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

No. B58/2012

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/AS 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

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

10 **KIWAT LUI**

Forty Eighth Respondent

TORRES STRAIT REGIONAL AUTHORITY

Forty Ninth Respondent

SECOND RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION AS TO FORM

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. First, did the Court below correctly hold that the non-exclusive right of the native title holders *"to take for any purpose resources"* in their own marine territories and shared territories[1] is extinguished by the system of prohibitions and licensing in colonial, State and/or Commonwealth fisheries legislation to the extent that the right included the *"taking of fish and other aquatic life for sale or trade"*.[2]

3. Secondly, did the Court below correctly hold that rights based upon reciprocal personal relationships with persons who have native title rights in their own land and marine territories[3] are not native title rights and interests within the meaning of s 223(1) of the *Native Title Act 1993 (Cth)* (**NTA**).

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903*

4. The second respondent certifies that it has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903 (Cth)*, and is of the view that no such notice is required.

PART IV: FACTS

5. Subject to the matters referred to at [6] to [11] below, the second respondent agrees with the appellant's summary of facts (appellant's submissions (**AS**), Part IV, paras 6-20). Nor does the second respondent take issue with the substance of the appellant's chronology save for the supplementary matters dealt with in the appendix.[4]

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[1] FCA [11]. See also paragraph 5, Schedule 4, order of 23 August 2010 (**Determination**) together with paragraphs 7 and 8 relating to the non-exclusive nature of the native title rights determined by the trial judge to exist.

[2] Order of the FCAFC made on 14 March 2012 at [1]. As the Determination applies only to land and waters below the high-water mark, the aquatic life referred to might perhaps more accurately have been described as marine life. However, for reasons of consistency with the Full Court's order, the term "aquatic life" is used in these submissions. Further, while the order of the Full Court refers to the terminology of "*sale or trade*", its reasons are consistent with the submission of the second respondent that the ordinary meaning of sale would include trade in any event: see [25] below.

[3] FCA [11].

[4] It is proposed in due course to provide to the Court a consolidated chronology, which incorporates the matters identified in the appendix into the appellant's chronology.

6. First, the primary judge found that the Torres Strait Islanders observed and acknowledged a single body of traditional laws and customs, notwithstanding some local differences both in content and in applicable laws.[5] However, the native title rights and interests held under the "*society's*" laws and customs were found to be held at the individual island community level by claim group members of that community.[6] There was no challenge to these findings on appeal.

7. Thus, the group rights[7] comprising the native title were determined to be held by members of each of the 13 island communities identified in Order 4(1) of the Determination[8] and paragraph 2 of Schedule 5 of the Determination,[9] each of which holds its own exclusive marine estate[10] (and in some areas shares its estate with one or more other island community[11]), on the basis of "*occupation based rights*".[12]

8. Secondly, the primary judge found that descent (including by adoption)[13] provides, inter alia, the basis for membership of each island community that holds the native title as a group.[14] His Honour also found, consistently with the appellant's case at trial, that under the laws and customs of the Torres Strait Islander society, the wives of members of the local island community groups also acquired (occupation based) rights and interests in relation to the land and waters of their respective husbands.[15] However the primary judge was not satisfied that the laws and customs regulating inter-island relationships otherwise generated rights and interests in relation to land and waters.[16]

9. Thirdly, it was common ground at the trial that the laws and customs advanced by the Island communities did not reflect an overarching spiritual connection with the waters.[17]

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[5] FCA [450], [488].
[6] FCA [11], [58], [253], [414], [445], [455], [540], [544], [552], [638].
[7] FCA [542]-[543].
[8] Determination at p 1.
[9] Determination at p 32.
[10] FCA [11], [58], [253], [414], [445], [455], [540], [544], [552], [611] – [614].
[11] FCA [261] – [262], [614], [640], [648].
[12] FCA [182], [247], [433], [540], [611], [638].
[13] FCA [194].
[14] FCA [182] and [247].
[15] FCA [71] and [194].
[16] FCA [71].
[17] FCA [3], [172] and [251].

10. In the fourth place, the second respondent does not accept that the last sentence in AS [14] accurately summarises the findings by the primary judge as to the nature of the reciprocal relationships and refers instead to the findings at FCA [506]-[508].[18] These factual findings are not challenged by the appellant.

11. Finally, in relation to AS [18], the "*difficulties involved in accommodating a conclusion ... [that reciprocity based rights could plausibly be said to be ones 'in relation to' land or waters] within the scheme of the NT Act*" (FCA [510]) are alluded to by the primary judge at FCA [502]; see also FCAFC [133].

PART V: LEGISLATIVE MATERIALS

12. Copies of the relevant legislative materials are proposed to be provided in an agreed annexure at the time of the filing of the appellant's reply.

PART VI: ARGUMENT

(1) EXTINGUISHMENT

(a) General principles

13. The question of whether valid laws enacted before the commencement of the NTA extinguished native title rights and interests falls outside the scope of the NTA and is therefore determined by the application of common law principles.[19]

14. In *Mabo (No. 2)*[20], Brennan J explained that:

> *"...the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive.*
>
> ...
>
> *A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title."*[21]

15. If native title is extinguished, that extinguishment is permanent.[22]

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[18] See further the argument in Part VI(2) below on the "reciprocal rights" issue.

[19] As from the provisions of Div 2B of Part 2 of the NTA and equivalent State and Territory laws which "*confirm*" extinguishment by certain kinds of acts, the NTA does not, in general, have anything to say about the extinguishment of native title which occurred validly before the Act came into force: *Western Australia v Commonwealth (**Native Title Act case**)* (1995) 183 CLR 373 at 454. See also, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1 (***Wik***) at 167-168 Gummow J.

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

[21] *Mabo (No.2)* at 64.

