

# *Before the High Court*

## *Clear Choices in Murky Waters: Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*

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### *Abstract*

Those who have travelled between the islands in the Torres Strait will know that much of the water is crystal clear.<sup>1</sup> However, the ‘clear constructional choices’ presented in the Torres Strait Regional Seas native title claim have led to murky waters. Twenty-one years after *Mabo*,<sup>2</sup> the Torres Strait Islander people again find themselves before the High Court. Given the narrow grounds of appeal, this case is not, in any sense, ‘the *Mabo* of the sea’. Nonetheless, the appeal presents the High Court with an opportunity to recognise and clarify native title rights. Two distinct issues are before the High Court: whether native title rights to commercial fishing have been extinguished and whether reciprocal native title rights can be recognised. Regarding whether native title rights to commercial fishing have been extinguished, the author argues that the trial judge was correct to identify the ‘clear constructional choices’ involved and that the majority in the Full Federal Court should not be so emphatic in their statement of the ‘orthodox approach’ to extinguishment. The lack of clarity regarding the content of reciprocal rights has made it hard for the Torres Strait Regional Seas Claim Group to succeed on the second issue, but there is no authority to prevent the High Court from recognising such rights.

## **I Introduction**

Geographically, culturally and legally, the Torres Strait is a unique part of Australia. The acquisition of sovereignty in the Torres Strait did not lead to the Torres Strait Islanders losing their ability to access land and seas.<sup>3</sup> The occupation of the region by the Torres Strait Islanders has had ‘an essentially maritime character’.<sup>4</sup> The sea is integral to Torres Strait Islander life and livelihood and Islander relationships with the sea are informed by ‘utility and practicality’ rather than an overarching creation story or spiritual connection.<sup>5</sup> *Mabo* originally

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<sup>1</sup> The author completed an internship at the Torres Strait Regional Authority in 2005.

<sup>2</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (*‘Mabo’*).

<sup>3</sup> *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 20 [6] (*‘Akiba FC’*). This point was not challenged and was confirmed on appeal: *Commonwealth v Akiba* (2012) 204 FCR 260, 263 [3] (*‘Akiba FFC’*).

<sup>4</sup> *Akiba FC* (2010) 204 FCR 1, 19 [2].

<sup>5</sup> *Ibid* 19 [3].

included a sea claim, but the portion of the claim relating to the sea was not pursued to the High Court.<sup>6</sup> This provides an insight into the early intentions of the Torres Strait Islanders to make native title claims to the sea. Since *Mabo*, 22 native title consent determinations to land have been made in the Torres Strait.<sup>7</sup> These consent determinations have recognised native title on all of the inhabited islands and most of the uninhabited islands within the area of the Torres Strait Regional Seas Claim ('Seas Claim').<sup>8</sup> Physically, more than legally, these consent determinations have laid the foundations for the Seas Claim.

This column is arranged in two parts. The first analyses the Seas Claim, including the decisions of the Federal Court and Full Federal Court. There can be no doubt that the Seas Claim is a complex matter. Justice Finn's reasons for judgment at first instance exceed 250 pages. This column has a necessary focus on those two matters that are now before the High Court. The second part explores the two grounds of appeal relating to commercial fishing and reciprocal rights. The author argues that, regarding commercial fishing, Finn J was correct to assert that there are 'clear constructional choices' and that Keane CJ and Dowsett J's approach to extinguishment is incorrect. This issue requires the Court to determine the distinction between partial extinguishment of and mere regulation of native title rights. It is critical to ask where the 'mere regulation' precedent of *Yanner v Eaton*<sup>9</sup> 'fits' in the regime of extinguishment. The claim to reciprocal rights has been rejected by all four Federal Court judges. The author submits, however, that this is not necessarily due to the notion of reciprocal rights but because of the way this issue has evolved. There is nothing in the *Native Title Act 1993* (Cth) ('*Native Title Act*'), nor in any case law, to prevent the High Court from recognising such rights. This column seeks to define the content of the reciprocal rights claimed and explore arguments the High Court could consider in favour of recognising reciprocal rights.

