HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

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

AND

COMMONWEALTH OF AUSTRALIA & ORS — RESPONDENTS

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia
[2013] HCA 33
7 August 2013
B58/2012

ORDER

1. *Appeal allowed in part.*

2. *Set aside paragraph 1 of the order of the Full Court of the Federal Court of Australia made on 14 March 2012 and, in its place, order that the appeal to that Court is dismissed.*

3. *The first and second respondents pay the appellant's costs of the appeal to this Court.*

4. *Appeal otherwise dismissed.*

On appeal from the Federal Court of Australia

Representation

B W Walker SC with R W Blowes SC, T P Keely and S A Hamilton for the appellant (instructed by Torres Strait Regional Authority)

J T Gleeson SC, Acting Solicitor-General of the Commonwealth with R J Webb QC and N Kidson for the first respondent (instructed by Australian Government Solicitor)

M A Perry QC with H P Bowskill for the second respondent (instructed by Crown Solicitor (Qld))

P L Gore for the third to thirty-first, thirty-third, forty-third and forty-fifth to forty-seventh respondents (instructed by Gore & Associates)

Submitting appearances for the thirty-second and thirty-fourth respondents

No appearance for the thirty-fifth to forty-second, forty-fourth, forty-eighth and forty-ninth respondents

Intervener

G R Donaldson SC, Solicitor-General for the State of Western Australia for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia

Native title – Native title rights in relation to waters – Determination made in relation to waters in Torres Strait – Determination included native title right to access and take for any purpose resources in native title areas – Successive Commonwealth and Queensland legislative regimes prohibited taking fish and other aquatic life for commercial purposes without licence – Whether legislative regimes inconsistent with continued existence of native title right – Whether right to access and take resources in native title areas partially extinguished where resources taken for commercial purposes.

Native title – Native title rights in relation to waters – Certain reciprocal access and use rights recognised in Islander society – Reciprocal rights arose out of personal relationships – Whether reciprocal rights "native title rights and interests" within meaning of s 223(1) of *Native Title Act* 1993 (Cth).

Words and phrases – "extinguishment", "inconsistent with the continued existence of a native title right", "native title rights and interests", "reciprocal rights".

Native Title Act 1993 (Cth), ss 10, 11, 211, 223, 225-227, 238.

FRENCH CJ AND CRENNAN J.

Introduction

1 On 2 July 2010, a Judge of the Federal Court of Australia (Finn J) delivered reasons for judgment in an application made on behalf of 13 island communities in the Torres Strait for a determination of native title over a large part of the waters of the Strait[1]. His Honour made final orders on 23 August 2010 which took the form of a native title determination over the waters ("the Determination"). The Determination defined "group rights" comprising the native title held by each of the communities. The native title rights and interests, set out in Order 5 of the Determination, included[2]:

> "the right to access resources and to take for any purpose resources in the native title areas."

The native title right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes. Like each of the native title rights and interests set out in the Determination, it was not exclusive. That is to say, it did not confer rights on the native title holders to the exclusion of others, nor any right to control the conduct of others[3]. It was a right to be exercised in accordance with the traditional laws and customs of the native title holders, the laws of the State of Queensland and the Commonwealth of Australia and the common law[4].

2 On 14 March 2012, the Full Court of the Federal Court, by majority (Keane CJ and Dowsett J, Mansfield J dissenting), allowed an appeal against the decision of the primary judge[5]. The majority held that successive fisheries legislation enacted by colonial and State legislatures in Queensland and by the Commonwealth Parliament had extinguished any right to take fish and other aquatic life for commercial purposes. The Full Court varied Order 5(b) of the Determination by adding after it the words[6]:

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1 *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

2 Determination, Order 5(b).

3 Determination, Order 7.

4 Determination, Order 8.

5 *The Commonwealth v Akiba* (2012) 204 FCR 260.

6 (2012) 204 FCR 260 at 308 [145].

"This right does not, however, extend to taking fish and other aquatic life for sale or trade."

The Full Court dismissed a cross-appeal by the appellant against a finding by the primary judge that reciprocity-based rights and interests subsisting between members of Torres Strait Island communities did not constitute native title rights and interests within the meaning of s 223 of the *Native Title Act* 1993 (Cth) ("the NT Act").

3 On 5 October 2012, this Court (French CJ, Crennan and Kiefel JJ) granted the appellant special leave to appeal against the decision of the Full Court[7]. The appeal should be allowed in relation to the extinguishment issue. The appeal should be dismissed in relation to the reciprocal rights issue.

The issues

4 The grant of special leave was limited to the following grounds set out in the notice of appeal:

> "... the majority of the Full Court erred in holding that notwithstanding the overall purpose of the Commonwealth and Queensland fisheries legislation is the regulation of taking certain fish and other aquatic resources for commercial purposes, a native title right to engage in such taking is extinguished by a specific provision of such legislation which prohibits all taking of such resources for commercial purposes save pursuant to a licence granted under the legislation;
>
> ... the majority of the Full Court erred in holding that the native title right to take fish and other aquatic life for trade or sale is extinguished in all or any part of the native title area by applicable Queensland and Commonwealth fisheries legislation;
>
> ... the Full Court erred in holding that rights held under traditional laws and customs on the basis of a 'reciprocal relationship' with a holder of 'occupation based rights' are not native title rights or interests within the meaning of s 223(1) of the *Native Title Act 1993* (Cth)."

5 The first two grounds assume the existence, under the traditional laws and customs of the group represented by the appellant, of a native title right to take fish and other aquatic life for trade or sale. That assumption was examined in the

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7 [2012] HCATrans 245.

course of argument against the alternative proposition that the taking of such marine resources for a commercial purpose was no more than a particular mode of enjoyment of the right "to take for any purpose resources in the native title areas." For the reasons that follow it should be treated as such. The Determination of native title by the primary judge did not include a native title right of the kind found by the Full Court to have been extinguished. The appeal should be allowed on the first two grounds in the notice of appeal.

6 The third ground raised the question whether intramural reciprocal relationships between members of different island communities give rise to obligations relating to access to and use of resources which are "rights and interests ... in relation to land or waters" within the meaning of s 223 of the NT Act. The answer to that question is in the negative.

7 Before considering these issues and the way they were dealt with at first instance and in the Full Court, it is necessary to refer first to the definition of "native title rights and interests" in s 223 of the NT Act and also to the Determination made by the primary judge.

Definition of "native title rights and interests"

8 Section 223 of the NT Act relevantly provides:

"**Native title**

Common law rights and interests

(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests."[8]

9 Section 223 defines the rights and interests which can be the subject of a determination of native title made under s 225 of the NT Act. They include usufructuary rights of the kind set out in s 223(2). It is a necessary condition of their inclusion in a determination that the rights and interests are recognised by the common law of Australia. That condition flows from s 223(1)(c). "Recognise" in this context means that the common law "will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them"[9].

