

In September 2011, the WA Government passed the *Conservation Legislation Amendment Act 2011* (WA), which amended the *Conservation and Land Management Act 1984* (WA) and the *Wildlife Conservation Act 1950* (WA). This enabled joint management between DEC and other landowners, including Aboriginal people, over lands and waters including private land, *Conservation and Land Management Act 1984* (WA) reserve land, pastoral leases and other Crown land.

Joint management was defined by the *Conservation Legislation Amendment Act 2011* (WA) as a cooperative legal arrangement between the WA Government, represented by DEC, and one or more other parties to manage land or waters in the State. Areas of the Yawuru conservation estate classified as 'out of town' reserves, which will be jointly managed by Yawuru and DEC, will be primarily vested freehold to Yawuru with a leaseback arrangement to DEC for joint management.

Case note: Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group

15 March 2012

Federal Court of Australia - Brisbane
Keane CJ, Mansfield, Dowsett JJ

Dr Lisa Strelein and Gabrielle Lauder,
AIATSIS

In this appeal, the Full Court of the Federal Court varied the original native title determination, which covered a significant area of the waters of the Torres Strait. The original determination contained a right to take resources 'for any purpose', but on appeal this right was restricted such that there is no right to take fish or other aquatic life for sale or trade. The cross-appeal by the Seas Claim Group – concerning the geographic extent of their claim, the recognition of reciprocity-based rights, and the relationship of native title rights to public rights – was dismissed.

Introduction

The Torres Strait sea claim decision was handed down in the Federal Court of Australia on 2 July 2010. Justice Finn, the primary judge, found that

the claim group had established their claim to approximately 37,800 square kilometres of sea between the Cape York Peninsula and Papua New Guinea.

The primary judge found that the claimants' native title interests include the non-exclusive right to 'access resources and take for any purpose resources in the native title area', subject to the laws of the State of Queensland and the Commonwealth of Australia. This determination did not affect the validity of other interests in relation to the native title areas, including the rights and interests of holders of licenses, permits, authorities, resource allocations and endorsements issued under State and Commonwealth fisheries legislation. To the extent of any inconsistency, native title rights and interests were to yield to common law public rights and customary rights.

Many of the issues that were contested at trial, including questions about the proper scope and definition of the relevant 'society', were no longer controversial on appeal. The issues to be decided in the appeal were:

1. whether Commonwealth and State licensing regimes for commercial fishing extinguished native title rights to take fish and marine life for commercial or trading purposes;
2. the geographic boundaries of the native title claim area; and
3. the nature and extent of subsisting native title rights and interests.

Appeal by Commonwealth – extinguishment issue

The important point of the decision at first instance was that once a determination had been made that law and custom supported the right to take resources, the use made of those resources was irrelevant (unless restricted by law and custom, which is matter internal to the group). The primary judge had held that although statutory licensing regimes had regulated the native title right to take fish or other marine resources for commercial purposes, they had not extinguished that native title right. This was based on the reasoning in *Yanner v Eaton* that native title rights will not be extinguished by legislation unless the legislation demonstrates a clear and plain intention to do so. In this case, as in *Yanner*, the judge held that the primary purpose of the legislation was to regulate the use of scarce resources, and the extinguishment of native title rights was not necessary to this purpose.

On appeal, the Commonwealth argued that previous regulatory regimes have extinguished native title rights to commercial fisheries and

although the current *Torres Strait Fisheries Act 1984* (Cth) and the *Fisheries Act 1994* (Qld) protect Islanders' traditional fishing rights, they do not have the effect of reviving or reinstating native title rights previously extinguished by legislative regimes. Queensland first legislated to prohibit the taking of fish without a statutory license in 1887 and the *Fisheries Act 1952* (Cth), which the Commonwealth argued had introduced a 'new species of statutory entitlement', placing prohibitions on the unlicensed taking of fish for commercial purposes in proclaimed waters.

The claim group relied on *Yanner v Eaton* and the trial judge's decision that the mere regulation of a right does not necessarily amount to extinguishment. The joint judgment of Chief Justice Keane and Justice Dowsett emphasised that the orthodox approach to the extinguishment of native title is to assess whether the native title rights under question are consistent with legislation regulating that activity. The majority held that although the licensing regimes do not explicitly extinguish native title, they manifest a clear intention to extinguish all common law rights. Extinguishment leaves no room for revival, unless expressly provided for by statute. The prohibition is directed at all commercial fishing. They held that there is no authority for the view that an explicit reference to native title is necessary to include native title holders within a general prohibition.

The claim group also relied on s211 of the *Native Title Act 1993*. Section 211 provides that, under certain circumstances, native title holders can carry on certain activities without a licence or permit, in spite of laws that would otherwise require a licence or permit. The joint judgment held that s211 did not assist the claim group's argument on two bases. Firstly, although s211 can alter the effect of existing legislation, it cannot deny the effect of past legislation. Accordingly, once the right to take native title fish for commercial purposes was extinguished, it could not be revived by invoking s211 of the NT Act. Secondly, s211(2) states that the law does not restrict native title holders from carrying on an activity where they do so for the purpose of satisfying their personal, domestic or non-commercial communal needs. It has no relation to an activity undertaken for commercial purposes.

