answered the extinguishment question in *Yanner*, far from it. It was the regulatory character of the statutory regime which denied any extinguishing effect.

39 In *Yanner*, the first conclusion of the majority at 373 [40] was that "The Fauna Act did not extinguish the rights and interests upon which the appellant relied". The second step in the reasoning was not to do with extinguishment, but was a separate step to do with the operation of sec 211 of the NTA. Thus, the second conclusion at 373 [40] was merely that s 211 operated to free the appellant in that case of the requirement for a licence. Had the first conclusion been a finding of extinguishment, the second conclusion would not have been apposite – sec 211 would have had no application and the magistrate would have been wrong to dismiss the information. While the conclusion of non-extinguishment in *Yanner*, was aided by a concession of the respondent that a bare prohibition to hunt, coupled with a licence arrangement does not effect extinguishment (201 CLR at 357.3), the correctness of the concession was explicitly examined and endorsed by the majority: *Yanner* 370-373 [31], [37]-[40].

40 The reasoning by the majority in the Court below from {FFC 288 [67]} that refers to *Ward* and culminates in the conclusion at {FFC 288 [70]} that, "There is no room for doubt that the prohibition is directed at *all* fishing for commercial purposes", refers to established principles of extinguishment by inconsistency of incidents between two sets of rights. There can be no inconsistency of incidents here between two sets of rights. The licenced native title rights are necessarily the same as the rights held under a licence by any other licence holder. The determination that they are consistent and co-exist (DNT [11] and item (4) of Schedule 6) is not challenged. The conclusion rather relies on characterising the prohibition as an absolute prohibition, as if it was not inextricably linked to a licensing mechanism; and on it being appropriate as a matter of construction to consider it apart from the broader regulatory statutory scheme of which it is an integral part. *Ward* does not support such an approach. The explicit reasoning in *Yanner* is inconsistent with it.

41 Again, the use made of the reasoning in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (***Harper***) by the majority in the Court below culminating in the conclusion of inconsistency at {FFC 290 [73]}, is also inconsistent with the explicit reasoning in *Yanner*. A clear and plain intention to extinguish native title is not shown merely because *all* persons are made subject to a licensing requirement. Paragraph 54(1)(a) of the Fauna Act also applied to all persons. Further, that reasoning of the majority depends upon the proposition that rights recognised by the common law, but derived from traditional laws and customs (native title rights), are as freely amenable to abrogation (*Harper* at 330.4 as set out at {FFC 290 [72]}) as rights derived from the common law (public rights). *Harper* is not authority for that proposition. That the licensing mechanism applies to *all* persons {FFC 290 [73]} does not

entail that it must affect equally, different kinds of pre-existing rights. In *Harper* in that context, Brennan J distinguished between a public right and a proprietary right at 168 CLR 330.4.

42 **Reciprocal rights issue**. In summary, the text of para 223(1)(a) of the NTA does not limit recognition of rights possessed under traditional laws and customs to rights having a particular basis in those traditional laws and customs; for example, to rights that arise from descent from a prior occupier or owner, rather than rights that arise from a relationship that attracts obligations *inter alia* to provide access to territory.

43 Nor does the text of para 223(1)(b) of the NTA limit recognition of rights possessed under traditional laws and customs to circumstances in which the rights holders have a connection to the land or waters having a particular basis; for example, a connection that arises from descent from a prior occupier or owner, rather than a connection that arises from a relationship that attracts obligations *inter alia* to provide access to territory.

44 The content of the reciprocity based rights for which recognition is sought in this case, is the same as the content of the rights already the subject of the determination, namely rights related physically to waters concerned. To draw upon common law property concepts, these rights are analogous to rights held under a licence from an "owner". Recognition is not sought in respect of other kinds of reciprocal rights, for example, to provide an assured welcome, accommodation and sustenance to a visiting friend {FC 130 [506]}. Such rights are not rights "in relation to land or waters".

45 A right which pursuant to traditional law and custom exists as the counterpart of an obligation, owed on the basis of a particular relationship, to provide access to the territory of another is a right "in relation to" that territory and a native title right within the meaning of subsec 223(1) of the NTA.

46 In *Travelex v FCT* (2010) 241 CLR 510, French CJ and Hayne J said at 519-20 [25]:

> It may readily be accepted that "in relation to" is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ. It may also be accepted that "the subject matter of the enquiry, the legislative history, and the facts of the case" are all matters that will bear upon the judgment of what relationship must be shown ... . (footnotes omitted)

47 There have been a number of cases where the breadth of the words "in relation to" has been emphasised, for example: *O'Grady v North Queensland Co* (1990) 169 CLR 356 at 374.2 per Toohey and Gaudron JJ and at 376.3-377.3 per McHugh J, *Airservices Australia v*

Canadian Airlines (1999) 202 CLR 133 at 219-20 [243] per McHugh J. See more generally Pearce DC and Geddes RS, *Statutory Interpretation in Australia*, 7th ed. (2011) at [12.7].