16. Notwithstanding that "*intention*" is the test, the clear and plain intention to which Brennan J refers is objectively ascertained and ascertained in the context where, prior to 1992, Parliament made laws unaware of the existence of native title.[23] Specifically, as Brennan J indicates in the passage quoted above, that intention is ascertained by determining whether the non-native title rights or statutory regime are inconsistent with the continued enjoyment of native title rights and interests in whole or to any extent, native title being susceptible to partial, as well as total, extinguishment.[24] For example, with respect to the effect of pastoral leases on native title, the majority in *Ward* considered that native title holders could continue to exercise native title rights to enter on the land, and to carry out many traditional activities, such as hunting or gathering traditional foods, there being no inconsistency between such native title rights and the rights granted to the pastoral lessee.[25] On the other hand, the majority held that native title rights to control the access of others to the land and to make decisions about use of the land were inconsistent and did not survive the grant of a pastoral lease.[26] Equally, it follows that Finn J, having found a native title right to access and take marine resources as such, correctly accepted that:

> *"...where the activity engaged in when exercising that right has itself a discrete and understood purpose, ... that activity may properly be able to be treated as a distinct incident of the right for extinguishment purposes. As have some number of the judges of this Court (e.g. Yarmirr FC at [255]; Neowarra at [779]; Gumana TJ at [247(b)]), I accept for present purposes that a right to take resources for trading or commercial purposes – whether exclusive or non-exclusive – is a discrete and severable charcteristic of a general right to take resources. To this extent I reject the applicant's submission that it is impermissible so to 'subdivide' this right."*[27]

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[22] *Fejo v Northern Territory* (1998) 195 CLR 96 at [45] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. The permanent effect of extinguishment upon native title is also reflected in the definition of "*extinguish*" in s 237A of the NTA which was inserted in 1998. Note however, that the NTA provides, e.g., that in certain circumstances, any prior extinguishment of native title is to be disregarded (ss 47, 47A and 47B), while s 223(3) provides that certain statutory rights for the benefit of Aboriginal peoples and Torres Strait Islanders fall within the definition of native title for the purposes of the Act.

[23] See *Wik* at 184-5 Gummow J and by analogy *Bropho v Western Australia* (1990) 171 CLR 1 at 16-17.

[24] *Wik* at 84-86; *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) at [78].

[25] *Ward* at [194].

[26] *Ward* at [192] in relation to the Western Australian pastoral leases, and at [417] and [422] in relation to the Northern Territory pastoral leases. It was also considered that other traditional rights, such as a right to burn off the land, may be inconsistent with the rights granted to the pastoral lessee and, thereby, extinguished: ibid at [194] Gleeson CJ, Gaudron, Gummow and Hayne JJ. The approach of the majority to the question of the extent to which native title was extinguished by the grant of a mining lease under the *Mining Act 1978* (WA) provides a further example of the application of the inconsistency of incidents test: see ibid at [308]-[309].

[27] FCA at [847]. See also FCAFC [24], [55] and [197].

17. In short, while native title "*...is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory*",[28] the extent of any extinguishment by acts of the sovereign is determined by the degree of inconsistency.

18. More particularly with respect to the question of regulation, Gleeson CJ, Gaudron, Kirby and Hayne JJ held in *Yanner v Eaton*[29] that:

> *"...regulating the way in which rights and interest may be exercised is not inconsistent with their continued existence. Indeed, regulating the way in which a right may be exercised presupposes that the right exists. No doubt, of course, regulation may shade into prohibition and the line between the two may be difficult to discern."*[30]

10 19. Thus, while in a general sense, legislation such as the Commonwealth and State laws regarding fishing might be said to have regulatory purpose, that does not in itself determine whether the legislative regime is inconsistent with the particular native title rights in question. Irrespective of the capacity to describe the purpose of a law in such terms, the question of legislative intention still reduces to the question of the extent, if any, of the inconsistency between the statutory regime and the native title rights. It follows that, what may amount to regulation of one aspect of the bundle of native title rights may be inconsistent with the existence of a different aspect of the bundle of rights. For example, the enactment of a state by-law prohibiting the taking of flora and fauna was held to extinguish native title rights to hunt fauna and gather flora in *Ward* (subject to the *Racial Discrimination Act 1975* (Cth)), but was
20 not inconsistent with, and did not extinguish, other native title rights.[31]

20. In the present case, the question is whether the non-exclusive native title right *"to take for any purpose resources"* in the native title holders' own marine territories and shared territories[32] has been extinguished by the system of prohibitions and licensing in colonial, State and/or Commonwealth fisheries legislation to the extent that the right included the taking of fish and other aquatic life for sale (including trade).

21. As explained below, an analysis of the colonial, State and Commonwealth fisheries legislation that cumulatively applied to the whole of the claimed area prior to 1975 reveals that this is not a case in which the question of whether the legislative scheme relevantly regulated rights or

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[28] *Mabo (No. 2)* at 58 Brennan J; Wik at 84 Brennan CJ, 126-127 Toohey J, 169, 220 Gummow J. See also s 223(1)(a), NTA.

[29] (2000) 201 CLR 351 (***Yanner***).

[30] *Yanner* at [37].

[31] *Ward* at [265]-[268] Gleeson CJ, Gaudron, Gummow and Hayne JJ.

[32] FCA [11]. See also paragraph 5, Schedule 4 of the Determination, together with paragraphs 7 and 8 relating to the non-exclusive nature of the native title rights determined by the trial judge to exist.

constituted a prohibition is a fine one. It is the State's contention that this is a straightforward case of prohibition coupled with a system for the grant of new exclusive statutory rights, and therefore of extinguishment to the extent that the native title right to take fish and other aquatic life within the native title holders marine territory would otherwise have included a right to fish for the purposes of sale. [33]

(b) Colonial and state prohibitions on fishing for sale

22. The first fisheries legislation that applied to the claim area was *The Queensland Fisheries Act of 1877* which prohibited only fishing for sale with a net. As such, it is *The Queensland Fisheries Act of 1887* (**1887 Fisheries Act**) that is the earliest of the fisheries laws relied upon here in relation to the question of extinguishment. By that time, Great Britain had not only in 1788 acquired sovereignty over mainland Queensland and the appertenant territorial sea from low-water mark to 3nm,[34] it had also acquired sovereignty over the islands 60 miles off the coast of Queensland in 1872,[35] and shortly thereafter acquired sovereignty over the remaining islands in the Torres Strait in 1879.[36]

23. Significantly for present purposes, the 1887 Act contained an unqualified prohibition on fishing for sale without a licence. Specifically, s 13 of the 1887 Act provided simply that *"[i]t shall not be lawful for any person to engage in taking fish for sale unless he has obtained from the Treasurer a licence for that purpose, for which an annual fee of ten shillings shall be paid."* That prohibition was reinforced by a prohibition upon engaging or employing another person to take fish for sale without a license (s 13), and employing a boat to take fish for sale with a net without obtaining a license (s 12).

24. Similarly, s 17(1) of *The Fish and Oyster Act of 1914* (**1914 Fish Act**) provided that *"[i]t is unlawful for any person (a) To engage in taking fish for sale; ... unless he has obtained from*

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[33] The statutory schemes governing fishing that have applied to varying extents over the Torres Strait in increasing complexity from 1887 onwards are explained in more detail in the reasons of Finn J at FCA [780]-[804] (colonial and state laws) and FCA [805]-[842] (Commonwealth laws). Note however the correction to that analysis at [37] below.

[34] *Commonwealth v Yarmirr* (2001) 208 CLR 1 (***Yarmirr***) at 53-54 [54].

