UNFINISHED BUSINESS IN THE STRAITS:

AKIBA V COMMONWEALTH OF AUSTRALIA [2013] HCA 33

by Lauren Butterly

It is fitting that this thematic edition on 'Business and Indigenous Rights' falls just after the first recognition by the High Court of commercial native title rights. The High Court unanimously upheld commercial fishing rights in the Torres Strait. As Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda stated: '[c]ommercial fishing rights are essential to the Indigenous people of Australia, not only because they are traditional rights but because they are integral to the economic development of Indigenous communities'.[1] The recognition of native title rights to commercial fishing is historic, and testament to the determination of the Torres Strait Regional Seas Claim Group ('Seas Claim Group') for persevering through three 'rounds' of litigation since the claim was lodged in 2001.[2] The High Court decision leaves unanswered questions about the test for extinguishment from a doctrinal native title law perspective. More importantly for the claimants, while some may argue that the immediate practical implications are limited, the outcome of the case signals an exciting opportunity to promote discussions about integrating sea rights, Indigenous governance and commercial development not only in the Straits, but across Australia.

BACKGROUND

Akiba v Commonwealth of Australia [2013] HCA 33 relates to a native title claim known as the Torres Strait Sea Claim ('Sea Claim'). The area of the Sea Claim was approximately 44 000 square kilometres seaward of the high water mark around the islands of the Torres Strait and the trial decision recognised native title rights to approximately 37 800 square kilometres.[3] Although the Sea Claim was initially lodged on an exclusive basis, this was amended following the High Court decision of *Commonwealth v Yarmirr* (2001) 208 CLR 1 ('*Yarmirr*') which held that only non-exclusive rights to the sea could be granted.[4] Essentially, claiming non-exclusive rights meant that the Seas Claim Group were not claiming control of access over the area.

Two issues were appealed by the Seas Claim Group to the High Court: the right to fish for commercial purposes and 'reciprocal rights'.[5] Most of the Sea Claim was determined by Finn J of the Federal Court in 2010 and was not challenged. Justice Finn held that the Seas Claim Group enjoyed non-exclusive rights to access, remain in and use their maritime territories and to access and take resources for any purpose subject to traditional laws and customs.[6] The phrase 'for any purpose' included commercial purposes. On appeal to the Full Federal Court, the majority (Keane CJ and Dowsett J) overturned Finn J's determination on commercial rights and held that they had been extinguished by legislative regimes. With respect to reciprocal rights, Finn J dismissed the claim for such rights and this was upheld by all judges in the Full Federal Court.

Before we consider these two issues in more detail, it is important to note that there were two separate judgments in the High Court: the majority judgment of Hayne, Kiefel and Bell JJ and the separate judgment of French CJ and Crennan J. Both judgments upheld rights to commercial fishing and dismissed the claim to reciprocal rights.

COMMERCIAL FISHING

Interestingly, the Seas Claim Group did not explicitly claim a right to fish for commercial purposes.[7] However, Finn J held that the broader claim made to fishing would encompass that use.[8] This, in itself, became a contested notion.

WHAT IS THE RELEVANT RIGHT?

The Commonwealth and the State of Queensland submitted that the right to take for commercial purposes was a 'discrete and severable characteristic of a general right to take marine resources'.[9] On appeal, the majority in the Full Federal Court agreed and held that commercial fishing was a separate 'incident' of native title.[10]

It is telling that, after setting out the procedural history of the case and the grounds for appeal, the first issue French CJ and Crennan J addressed was whether this right was

'all encompassing'. Their Honours held that it should not be treated as a separate incident of native title, but as part of the broader right to fish. Therefore, their Honours stated, the original determination of the native title right 'did not include a native title right of the kind found by the Full Court to have been extinguished'.[11] The majority judgment also agreed that the premise of analysing the separate incident in this way was flawed and led to error.[12]

EXTINGUISHMENT BY LEGISLATION

Once the relevant right had been identified, the High Court was then required to consider whether those rights had been extinguished by statutory regimes relating to fishing and licensing. The relevant Queensland and Commonwealth fisheries legislation (between them) applied to the whole determination area.[13] The legislative schemes can generally be described as having a provision that prohibits a person from engaging in commercial fishing unless that person holds a licence.[14] The Commonwealth and Queensland argued that the legislation extinguished the right to take resources for trade and commercial purposes. They did not argue that the right to take marine resources more generally had been extinguished. The Seas Claim Group accepted that they required licences to fish for commercial purposes and, as French CJ and Crennan J noted, '[t]here was nothing to suggest...that native title holders had ever been precluded from applying for licences to fish for commercial purposes under the successive regimes or are now precluded from doing so'.[15]

Although the right to take for commercial purposes was not a distinct incident of native title, Finn J and both High Court judgments clearly provide that it could be treated separately in relation to extinguishment. Justice Finn specifically noted that the separation of commercial rights remains 'a characteristic of the fisheries legislation' and is a distinction which is commonly made.[16] The High Court unanimously held that commercial fishing rights were not extinguished. It is at this point that the judgments diverge, but only slightly, as explained below.