48 In the statutory context in question, the phrase "in relation to" should be given a broad interpretation. The relevant context includes the first stated of the main objects of the Act, which is to provide for the recognition and protection of native title: para 3(a) of the NTA. As Kirby J said in *Ward* 213 CLR at 246 [577], the phrase "in relation to" in subsec 223(1) of the NTA "is obviously very broad". The Full Court appeared to accept the broad scope of the phrase {FFC 305 [128]}.

49 The appellant accepts that reciprocal rights are inferior to occupation based (or ownership) rights {FC 60 [190]}. This is, however, not to the point as there is nothing in subsec 223(1) which suggests that recognition is confined to those with rights as "owners". On the contrary, the typology of "communal, group or individual" rights and interests in subsec 223(1) is intended to cover the field of classes of rights and interests. The origin of this phrase is Brennan J's reasons in *Mabo [No 2]* 175 CLR at 57.3.

50 The reciprocal rights issue turns on the proper construction of subsec 223(1) of the NTA. The Full Court misdirected itself in relation to this matter by imposing requirements that have no footing in the text of subsec 223(1).

51 The Full Court refers to a number of related matters (considered separately below) in support of its conclusion that reciprocal rights are not native title rights and interests {FFC 305-6 [129]-[132]}. The Full Court, with respect, tends to underplay the significance of reciprocal rights, contrary to the accepted evidence of Professor Scott that these rights are "fundamental" {FC 60 [190], see also 130 [508]} and contrary to the primary judge's conclusion that they are "an important component in the body of laws and customs in Torres Strait" {FC 119 [452]}. These matters were not challenged on appeal.

52 First, the Full Court emphasised the need for reciprocity based rights holders to have permission (or some form of licence from the person concerned) {FFC 306 [130], [132]}. To the extent that permission is required, however, it is not permission that under traditional laws and customs can ordinarily be denied. The primary judge recited evidence from Kris Billy ("Thubud are like family; you can't say no to them, unless you have a very good reason" {FC 130 [507], FFC 304 [120]}) and see also Daisy Kebay's evidence recited at {FC 67 [221]}. Professor Scott agreed with the primary Judge that to deny the rights and obligations arising out of reciprocal relationships is to deny the relationship {FC 129 [504], FFC 130 [120]}. The Full Court contrasted this need for permission with occupation based rights holders who

access and use land, water and resources *as of right* (subject to any overarching law or custom) {FFC 306 [132]}.

53 The Full Court's analysis diminishes the primary judge's conclusion that reciprocal rights are properly described as "rights", not merely privileges or interests (see the definition of "interest" in s 253 of the NTA) {FC 130 [508]}. The primary judge's conclusion in this regard was not put in issue before the Full Court. It was therefore necessary for the Full Court to proceed on the basis that reciprocal rights were indeed rights. Insofar as it has not done this, it has fallen into error.

54 Secondly, the Full Court described reciprocal rights as being held "mediately through a personal relationship with a native title holder" {FFC 306 [130]}. It also characterised occupation based rights as arising by reason of "who you are" and reciprocal rights as arising by reason of "who you know" {FFC 306 [131]}. This comparison does not do justice to the nature of reciprocal rights. While it is accepted that there are qualitative differences between the two kinds of rights, both kinds of rights in fact arise by virtue of a culturally significant relationship with a native title holder. In the case of occupation based rights, the relevant relationship is between the rights holder and his or her mother or father and prior ancestors; in the case of reciprocal rights, the relevant relationship is between a rights holder and a brother-in-law, sister's son, brother's daughter, *tebud/thubud* etc.

55 Thirdly, the Full Court refers to reciprocal rights persisting only as long as a personal relationship with a native title holder continues {FFC 306 [133]}. This statement is, with respect, apt to mislead because it conveys that typically there is an ephemeral quality about these rights. On the contrary, the evidence established and accepted by the trial judge was to the effect that, once acquired, reciprocal rights are usually lifelong and are commonly transmitted to subsequent generations {FC 61 [192], 68-9 [226]-[227], 69-70 [229]-[232], 121 [463], 130 [507]}.

56 There is no basis in the text of subsec 223(1) of the NTA or in the authorities for the proposition that native title rights:

(a) must be unqualified in the sense that no kind of permission or licence is required and can only relate to things that may be done as of right;

(b) cannot be held mediately through a personal relationship with a native title holder;

(c) must be perpetual or have any particular degree of permanence.