## II Background

The Seas Claim was lodged with the National Native Title Tribunal on 23 November 2001.<sup>10</sup> The members of the Regional Seas Claim Group ('Seas Claim Group') are living descendants of a number of Torres Strait Islanders.<sup>11</sup> The respondents are the Commonwealth, the State of Queensland, a group of parties loosely called the 'the Commercial Fishing Parties' and, at trial, a small group of

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<sup>6</sup> See Richard Bartlett, *Native Title in Australia* (LexisNexis, 2<sup>nd</sup> ed, 2004) 235–6 (esp fn 82).

<sup>7</sup> *Akiba FC* (2010) 204 FCR 1, 20 [7].

<sup>8</sup> *Ibid.* The claim in *Akiba FC* is known as the 'Torres Strait Regional Seas Claim'. However, see below n 10 for further clarification.

<sup>9</sup> (1999) 201 CLR 351 ('*Yanner*').

<sup>10</sup> *Akiba FFC* (2012) 204 FCR 260, 19 [1]. In 2008, claims were lodged by the Kaurareg and Gudang peoples in the southern part of the Torres Strait. The original application was then split into Parts 'A' and 'B'. The decisions in this matter only relate to Part A: *Akiba FFC* (2012) 204 FCR 260, 263 [2].

<sup>11</sup> The list 'contains in aggregate all of the names of persons identified in *Mabo (No 2)* and in the various Consent Determinations as being ancestors of members of the *Mabo (No 2)* claim group': *Akiba FC* (2010) 204 FCR 1, 30 [54].

parties from Papua New Guinea.<sup>12</sup> The Torres Strait is subject to an elaborate and complex legal and administrative regime. Of particular importance is the *Torres Strait Treaty* between Papua New Guinea and Australia.<sup>13</sup> The Treaty provides the maritime boundary between Australia and Papua New Guinea.

The area of the claim is approximately 44 000 square kilometres seaward of the high water mark around the islands and includes beaches, reclaimed areas and intertidal zones.<sup>14</sup> The rights claimed at trial fell into three groups:

1. rights to enter, remain, use and enjoy;
2. rights to access and take resources and to a livelihood based upon accessing and taking; and
3. rights to 'protect' resources, habitat and places of importance.<sup>15</sup>

These rights were claimed on a *non-exclusive* basis. Justice Finn emphasised that the application, as it stood at the time of trial, did not seek to 'control access by any other person to, or to control the conduct of any other person in, the claim area'.<sup>16</sup> The original application as filed did assert such exclusive rights but, in the opinion of Finn J, this was 'wisely abandoned: cf *Commonwealth v Yarmirr*'.<sup>17</sup>

*Commonwealth v Yarmirr*<sup>18</sup> was the first native title determination in relation to a sea claim. The claim was for *exclusive* possession of 2000 square kilometres of sea and seabed around Croker Island. Gleeson CJ and Gaudron, Gummow, Kirby and Hayne JJ held that the *Native Title Act* allowed for claims to the sea.<sup>19</sup> However, the majority held that although native title rights could be recognised, they could not be *exclusive* due to the inconsistency between common law public rights to navigate and fish and the international right of innocent passage.<sup>20</sup> Since *Yarmirr*, two further Federal Court decisions have reiterated this

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<sup>12</sup> With respect to the seven parties from Papua New Guinea, see *Akiba FC* (2010) 204 FCR 1, 235–40 [955]–[986]. This aspect was not appealed.

<sup>13</sup> *Treaty between Australia and the Independent State of Papua New Guinea Concerning the Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters*, opened for signature 18 December 1978, 1985 ATS 4 (entered into force 15 February 1985).

<sup>14</sup> *Akiba v Queensland (No 1)* [2006] FCA 1102, [2].