Their Honours concluded that the right to take fish and other aquatic life for commercial purposes without a licence could not survive the enactment of laws that prohibit that activity. Accordingly, they ordered that the native title determination be amended to exclude commercial hunting and fishing.

Justice Mansfield, dissenting on this point, came to a different conclusion on the question of

extinguishment. His Honour was of the view that the legislative regimes of Queensland since 1877 and of the Commonwealth since 1952 did not take away the native title right to fish for commercial purposes, but rather constituted measures for the management of fisheries. His Honour did not dispute the fact that the claim group were required to comply with the restrictions and requirements of the licensing regime in force. But he was satisfied that the legislation created a regime of control consistent with the continued enjoyment of the native title right to take fish or other marine resources for commercial purposes.

Cross-appeal by claim group

At the same time as the Commonwealth's appeal against the primary judge's decision on commercial fishing and hunting rights, the claim group filed their own appeal against the original judgment (known as a cross-appeal) on the grounds that the primary judge:

1. failed to recognise the full geographical extent of their claim with respect to waters in the north-eastern extremities of the claimed area;
2. failed to accept reciprocity-based rights as native title rights under s223(1) of the *Native Title Act 1993* (Cth); and
3. proceeded on the footing that native title rights must yield to common law public rights and customary rights to fish and navigate to the extent of any inconsistency.

Sea claim area

The primary judge had held that the claim group had established their connection by traditional law and custom to the main area of the claim, satisfying the requirements of s223(1)(b) of the *Native Title Act 1993*. His Honour found, however, that the evidence was not sufficient to establish the claimants' connection to the outer extremities of the claim area.

On appeal, the claim group relied on the primary judge's finding that the Torres Strait Islanders are a maritime people who 'have long been exceptional navigators' and on the evidence showing use of, and visitation to, areas a long way outside of the nearest community islands. They also argued that the evidence demonstrated fishing in deep waters far away from reefs.

All of the judges on appeal, including Mansfield J, rejected the claim group's argument on this point. Their Honours considered that the primary judge's approach to the evidence had been correct. Where the evidence indicated journeys to specific geographic features, those features had been included in the determination area, but the waters

surrounding those features were not included unless the evidence showed some use of the waters. While particular areas might have been crossed by Islanders travelling between certain islands, the evidence did not positively establish that this was the case, and in any case their Honours doubted whether evidence of travel by an individual would be sufficient to establish the necessary connection at the community level. In all, the Full Court judges considered that the evidence of 'use' of the four excluded areas was not sufficient or specific enough to demonstrate that the primary judge's findings were mistaken.

Reciprocity-based rights

There are two types of rights identified in what the claim group call the 'customary marine tenure model': (i) occupation-based rights; and (ii) reciprocal rights. Occupation-based rights are held by descendants of the socially recognised prior occupying ancestors and the wives of members of the group. Reciprocal rights are held by each person or each group who has a relevant reciprocal relationship with an ancestral occupation-based rights holder. Such rights cover the same area and content as the ancestral occupation based rights holder. Put simply, they are rights that give access to the land and waters of another. Reciprocal rights do not include territorial rights and are ultimately subject to the control of the occupation-based rights holder.

The primary judge had held that reciprocal relationships are situational in the sense that they will be enjoyed and discharged as the situation requires. His Honour had concluded that reciprocity-based rights are not rights in relation to land or waters, but rights in relation to persons which invoke social and personal obligations. Accordingly, reciprocity based rights are not native title rights for the purposes of s223(1) of the *Native Title Act 1993* (Cth). This was not to deny, however, that such rights exist under the Islanders' traditional laws and customs.

On appeal, the claim group argued that the basis of a right should not be a barrier to recognising native title rights. They further argued that the primary judge erred in contrasting rights in relation to land or waters and rights in relation to persons.

The joint judgment concluded that s223(1) of the *Native Title Act 1993* (Cth) does not contemplate rights that are dependent on the permission of other native title holders for their enjoyment. Their Honours said that such rights would not be held by reason of a person's own connection with the land and waters under their laws and customs, but would instead be held 'mediately' through a personal relationship with another person who did have the necessary connection. Practical inconsistencies

would arise if native title was held not only by the members of a community but unidentified individuals on the basis of their relationship with native title holders. Accordingly, the claim group could not succeed in their attempt to have reciprocity-based rights recognised in the native title determination.

Relationship with Public Rights

The primary judge held that the common law's public right to navigate and to fish within the claim areas co-exists with native title rights, and that the Islanders have those public rights in addition to native title rights in those areas.

On appeal, the claim group sought to amend the determination so that it would specify that the public rights do not prevail over the native title rights – in effect, that they are on equal footing. They also argued that the two sets of rights should be described in the determination as being required to be 'exercised reasonably'.

The joint judgment rejected this argument as it would leave open the possibility of a practical collision between two sets of rights. The law establishes priorities between two types of rights. The purpose of s225(d) of the *Native Title Act 1993* (Cth) is to resolve such inconsistencies.

The majority held that native title rights in this circumstance must yield, reinforcing the superiority of non-native title rights.

Leave to appeal

The claim group have applied for special leave to appeal to the High Court of Australia in relation to the extinguishment question, the reciprocal rights question and the public rights question.