10 Extinguishment is the obverse of recognition. It does not mean that native title rights and interests are extinguished for the purposes of the traditional laws acknowledged and customs observed by the native title holders. By way of example apposite to this case, the plurality pointed out in *Yanner v Eaton*[10] that to tell a group of Aboriginal people that they may not hunt or fish without a permit[11]:

> "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."

"Extinguishment" means that the native title rights and interests cease to be recognised by the common law and thereupon cease to be native title rights and

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8 Subsections (3), (3A) and (4), which are not material for present purposes, provide for certain statutory rights and interests to be treated as native title rights and interests, and exclude statutory access rights for native title claimants and rights and interests created by reservations or conditions in pastoral leases granted before 1 January 1994.

9 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 49 [42] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2001] HCA 56.

10 (1999) 201 CLR 351; [1999] HCA 53.

11 (1999) 201 CLR 351 at 373 [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

interests within the meaning of s 223 of the NT Act. As six Justices of this Court said in *Fejo v Northern Territory*[12]:

> "The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title." (emphasis in original)

In this appeal "extinguishment" is said, by the respondents, to result from statutory regimes affecting the exercise of a broadly stated native title right in a way that is not consistent with the recognition of an incident or lesser right comprised within that broadly stated native title right.

The Determination

11 To answer the description of a "determination of native title" under the NT Act, the Determination made by the primary judge had to comply with the requirements of s 225, which provides:

> "A ***determination of native title*** is a determination whether or not native title exists in relation to a particular area (the ***determination area***) of land or waters and, if it does exist, a determination of:
>
> (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
>
> (b) the nature and extent of the native title rights and interests in relation to the determination area; and
>
> (c) the nature and extent of any other interests in relation to the determination area; and
>
> (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
>
> (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others."

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12 (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1998] HCA 58.

A note to the section stated that the determination may deal with the matters in pars (c) and (d) by referring to a particular kind or particular kinds of non-native title interests.

12 The specifications of the waters constituting the determination area, waters excluded from it, and parts of the determination area in which native title was held to exist and parts in which it was held not to exist were set out in Orders 1 to 3 of the Determination made by the primary judge, read with Scheds 1 to 4. Order 3 provided:

> "Native title exists in those parts of the determination area described in Schedule 4 (**native title areas**)."

Schedule 4 provided:

> "The parts of the determination area where the native title exists are those parts other than the parts described in Schedule 3 and comprise the areas which are the marine territories of each island community identified in Order 4 and described in Schedule 5(2) which are owned by the respective community or are shared with one or more other island community or communities."

13 Order 4(1) provided:

> "The group rights comprising the native title are held by the members of each of the following island communities in respect of the native title areas described in Schedule 4".

There followed the names of 13 islands in the determination area. The names of the persons whose descendants were "[t]he native title holders ... in aggregate" referred to in Order 4(2) were listed in Sched 5(1). Separate lists in Sched 5(2) set out the names of persons from whom the members of each of the relevant island communities were descended.

14 The native title rights and interests were defined in Order 5 of the Determination as:

> "(a) the rights to access, to remain in and to use the native title areas; and
>
> (b) subject to orders 6 and 9, the right to access resources and to take for any purpose resources in the native title areas."

Orders 6 and 9 concerned the non-application of the Determination to, and the non-existence of native title rights and interests in, minerals and petroleum resources. They are not material for present purposes. Order 7 provided that the

native title rights and interests did not confer possession, occupation, use and enjoyment of the native title areas or any parts of them on the native title holders to the exclusion of all others, nor any right to control the conduct of others. Order 8 provided in standard form:

> "The native title rights and interests are subject to and exercisable in accordance with the:
>
> (a) traditional laws and customs of the native title holders; and
>
> (b) laws of the State of Queensland and the Commonwealth of Australia including the common law."

15 Order 10, read with Sched 6, set out the nature and extent of the other interests in relation to the native title areas. The relationship between the native title rights and interests and those other interests was defined in Order 11 as follows:

> "(a) the other interests co-exist with the native title rights and interests;
>
> (b) the determination does not affect the validity of those other interests;
>
> (c) to the extent of any inconsistency, the native title rights and interests yield to the other interests referred to in Schedule 6."

So far as they existed, the other interests set out in Sched 6 included the following:

1. The international right of innocent passage through the territorial sea.

2. Any subsisting public right to fish.

3. The public right to navigate.

4. The rights and interests of holders of licences, permits, authorities, resource allocations or endorsements issued under the *Fisheries Act* 1994 (Q), the Fisheries Regulation 2008 (Q), the *Torres Strait Fisheries Act* 1984 (Cth) and the *Fisheries Management Act* 1991 (Cth), or any other legislative scheme for the control, management and exploitation of the living resources within the determination area.

5. Other rights and interests under various licences, certificates and permits or otherwise granted by the Crown or conferred by statute, rights of access under statutory authority, and rights and interests held by the State or the Commonwealth.

6. Rights and interests of the Australian Maritime Safety Authority as the owner and manager of aids to navigation in various defined locations and under certain sub-leases, and, subject to the laws of Australia, the customary rights of citizens of Papua New Guinea who live in the Protected Zone or the adjacent coastal area of Papua New Guinea.

Extinguishment and fisheries legislation in the Federal Court

16 The effects of colonial, State and Commonwealth fisheries legislation on the native title right "to take for any purpose resources in the native title areas" were considered by the primary judge and the Full Court. That consideration involved a review of historical and contemporary statutes. It is not necessary for present purposes to repeat that review in detail. The succession of relevant statutes was set out in the judgment at first instance and extracted from that judgment at some length in the majority judgment of the Full Court[13]. It is sufficient to say that the history of the relevant colonial and State legislation dates back to the *Queensland Fisheries Act* 1877 (Q)[14]. The history of the relevant Commonwealth legislation began with the *Fisheries Act* 1952 (Cth) and the *Pearl Fisheries Act* 1952 (Cth)[15]. It was not in dispute that between them the relevant statutes applied to all of the waters in the determination area. The common feature of the legislation, which was invoked by the Commonwealth and by the State of Queensland in favour of their extinguishment submissions, was the imposition of a prohibition against any person taking fish and other aquatic life for commercial purposes without a licence granted under the relevant statute[16]. It was that feature which the parties debated in this Court.

17 No contention was advanced before the primary judge that:

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13 (2012) 204 FCR 260 at 275–279 [42], 280–283 [44]–[45].

14 The sequence of relevant colonial and State legislation includes: *Queensland Fisheries Act* 1877 (Q); *Pearl-shell and Bêche-de-mer Fishery Act* 1881 (Q); *Oyster Act* 1886 (Q); *Queensland Fisheries Act* 1887 (Q); *Fish and Oyster Act* 1914 (Q); *Fisheries Act* 1957 (Q).

15 The sequence of relevant Commonwealth legislation is: *Fisheries Act* 1952 (Cth); *Pearl Fisheries Act* 1952 (Cth); *Continental Shelf (Living Natural Resources) Act* 1968 (Cth); *Torres Strait Fisheries Act* 1984 (Cth); *Fisheries Management Act* 1991 (Cth).