<sup>15</sup> *Akiba FC* (2010) 204 FCR 1, 131 [512]. Note the concessions made by Queensland and the Commonwealth in this regard: *Akiba FC* (2010) 204 FCR 1, 132 [514]–[515].

<sup>16</sup> *Akiba FC* (2010) 204 FCR 1, 33 [65]. However, Finn J noted that rights to 'protect' were an 'unelaborated entitlement' and that the 'applicant disavows a right that has an "exclusive content" but is left with one that has an elusive content': *Akiba FC* (2010) 204 FCR 1, 136 [535], [537].

<sup>17</sup> *Akiba FC* (2010) 204 FCR 1, 33 [64]. Also note Finn J's comments at 186 [745].

<sup>18</sup> (2001) 208 CLR 1 ('*Yarmirr*').

<sup>19</sup> *Ibid* 37 [8]; 112–13 [250]–[252] (McHugh and Callinan JJ dissenting). This included the territorial sea.

<sup>20</sup> *Ibid* 56 [61], 60–1 [76], 67–8 [94]–[100]. Justice Kirby dissented on the 'exclusivity' point and instead 'attributed a 'qualified exclusive' nature to the rights': Ulla Secher, 'The Crown's Radical and Native Title: Lessons from the Sea — *Yarmirr* and Beyond' (Pt 2) (2011) 35 *Melbourne University Law Review* 1099, 1113. This approach has not gained traction. See also Samantha Hepburn, 'Native Title Rights in the Territorial Sea and Beyond: Exclusivity and Commerce in the *Akiba* Decision' (2011) 34 *University of New South Wales Law Journal* 159, 168.

non-exclusive approach to the determination of sea claims.<sup>21</sup> The Seas Claim now joins that list.

Justice Finn (at first instance) held that the Seas Claim Group enjoyed non-exclusive rights to access, remain in and use their maritime territories (or those shared with other communities) and to access resources and take resources *for any purpose* in those territories subject to traditional laws and customs.<sup>22</sup> The phrase ‘for any purpose’ included commercial purposes. Justice Finn was not satisfied that the applicant had established rights to livelihood (but noted that livelihood is encompassed by the right to take resources) or rights to protect.<sup>23</sup>

Putting issues of non-recognition and extinguishment to one side, Finn J identified four issues to be considered, including the ‘Society issue’ and the ‘Rights issue’.<sup>24</sup> The Society issue was not appealed, but a brief overview is necessary as it is central to understanding who holds the respective native title rights. The key question was whether there was one society within the Torres Strait or a number of societies (either made up of individual islands or ‘clusters’ of islands).<sup>25</sup> Justice Finn held that there was one society in the Torres Strait and that the society was ‘in aggregate’ the holders of the native title rights.<sup>26</sup> However, his Honour further held that members of the society did not hold those rights communally and that the laws and customs ‘determine which “sub-sets” of the wider Islander society “[have] interests in particular ... areas”’.<sup>27</sup>

Claims to reciprocal rights were considered within the Rights issue.<sup>28</sup> These reciprocal rights are based on the customary marine tenure model in the Torres Strait.<sup>29</sup> This model contained two types of rights: emplacement-based rights and reciprocity-based rights. Emplacement-based rights are linked to occupation.<sup>30</sup> Reciprocal rights are held because of a relevant relationship with a holder of emplacement-based rights.<sup>31</sup> An example is ‘to provide an assured welcome, accommodation and sustenance to a visiting friend’.<sup>32</sup> Although further examples were provided, the reasons for decision leave a question as to the content of the reciprocal rights claimed. Justice Finn notes that Queensland was ‘quick to note’ that the term ‘reciprocity’ (and the related term ‘exchange’) are ‘hardly

<sup>21</sup> *The Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2004] FCA 298, and *Gumana v Northern Territory* (2005) 141 FCR 457 (‘*Gumana FC*’). Consent determinations to the sea include, for example, *Kuuku Ya'u People v State of Queensland* [2009] FCA 679.