57 Subsection 223(1) does not require a comparison of different kinds of customary rights and interests. Either such rights and interests meet the requirements of subsec 223(1) or

they do not; but, they do not fail to meet those requirements because they are rights other than "ownership" rights.

58 If the Full Court's reasoning were correct, spouses would not hold native title rights because such rights would be acquired "mediately through a personal relationship with a native title holder" and would be rights arising by reason of "who you know". This would be contrary to numerous determinations, including determinations made following trials. On two occasions, the question of whether spouses have native title rights has been considered by a Full Court of the Federal Court (*Northern Territory v Alwayarr* (2005) 145 442 at [117] and, *Gumana v Northern Territory* (2007) 158 FCR 349 at [135]-[163]). In each case, a finding that spouses have native title rights was upheld on appeal, though the argument largely turned on the connection requirement in para 223(1)(b). Also of interest for present purposes is that, at trial in *Gumana*, Selway J adopted the Commonwealth's description of the rights of spouses as being rights in the clan estate of a spouse "subject to a requirement of 'permission' from clan members which is rarely refused (but in principle may be refused)" (*Gumana v Northern Territory* (2005) 141 FCR 457 at [216]).

59 Beyond the position of spouses, the decision of the Court below involves a significant narrowing of the basis for recognition of native title compared to other determinations that have been made by consent and after trial which recognise as native title holders, persons who hold rights in the country of others and rights that are subject to the rights of those others: eg, *Neowarra v State of Western Australia* [2004] FCA 1092, order [3], per Sundberg J (various bases for rights held 'intramurally' within a community of native title holders); *A-G for the Northern Territory v Ward* [2003] FCAFC 283, especially order [4] per Wilcox, North and Weinberg JJ (members of neighbouring estates, spouses of group members and others with ritual authority); *Gumana v Northern Territory* (No 2) [2005] FCA 1425, order [3] per Mansfield J giving full effect to the reasons of Selway J (persons whose mother or mother's mother was a member of the clan, guardians of or successors to the rights of a clan and other non-descent bases for rights).

60 The form of the determinations referred to above depended not only on the facts of those matters, but also on the construction of subsec 223(1) of the NTA and its application to the facts.

61 The Full Court noted the primary judge's comment that "considerable difficulties" would in any event exist in accommodating reciprocal rights within the scheme of the NTA {FFC 304 [121]}. The difficulties referred to were said by the Commonwealth to be associated with the connection requirement of para 223(1)(b).

62 The primary judge had held that, if it be necessary to classify the native title rights and interests, they are group rights and interests {FC 137 [543]}. Although at trial the appellant's claim was initially put on the basis that reciprocal rights are group or individual rights, it was ultimately accepted that such rights are held by individuals {FC 127-8 [493]}. The Full Court noted the primary judge's finding that the native title holders do not hold their native title rights communally {FFC 304 [123]}.

63 The appellant accepts that, for the purposes of s 223(1) of the NTA, native title rights must be "communal, group or individual". There is, however, no requirement that the rights established in a given case all must fall into one only of these categories. Recognition of native title cannot be declined just because, for example, some of the native title rights are group rights and some of them are individual rights. Equally, regardless which one or more of those epithets is held appropriate for a native title right, it is necessary only to show that there is a connection which is also properly described by one or more of those epithets.

64 The Full Court stated that, the relevant relationship is "one subsisting *directly* between the peoples who possess those rights and the land and waters" (emphasis added) {FFC 305 [129]}. The Court cited no authority for this proposition. The only authority cited by Court at this point was a passage from Gummow J's reasons in *Yanner* {FFC 305 [129]}, but that passage says nothing about any requirement of directness.

65 The Full Court fell into error in imposing a requirement of directness. No such requirement appears in the text of subsec 223(1). Nor is there any warrant in the authorities for reading the word "connection" in subsec 223(1) as if it reads "direct connection".

66 The Full Court's substantive discussion of "connection" is contained in the following single paragraph {FFC 305-6 [130]}:

> Such rights cannot be said to be possessed by the claimants themselves, so far as they relate to land and waters: such rights are not held by reason of the putative holders' own connection under their laws and customs with the land and waters in question but are held mediately through a personal relationship with a native title holder who does have the requisite connection; as Gleeson CJ, Gaudron, Gummow and Hayne JJ emphasised in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [9] "those peoples, *by those laws and customs* must have a '*connection*' with the land or waters" (original emphasis).