[35] See the Letters Patent dated 30 May 1872 (document no. 2 at pp 10-12 of Exhibit 81R1). See also the Commonwealth's Second Amended Points of Response to the Applicant's Second Amended Points of Claim (**Commonwealth's 2POR**) at [2.1] and Map 1 at Attachment A thereto, depicting the 3nm territorial sea as at 30 May 1872.

[36] See the Proclamation made on 18 July 1879, published in the Government Gazette on 21 July 1879 (document no. 4 at pp 13-15 of Exhibit 77R2). See also the Commonwealth's 2POR at [2.2] and Map 2 at Attachment B thereto, depicting the 3nm territorial sea as at 18 July 1879. See also FCA [687].

the Minister a license for that purpose", for an annual fee.[37] The prohibition was backed up by stringent compulsive powers of inspection and the like.[38] Importantly, the comprehensive nature of the prohibition is apparent from the breadth of the definition of *"Fish"* in s 4 to mean *"[e]very description of fish, shellfish, turtles, crabs, prawns, shrimps, mammals, crustacea, molluscs and sponges or other marine products, found in Queensland waters, including their spat, spawn, fry, and young".*[39]

25. While there was no definition of sale in either the 1887 or 1914 Acts, the ordinary meaning of the term "*sale*" means "*to sell*". The term "*sell*" in turn includes (and included then) "*to give up or part with one thing in exchange for another*", as well as "*[t]o give up or hand over (something) to another person for money (or something that is reckoned as money; esp. to dispose of (merchandise, possessions etc) to a buyer for a price;...*"[40]

26. In any event, if there were any doubt about the matter, it was put to rest by the 1957 Fisheries Act. That Act continued the prohibition on taking fish for sale in Queensland waters[41] by s 80(1)(i) of *The Fisheries Act of 1957* (**1957 Fisheries Act**).[42] The prohibition applied to "*fish*" defined in essentially the same broad terms as the 1914 Act save for exempting (relevantly)

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[37] The prohibition also extended to engaging or employing another to engage in fishing for sale without a licence: s 17(4), 1914 Fish Act. While an amendment made to the 1914 Fish Act in 1955 provided that the Act did not apply to the taking of fish by any Islander within the meaning of *The Torres Strait Islanders Acts* who usually lives on a reserve, this was the first time that any such exemption was enacted and it was limited only to the taking of fish "*for consumption by islanders or aboriginals*": see FCAFC at [206].

[38] See ss 5(1) and (2) and 44 (powers of inspectors). See also s 16 in relation to the requirement for a licence to employ a vessel in taking fish for sale.

[39] Note that oysters were excluded from the definition and subject to the separate regime in Part III of the 1914 Fish Act which prohibited the taking of oysters for sale without a licence (s 26) and provided for the grant of licences on payment of a prescribed fee to take oysters for sale and to employ another to do so (s 23(1)(i)).

[40] Oxford English Dictionary (online version) (viewed 28 November 2012).

[41] The term "*Queensland waters*" was defined in s 6(1) of the 1957 Fisheries Act in the same terms as the 1914 Fish Act as amended in 1955.

[42] Section 80(1) provided that *"It shall be unlawful for any person – (i) To engage in taking fish for sale; or (ii) To employ any other person whether wholly or partly for the purpose of taking fish for sale;... unless the person so engaged or employed ... holds a licence granted by the Minister for the purposes of this section"* upon payment of a prescribed fee in advance. While "*sell*" was specifically defined but not "*sale*" (the latter being the term used in s 80(1)), the term "*sale*" means "*to sell*" (Oxford English Dictionary) and it can reasonably therefore be inferred that Parliament intended that the words "*sale*" and "*sell*" would bear a consistent meaning, as indeed the Parliament later expressly provided by an amendment to s 6 by the *Fisheries Act Amendment Act 1982* (Qld): see *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452 Hodges J; Pearce and Geddes, *Statutory Interpretation in Australia* (7th ed, Butterworths) at [4.6]. Section 82(10) also provided that it was unlawful to employ or use a vessel in taking fish or other marine products save under a licence. Section 92 also made it an offence to contravene any licence under the Act. It is also noted that, as was the case under the 1914 Act as amended in 1955, the 1957 Fisheries Act also allowed for the grant of exclusive licences to take fish within a defined area: s 82, 1957 Fisheries Act.

"whales, oysters, pearl shell, trochus, beche-de-mer, green snail...", those being subject to more detailed and stringent regimes.[43] In addition, an expansive definition of *"sell"* was included in s 6(1) making it clear that the concept extended to such dealings as barter and exchange. Specifically, s 6(1) provided that:

> *" 'Sell':- Includes sell by wholesale or by retail or by auction, and barter, exchange, or supply for profit, assign or part with possession for valuable consideration, offer or expose for sale, keep or have in possession for sale, or send, forward, consign, or deliver for or on sale, and to authorise, cause, permit, allow, suffer, or attempt any of these things."*

27. The term *"take"* was defined in s 6(1) with similar breadth to mean *"[w]ith its derivatives, includes fish for catch, kill, destroy, dredge for, raise, collect, gather, obtain by any means, or carry away".*

28. Each of the 1887 Fish Act, the 1914 Fish Act and the 1957 Fisheries Act applied from the time of its enactment to areas of land and waters within Queensland, including the islands forming part of Queensland and also offshore to the outer limits of the 3nm territorial sea adjacent to mainland Queensland and each of those islands.

29. Specifically, the 1887 Act applied to "*Queensland waters*" which was relevantly defined in s 2(2) as including "*all salt and fresh waters which are not upon land which is the property of a private person*". The 1914 Fish Act also applied to "*Queensland waters*" which was relevantly defined in s 4 of the 1914 Fish Act as including "*all salt, brackish and fresh waters within the territorial limits of Queensland which are not upon land which is the property of a private person*". Equally, the 1914 Act as amended in 1955 and the 1957 Act applied to "*Queensland waters"* being relevantly "*[t]he sea within territorial limits of Queensland...*".[44]

30. It is clear from these definitions that the Acts were intended to apply in respect of the sea within what was then considered to be the territorial limits of Queensland, namely the waters out to the 3nm limit. As Menzies J explained in *Bonser v La Macchia*:

> *" 'Waters within the territorial limits of a State' I read as meaning waters which could also be described as the territorial waters of a State or, to use the language of the Acts of the Federal Council of Australasia, to be referred to hereafter as 'waters within the territorial jurisdiction' of a*

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[43] In relation to the whales, see Part II, 1957 Fisheries Act; pearls, pearl shell, trochus, beche-de-mer or green snail, see Part III of the Act; and oysters, see Part IV of the Act.