16 (2012) 204 FCR 260 at 288 [70].

- native title had been extinguished in any part of the determination area by leases or licences given under Queensland statutes attaching exclusive rights to such grants;

- the right to fish for particular species or a number of species for commercial purposes had been legislatively extinguished and replaced by rights granted pursuant to, or in connection with, statutory management plans[17].

18 The State of Queensland submitted to the primary judge that its successive legislative regimes since 1877 had abrogated or extinguished any pre-existing native title rights to fish for commercial purposes and replaced them with rights conferred only upon those who held the necessary statutory licences. The legislative history was said to have resulted in the extinguishment of any rights to take or use the resources of the claim area for trading or commercial fishing purposes[18].

19 The Commonwealth submission, reflecting that of the State, pointed to a history of increasingly comprehensive management regimes and the retention by the Crown exclusively for itself and its agencies of the capacity to manage the seas, including those in the claim area. Fisheries management had focused upon commercial fishing, reflecting the treatment of fisheries in the sea as a public resource and concerns about the long-term development and sustainability of the fishing industry[19].

20 The appellant submitted before the primary judge that the relevant native title right was the right to access and take marine resources and not a differentiated right to take resources for trade or commercial purposes. Neither the State nor the Commonwealth argued that the native title right to take marine resources had itself been extinguished. The appellant submitted that the effect of the successive regulatory schemes was to regulate the exercise of native title rights and not to extinguish them or their incidents[20]. There was nothing to suggest, and no party suggested, that native title holders had ever been precluded

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17 (2012) 204 FCR 260 at 316 [194].

18 (2010) 204 FCR 1 at 201 [803].

19 (2010) 204 FCR 1 at 208–209 [840]–[841].

20 (2010) 204 FCR 1 at 209 [842].

from applying for licences to fish for commercial purposes under the successive regimes or are now precluded from doing so[21].

21 In a key passage in his reasons for judgment on the extinguishment issue, his Honour said[22]:

> "The native title right I have found is a right to access and take marine resources as such — a right not circumscribed by the use to be made of the resource taken."

His Honour nevertheless accepted that an activity carried on in exercising a native title right might be treated as a distinct "incident" of the right for extinguishment purposes when the activity had a discrete and understood purpose. It was in that context that his Honour rejected the appellant's submission that it was impermissible to subdivide the general right to take resources. He said[23]:

> "The distinction between engaging in an activity for commercial purposes or for non-commercial, private or other purposes is one commonly made. It was from the outset, and remains, a characteristic of the fisheries legislation considered in this matter. It is reflected in the differentiation of purposes in s 211 of the NT Act."

A broadly defined native title right such as the right "to take for any purpose resources in the native title areas" may be exercised for commercial or non-commercial purposes. The purposes may be well defined or diffuse. One use may advance more than one purpose. But none of those propositions requires a sectioning of the native title right into lesser rights or "incidents" defined by the various purposes for which it might be exercised. The lesser rights would be as numerous as the purposes that could be imagined. A native title right or interest defines a relationship between the native title holders and the land or waters to which the right or interest relates. The right is one thing; the exercise of it for a particular purpose is another. That proposition does not exclude the possibility that a native title right or interest arising under a particular set of traditional laws and customs might be defined by reference to its exercise for a limited purpose[24]. That is not this case. The right defined by Order 5(b) of

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21 (2010) 204 FCR 1 at 210 [844].

22 (2010) 204 FCR 1 at 211 [847].

23 (2010) 204 FCR 1 at 211 [847].

24 An analogous right at common law is the easement: see Gray, *Elements of Land Law*, (1987) at 633–634.

the Determination, which, save for the extinguishment question, was not in dispute, was a right "to take for any purpose resources in the native title areas."

22 His Honour treated the exercise for commercial purposes of the group right to take resources in the native title areas as though it were the exercise of a right to take marine resources for commercial purposes. That equivalence attracted the application of principles governing the extinguishment of native title. On that basis, the question of construction, as his Honour posed it, was whether successive Queensland and Commonwealth legislative regimes had disclosed a clear and plain intention to extinguish that right[25]. His Honour held that they had not[26]:

> "the legislative regimes of the State since 1877, and of the Commonwealth since 1952, concerning fisheries did not, and do not, severally or together evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes. To the extent that those legislative regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders' marine estate, or prohibits qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in that estate: cf s 211 of the NT Act; the native title holders must, in enjoying their native title rights, observe the law of the land. This is their obligations as Australian citizens. But complying with those regimes provides them with the opportunity — qualified it may be — to exercise their native title rights."

23 The majority in the Full Court, in a similar vein, focused upon "the effect of successive licensing regimes whereby, in simple terms, fishing for commercial purposes without a licence issued by the government of Queensland or the Commonwealth was prohibited."[27] Their Honours concluded that it was sufficient to establish extinguishment of a native title right to take fish for commercial purposes that the *Fish and Oyster Act* 1914 (Q) and the *Fisheries Act* 1952 (Cth) prohibited that activity without licences granted under those respective statutes[28]. Central to their Honours' reasoning was the proposition that

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25 (2010) 204 FCR 1 at 212 [850].

26 (2010) 204 FCR 1 at 215 [861].

27 (2012) 204 FCR 260 at 273 [37]. The relevant State Acts were in force before the *Racial Discrimination Act* 1975 (Cth) and before the NT Act. No question of their invalidity for inconsistency with a Commonwealth law arose.

28 (2012) 204 FCR 260 at 288 [70].

the prohibition could not be characterised as mere regulation of fishing in the native title area. Consideration of the Full Court's judgment directs attention to the distinction between rights and their exercise for particular purposes, and to the concepts of "extinguishment" and "native title right" and their interaction. Those matters are inter-related and, to the extent that they involve the concept of extinguishment as an effect of legislative action, a question of statutory construction is raised.

Rights, extinguishment and statutory construction

24 "Extinguishment" in relation to native title refers to extinguishment or cessation of rights[29]. Such extinguishment of rights in whole or in part is not a logical consequence of a legislative constraint upon their exercise for a particular purpose, unless the legislation, properly construed, has that effect. To that proposition may be added the general principle that a statute ought not to be construed as extinguishing common law property rights unless no other construction is reasonably open. Neither logic nor construction in this case required a conclusion that the conditional prohibitions imposed by successive fisheries legislation in the determination area were directed to the existence of a common law native title right to access and take marine resources for commercial purposes. In any event, nothing in the character of a conditional prohibition on taking fish for commercial purposes requires that it be construed as extinguishing such a right.

25 Recognition of the distinction between a broadly stated right and its exercise in particular ways or for particular purposes is implicit in the legislative scheme of the NT Act dealing with extinguishment. The NT Act contemplates the existence of legislative or executive acts which "affect" native title rights and interests by constraint or restriction but do not extinguish them. Section 227 provides:

> "An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise."

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29 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 per Gummow J; [1996] HCA 40; *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Western Australia v Ward* (2002) 213 CLR 1 at 89 [78], 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 28.

