
COMMERCIAL NATIVE TITLE FISHING RIGHTS

IN THE TORRES STRAIT AND THE QUESTION OF REGULATION

VERSUS EXTINGUISHMENT

by Sean Brennan

INTRODUCTION

The Torres Strait Regional Sea Claim (*Akiba*), one of the most important native title cases of the past decade, is heading to the High Court. In October, 2012, Chief Justice French and Justices Crennan and Kiefel granted special leave to appeal from a Full Federal Court decision delivered earlier in the year. The basic finding that offshore native title exists is not in contest, but the *scope* of rights held by the Torres Strait Islander claim group is.

In particular, the High Court will consider Justice Finn's finding at trial that the rights include a non-exclusive right to trade in fish and other marine resources. The recognition of that commercial native title right, overturned by a 2-1 majority in the Full Federal Court, is one of two factors which elevate the significance of this case. The *Akiba* litigation is also important for clarifying the distinction between partial extinguishment of native title and its regulation.

EXTINGUISHMENT VERSUS REGULATION

Extinguishment law has always played an outsized role in the definition of native title in Australia.¹ The relative harshness of Australia's extinguishment rules has restricted the contemporary economic value of native title and more generally the legal recognition of traditional connection to land and sea country.²

That harshness emerged after 1992 as judges and parliaments were called upon to characterise in legal terms the friction, if any, which exists at the interface between customary legal rights on the one hand and some form of official action (such as a land grant, the creation of a national park or the passage of a Mining Act) on the other. Assuming there is some legal impact on native title, the courts have identified three choices: total extinguishment, partial extinguishment or suppression to the extent of any inconsistency. This third option—called 'regulation' at common law and 'the non-extinguishment principle' in the *Native Title Act 1993* (Cth)—means that native title can continue to be exercised in a way that is consistent with the official action that has been taken (the grant of

an exploration licence, the declaration of a national park and so on). To the extent a conflict arises between the two, legally the native title rights must yield. For example, unrestricted traditional food collection may need to give way to a more regulated form of subsistence gathering that complies with a State nature conservation law, say as to the quantities of a plant that may be taken at any one time.³ But whereas extinguishment is permanent, suppression is temporary. So if an exploration licence expires, the native title rights can 'spring back' to their full extent. The harshness of Australian extinguishment law consists in the frequency with which it consigns official actions to the extinguishment category rather than the suppression one, without, it should be said, an adequate justification in legal policy terms for this more destructive treatment of property rights.⁴ The extinguishment test case of 2002 in the High Court—*Western Australia v Ward*⁵—epitomises this approach.

THE YANNER PRECEDENT

The interesting contrast in this respect is the High Court decision in *Yanner v Eaton* (*Yanner*) from 1999.⁶ Murrandoo Yanner was prosecuted for capturing a crocodile for personal and communal consumption without a licence. The *Fauna Act 1974* (Qld) vested in the Crown 'property' in certain animals taken in the wild, as part of a royalty system originally set up to deal with a trade in furs. The Act also made it an offence to take such fauna without a permit under the Act. The Native Title Act, in section 211, exempts native title holders from State licensing schemes in a non-commercial hunting situation like this. But Yanner could only take advantage of the exemption if he could show his native title right to take crocodile was unextinguished. The High Court found in his favour, rejecting the State's argument that the Fauna Act had extinguished that right.

Section 54(1)(a) said that a person shall not take fauna without a permit—the prohibition and its conditional relaxation through a licensing regime were contained in a single legal provision. The majority in *Yanner* conceded that there are some grey areas between regulation and

prohibition for the purposes of extinguishment analysis. But in the end:

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.⁷

The litmus test for extinguishment is often said to be *inconsistency*. And the majority said that '*regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence'.⁸

Indeed counsel in *Yanner* for both Queensland and the Commonwealth conceded that a bare prohibition coupled with a licensing regime would not be sufficient alone to extinguish the native title right to hunt crocodile.⁹ Those same parties are now back in court in *Akiba*, putting forward what is essentially the opposite argument.