<sup>22</sup> *Akiba FC* (2010) 204 FCR 1, 21 [11]. With respect to the term ‘enjoy’, see 133 [522].

<sup>23</sup> *Ibid* 135 [530], 137 [539].

<sup>24</sup> The other two issues were ‘Sovereignty’ and ‘Geography’. Part of the Sovereignty issue related to recognition of native title beyond territorial waters. Finn J held that native title could be recognised beyond territorial waters: *Akiba FC* (2010) 204 FCR 1, 183 [731]. This was not appealed. The contentious part of the Geography issue related to ‘connection’ (pursuant to the *Native Title Act* s 223(1)(b)) to certain extremities in the Seas Claim area. This was cross-appealed to the Full Court but was dismissed by all three judges and has not been appealed to the High Court.

<sup>25</sup> *Akiba FC* (2010) 204 FCR 1, 57 [175].

<sup>26</sup> *Ibid* 127 [492].

<sup>27</sup> *Ibid* 137 [542].

<sup>28</sup> *Ibid* 127 [493].

<sup>29</sup> *Ibid* 33–4 [68]–[71].

<sup>30</sup> *Ibid* 34 [69].

<sup>31</sup> *Ibid* 34 [70].

<sup>32</sup> *Ibid* 130 [506].

illuminating, particularly of the actual content of the laws and customs'.<sup>33</sup> The content was not resolved in the reasons of the Full Court. The confusion about content, and even who the reciprocal rights holders are, is apparent from the High Court submissions of all parties.<sup>34</sup>

Beyond the problems with definition, this issue raises the application of the *Native Title Act* s 223(1) and whether reciprocal rights are 'in relation to' land and waters and meet the requisite 'connection' requirements. Both Queensland and the Commonwealth denied that reciprocal rights met these requirements because the rights were dependent on a relationship.<sup>35</sup> Justice Finn stated that he was satisfied that under laws and customs there are reciprocal relationships that give rise to rights (and obligations).<sup>36</sup> However, his Honour held that they were not rights 'in relation to land and waters', but 'rights in relation to persons' and did not meet the *Native Title Act* s 223(1).<sup>37</sup> The Seas Claim Group cross-appealed.<sup>38</sup> On appeal, Keane CJ and Dowsett J (Mansfield J agreeing on this issue), held that s 223(1) did not 'contemplate rights and interests which are, in some general or indirect way, related to land and waters, but dependent on the permission of other native title holders for their enjoyment'.<sup>39</sup>

Commercial fishing rights were considered in the context of non-recognition of native title rights and extinguishment.<sup>40</sup> At trial, Queensland and the Commonwealth did not object to rights to 'access and take resources' from the waters for personal, domestic and *non*-commercial use. Queensland and the Commonwealth submitted that commercial fishing rights either could not be recognised or were extinguished by comprehensive legislation.<sup>41</sup> Justice Finn dealt with the 'non-recognition' arguments surprisingly quickly given that his Honour overturned what had become the conventional understanding that exclusive possession was needed to maintain commercial rights.<sup>42</sup> Exclusivity has not been raised on appeal; rather the focus has been on extinguishment.

This issue turns on whether there has been partial extinguishment (of the commercial part of the native title right to access and take fish) or whether the right

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<sup>33</sup> Ibid 59 [186].

<sup>34</sup> Torres Strait Regional Authority ('TSRA'), 'Appellant's Submissions', Submission in *Akiba v Commonwealth*, B58/2012, 9 November 2012, [44], [54]; Commonwealth, 'First Respondent's Submissions', Submission in *Akiba v Commonwealth*, B58/2012, 3 December 2012, [44]–[47], [49]; Queensland, 'Second Respondent's Submissions', Submission in *Akiba v Commonwealth*, B58/2012, 3 December 2012, [66]; Attorney-General for Western Australia, 'Written Submissions of the Attorney-General for Western Australia (Intervening)', Submission in *Akiba v Commonwealth*, B58/2012, 10 December 2012, [8] and [20].