The term "act" there includes the making, amendment or repeal of any legislation[30] and includes legislation which is partly inconsistent with the continued enjoyment or exercise of native title rights and interests. The plurality in *Western Australia v Ward*[31] adverted to "the distinction between the extinguishment of native title rights and interests and partial inconsistency" in the NT Act which was continued by the amendments to that Act in 1998[32].

26 That distinction, which is made in s 227, is also brought out in s 238, which "sets out the effect of a reference to the non-extinguishment principle applying to an act."[33] The non-extinguishment principle is applied to various classes of "act" by the NT Act. If an "act" to which it applies affects any native title in relation to the land or waters concerned, then "the native title is nevertheless not extinguished, either wholly or partly."[34] Section 238(4) provides:

> "If the act is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency."

The "non-extinguishment" principle is a statutory construct. It is nevertheless underpinned by a logical proposition of general application: that a particular use of a native title right can be restricted or prohibited by legislation without that right or interest itself being extinguished.

27 The distinction between the existence and exercise of a right appears in s 211 of the NT Act. Because the section was mentioned by the primary judge and in submissions, it is desirable to set out the relevant parts of it:

> "*Requirements for removal of prohibition etc on native title holders*
>
> (1) Subsection (2) applies if:

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30 NT Act, s 226.

31 (2002) 213 CLR 1.

32 (2002) 213 CLR 1 at 69 [27] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

33 NT Act, s 238(1).

34 NT Act, s 238(2).

(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and

(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and

...

Removal of prohibition etc on native title holders

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and

(b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of ***class of activity***

(3) Each of the following is a separate ***class of activity***:

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph."

28 The distinction between native title rights and their exercise is made explicit in s 211 and was noted by the plurality in *Yanner v Eaton*. Their Honours said that[35]:

> "the section necessarily assumes that a conditional prohibition of the kind described [in s 211(1)(b)] does not affect the existence of the native title rights and interests in relation to which the activity is pursued."

There is a tension between that observation and an element of the reasoning in *Western Australia v The Commonwealth* (*Native Title Act Case*)[36] in which the plurality Justices appeared to equate each broadly stated "class of activity" described in s 211(3) with a usufructuary right or interest, being an incident of a more broadly stated native title[37]. That will be so in many, if not most, cases. Whether it is a proposition that emerges from the construction of s 211 was not a question whose resolution formed any part of the reasoning which led their Honours to hold that s 211 was a valid exercise of Commonwealth power[38].

29 The existence of the distinction between the exercise of a native title right for a particular purpose or in a particular way, and the subsistence of that right, is relevant to the construction of statutes said to effect the extinguishment of native title rights. Put shortly, when a statute purporting to affect the exercise of a native title right or interest for a particular purpose or in a particular way can be construed as doing no more than that, and not as extinguishing an underlying right, or an incident thereof, it should be so construed. That approach derives support from frequently repeated observations in this Court about the construction of statutes said to extinguish native title rights and interests.

30 The early approach of this Court in *Mabo v Queensland [No 1]*[39] and *Mabo v Queensland [No 2]*[40] to determine whether native title rights or interests

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35 (1999) 201 CLR 351 at 373 [39] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

36 (1995) 183 CLR 373; [1995] HCA 47.

37 (1995) 183 CLR 373 at 474 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

38 Their Honours' conclusion was based on their rejection of the State of Western Australia's submission that s 211 constituted an impermissible attempt to control the exercise of State legislative power: (1995) 183 CLR 373 at 475–476.

39 (1988) 166 CLR 186; [1988] HCA 69.

40 (1992) 175 CLR 1; [1992] HCA 23.

had been extinguished by legislative or executive action focused upon the intention to be imputed to the legislature or the executive. For both legislative and executive action, a plain and clear intention to extinguish native title was required[41]. Imputed legislative intention is, and always was, a matter of the construction of the statute. As was stated in *Lacey v Attorney-General (Qld)*[42]:

> "Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts." (footnote omitted)

31 The identification of a statute's purpose may aid in its construction. That identification may be done by reference to the apparent legal effect and operation of the statute, express statements of its objectives and extrinsic materials identifying the mischief to which it is directed. However, purposive construction to ascertain whether a statute extinguishes native title rights or interests is not without difficulty where the statute was enacted prior to this Court's decision in *Mabo [No 2]* that the common law could recognise native title. The difficulty was described by Gummow J in *Wik Peoples v Queensland*[43]. The Court in that case was, as his Honour pointed out, construing statutes "enacted at times when the existing state of the law was perceived to be the opposite of that which it since has been held then to have been."[44] That reality affected the application of the purposive approach to construction. The Court therefore focused on inconsistency as the criterion for extinguishment. In the case of competing rights — native title rights and interests on the one hand and statutory rights on the other — the question was[45]:

> "whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right."

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41 *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 213 per Brennan, Toohey and Gaudron JJ, Mason CJ at 195 and Wilson J at 201 agreeing with their construction; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 per Brennan J, Mason CJ and McHugh J agreeing at 15, see also at 111 per Deane and Gaudron JJ, 195 per Toohey J.

42 (2011) 242 CLR 573 at 592 [43]; [2011] HCA 10.

43 (1996) 187 CLR 1.

44 (1996) 187 CLR 1 at 184.

45 (1996) 187 CLR 1 at 185.

His Honour observed that that notion of inconsistency included the effect of a statutory prohibition of the activity in question.

32 In *Fejo v Northern Territory*[46] the plurality held that a grant of land in fee simple extinguished underlying native title because the two sets of rights were inconsistent with each other[47]. Similarly, in *Yanner v Eaton* the plurality said[48]:

> "native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests."

Nevertheless, "[t]he extinguishment of such rights must, by conventional theory, be clearly established."[49]

33 The inconsistency criterion was considered in relation to statutory regulation in *Yanner v Eaton*. The plurality observed that "*regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence."[50] Gummow J, in a separate judgment, noted that a requirement for an Indigenous person to obtain a permit under the *Fauna Conservation Act* 1974 (Q) to hunt did not abrogate the native title right to hunt[51]:

> "Rather, the regulation was consistent with the continued existence of that right."

34 Inconsistency analysis was applied by this Court to the question whether the common law would recognise native title in the territorial sea. The answer to that question was in the affirmative. In *The Commonwealth v Yarmirr*, the Court found no inconsistency to exist between past or present laws relating to the territorial sea and recognition by the common law of Australia of native title rights and interests in relation to the seas and sea-beds in that area[52]. There was,

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46 (1998) 195 CLR 96.

47 (1998) 195 CLR 96 at 126 [43].

48 (1999) 201 CLR 351 at 372 [35].

49 (1999) 201 CLR 351 at 372 [35].

50 (1999) 201 CLR 351 at 372 [37] (emphasis in original).

51 (1999) 201 CLR 351 at 397 [115].