[44] By *The Fish Oyster Acts Amendment Act of 1955*, a new definition of *"Queensland waters"* was inserted to mean *"[t]he sea within territorial limits of Queensland and all salt, brackish, and fresh waters in Queensland whether coastal or inland, including, but without limiting the generality thereof, the waters of all bays, gulfs, and inlets of the sea, and all rivers, creeks, streams, lakes, and lagoons, and waters on all foreshores and all other waters whatsoever of the State: Provided that the term does not include water on or over land which for the time being is lawfully granted in fee simple by the Crown".* The definition of "Queensland waters" in s 6(1) of the *1957 Fisheries Act* is in the same terms.

State. In 1900 waters within the three-mile limit of the coast of a colony would be understood as the territorial waters of the colony..."[45]

31. Notwithstanding that it was ultimately held in the *Seas and Submerged Lands Case*[46] that the boundaries of the colonies and, in due course, of the States ended at the low-water mark, the colonies and the States were competent to make laws applying extra-territorially, including fishing laws over sea territory adjacent to the State out to and beyond the 3nm limit.[47]

32. It follows that any extinguishment by reason of the 1887, 1914 and 1957 fisheries laws occurred to native title rights within the outer limits of the 3nm territorial sea drawn at that stage from the low-water mark.

(c) Commonwealth prohibitions on fishing for sale

33. Fisheries laws 1952: The *Fisheries Act 1952* (Cth) was the first general fisheries legislation enacted by the Commonwealth and remained in force until repealed by the *Fisheries Management Act 1991* (Cth).[48] Accordingly, this Act was in force on 9 February 1983 when the baselines were defined,[49] and 13 November 1990 when the territorial sea was extended to 12nm.[50]

34. At the same time as the *Fisheries Act 1952* was enacted, the Parliament also enacted the *Pearl Fisheries Act 1952* (Cth). Both Acts, as the trial judge held at [808], operated on essentially the same principles. By s 7 of the *Fisheries Act 1952* and s 8 of the *Pearl Fisheries Act 1952*, the Governor-General could, by proclamation "*declare any Australian waters to be proclaimed waters for the purposes of this Act*". "*Australian waters*" were originally defined as meaning "*(a) Australian waters beyond territorial limits; and (b) the waters*

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[45] (1969) 122 CLR 177 at 209.

[46] *New South Wales v Commonwealth* (1975) 135 CLR 337 at 371, 378, 467-8, 484; *Yarmirr* at [53].

[47] See generally *Bonser v La Macchia* (1969) 122 CLR 177 at 189.1-.3,190.4-191.2 Barwick CJ, 201.5-202.5 Kitto J, 209.6-210.1 and 211.4 Menzies J, 213.4-.4 and 226.1-.5 Windeyer J; *Pearce v Florenca* (1976) 135 CLR 507 at 518-520 Gibbs J and 526 Jacobs J; *Port MacDonnell Fisherman's Association v South Australia* (1989) 168 CLR 340 at 369-373; *Yarmirr* at [62]-[67].

[48] See also the *Fisheries Legislation (Consequential Provisions) Act 1991* (Cth) in relation to savings and transitional provisions.

[49] See the Proclamations made on 4 February 1983 and published in the Commonwealth of Australia Gazette on 9 February 1983 (document no. 5 at pp 19-32 of Exhibit 81R1). See also the Commonwealth's 2POR at [2.4] and Map 3 at Attachment C thereto, depicting Australia's territorial sea and internal waters as at 14 February 1983. See also *Yarmirr* at [66].

[50] Proclamation under s 7 of the *Seas and Submerged Lands Act 1973* (Cth) made in 1990, referred to in *Yarmirr* at [66]. See also the Commonwealth's 2POR at [2.5] and Map 4(a) at attachment D thereto, depicting Australia's territorial sea as at 20 November 1990.

adjacent to a Territory and within territorial limits."[51] "*Territory*" in turn was defined to mean "*Territory of the Commonwealth*" and therefore apt to embrace Australia's external territories at the time.[52]

35. On 30 November 1954, the Governor General issued a proclamation declaring "proclaimed waters" pursuant to s 7 of the *Fisheries Act 1952*. As the trial judge found at FCA [812], "*these waters completely surrounded the Australian coast but did not include waters within the territorial limits of a state. These proclamations were held to be valid in Bonser v La Macchia*[53] *... The 'proclaimed waters' thus encompassed the waters within the claimed area.*"[54]

10 36. Significantly, s 13 of the *Fisheries Act 1952* provided that the taking of fish or pearl-shell, trochus, beche-de-mer and green snail, or use of a boat for that purpose, in an area of proclaimed waters was prohibited without a licence.[55] The term "*fish*" was defined in s 4 of the Fisheries Act 1952 only so as to make it clear that it included "*turtles, dugong, crustacea, oysters and other shellfish*" and excluded whales which were covered by the *Whaling Act 1935* (Cth),[56] and pearl shell, trochus, beche-de-mer or green snail to which a general prohibition on taking applied under the Pearl Fisheries Act without a licence.[57] As such,

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[51] See s 4, *Fisheries Act 1952* (Cth) and s 5(1), *Pearl Fisheries Act 1952* (Cth). Note that the definition of "Australian waters" was amended by the *Fisheries Act 1953* (Cth) so as to include "*(c) the waters adjacent to a Territory, not being part of the Commonwealth, and beyond territorial limits.*" The *Pearl Fisheries Act 1953* (Cth) amended the definition in a like manner but also, adding in addition, "*being waters that are above the continental shelf.*"

[52] See s 4, *Fisheries Act 1952* (Cth) and s 5(1), *Pearl Fisheries Act 1952* (Cth).

[53] (1969) 122 CLR 177 at 199-200.

[54] See also subsequent proclamations issued pursuant to section 7 of the *Fisheries Act* 1952 (Cth) on 9 December 1954, 16 February 1956, 22 August 1968, 26 September 1979 and 20 December 1990 which the primary judge also found "embraced the claimed area" (FCA [808]) (see document nos.26, 27, 28, 30 and 31 at pps.50, 51, 52, 56 and 57 of Exhibit 77R2).

[55] *Fisheries Act 1952* (Cth), s13; *Pearl Fisheries Act 1952* (Cth), s14.

[56] The *Whaling Act 1935* prohibited absolutely the taking of certain whales (including calves) (s 6) and introduced a licensing scheme whereby no whales could be taken except pursuant to a licence issued pursuant to s 7. The Act empowered officers to board any ship suspected of taking whales (ss 5 and 16). This Act was substituted in due course by the *Whaling Act 1960* (Cth). Under s10 of the 1960 Act, the Minister was empowered to prohibit the taking or killing of whales specified in the Gazette (see Whaling Notices No.s 1-8 made under s 10 of the *Whaling Act 1960* at document nos. 59-62, pp 346-355 of Exhibit 77R2). Whales were subsequently protected under the *Whale Protection Act 1980* (Cth), s 9 of which placed a total prohibition on the killing or injuring of whales, unless done pursuant to a permit issued pursuant to s 11. This was supported by powers of inspection, including powers of arrest (s 24) and power to seize vessels (s 26(2)).