CLEAR AND PLAIN INTENTION

Chief Justice French and Justice Crennan began by emphasising the general principle that 'a statute ought not to be construed as extinguishing common law property rights unless no other construction is reasonably open'.[17] Their Honours then stated that in *Mabo v Queensland [No 1]* (1988) 166 CLR 186 and *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*), the approach of the High Court was that a clear and plain intention was required to extinguish.[18] However, their Honours explain that due to the difficulties of statutory construction where a statute was enacted prior to *Mabo*, 'the Court' in *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*') 'focused on inconsistency as the criterion of extinguishment'.[19] Chief Justice French and Justice Crennan then outlined some examples of the High Court applying '[i]nconsistency analysis'.[20] Their Honours concluded by stating that the 'pre-eminence of inconsistency as the criterion of extinguishment' was reiterated in *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*'), where 'the plurality' warned against misunderstanding clear and plain intention, in that 'the subjective state of mind of those whose acts were alleged to have extinguished native title were irrelevant'.[21]

The majority judgment began by outlining four propositions upon which 'resolution' of extinguishment depends.[22] The fourth of these was said to be of 'critical importance to this case': that 'inconsistency of *rights* lies at the heart of any question of extinguishment' [emphasis as appeared in the judgment].[23] Their Honours simply noted that '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...'.[24]

It may be that there is something to be said about the way French CJ and Crennan J (briefly) chronicled the history of 'clear and plain intention'. Certainly, tracing the shift from clear and plain intention to inconsistency back to 'the Court' in *Wik* gives it a sense of historical legitimacy; suggesting that this judgment is merely clearing up an area that had been a bit 'messy'. Attention was brought by both judgments to the fact that subjective intention is irrelevant.[25] As noted by Richard Bartlett in the context of *Ward*, '[s]uch a caveat has...always been accepted but does not deny the significance of the requirement [of clear and plain intention] and its links to demands of equality'.[26]

Ironically, this judgment leaves the 'clear and plain intention test' in a less than clear position. The judgments do not seem to go as far as to exclude the operation of the 'clear and plain intention test'; rather they simply confirm that the correct test *in this case* is inconsistency. The most important native title case of the past decade has produced murky waters with respect to the test for extinguishment.

INCONSISTENCY OF RIGHTS

Both judgments offered a relatively succinct application of the 'inconsistency analysis'. It was emphasised that, in this case, the analysis arose due to inconsistency between legislation and recognition of a native title right.[27]

Chief Justice French and Justice Crennan began by stating that 'nothing in the character of a conditional prohibition on taking fish for commercial purposes requires that it be construed as extinguishing such a right'.[28] As discussed above, the judgment demonstrated examples of inconsistency analysis before concluding, almost abruptly, that the submissions of inconsistency of the Commonwealth and Queensland should not be accepted as they rest upon the wrong characterisation of the right as the 'exercise of a lesser right defined by reference to that purpose'.[29]

The majority judgment was slightly more descriptive. In particular, they focussed on the case of *Yanner v Eaton* (1999) 201 CLR 351 ('*Yanner*') as authority for the fact that regulation does not sever the connection with the waters and that a 'statutory prohibition' does not conclusively establish extinguishment.[30] After confirming that the prohibition on taking fish for sale or trade without a licence did not extinguish the right, the majority noted that that test for extinguishment is 'not to be determined by asking whether the...legislature has asserted control, or dominion, over a particular activity'.[31] They concluded by stating that 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'.[32]

THE REPEATED STATUTORY INJUNCTION: 'NO COMMERCIAL FISHING WITHOUT A LICENCE'[33]

As noted above, the Seas Claim Group accepted that they required licences to fish for commercial purposes. This was not a focus of the High Court's judgments because, in short, it did not have to be. However, it raises real practical questions. The first is: what licences, as currently operating, are held by native title holders?