52 (2001) 208 CLR 1 at 60 [76] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

however, an inconsistency between native title rights to exclusive possession and common law public rights to navigate and to fish and the international right of innocent passage recognised by Australia[53]. So it is that in this case the right to access and take the resources of the native title area is not an exclusive right.

35 The pre-eminence of inconsistency as the criterion of extinguishment of native title rights by the grant of rights by the Crown or pursuant to statutory authority was reiterated by the plurality in *Western Australia v Ward*[54]. Their Honours warned against misunderstanding the criterion of "clear and plain intention" to extinguish, which had been used in earlier decisions of the Court. The subjective states of mind of those whose acts were alleged to have extinguished native title were irrelevant[55]:

> "As *Wik* and *Fejo* reveal, where, pursuant to statute, be it Commonwealth, State or Territory, there has been a grant of rights to third parties, the question is whether the rights are inconsistent with the alleged native title rights and interests. That is an objective inquiry which requires identification of and comparison between the two sets of rights." (footnotes omitted)

In so saying, their Honours emphasised the need to identify and compare the two sets of rights. In so doing, they distinguished between activities on land and the right pursuant to which the land is used[56]. Their Honours went on to reject the proposition that there could be degrees of inconsistency between rights or, absent statutory powers, suspension of one set of rights in favour of another and said[57]:

> "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."

The State of Queensland relied upon that observation in its written submissions. While this case is concerned with inconsistency, it is not concerned with inconsistency of rights. The question in this case is whether successive statutory

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53 (2001) 208 CLR 1 at 67 [94] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

54 (2002) 213 CLR 1.

55 (2002) 213 CLR 1 at 89 [78].

56 (2002) 213 CLR 1 at 89 [78].

57 (2002) 213 CLR 1 at 91 [82].

regimes were inconsistent with the recognition by the common law of an asserted native title right.

36 The State of Queensland characterised the successive colonial, State and Commonwealth fisheries laws as inconsistent with a right to take fish or aquatic life for commercial purposes. The asserted inconsistency turned, critically, upon the general application of the statutory prohibitions against taking fish and aquatic life for such purposes, absent a licence. Extinguishment was said to flow from a comparison of the statutory regime and the rights claimed. The Commonwealth identified an inconsistency arising "because of the limited and defined creation of statutory rights to fish for commercial purposes which did not allow for the continued enjoyment of native title rights ... to fish for those purposes."

37 The Commonwealth and the State of Queensland relied upon the decision of this Court in *Harper v Minister for Sea Fisheries*[58]. The question in that case was whether a fee charged for a licence to take abalone in Tasmania was an excise. To take abalone without a licence was prohibited by regulation. The Court held the fee was not a tax and therefore not a duty of excise. The licence conferred a privilege analogous to a profit à prendre. The fee for the licence was a charge for the acquisition of that right, which was akin to a property right. The effect of the licensing regime was to convert what was formerly in the public domain into "the exclusive but controlled preserve of those who hold licences."[59] The public right to take abalone, "being a public not a proprietary right, [was] freely amenable to abrogation or regulation by a competent legislature"[60].

38 As the appellant submitted, *Harper* is not authority for the proposition that native title rights and interests, derived from traditional laws and customs and recognised by the common law, are as freely amenable to abrogation as public rights derived from the common law. Moreover, the decision in *Harper* did not deal with the question whether what is affected by a licensing regime is the exercise, for a particular purpose, of a broadly stated native title right capable of being exercised for any purpose.

39 The submissions as to inconsistency made by the Commonwealth and the State of Queensland ought not to be accepted. The premise upon which they rest is the characterisation of the exercise, for a particular purpose, of a general native title right as the exercise of a lesser right defined by reference to that purpose.

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58 (1989) 168 CLR 314; [1989] HCA 47.

59 (1989) 168 CLR 314 at 325 per Mason CJ, Deane and Gaudron JJ.

60 (1989) 168 CLR 314 at 330 per Brennan J.

That characterisation is not a logical necessity. Nor is it necessary for coherence in the law. Its rejection is consistent with the maintenance of a proper distinction between proprietary or usufructuary rights and their exercise in particular ways or for particular purposes. The appeal on the first two grounds should be allowed.

The reciprocal rights ground

40 As appears from the Determination and the reasons of the primary judge, his Honour found that while all of the claim group members were, in aggregate, the holders of all of the native title rights, they did not hold them communally[61]. They were best described as "group rights and interests"[62]. The groups comprised the claim group members of each of the island communities who held emplacement-based rights in their respective areas or estates. There were also rights held by claim group members of more than one island community in shared areas[63].

41 The appellant had sought inclusion in the Determination of persons said to be the holders of "reciprocal rights". The primary judge held that those rights, being relationship-based, were not rights "in relation to" waters within the meaning of s 223(1) of the NT Act. The Full Court dismissed the appellant's cross-appeal against this aspect of the primary judge's decision.

42 The reciprocal rights asserted by the appellant derived from the "customary marine tenure model", which the primary judge found to encompass two types of rights. The first were "ancestral occupation based rights" or "emplacement based rights". The second were "reciprocal rights"[64]. His Honour found that the latter differed from "occupation based rights". Their defining characteristics were that they[65]:

> "(a) are **held** by each person who has or each group of persons who have a relevant reciprocal relationship (whether based in kinship or of another kind, such as *tebud/thubud*) with an ancestral occupation based rights holder or group of such rights holders; and

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61 (2010) 204 FCR 1 at 137 [542].

62 (2010) 204 FCR 1 at 137 [543].

63 (2010) 204 FCR 1 at 137 [543].

64 (2010) 204 FCR 1 at 33–34 [68]–[70].

65 (2010) 204 FCR 1 at 127 [493].

(b) can be called **rights** or **interests** because they are enforceable and sanctioned by appeal to the law or custom that associates the reciprocal obligation with the relationship and the law or custom that sanctions consequences for denial of the reciprocal obligation;

(c) are '**group**' or '**individual**' rights;

(d) cover the **area** covered by the rights held by the person or group upon whom the right depends (but ultimately subject to regulation by that person or group or by the descent group of ancestral occupation based rights holders for that area);

(e) the **content** of the rights is reciprocal shared access and use which permits the same activities as may be done by the person or group upon whom the right depends but does not include territorial control or livelihood and the exercise of the right is subject ultimately to control by ancestral occupation based rights holders." (emphasis in original)

43 His Honour accepted that the Islander society has a body of laws and customs founded upon a dominant and pervasive principle of reciprocity and exchange. It is a principle which expresses notions of "respect, generosity and sharing, social and economic obligations and the personal nature of relationships"[66].

44 The relationships and the rights and obligations which arose out of them were personal in that the discharge of the performance obligation was the responsibility of the Islander host (in the case of a *tebud* relationship) or of the relative and not of the Island community. The relationship could be passed down through generations[67]. His Honour concluded that the parties to such status-based relationships had what could properly be described as rights and obligations recognised and expected to be honoured or discharged under Islander laws and customs. They were not mere privileges. However, they were not rights in relation to land or waters. His Honour said[68]:

> "They are rights in relation to persons. The corresponding obligations are likewise social and personal and can be quite intense in character. This

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66 (2010) 204 FCR 1 at 129–130 [505].