THE AKIBA TRIAL BEFORE JUSTICE FINN

In July, 2010, Justice Paul Finn of the Federal Court found that the Torres Strait Islanders of the Regional Seas Claim Group in aggregate hold native title in the waters of the Torres Strait (except a southern area overlapping with the Kaurareg people's sea claim, which was hived off for separate consideration).¹⁰ He accepted that there is a single Torres Strait Islander 'society', whose traditional laws and customs regulate the occupation and use of sea country across the region. Within that society, each of 13 groups associated with a particular island community holds non-exclusive rights to access and use their own marine territories (including any shared with another island group) and to take resources in those territories for any purpose.

Geographically, he said the rights extend beyond the territorial sea (typically 12 nautical miles offshore) into Australia's Exclusive Economic Zone ('EEZ'), and in the northernmost part of the Strait they include areas regulated by the Treaty with Papua New Guinea ('PNG') signed in 1978.

Justice Finn said that the right to take resources includes taking them for trading or commercial purposes, subject to any requirements under Australian law such as a licence or permit. But he refused to recognise, as native title rights, so-called 'reciprocity based rights', which entitle people to access and use a marine area where they have reciprocal personal relationships to those who hold the primary or occupation-based rights for that area.

THE FULL FEDERAL COURT APPEAL

The Commonwealth and Queensland both appealed against the recognition of the non-exclusive commercial right to fish (despite, it might be said, a history of governments exhorting traditional owners to make more economically productive use of their gains under native title and land rights law). The claim group members cross-appealed against Justice Finn's finding that they lacked connection to certain areas at the outer perimeter of the claim area, his refusal to recognise reciprocity-based rights and his conclusion that native title rights must yield to the common law rights of the public to fish and to navigate through waters, and potentially also to the customary rights of PNG nationals under the Treaty. The cross-appeals in the Federal Court, rejected by all three appellate judges, are not dealt with in this article.

An instrument made under section 17 of the *Torres Strait Fisheries Act 1984* (Cth) prohibited Islanders from engaging in community fishing for commercial purposes and then in the next paragraph said that a person holding a commercial fishing licence under the Act was exempt from the prohibition. In applying *Yanner* at trial, Justice Finn said he faced 'clear constructional choices' in interpreting that instrument.¹¹ Was this a regime of regulatory control consistent with the continued enjoyment of the traditional right to fish for trading purposes? Or was it the extinguishment of that right and the creation of a new statutory right to engage in commercial fishing? He concluded the necessary 'clear and plain intention to extinguish' native title was absent and that this was a regulatory regime.¹²

Justice Mansfield, in his dissent, endorsed this approach. He said this was a regulatory regime aimed at conserving the resource and securing fair fishing practices, which used a conditional prohibition coupled with a licensing regime to achieve those objectives.¹³ But the majority judges (Chief Justice Keane and Justice Dowsett) disagreed. They found that the right to fish had been partially extinguished by the statutory prohibition on commercial fishing and the creation of new statutory rights to pursue that activity. They ordered that the native title right to take resources for any purposes be qualified so as not to 'extend to taking fish or other aquatic life for sale or trade'.¹⁴

One aspect of the argument concerns the right, at common law, of the general public to fish. There is a pre-*Mabo* High Court tax case (*Harper*)¹⁵ which said that imposing a general prohibition on taking marine resources, followed by the introduction of a statutory licence to take, abrogates the prior common law right. But the Court in *Harper* also

noted that this was a ‘public not a proprietary right’ and thus ‘freely amenable to abrogation’.¹⁶ The High Court will have to decide whether, in the post-*Mabo* era, it agrees with Justices Finn and Mansfield that native title is in a different category and there was no clear intention to extinguish private as well as public rights held at common law.¹⁷

With respect, the Full Court majority judges misunderstood the reasoning in *Yanner*. In denying that *Yanner* stands for a general proposition that a prohibition coupled with a licensing regime is regulation rather than prohibition, they said that in *Yanner* ‘it was the operation of section 211 of the Native Title Act upon the Queensland legislation which denied effect to the prohibition which would otherwise have applied to the activity’.¹⁸

This wrongly interpolates section 211 into the extinguishment analysis carried out by the High Court in *Yanner* and overlooks the clear finding that a licensing regime was insufficient to extinguish the native title right to hunt.¹⁹ The *Yanner* majority referred to section 211 only to provide further, *independent* support for this analysis, not to justify its finding on regulation versus extinguishment—the supplementary point being that section 211 self-evidently *assumes* that a native title right can survive where a law prohibits a person carrying on a traditional activity other than in accordance with a licence.²⁰