[57] Section 14 of the Pearl Fisheries Act prohibited a person from engaging in "pearling" in an area of proclaimed waters otherwise than pursuant to a licence. "*Pearling*" was defined in s 5(1) to include "*...the*

together the 1952 Fisheries, Pearl Fisheries and Whaling Acts were intended comprehensively to cover living marine creatures that were susceptible to being taken.

37. The term *"take"* was defined in s 4 in the *Fisheries Act 1952* in terms that limited the scope of the prohibition in s 13, namely: " *'take' in relation to fish, means take, catch or capture for trading or manufacturing purposes and 'taking' has a corresponding meaning"*. It follows in this regard that the trial judge was in error at [FCA 811] of his reasons in finding that the prohibitions in the *Fisheries Act* 1952 were not limited to the taking of fish for any particular purpose until 1973. Otherwise this scheme was essentially retained for the duration of this Act[58] until 1985 with the introduction of managed fisheries where licences, specified to be issued for 12 month periods, were made subject to plans of management for the relevant fishery.[59]

38. 1968 Continental Shelf Act: The *Pearl Fisheries Act 1952* (Cth) was repealed by the *Continental Shelf (Living Natural Resources) Act 1968* (Cth) (**1968 Continental Shelf Act**). The primary purpose of the latter Act was *"to enable the fullest possible protection to be given to the living sedentary resources of the continental shelves of Australia and the external Territories."*[60] Accordingly, the Act, together with legislation in relation to the non-living continental shelf resources, was intended to place Australia *"in a position to exercise full legal control over all of its continental shelf resources, both living and non-living, covered by the Convention"*, referring to the 1958 Convention on the Continental Shelf which was included in the schedule to the *Seas and Submerged Lands Act 1973* (Cth) (**SSLA**).

39. By s 7, the Governor-General was empowered to declare a marine organism to be a sedentary organism to which the Act applied when satisfied that it fell within the sedentary species covered by the Convention on the Continental Shelf. At the same time, the *Fisheries Act 1952* was amended so as to include crustacea and molluscs save for any sedentary

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work of searching for or obtaining pearl shell, trochus, beche-de-mer or green snails". Provision was made for the grant of licences to persons to search for and obtain pearl shell etc, to use a boat for those purposes, or to dive under s 10, and for scientific purposes under s 16.

[58] A new s 13 was inserted by the *Fisheries Act 1973* (Cth) which prohibited a person from engaging in *"fishing"* (defined in s 4 as meaning *"the taking of fish, and includes the processing of fish that have been taken or the carrying of fish that have been taken"*) but provided that it was a defence if the person established *inter alia* that *"the fish was not taken, caught, captured or retained for trading or manufacturing purposes..."* (s 13(4)(a)).

[59] See the amendments to s 9 of the *Fisheries Act 1952* (Cth) by the *Fisheries Legislation Amendment Act 1985* (Cth) in consequence of the insertion of s.7B providing for the determination of management plans for fisheries.

[60] Continental Shelf (Living Natural Resources) Bill 1967, Second Reading Speech, Parliamentary Debates, House of Representatives , 21 November 1968, p. 3136; Finn J at FCA [815].

organism for the purposes of the 1968 Continental Shelf Act. The relevant provisions of the 1968 Continental Shelf Act related to areas of the continental shelf declared to be "*controlled areas*" under s. 11 of that Act.[61]

40. Section 15 of the 1968 Continental Shelf Act prohibited in unqualified terms the taking, and the use of a ship for searching for or taking, of sedentary organisms in a controlled area without a licence although it was a defence if the search or taking was not for "*a commercial purpose*".

(d) Extent of extinguishment by inconsistent fisheries laws

41. It was the case under each of the colonial, State and Commonwealth fisheries laws analysed above that fishing for sale was prohibited without exception or exemption save for the grant of a statutory licence on payment of a fee. Those laws, having cumulatively applied to the whole of the claim area, therefore had the effect, in the State's submission, of extinguishing any native title right to take fish and other aquatic life to such an end.

42. In this regard, the test, as earlier explained, reduces ultimately to one of inconsistency *simpliciter*. As Gleeson CJ, Gaudron, Gummow and Hayne JJ held in *Ward*:

> *"Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment."*[62]

43. In this regard, Keane CJ and Dowsett J correctly held below that "*[n]othing in Yanner denies that legislation which was necessarily inconsistent with the continued enjoyment of native title rights extinguished those rights.*" Indeed, as they then observed, "*[t]he contrary view is difficult to reconcile with the approach taken in Ward.*"[63]

44. In the present case, the inconsistency arises by virtue of the following features of the laws in question:

44.1. their geographical application cumulatively to the whole of the claim area;

44.2. the prohibition upon the activity of taking fish and other aquatic life for sale, non-compliance with which constituted an offence;

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[61] See also s 9 which provides that "*This Act extends to all the Territories and to all parts of the Australian continental shelf and all parts of the continental shelf of a Territory [which means Territory of the Commonwealth], and applies to all persons, including foreigners, and to all ships, including foreign ships.*" Various proclamations concerning marine and sedentary organisms, and defining the "*controlled area*" were issued in 1970: see document nos. 64-70 at pp 357-364 of Exhibit 77R2.

[62] *Ward* at [82].

[63] FCAFC [81].

44.3. the fact that the prohibition related to "taking" for sale irrespective of the means by which taking was effected;

44.4. the fact that the prohibition in each case was, as Keane CJ and Dowsett J held below, *"directed at **all** fishing for commercial purposes"* (at [70]), the regimes being intended to be comprehensive in their coverage of fish and other aquatic life and applying to all persons indiscriminately; and

44.5. the fact that the activity of taking fish for sale could be undertaken only pursuant to, and in accordance with, a licence granted for a fee.

45. As such, the native title rights must be extinguished to that extent.

10 46. While that result necessarily flows from a comparison of the statutory regime with the rights claimed, it is also consistent with the decision in *Harper v Minister for Sea Fisheries* (***Harper***).[64] In that case, Tasmanian fishing laws prohibited the taking of abalone in Tasmanian waters for commercial purposes save by authority of a licence for which a fee was paid. The existence of those features led the Court to hold that the public right to fish with respect to abalone was abrogated to that extent. As Mason CJ, Deane and Gaudron JJ held:

> *"What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold licences. The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. This privilege can be compared to a profit a prendre. In truth, however, it is an*
> 20 *entitlement of a new kind created as part of a system for preserving a limited public natural resource ..."*[65]

47. Similarly, Brennan J (with whose reasons Mason CJ, Deane and Gaudron JJ were in general agreement) held that *"[t]he public right of fishing for abalone in State fishing waters is thus abrogated and private statutory rights to take abalone in limited quantities are conferred on the holders of commercial and non-commercial abalone licences."*[66]

48. In this regard, contrary to the appellant's submissions at AS [41], the description of the public rights to fish and to navigate as *"freely amenable to abrogation or regulation by a competent*

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[64] (1989) 168 CLR 314.