67 (2010) 204 FCR 1 at 130 [507].

68 (2010) 204 FCR 1 at 130 [508].

> emerges clearly in the Islander evidence, the predominant emphases being on helping, sharing, being hospitable."

45 The Full Court dismissed the cross-appeal on this ground, substantially for the reasons given by the primary judge. In their joint judgment, Keane CJ and Dowsett J observed that the primary judge's use of the term "status-based" as a description of the reciprocal relationships was derived from the evidence of an expert witness called on behalf of the appellant. Their Honours said[69]:

> "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".

Putting to one side the reference to "connection", which was criticised by the appellant in his submissions to this Court, it is sufficient to say that the primary judge was correct in his characterisation, on the basis of the evidence before him, of the reciprocal rights as rights of a personal character dependent upon status and not rights in relation to the waters. The appeal against this aspect of the Full Court's judgment should be dismissed.

Conclusion

46 For the above reasons, the appeal should succeed on the extinguishment question, but fail on the reciprocity of rights question. The following orders should be made:

1. Appeal allowed in part.

2. Set aside par 1 of the order made by the Full Court of the Federal Court of Australia on 14 March 2012 and, in its place, order that the appeal to that Court is dismissed.

3. The first and second respondents pay the appellant's costs of the appeal to this Court.

4. Appeal otherwise dismissed.

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69 (2012) 204 FCR 260 at 306 [130].

47 HAYNE, KIEFEL AND BELL JJ. The facts and circumstances giving rise to this appeal are described in the reasons of French CJ and Crennan J. As is explained in those reasons, there are two issues in this appeal: one about extinguishment and the other about reciprocal rights. We agree that, for the reasons given by French CJ and Crennan J, the appeal about reciprocal rights should be dismissed. For the reasons which follow, the appeal about extinguishment should be allowed and the primary judge's determination restored.

The primary judge's determination

48 The primary judge, Finn J, determined[70] that the native title holders (represented by the appellant in this Court) hold native title rights and interests in defined areas of waters of the Torres Strait. Those native title rights and interests were described in the native title determination made by Finn J as "the rights to access, to remain in and to use the native title areas" and, subject to some qualifications about minerals and petroleum resources which need not now be noticed, "the right to access resources and to take for any purpose resources in the native title areas".

The Full Court

49 On appeal, the Full Court of the Federal Court (Keane CJ and Dowsett J, Mansfield J dissenting) held[71] that the determination made by Finn J should be varied. The Full Court found[72] the continued existence of a native title right and interest "to access resources and to take for any purpose resources in the native title areas" to be inconsistent with, and to have been partly extinguished by, successive Commonwealth[73] and Queensland Acts[74] which prohibited taking fish

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70 *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

71 *Commonwealth v Akiba* (2012) 204 FCR 260.

72 (2012) 204 FCR 260 at 295-296 [84]-[87] per Keane CJ and Dowsett J.

73 In particular, *Fisheries Act* 1952 (Cth), *Pearl Fisheries Act* 1952 (Cth), *Continental Shelf (Living Natural Resources) Act* 1968 (Cth), *Torres Strait Fisheries Act* 1984 (Cth) and *Fisheries Management Act* 1991 (Cth). See (2012) 204 FCR 260 at 275 [41], 280-283 [44]-[45].

74 In particular, *Queensland Fisheries Act* 1877 (Q), *Pearl-shell and Bêche-de-mer Fishery Act* 1881 (Q), *Oyster Act* 1886 (Q), *Queensland Fisheries Act* 1887 (Q), *Fish and Oyster Act* 1914 (Q), *Fisheries Act* 1957 (Q), *Fisheries Act* 1976 (Q),

(Footnote continues on next page)

or other aquatic life for commercial purposes without a licence. Accordingly, the Full Court ordered that the determination that the native title holders had "the right to access resources and to take for any purpose resources in the native title areas" be varied[75] by adding the qualification that the right "does not, however, extend to taking fish and other aquatic life for sale or trade".

Relevant principles

50 Resolution of the extinguishment issue presented in this appeal depends upon applying principles established and applied by this Court in several decisions about the *Native Title Act* 1993 (Cth) ("the NTA"). Those decisions include *Wik Peoples v Queensland*[76], *Fejo v Northern Territory*[77], *Yanner v Eaton*[78], *The Commonwealth v Yarmirr*[79] and *Western Australia v Ward*[80].

51 In particular, resolution of the extinguishment issue depends upon four propositions. Three are identified most conveniently by reference to the plurality reasons in *Ward*. First, "[b]ecause what is claimed in the present [matter is] claims made *under* the NTA, for rights *defined* in the NTA, it is that statute which governs"[81] (original emphasis). Second, "[t]he NTA provides that there can be partial extinguishment or suspension of native title rights"[82]. Third,

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Fisheries Act Amendment Act 1981 (Q) and *Fisheries Act* 1994 (Q). See (2012) 204 FCR 260 at 275-279 [41]-[42].

75 (2012) 204 FCR 260 at 308 [145].

76 (1996) 187 CLR 1; [1996] HCA 40.

77 (1998) 195 CLR 96; [1998] HCA 58.

78 (1999) 201 CLR 351; [1999] HCA 53.

79 (2001) 208 CLR 1; [2001] HCA 56.

80 (2002) 213 CLR 1; [2002] HCA 28.

81 (2002) 213 CLR 1 at 208 [468] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also at 60 [2], 64-69 [14]-[25].

82 (2002) 213 CLR 1 at 208 [468] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also at 63 [9], 69-70 [26]-[29], 89 [76].

"[q]uestions of extinguishment first require identification of the native title rights and interests that are alleged to exist"[83].

52 The fourth proposition of critical importance to the determination of this appeal is established by, and reflected in, all five of the cases that have been mentioned[84]. It is that inconsistency of *rights* lies at the heart of any question of extinguishment.

53 Something more must be said about each of these propositions.

The statute governs

54 As the plurality noted[85] in *Ward*, this Court's decisions in *Wik*, *Fejo* and *Yanner* "were not given in appeals brought in respect of the determination by the Federal Court of applications under the NTA". By contrast with those three cases, but like *Yarmirr* and *Ward*, this is an appeal against orders of the Full Court of the Federal Court made on appeal against a determination of native title made by a single judge of the Federal Court. The determination provisions of the NTA are directly engaged. The NTA "lies at the core of this litigation"[86]. Questions about extinguishment of native title rights and interests cannot be answered without beginning in the relevant provisions of the NTA.

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83 (2002) 213 CLR 1 at 208 [468] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also at 91-95 [83]-[95].