<sup>35</sup> *Akiba FC* (2010) 204 FCR 1, 128 [494].

<sup>36</sup> Ibid 130 [507].

<sup>37</sup> Ibid 130–1 [508]–[510].

<sup>38</sup> *Akiba FFC* (2012) 204 FCR 260, 266–7 [14]–[17].

<sup>39</sup> Ibid 305–6 [128], [130].

<sup>40</sup> *Akiba FC* (2010) 204 FCR 1, 186 [748], 189 [763].

<sup>41</sup> Ibid 189 [763].

<sup>42</sup> Ibid 187–8 [751]–[757]. See Sean Brennan, 'Commercial Native Title Fishing Rights in the Torres Strait and the Question of Regulation versus Extinguishment' (2012) 8(2) *Indigenous Law Bulletin* 17, 19; Hepburn, above n 20, 176–8; *Commonwealth v Yarmirr* (1999) 101 FCR 171 ('*Yarmirr FC*') 230–1 [250]–[251].

to take fish for commercial purposes is merely regulated.<sup>43</sup> The trial judge noted the requirement for a ‘protracted and detailed’ exploration of the relevant legislation since 1877 (Queensland) and 1952 (Commonwealth).<sup>44</sup> The scheme of legislation generally can be described as having a provision that prohibits a person from engaging in commercial fishing unless that person holds a licence or permit. Justice Finn concluded that this legislation was regulatory, not prohibitory, and did not evince a ‘clear and plain intention to extinguish’ native title rights.<sup>45</sup> In drawing this conclusion, Finn J noted the ‘clear constructional choices’ that were open and that his Honour was ‘quite conscious’ he had taken a view that differs from judges whose views he greatly respected.<sup>46</sup> It is apt to note that the majority in *Yanner*, a case this column will return to in detail, stated that ‘[n]o doubt ... regulation may shade into prohibition and the line between the two may be difficult to discern’.<sup>47</sup>

The Commonwealth, Queensland and the ‘Commercial Fishing Parties’ appealed the primary judge’s finding. The majority upheld the appeal, holding that the ‘right to fish for commercial purposes cannot survive the enactment of law which prohibits the unlicensed taking of fish for commercial purposes’.<sup>48</sup> The majority drew particular attention to the case of *Harper v Minister for Sea Fisheries*<sup>49</sup> and to the impact of the *Native Title Act* s 211 on the outcome in *Yanner*.<sup>50</sup> Justice Mansfield dissented on this issue, finding that Finn J was correct and that the licensing requirements did not necessarily mean that the native title right to fish for commercial purposes had been extinguished.<sup>51</sup> Regarding ‘constructional choices’, the majority noted Finn J’s approach ‘sits uneasily with the orthodox approach to the issue of extinguishment’.<sup>52</sup> However, this is itself a ‘constructional choice’ on behalf of the majority, and one that cannot be made so emphatically.

### III Exploration of Grounds of Appeal

#### A *Commercial Fishing Rights: Does ‘regulation shade into prohibition’ and what part do ‘clear constructional choices’ play?*

Before diving into the commercial fishing rights issue one must address its practical significance. The Seas Claim Group conceded that native title holders must obtain a licence under the relevant fisheries legislation to engage in

<sup>43</sup> Justice Finn accepted that the commercial aspect of the right to fish was a ‘distinct incident of the right for extinguishment purposes’: *Akiba FC* (2010) 204 FCR 1, 211 [847].

<sup>44</sup> *Akiba FC* (2010) 204 FCR 1, 190 [765].

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid* 214 [855]. This article will further explore those precedents below.

<sup>47</sup> *Yanner* (1999) 201 CLR 351, 372 [37].