[65] *Harper* at 325. The Court therefore held that within such a scheme, the fee exacted for the licence *"...was the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who, by their own choice, acquire or retain commercial licences."* (*Harper* at 325) and, therefore not a duty of excise.

[66] *Harper* at 332.

legislature"[67] was equally apt to describe the situation with respect to native title rights and interests at common law prior to the enactment of the *Racial Discrimination Act 1975* (Cth) and subsequently the *Native Title Act 1993* (Cth). The description refers only to the competency of the Parliament as opposed to the Crown to abrogate or regulate the rights. It says nothing about the question of statutory construction. With respect to the latter, Gleeson CJ, Gummow, Hayne and Crennan JJ held in *Northern Territory v Arnhem Land Aboriginal Land Trust* (***ALALT***) that "*[t]he statutory abrogation of a public right may appear not only from express words but by necessary implication from the text and structure of the statute.*"[68] Such an implication will be drawn where, as in the case of native title, a comparison between the legal nature and incidents of the public and statutory rights reveals that the two are inconsistent, as Gummow J explained in *Wik*.[69]

49. In this case, unlike the position in *ALALT*, it is not contended that there is any necessary inconsistency between the existence of any statutory exemptions and the native title rights. The fact that the taking of fish for purposes other than sale was permitted (albeit subject to regulation) left room for a native title right to exist to that extent. By contrast, the existence of the absolute prohibition upon taking fish and other aquatic life for sale left no such room for the native title right to continue to that extent. That activity could be carried out only where a right (licence) was granted under State or Commonwealth law.

(e) Yanner v Eaton distinguished

50. The appellant submits that the prohibition in *Yanner* "*is relevantly indistinguishable in form from the prohibitions in the legislation in question.*"[70] That submission is based upon the terms of s 54(1)(a) of the *Fauna Conservation Act 1974* (Qld) (**Fauna Act (Qld)**) which 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 ... or other authority granted and issued under this Act."*

51. Crucially, however, the appellant's submission overlooks the exemptions to that prohibition. As Gleeson CJ, Gaudron, Kirby and Hayne JJ emphasised in their joint reasons:

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[67] Thus since Magna Carta, it has been the case that the public right cannot be abrogated by the Crown, no such limitation applies of course to the Parliament: see *Harper* at 330 Brennan J, and the authorities there referred to.

[68] (2008) 236 CLR 24 at 58 [27].

[69] *Wik* at 185.

[70] AS [32].

> *"The apparent generality of that prohibition must be understood in the light of not only its reference to the holder of a licence, permit, certificate or other authority granted and issued under the Fauna Act, but also the further exemptions created by s 54(1)(b). That paragraph exempted (among other things) the keeping of protected fauna that was taken otherwise than in contravention of the Act during an open season (s 54(1)(b)(i)) and the taking of fauna at a time and place when and where it is non-protected fauna (s 54(1)(b)(ii)).*"[71]

52. There being then no general prohibition, it followed that that was a case where the question arose as to whether native title rights were merely regulated.[72] No clear and plain intention to extinguish a native title right to the extent that it encompassed a right to take fauna was discerned by the High Court from the Fauna Act. It would seem to be for this reason that the inconsistency alleged by the Crown with the continued existence of native title focused instead upon the statutory vesting of "*property*" in the Crown by successive fauna Acts. However, that was held to constitute *"nothing more than 'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource'."*[73] Thus, the joint judgment concluded that the Fauna Act did not sever the native title holders' connection with the land concerned and did not deny the continued existence of the native title rights on which the appellant relied.[74]

53. Finally, the fact that the fisheries legislation included additional (and increasingly detailed) measures to promote conservation such as control of equipment such as nets that may be used,[75] regulation of the weight of different species of fish that may be taken,[76] prohibitions upon the taking of particular species of fish for any purpose,[77] and closed seasons,[78] and in this respect resembles the law considered in *Yanner*, does not detract from the unqualified nature of the prohibition here: cf AS [29].

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[71] *Yanner* at [13]. The joint judgment also pointed out that non-protected fauna in turn could be taken at any time: ibid at [12].

[72] Gleeson CJ, Gaudron, Kirby and Hayne JJ did not determine the question of "*whether or not prohibiting the exercise of that [usufructuary] relationship altogether might, or might to some extent*" deny the continued exercise of the rights and interests that Aboriginal law and custom recognizes them as possessing: *Yanner* at [38].

[73] *Yanner* at [28] (quoting *Toomer v Witsell* (1948) 334 US 385 at 402).

[74] Their Honours then held that, there being then no extinguishment of the native title right, s 211 of the NTA by operation of s 209 of the Constitution displaced the State's conditional prohibition upon taking a crocodile without a licence insofar as it was taken for the purpose of satisfying personal, domestic or non-commercial needs: *Yanner* at [38].

[75] See e.g. s 4, 1887 Fisheries Act limiting the mesh of a net that may be used to take fish; and s 72, 1957 Fisheries Act.

[76] Section 7, 1887 Fisheries Act.

[77] E.g. s 71(1), 1957 Fisheries Act.

[78] E.g. s 7, 1914 Fish Act; s 70(1) and (2)(iv), 1957 Fisheries Act.

(2) RECIPROCITY BASED RIGHTS

54. The native title rights that are recognised by the NTA and may be the subject of a determination under that Act are defined in s 223(1). Importantly for present purposes, s 223(1) provides that:

54.1. the communal, group or individual rights and interests of (relevantly) Torres Strait Islanders must be rights *"in relation to land or waters"*;[79]

54.2. it is necessary but not sufficient for the communal, group or individual rights and interests of (relevantly) Torres Strait Islanders to be "*possessed under the traditional laws acknowledged, and the traditional customs observed, by the ... Torres Strait Islanders*" (s 223(1)(a));

54.3. it is necessary that the Torres Strait Islanders "*by those laws and customs, have a connection with the land or waters*" (s 223(1)(b)).