84 See, for example, *Wik* (1996) 187 CLR 1 at 133 per Toohey J, 185-186 per Gummow J; *Fejo* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Yanner* (1999) 201 CLR 351 at 372 [35] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; *Yarmirr* (2001) 208 CLR 1 at 49 [42] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Ward* (2002) 213 CLR 1 at 89-91 [78]-[82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

85 (2002) 213 CLR 1 at 60 [2] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

86 *Ward* (2002) 213 CLR 1 at 60 [2] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

55 The expression "native title" or "native title rights and interests" is defined in s 223[87]. Paragraphs (a) and (b) of s 223(1) indicate that it is from the traditional laws and customs that native title rights and interests derive, not the common law[88]. Section 10 of the NTA provides that "[n]ative title is recognised, and protected, in accordance with" the NTA and s 11(1) provides that native title cannot be extinguished contrary to the NTA.

56 In this case, partial extinguishment of native title was said to have been effected by the making of legislation prohibiting taking, without a licence issued under the relevant Act, fish or other aquatic life for sale or trade. Section 226 of the NTA provides that "the making ... of any legislation"[89] was one species of an act affecting native title. Accordingly, in considering questions about

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87 Section 223 relevantly provides:

"*Common law rights and interests*

(1) The expression ***native title*** or ***native title rights and interests*** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests."

88 *Ward* (2002) 213 CLR 1 at 66 [20] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

89 s 226(2)(a).

extinguishment said to have been effected by the making of legislation prohibiting commercial fishing without a licence, regard must be had to s 227 of the NTA, which provides that:

> "An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise."

57 As Toohey J said in *Wik*[90] (with the concurrence of Gaudron, Gummow and Kirby JJ):

> "Whether there was extinguishment can *only* be determined by reference to such *particular* rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, *to that extent*, to the rights of the grantees." (emphasis added)

58 Two other aspects of the NTA may be mentioned but put aside from further consideration. First, it was not submitted in this appeal that the making of the early legislation about fishing which was said to have extinguished native title (particularly the *Fisheries Act* 1952 (Cth) and the *Queensland Fisheries Act* 1887 (Q)) was a "past act" within the meaning of s 228 of the NTA. And no separate argument for extinguishment was advanced with respect to later legislation which may have fallen within the definition of a "past act". Accordingly those provisions of the NTA which deal with a "past act" may be put aside from consideration. The question is whether the legislation about fishing was "effective at common law to work extinguishment of native title"[91]. Second, it was not submitted that the "non-extinguishment principle" dealt with in s 238 was engaged, and again, that provision may be put aside from consideration.

Partial extinguishment

59 The NTA postulates that there may be partial extinguishment of native title rights and interests[92]. So, for example, s 23A(1) of the NTA speaks of the

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90 (1996) 187 CLR 1 at 133.

91 *Ward* (2002) 213 CLR 1 at 62 [5] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

92 *Ward* (2002) 213 CLR 1 at 70 [29] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

provisions of Div 2B of Pt 2 of the NTA providing that certain acts "attributable to the Commonwealth that were done on or before 23 December 1996 will have completely or partially extinguished native title". And that postulate of the NTA is wholly consistent with the conclusion reached by the plurality in *Ward*[93] that native title rights and interests may properly be seen as a bundle of rights, the separate components of which may be extinguished separately. As the plurality said[94] in *Ward*, "it is a mistake to assume that what the NTA refers to as 'native title rights and interests' is necessarily a single set of rights relating to land [or waters] that is analogous to a fee simple".

The native title rights and interests in issue

60 As has already been noted, debate about extinguishment must begin by identifying the native title rights and interests that are in issue. As s 225 of the NTA required, the determination of native title made in this case, by Finn J, identified the holders of the rights comprising the native title and identified the areas in respect of which those rights and interests existed. The relevant native title rights and interests were determined to be "the rights to access, to remain in and to use the native title areas" and, subject to some presently irrelevant qualifications about minerals and petroleum resources, "the right to access resources and to take for any purpose resources in the native title areas". These are the rights and interests which are at stake. Have these rights and interests been partially extinguished? More particularly, did the enactment of laws which prohibited the unlicensed taking of fish or other aquatic life for commercial purposes partially extinguish the right to take resources for any purpose?

Inconsistency of rights

61 This Court held in *Western Australia v The Commonwealth* (*Native Title Act Case*)[95] that, at common law, native title rights and interests can be extinguished by "a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title[96]". In *Yanner*, the

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93 (2002) 213 CLR 1 at 89 [76] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

94 (2002) 213 CLR 1 at 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

95 (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47.

96 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 per Brennan J, 110-111 per Deane and Gaudron JJ; [1992] HCA 23.

plurality noted[97] that the "extinguishment of such rights must, by conventional theory, be clearly established[98]". Likewise, as the plurality held in *Ward*[99], under the NTA, "[w]hether native title rights have been extinguished by a grant of rights to third parties or an assertion of rights by the executive requires comparison between the legal nature and incidents of the right granted or asserted and the native title right asserted".

62 As was also noted[100], however, by the plurality in *Ward*, while it is often said that a "clear and plain intention" to extinguish native title must be demonstrated, it is important that this expression not be misunderstood. The relevant question is one of inconsistency, and that is an objective inquiry. The "subjective thought processes of those whose act is alleged to have extinguished native title are irrelevant"[101].

63 Hence, as the NTA acknowledges in s 211, and as was held[102] in *Yanner*, "[r]egulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent)". Likewise, regulating particular aspects of the usufructuary relationship with traditional waters does not sever the connection of the Torres Strait Islanders concerned with those waters (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent).

64 Not only does regulation of a native title right to take resources from land or waters not sever the connection of the peoples concerned with that land or those waters, regulation of the native title right is not inconsistent with the continued existence of that right. Indeed, as was pointed out in *Yanner*[103],

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97 (1999) 201 CLR 351 at 372 [35] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

98 *Wik* (1996) 187 CLR 1 at 85 per Brennan CJ, 125 per Toohey J, 146-147 per Gaudron J, 185 per Gummow J, 247 per Kirby J.

99 (2002) 213 CLR 1 at 208 [468] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also at 89-91 [78]-[82].

100 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

101 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

102 (1999) 201 CLR 351 at 373 [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

103 (1999) 201 CLR 351 at 372 [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

"regulating the way in which a right may be exercised presupposes that the right exists". Of course, regulation may shade into prohibition[104], and the line between the two may be difficult to discern[105]. But the central point made in *Yanner*, and reflected in each of *Wik*, *Fejo*, *Yarmirr* and *Ward*, is that a statutory prohibition on taking resources from land or waters without a licence does not conclusively establish extinguishment of native title rights and interests of the kind found to exist in this case: "the rights to access, to remain in and to use the native title areas", and "the right to access resources and to take for any purpose resources in the native title areas".

Prohibition of a particular activity

65 In this case, the majority in the Full Court identified[106] the starting point for consideration of extinguishment as "whether the *activity* which constitutes the relevant *incident* of native title is consistent with competent legislation relating to that activity" (emphasis added). The essential premise for the analysis that followed was that the relevant "activity" was to be identified as "taking fish and other aquatic life for sale or trade" and that the activity identified in this way was an "incident of native title". That premise is flawed.