67 It is, with respect, unclear from this paragraph how the Full Court analysed the connection requirement in para 223(1)(b) of the NTA, or how it applied that requirement to the present case. On the one hand, the Court appeared to be looking for connection at an individual level ("own connection", "a native title holder who does have the requisite connection"). On the other hand, the Court recited a passage from the majority in *Yarmirr*,

which sets out the requirements of para 223(1)(b), albeit with emphasis on particular aspects. Under para 223(1)(b), it is of course "the Aboriginal peoples or Torres Strait Islanders" who must have a connection with the land and waters.

68 If the Full Court considered that the primary judge's finding that the native title holders do not hold their native title rights communally was problematic in terms of the application of the connection requirement to the reciprocal rights holders, it did not spell out why this was so.

69 The existence of a connection of reciprocal rights holders by laws and customs to the marine territory in which the reciprocal rights are exercisable is clear. That connection is underpinned by the unchallenged connection of the counterparty to that territory. That connection is extended to the reciprocal rights holder by the laws and customs about reciprocal relationships, including those which attach rights in territory to the relationships.

70 The required connection is also satisfied and maintained when people and places are viewed at a broader scale. Reciprocity was important to the primary judge's 'one society' finding. As an 'informing principle' {FC 59-62 [185]-[194}, in its manifestations {FC 62-73 [195]-[242]} in various laws and customs of the normative system {FC 122-3 [469]}, and in its application in the existence and exercise of reciprocal rights {FC 129 [504]}, 'reciprocity' overlays the connections of communities to community areas with a network of connection {FC 34 [71], 126-7 [489]-[490]}, 129-30 [505]-[508] extending across the Island communities and marine territories {FC 121 [463]-[464]}. In this case, as in others, the laws and customs link the native title holders to each other and to the land and waters of the native title area "in a complex of relationships": *Bodney v Bennell* (2008) 167 FCR 84 [169].

71 In relation to the Full Court's apparent reliance on the 22 consent determinations of native title, it is not entirely clear what use it made of them. Whatever the case, the terms of those determinations did not necessitate a finding that the holders of the reciprocal rights are not native title holders (save to the extent that they are also occupation based rights holders). Under para 86(1)(c) of the NTA, subject to subsec 82(1), the Federal Court could have adopted any finding, decision or judgment of the Federal Court in another matter, but it was not asked to do so and did not do so. No complaint has been made about that.

72 The earlier determinations all related to land (including some heavily populated islands), not a large area of sea. Generally, exclusive, as distinct from non-exclusive, native title rights were determined. Unremarkably, the claims leading to these determinations were brought by groups representing the people of one or more of the 'community Islands'. In

contrast, the native title claim group in the present proceeding was in aggregate the membership of all of those groups and the persons identified in Mabo *[No 2]* {FC 30 [54]}.

73 The earlier determinations, by their terms, are not inconsistent with the existence of reciprocal rights, without recognising them as native title rights. This is because, in each case, the determined rights are expressed to be subject to and exercisable in accordance with the traditional laws and customs (which include laws and customs about reciprocal rights).

74 Even if there is an inconsistency between the terms of the 22 consent determinations and the determination that the appellant says should have been made in the present case (which there is not), the Federal Court should not have been deflected from making the appropriate determination on the evidence in the present case. The determination in the present case was made after a long trial; all of the earlier determinations were made by consent and on minimal evidence. It is in any event possible to vary a determination of native title in certain circumstances (see subsecs 13(4) and 13(5) of the NTA).

Part VII: Legislation

75 The verbatim content of applicable provisions of statutes and regulations relevant to the appeal and relied on by the parties will be provided in an agreed book or annexure at the time of filing the appellant's reply.

Part VIII: Orders sought

76 The Appellant seeks the following orders:

(1) The appeal be allowed.

(2) Order 1 made by the Full Court of the Federal Court of Australia on 14 March 2011 be set aside.

(3) Order 2 made by the Full Court of the Federal Court of Australia on 14 March 2011 be set aside so far as necessary to make the orders that follow.

(4) The determination of native title made by the Federal Court of Australia on 23 August 2010 (**Determination**) be varied as set out in the orders that follow:

Order 4 of the Determination be varied by:

(a) amending paragraph (1) to commence:

> "(1) The persons who hold group rights comprising the native title are the persons who are members of each of the following island communities in respect of the native title areas described in Schedule 4:"

(b) renumbering paragraph (2) as paragraph (3).

(c) adding a new paragraph (2) as follows:

"(2) The native title rights are also held by a native title holder referred to in paragraph (1) in respect of a native title area or areas described in Schedule 4 other than the area or areas of his or her own island community or communities where that person has a reciprocal relationship with a member of that other island community or those island communities which gives rise to those rights."

Part IX: Time Estimate

77 It is estimated that 2 hours will be required for the presentation of the appellant's oral argument.

9th November 2012

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