(a) Construction of the requirement that the rights be "in relation to land or waters"

55. While the phrase "*in relation to*" is a phrase of wide import, the closeness of the relationship required by the expression "*must be ascertained by reference to the nature and purpose of the provision in question and the context in which it appears*".[80] As Toohey and Gummow JJ said, in *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 331.9:

> *"The connection which is required by the phrase 'in relation to' is a question of degree. There must be some 'association' which is 'relevant' or 'appropriate'. The question of the relevance or appropriateness of the connection is a question which cannot be divorced from the particular statutory context."*

56. As such, the fact that the appellant points to other contexts in which the words have been broadly construed takes the matter no further (cf AS [47]). Nor logically does the stated object of the Act to recognise and protect native title support a broad construction when it is the very subject matter of recognition and protection which falls to be construed (cf AS [48]). Rather, the object to "*protect*" native title reveals that the rights in question are pre-existing rights,[81]

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[79] The term "*waters*" is defined in s 253 and includes sea, the seabed and the intertidal zone between high and low-water mark.

[80] *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313.3 Brennan CJ, Gaudron and McHugh JJ and at 330.5 -331.10 Toohey and Gummow JJ; *Travelex Ltd v Commissioner of Taxation of the Commonwealth of Australia* (2010) 241 CLR 510 at [25] French CJ and Hayne J.

[81] *Native Title Act case* at 459.3. (*"The Act removes the common law defeasibility of native title, and secures the Aboriginal people and Torres Strait Islanders in the enjoyment of their native title subject to the prescribed*

namely, the pre-sovereign rights in relation to land recognised by the common law. [82] The correspondence in language to which the appellant refers at AS [49] between s 223(1)(a) and (b) and the description of native title rights in Brennan J's judgment in *Mabo (No. 2)* is, therefore, no coincidence.[83] As Gleeson CJ, Gummow and Hayne JJ held in *Yorta Yorta* at [75]:

> *"Native title is not a creature of the common law, whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today. Native title, for present purposes, is what is defined and described in s 223(1) of the Native Title Act. Mabo (No. 2) decided that certain rights and interests relating to land, and rooted in traditional law and custom, survived the Crown's acquisition of sovereignty and radical title in Australia. It was this native title that was then 'recognised, and protected' [s 10 NTA] in accordance with the Native Title Act and which, thereafter, was not able to be extinguished contrary to that Act."*

57. Thus, as antecedent rights in relation to land, the rights were not extinguished by the acquisition by the Crown of radical title on land[84] when the Crown acquired sovereignty, but constituted a burden upon it.[85] Such rights may constitute rights of exclusive occupation, possession and use upheld by the High Court in *Mabo (No. 2)*. They may also constitute lesser rights such as those identified in s 223(2), namely, "*hunting, gathering, or fishing rights or interests*". A common element is that the rights involve use or control of land or waters, the geographical extent of which must ultimately be defined in compliance with the requirements of s 225 of the NTA.[86]

58. Those antecedent rights were not, however, the only rights that may have existed at the time that sovereignty was acquired and which might continue to be observed by indigenous peoples under their traditional laws and customs. For example, in the present case the appellant accepts that a reciprocal right to accommodation and sustenance is not a right in relation to land, notwithstanding that it is possessed under traditional laws and customs (AS

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exceptions which provide for native title to be extinguished or impaired."). See also ibid at 453.4; and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (***Yorta Yorta***) at [44]-[47] and [75]-[77].

[82] *Native Title Act case* at 452; *Yarmirr* at [7]; *Yorta Yorta* at [75].

[83] *Ward* at [16]. See also the preamble to the NTA which is now part of the NTA by virtue of s 13(2)(b) of the *Acts Interpretation Act 1901 (Cth)* (as amended by the *Acts Interpretation Amendment Act 2011 (Cth)* (No. 46 of 2011), schedule 1, s 22 (the transitional provisions (schedule 3, s 1) provide that the amendments apply in relation to Acts enacted before the amendments came into force)).

[84] The Crown did not acquire radical title below the limits of the colonies, i.e., below the low-water mark: *Yarmirr* at [54]-[55] (also holding at [48] that radical title is not a pre-requisite to the recognition of native title); see also at [181].

[85] *Mabo (No. 2)* at 51.6-52.4 Brennan J.

[86] The question of whether passive uses of the land might also be recognised does not arise in this case.

[44]). More telling is the finding in *Ward* that while denial or control of access to land held under native title where artworks on rocks may be located would have the requisite relationship to land, the right to restrain visual or auditory reproductions of what was found there would not.[87] The latter was held to be "*something approaching an incorporeal right akin to a new species of intellectual property...*" than a right in relation to land.[88] While in one sense such a "right" might be said to relate to land, the relationship was too indirect.

(b) Reciprocity based rights are not rights in relation to land

59. The parties do not challenge the factual findings of Finn J as to the existence and content of the reciprocity based rights under the traditional laws and customs of the Islanders. As the appellant points out, his Honour's factual findings were based upon an acceptance of the appellant's evidence, including that of Professor Scott (AS [5]-[16]). The appellant challenges only the primary judge's characterisation of the rights upheld by the Full Court, namely, that they are not rights in relation to land for the purposes of s 223(1) of the NTA.

60. However, the effect of the findings of the trial judge are that the right under traditional laws and customs is the right of the reciprocal rights holder (conveniently termed the **visitor**) to request and receive what he or she requires from a person with whom he or she has a relevant relationship under those laws and customs (the **host**). As the primary judge held, examples of the rights and obligations of reciprocal relationships in practice given in Islander evidence at trial included:

> *"... to provide an assured welcome, accommodation and sustenance to a visiting friend: eg Lizzie Lui; Lillian Bosun, (I always give them a place to sleep); to go fishing with, to share with, him or her: Walter Nona; to be provided with something you need: Kapua Gutchen; or to provide something to your friend if requested: Patrick Whap."*[89]

61. That evidence supports his Honour's finding that:

> *"...the reciprocal obligations assumed are* ***situational*** *in the sense of requiring the appropriate response to the friend's requirements of the moment – "If a person asks his thubud [90] for help, then that person must help": Mebai Warusam; George Mye – and are*

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[87] *Ward* at [59] Gleeson CJ, Gaudron, Gummow and Hayne JJ.

[88] Ibid.

[89] FCA [506].

[90] As explained in Islander evidence, "*Thubud is family. If someone is my thubud they will look after me when I am visiting or they will come and stay with me when they visit Iama Island. That can carry over the generations too*" (FCA [231]). *Thubud* relationships "*entail reciprocal obligations, albeit their manner of discharge (for example access to a particular island place) will depend upon what the performing party properly is able to provide, given his or her own rights and interests; and they involve personal, not group or community, relationships*": FCA [232].