This judgment does not require either the Commonwealth or Queensland to reallocate commercial fishing licences, nor does is mandate that native title claimants should be granted a certain number of licences. Practically, the only immediate impact is that rights in relation to commercial fishing will now be subject to the limited future act processes in the *Native Title Act 1993* (Cth) ('*NTA*').[34] However, such issues should be negotiated rather than viewed in the narrow legal framework of native title. Further, it must be recognised that there is already a very active Indigenous commercial fishery in the Torres Strait.[35] The practical questions raised by this judgment present a valuable opportunity to open up discussions and also to showcase the successful commercial fishing by traditional owners that is already taking place in the Strait.

RECIPROCAL RIGHTS

Whilst the High Court decision focussed on commercial fishing rights, there was another issue before the Court. The Seas Claim Group also claimed reciprocal rights. Justice Finn described reciprocal rights as 'rights and obligations recognised and expected to be honoured or discharged under Islander laws and customs'.[36] A key aspect of understanding these rights is that although the 'society' in the Torres Strait was viewed as one society, all members did not hold the rights communally. Rather, the laws and customs determined who had rights in particular areas.[37] Reciprocal rights were held due to a relationship with a holder of native title rights in a particular area.

Justice Finn held that the reciprocal rights were not in relation to 'land and waters' as was required by section 223(1) *NTA*. This was upheld by all three judges in the Full Federal Court and unanimously by the High Court. Although this aspect of the case was not successful in the High Court, as summarised by David Saylor, who was the instructing solicitor on the Sea Claim for many years, the High Court judgment 'cannot and will not sever [reciprocal rights] from the traditional system in any event'.[38]

CONCLUSION

The most important native title case of the last decade will also go down in history as the shortest. Its brevity has arguably contributed to the murky waters surrounding clear and plain intention. Due to the Commonwealth election caretaker mode in place when the judgment came down, and now to the settling-in period of the new government, no indication of how this decision may lead to negotiations has yet been given. The journey of interpreting, discussing and negotiating commercial native title rights to fishing is only just beginning.

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1 Australian Human Rights Commission, *Fishing rights affirmed for Torres Strait Islanders* (7 August 2013) <http://www.humanrights.gov.au/news/stories/fishing-rights-affirmed-torres-strait-islanders>.

2 *Akiba v Queensland [No 3]* (2010) 204 FCR 1, *Commonwealth v Akiba* (2012) 204 FCR 260 and *Akiba v Commonwealth of Australia* [2013] HCA 33 (7 August 2013).

3 National Native Title Tribunal, *Claimant summary - Torres Strait Regional Sea Claim* <http://www.nntt.gov.au/Applications-And-Determinations/Search-Applications/Pages/Application.aspx?tribunal_file_no=QC2001/042> and National Native Title Tribunal, *Torres Strait Islanders' sea rights recognised* (2 July 2010) <http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title/Pages/TorresStraitIslanderssearightsrecognised.aspx>.

4 For a further explanation see Samantha Hepburn, 'Native Title in Coastal and Marine Waters', in Rachel Baird and Donald Rothwell (eds), *Australian Coastal and Marine Law* (Federation Press, 2011) 296, 305–308.

5 For a detailed consideration of the arguments relating to both of these issues see Lauren Butterly, 'Clear choices in murky waters: *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*' (2013) 35 *Sydney Law Review* 237.

6 *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 21 [11].

7 Ibid 187 [751].

8 Ibid.

9 Ibid 285 [55].

10 Ibid 296 [87].

11 *Commonwealth of Australia* [2013] HCA 33 (7 August 2013) [5].

12 Ibid [65]–[67].

13 Ibid [16].

14 Lauren Butterly, above n 5, 246. Also see *Akiba* [2013] HCA 33 (7 August 2013) [16].

15 *Akiba* [2013] HCA 33 (7 August 2013) [20].

16 Ibid [21].

17 Ibid [24].

18 Ibid [30].

19 Ibid [31].

20 Ibid [32]-[35].

21 Ibid [35].

22 Ibid [50]. The remaining four propositions are identified at [51].

23 Ibid [52].

24 Ibid [62].

25 Ibid [35], [62].

26 Richard Bartlett, *Native Title in Australia* (LexisNexis, 2nd ed, 2004) 287.

27 *Akiba* [2013] HCA 33 (7 August 2013) [36].

28 Ibid [24].

29 Ibid [39].

30 Ibid [63].

31 Ibid [68].

32 Ibid [75].

33 Ibid.

34 See *Native Title Act 1993* (Cth) s 24HA.

35 See for example: Protected Zone Joint Authority, *Torres Strait Finfish (Reef Line) Fishery* <http://pzja.gov.au/the-fisheries/torres-strait-finfish-reef-line-fishery/>.

36 *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 130 [508].

37 Ibid, 137 [542].

38 E-mail from David Saylor to Lauren Butterly, 14 August 2013 (personal communication).

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