<sup>48</sup> *Akiba FFC* (2012) 204 FCR 260, 295–6 [87].

<sup>49</sup> (1989) 168 CLR 314.

<sup>50</sup> *Akiba FFC* (2012) 204 FCR 260, 294–5 [83].

<sup>51</sup> *Ibid* 321 [221].

<sup>52</sup> *Ibid* 287 [63]. The majority did not point to any particular authority with respect to the ‘orthodox approach’ but later makes comment on the relationship between *Western Australia v Ward* (2002) 213 CLR 1 (‘*Ward*’) and *Yanner* (1999) 201 CLR 351, 294 [81].

commercial fishing. Finn J described this point as ‘a narrow and seemingly barren question’.<sup>53</sup> As with all native title rights, such rights are exercisable according to traditional laws and customs. The Torres Strait Islanders cannot, for example, pursuant to their native title rights, acquire the *Abel Tasman* ‘super trawler’ and fish until the hold is full.<sup>54</sup> The author does not intend to downplay the legitimate interests of non-Indigenous commercial fishers, but merely to put the native title rights claimed in this case, and potential future cases, into perspective.<sup>55</sup>

The Commonwealth and the states have long argued against a right to trade in resources.<sup>56</sup> However, the evidence in this case demonstrated a ‘long and well chronicled history’, with the Islanders described as ‘avid traders’.<sup>57</sup> Justice Finn noted the irony of the state’s stance given that commercial trade of fish by Torres Strait Islanders was ‘positively encouraged by the Queensland Government’.<sup>58</sup> The Commonwealth raised precedents where claims for commercial fishing have foreshadowed extinguishment.<sup>59</sup> Such precedents prompted Finn J’s comment that he was taking a different view to previous cases. However, the cases relied upon by the Commonwealth only considered the issue peripherally.<sup>60</sup> Moreover, these cases did not critically engage with the aspects of *Yanner* and *Harper* that have become central to this case.<sup>61</sup>

The key questions that have arisen in this case are: does the case of *Harper*,<sup>62</sup> which declared the abrogation of public rights to fish, inform

<sup>53</sup> *Akiba FC* (2010) 204 FCR 1, 211 [845]. Also note *Akiba FFC* (2012) 204 FCR 260, 270 [23].

<sup>54</sup> The *Abel Tasman* ‘super trawler’ gained much notoriety in 2012 and is now subject to a two-year ban from fishing in Australian waters: Tony Burke, ‘Gillard Labor Government Acts to Stop Super Trawler’, Department of Sustainability, Environment, Water, Populations and Communities (Media Release, 11 September 2012) <<http://www.environment.gov.au/minister/burke/2012/mr20120911.html>>.

<sup>55</sup> Commercial fishing is an important economic activity in the Torres Strait: Queensland Government, ‘Commercial Fishing in the Torres Strait’, Business and Industry Portal (24 November 2012) <<http://www.business.qld.gov.au/industry/fisheries/commercial-fishing/commercial-fishing-torres-strait>>.

<sup>56</sup> Brennan, above n 42, 19.

<sup>57</sup> *Akiba FC* (2010) 204 FCR 1, 70 [234], 134 [526].

<sup>58</sup> *Ibid* 134–5 [528]. This was through the ‘Company Boat system’ that operated from the early 1900s until the 1970s. The object of the system was to ‘facilitate island community and family ownership of pearl-shelling and trochus luggers and cutters’: *Akiba FC* (2010) 204 FCR 1, 141 [557] ff.

<sup>59</sup> See below n 60.