> ***multi-faceted**, that is they are not limited, for example, to permitting the friend to fish, usually in the host's company, on the family's or community's marine estate."*[91]

62. A right of that nature does not constitute a right in relation to land, as the courts below held. It is the right to make the request and the obligation in general to comply which are the substance of the rights and obligations under traditional laws and customs. The subject matter of a request may or may not involve any physical use of, or access to, water or land; that will be a matter which depends upon the situation or needs of the visitor. However, the fact that in some situations the subject-matter of the request or need may be, for example, access to waters in respect of which the host has the right to fish under the traditional laws and customs cannot transform the reciprocal right into one that relates to land.

63. In short, the "*content*" of the right is not identified by reference to how the obligation might be discharged in any particular situation (for example, as a "right" to fish on the host's marine estate).[92] The "content" or subject-matter of the "right" is a right to request of the host what the visiting friend needs; the right therefore has no specific subject matter[93] unless and until a request is made or need arises.

(c) No connection with the waters exists by the traditional laws and customs

64. With respect to the requirement in s 223(1)(b), Gleeson CJ, Gaudron, Gummow and Hayne JJ observed in *Ward* at [64] that:

> *"In its terms, s 223(1)(b) is not directed to how Aboriginal peoples or Torres Strait Islanders use or occupy land or waters. Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters. That is, it requires, first an identification of the content of the traditional laws and customs and secondly, the characterisation of the effect of those laws and customs as constituting a 'connection' of the peoples with the land or waters in question."*

65. This reveals the second difficulty with the appellant's submission, namely, that the reciprocal right arises under traditional laws and customs where the requisite relationship (i.e. connection) exists between the visitor and the host. It does not arise under traditional laws and customs by reason of the relationship (i.e. the connection) between the visitor and the land or waters to which the request may relate. As the submissions by the appellant at AS [69] appear to acknowledge, it is the counterparty (that is, the member of the host island community) who has the requisite connection to the land or waters "*by*" the laws and customs.

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[91] FCA [506] (emphasis added).

[92] Cf AS [44].

[93] Cf *Ward* at [58].

Yet, in order for the "*individual*"[94] rights of the visitor to be recognised under s 223(1), it is the visitor who must have the requisite connection.[95] The "*status based*"[96] character of the reciprocity rights in this regard is aptly illustrated by the evidence of Professor Scott accepted by the primary judge that to deny a partner in reciprocity without valid reasons was effectively to end the relationship,[97] i.e., to end the relationship between the partners in reciprocity as opposed to ending a relationship with land. Thus the primary judge was correct to hold that reciprocal based rights are not rights in relation to land, but "*rights in relation to persons*".[98]

66. Contrary to the appellant's submissions at AS [58], the position with respect to marriage (and adoption) is different because such relationships have the effect that the wife, in common with the adopted person, becomes a member of the "*group*" comprising the occupation based rights holders.[99] In this context, the relevant enquiry is not whether individual wives have a connection with the land and waters in respect of which they hold rights and interests; but rather whether the group, of which they have become a member, has the required connection.[100]

PART VIII: TIME ESTIMATE

67. It is estimated that 1 hour will be required for the presentation of the second respondent's oral argument.

Dated: 3 December 2012

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[94] See AS [62].

[95] See *Gumana v Northern Territory* (2007) 158 FCR 349 (***Gumana FC***) at [143]: "If the peoples have individual rights and interests, the question under [s 223(1)(b)] is whether those individuals have the required connection with the land or waters."

[96] FCA [507].

[97] AS [16(1)]. See also FCAFC [130].

[98] FCA [508].

[99] FCA [71], [194], [198], [200]. Cf AS [58] in relation to spouses.

[100] See again *Gumana FC* at [143].

APPENDIX: SUPPLEMENTED CHRONOLOGY

1788	Great Britain acquired sovereignty over mainland Queensland and adjacent territorial sea from the low-water mark to 3nm	*Commonwealth v Yarmirr* (2001) 208 CLR 1 at [54]
1872	Great Britain acquired sovereignty over the islands 60 miles off the coast of Queensland.	Letters Patent dated 30 May 1872 (document no. 2 at pp 10-12 of Exhibit 81R1)
1879	Great Britain acquired sovereignty over the remaining islands in the Torres Strait.	Proclamation made on 18 July 1879 (document no. 4 at pp 13-15 of Exhibit 77R2); FCA [687].
1901	At the time of Federation, Australia's territorial sea lay at 3nm from the low-water mark.	*Bonser v La Macchia* (1969) 122 CLR 177
1935	*Whaling Act 1935* (Cth)	FCA [788]
11/9/1953	Commonwealth declared limited sovereign rights over the continental shelf beneath the high seas contiguous to its coast for the purpose of exploring it and exploiting its natural resources.	*Yarmirr* at [129]
30/11/1954	Proclamation issued declaring "proclaimed waters" pursuant to s 7, *Fisheries Act 1952* (Cth), excluding waters within the territorial limits of a State. The primary judge held that the "proclaimed waters" thus encompassed the waters within the claimed area: FC [812]	FCA [812]; Held valid in *Bonser v La Macchia* (1969) 122 CLR 177, 199-200 (see also document no. 26 at p 50 of Exhibit 77R2)
1954-1990	Subsequent proclamations issued pursuant to section 7 of the *Fisheries Act* 1952 (Cth) on 9 December 1954, 16 February 1956, 22 August 1968, 26 September 1979 and 20 December 1990 which the primary judge also found "embraced the claimed area" (FCA [808])	FCA [808] (see document nos.26, 27, 28, 30 and 31 at pps.50, 51, 52, 56 and 57 of Exhibit 77R2).
1970	Proclamations made under s 7 (concerning marine and sedentary organisms) and s 11 ("controlled areas") of the *Continental Shelf (Living Natural Resources) Act 1968* (Cth)	See document nos. 64-70 at pp 357-364 of Exhibit 77R2.
20/9/1979	By a proclamation under s 7 of the *Fisheries Act 1952*, the Commonwealth established a 200nm fishing zone.	FCA [808] (document no. 30 at p 56 of Exhibit 77R2)
1/1/1982	Commencement of the *Coastal Waters (State Powers) Act 1980*	

	(Cth).	
9/2/1983	Proclamation of the baselines under s 7 of the Seas and Submerged Lands Act from which Australia's territorial sea is drawn (being drawn in accordance with the 1958 Convention)	Document no. 5 at pp 19-32 of Exhibit 81R1. *Yarmirr* at [66]
14/2/1983	Commencement of the *Coastal Waters (State Title) Act 1980* (Cth).	
9/11/1990	By proclamation under s 7 of the *Seas and Submerged Lands Act*, Australia extended the territorial sea from 3nm from the baselines fixed by the proclamation of 9/2/83, to 12nm from those baselines.	*Yarmirr* at [66] FCA [808]