66 The relevant native title right that was found to exist was a right to access and to take resources from the identified waters for *any* purpose. It was wrong to single out taking those resources for sale or trade as an "incident" of the right that had been identified. The purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.

67 Focusing upon the *activity* described as "taking fish and other aquatic life for sale or trade", rather than focusing upon the relevant native title *right*, was apt to, and in this case did, lead to error. That shift of focus, from right to activity, led to error in this case by inferentially reframing the question determinative of

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104 (1999) 201 CLR 351 at 372 [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

105 *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 188-190 per Isaacs J, 211-212 per Higgins J; [1922] HCA 56; *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 148-149 per Starke J, 155-156 per Dixon J; [1933] HCA 56; *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 93-94 per Rich ACJ, 95 per Starke J; [1941] HCA 7; *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 at 93-94. See also *Yanner* (1999) 201 CLR 351 at 372 [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

106 (2012) 204 FCR 260 at 287 [63].

extinguishment as being whether the statutory prohibition against fishing for a particular purpose without a licence was inconsistent with the continued existence of a native title right to fish *for that purpose*. But the relevant native title right that was found in this case was a right to take resources for *any* purpose. No distinct or separate native title right to take fish for sale or trade was found. The prohibition of taking fish for sale or trade without a licence regulated the exercise of the native title right by prohibiting its exercise for *some*, but not all, purposes without a licence. It did not extinguish the right to any extent.

68 The Full Court's focus upon a particular activity was not consistent with the plurality's observation[107] in *Ward* that reference to activity "is relevant only to the extent that it focuses attention upon the right". The focus upon the activity led to the majority framing the relevant question as being whether the identified activity was "consistent with competent legislation relating to that activity"[108]. But extinguishment of native title rights and interests is not to be determined by asking whether the federal or State legislature has asserted control, or dominion, over a particular activity, and then concluding that the relevant native title right no longer includes the right to pursue that form of activity. To pursue an inquiry of that kind would be apt to revive some variation of the adverse dominion test for extinguishment rejected[109] by this Court in *Ward*. The enactment of legislation controlling some activity which may be undertaken in exercise of a native title right or interest presents a question about extinguishment. The extinguishment question is to be answered by deciding whether the legislation is inconsistent with the relevant native title right or interest; it is not determined by observing only that there is legislation which governs or affects the exercise of the right.

69 These are reasons enough to reject the conclusion reached by the majority in the Full Court. There are, however, three particular errors in reasoning to which reference must be made.

Three particular matters

70 First, the majority in the Full Court said[110] that the "general conservation objectives" of the relevant legislation prohibiting commercial fishing without a

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107 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

108 (2012) 204 FCR 260 at 287 [63].

109 (2002) 213 CLR 1 at 89 [76] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

110 (2012) 204 FCR 260 at 295 [84].

licence could "be easily defeated by the expedient of traders buying fish in commercial quantities from native title holders". That is obviously right, but it is irrelevant to the issue of extinguishment. It is an observation that assumes that the native title holders may take fish for sale or trade without a licence under the relevant legislation. But it was not suggested in the Full Court, or in this Court, that the exercise of the native title right to take resources from the native title areas was, or is, unaffected by legislation about fishing. Contrary to the reasoning of the majority in the Full Court, inconsistency is not demonstrated by assuming that exercise of the native title right or interest would be unaffected by the law or laws in issue. That is, it is not to the point to ask, as the Full Court did, what the position would be if the legislation did not affect the exercise of native title rights and interests. The only question is whether the legislation has extinguished the right in whole or in part.

71 Second, the majority in the Full Court were wrong to treat[111] the decision in *Yanner* as depending wholly upon the availability and operation of s 211 of the NTA. (It will be recalled that s 211 permits holders of native title rights to hunt or fish to exercise those rights "for the purpose of satisfying their personal, domestic or non-commercial communal needs"[112], despite legislation prohibiting or restricting that activity other than in accordance with a statutory licence.) Section 211 can be engaged only if relevant native title rights and interests continue to exist.

72 What is presently important is that *Yanner* established that legislation may regulate the exercise of native title rights and interests without extinguishing those rights or interests. And it is important to recognise that this Court held in *Yanner* that the relevant native title rights and interests continued to exist despite the nature and extent of the regulation effected by the legislation at issue in that case, the *Fauna Conservation Act* 1974 (Q).

73 Like the various forms of fisheries legislation at issue in this appeal, the *Fauna Conservation Act* prohibited taking fauna without a licence. But the *Fauna Conservation Act* went further than the legislation now in issue in two respects. First, it prohibited taking fauna without a licence for *any* purpose. Second, it provided that *all* fauna (other than fauna taken during an open season with respect to that fauna) "is the property of the Crown and under the control of

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111 (2012) 204 FCR 260 at 293-294 [79]-[81].

112 s 211(2)(a).

the Fauna Authority". This Court held[113] that the *Fauna Conservation Act* did not extinguish the relevant native title rights and interests.

74 Third, Finn J was right to hold[114] that this Court's decision in *Harper v Minister for Sea Fisheries*[115] does not have any direct application to the issues of extinguishment of native title rights and interests which arise in this appeal. Nor does *Harper* provide useful guidance about those issues. To the extent to which the decision of the majority in the Full Court depended[116] upon drawing on what was said in *Harper*, that reasoning was erroneous. *Harper* decided that, on its true construction, legislation providing for the licensed taking of abalone abrogated the common law public right to fish for abalone. That is, *Harper* decided that an Act dealt with a subject comprehensively, to the exclusion of a common law right. The question decided in *Harper* was, therefore, radically different[117] from the question presented in this appeal. This case concerns the relationship between legislation prohibiting commercial fishing without a licence and rights and interests which are rooted, not in the common law, but in the traditional laws acknowledged, and traditional customs observed, by Torres Strait Islanders.

Conclusion and orders

75 As the plurality in *Yanner* held[118], "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*" (emphasis added). Likewise, telling the native title holders in this case, "You may not fish for the purpose of sale or trade without a licence", did not, and does not, sever their connection with the waters concerned and it did not, and does not, deny the continued exercise of the rights and interests possessed by

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113 (1999) 201 CLR 351 at 373 [40] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 400 [123] per Gummow J.

114 (2010) 204 FCR 1 at 209 [842].

115 (1989) 168 CLR 314; [1989] HCA 47.

116 (2012) 204 FCR 260 at 288-290 [71]-[73].

117 *Yanner* (1999) 201 CLR 351 at 374 [41] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

118 (1999) 201 CLR 351 at 373 [38].

them under the traditional laws acknowledged, and traditional customs observed, by them. The repeated statutory injunction, "no commercial fishing without a licence", was not, and is not, inconsistent with the continued existence of the relevant native title rights and interests.

76 The Full Court was wrong to conclude that the determination of native title rights and interests made at first instance should be varied. The orders proposed by French CJ and Crennan J should be made.