Over the years, respondent parties have run a variety of arguments to defeat the claim of a native title right to trade in resources. These include that the evidence does not factually support the existence of such a right under traditional law,²¹ that the activity of exchange did not constitute a ‘right’ to trade,²² that the right is not one ‘in relation to land or waters’,²³ that such a right cannot exist in the absence of exclusive possession native title²⁴ and that any such right has been extinguished by legislative or executive action.²⁵

The Islander claim group overcame all these potential hurdles in persuading Justice Finn at trial. The strong evidence of pre-colonisation inter-island trade provided a solid basis for native title recognition of the commercial right to fish. Two Federal Court judges have agreed that, applying High Court authority, fisheries legislation did no more than regulate that right. Two other Federal Court judges misconstrued the reasoning in that High Court case and arrived at the opposite conclusion. The Islanders concede they must exercise such a non-exclusive right according to Australian law, which includes obtaining a licence from the relevant fisheries authority.²⁶ Yet both the Commonwealth and Queensland persist in seeking

to defeat this already legally contained right.²⁷ In 2013, the High Court can maintain the measured principle expressed in *Yanner* or once more it can exacerbate the harshness of Australian extinguishment law, making it even more difficult to eke out something beyond symbolic value from the contemporary recognition of native title.

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- 1 Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23 *Sydney Law Review* 95, 108, 115-116.
- 2 Sean Brennan, ‘Native Title in the High Court of Australia a decade after *Mabo*’ (2003) 14 *Public Law Review* 209, 214, 218.
- 3 Subject to the operation of section 211 of the *Native Title Act 1993* (Cth), discussed later.
- 4 *Western Australia v Ward* (2000) 99 FCR 316, 488-490 (North J, dissenting); Sean Brennan, ‘Native Title in the High Court of Australia a decade after *Mabo*’ (2003) 14 *Public Law Review* 209, 214.
- 5 *Western Australia v Ward* (2002) 213 CLR 1.
- 6 *Yanner v Eaton* (1999) 201 CLR 351.
- 7 *Ibid* 373 (Gleeson CJ, Gaudron, Kirby, Hayne JJ).
- 8 *Ibid* 372.
- 9 *Ibid* 354-355, 357, 370.
- 10 *Akiba v Queensland (No 2)* (2010) 270 ALR 564.
- 11 *Ibid* 762. He said the same constructional choices arose under the Queensland fisheries legislation.
- 12 *Ibid* 764-765.
- 13 *Commonwealth v Akiba* (2012) 289 ALR 400, 457.
- 14 *Ibid* 444, 460.
- 15 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.
- 16 *Ibid* 330 (Brennan J).
- 17 *Akiba v Queensland (No 2)* (2010) 270 ALR 564, 760-761, 764 (Finn J); *Commonwealth v Akiba* (2012) 289 ALR 400, 458 (Mansfield J).
- 18 *Commonwealth v Akiba* (2012) 289 ALR 400, 427 (Keane CJ and Dowsett J).
- 19 *Yanner v Eaton* (1999) 201 CLR 351, 370-373 (Gleeson CJ, Gaudron, Kirby, Hayne JJ) and 115 (Gummow J).
- 20 *Ibid* 373 (Gleeson CJ, Gaudron, Kirby, Hayne JJ), cited with approval by the present High Court Chief Justice when he was on the Federal Court, in 2005: *Sampi v Western Australia* [2005] FCA 777, [1146] (French J).
- 21 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 586-588 (Olney J).
- 22 *Ibid* 588.
- 23 *Ibid* 587.
- 24 *Commonwealth v Yarmirr* (1999) 101 FCR 171, 230-231 (Beaumont and von Doussa JJ); *Daniel v Western Australia* [2003] FCA 666, [320] (RD Nicholson J).
- 25 *Commonwealth v Yarmirr* (1999) 101 FCR 171, 231 (Beaumont and von Doussa JJ); *Neowarra v Western Australia* [2005] 141 FCR 457, [779] (Sundberg J); *Gumana v Northern Territory* (2005) 141 FCR 523-524 (Selway J).
- 26 *Commonwealth v Akiba* (2012) 289 ALR 400, 431 (Keane CJ and Dowsett J).
- 27 Transcript of Proceedings, *Akiba v Commonwealth* [2012] HCATrans 245 (5 October 2012).