<sup>60</sup> The majority in *Yarmirr FC* considered this matter briefly even though it was ‘not ... strictly necessary’ and concluded that any commercial fishing rights ‘were at least regulated and possibly wholly or partially extinguished, by statute or executive act or both’: *Yarmirr FC* (1999) 101 FCR 171, 231 [255] (emphasis added). Further, as Mansfield J suggests (*Akiba FFC* (2012) 204 FCR 260, 324 [234]), Sundberg J’s reasons in *Neowarra v State of Western Australia* [2003] FCA 1402 (*‘Neowarra’*) seem to have attributed ‘a somewhat more definitive statement than their Honours expressed’ in *Yarmirr FC*: *Neowarra* [779]. Selway J in *Gumana FC* made a stronger statement, noting that ‘any exclusive or commercial right to fish ... was extinguished in part by the various statutes dealing with fisheries which were applicable from time to time in the Northern Territory’: *Gumana FC* (2005) 141 FCR 457, 523–4 [247(b)]. However, this was prefaced by a statement that ‘[i]n light of the admissions ... [this question] ... probably ... does not need detailed consideration’ and that ‘there were a number of legislative and other acts which may have extinguished at least some incidents of native title’ (emphasis added): at 523–4 [247].

<sup>61</sup> Although, with respect to *Yanner*, note Merkel J’s dissent in relation to extinguishment: *Yarmirr FC* (1999) 101 FCR 171, 332–9 [701]–[736].

<sup>62</sup> (1989) 168 CLR 314.

extinguishment of native title rights, and where does the case of *Yanner*<sup>63</sup> ‘fit’ in the extinguishment regime?

In the context of abalone fishing, *Harper* held that a state licensing regime created new statutory rights that replaced public fishing rights.<sup>64</sup> Justice Finn stated that *Harper* ‘applies a different legal criteria for extinguishment to that to be applied to native title’.<sup>65</sup> The majority in the Full Court, however, stated that the criteria was not different as the legislation in both cases applied to *all* persons who engaged in commercial fishing (emphasis as added by the majority).<sup>66</sup> The assertion that all persons are subject to a licensing regime does not in itself say anything about ‘clear and plain intention’<sup>67</sup> to extinguish native title rights (nor inconsistency of those native title rights with other rights).

*Harper* was decided in 1989 and needs to be reconsidered in light of *Mabo*. Post-*Mabo* cases confirming *Harper* have been identified, but these have not dealt with the distinction between public rights and native title rights.<sup>68</sup> The foundation of the public right to fish is uncertain but it is clear from the case law that public rights to fish are ‘freely amenable’ to abrogation.<sup>69</sup> Justice Brennan in *Harper* states that this is because the right is a public, not proprietary, right.<sup>70</sup> Regardless of the classification, of course, native title rights can also be abrogated, but not so ‘freely’. The majority in *Northern Territory v Arnhem Land Aboriginal Land Trust* analysed abrogation of the public right to fish.<sup>71</sup> Ironically, in that case, the Commonwealth submitted that the relevant fisheries legislation ‘preserves and operates upon the public rights of fishing, albeit heavily regulated’.<sup>72</sup> The majority note that statutory abrogation may occur by express words or ‘by necessary implication from the text and structure of the statute’.<sup>73</sup> While it is clear from the review of the case law on abrogation that the public right to fish cannot ‘be taken away without competent legislation’, there is no requirement of clear and plain intention.<sup>74</sup> *Harper* is simply an example of how easily public rights can be abrogated.

The Commonwealth submits that the question is not if *Harper* is authority for whether native title rights are freely amenable to abrogation, but what aspects of the regime in *Harper* manifested a ‘clear legislative’ intention to abrogate the

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<sup>63</sup> (1999) 201 CLR 351.

<sup>64</sup> *Harper* (1989) 168 CLR 314, 325, 332.

<sup>65</sup> *Akiba FC* (2010) 204 FCR 1, 209 [842].

<sup>66</sup> *Akiba FFC* (2012) 204 FCR 260, 290 [73].

<sup>67</sup> In *Mabo* (1992) 175 CLR 1 the High Court held that there must be a ‘clear and plain intention’ to extinguish native title: at 64 (Brennan J), 111 (Deane and Gaudron JJ), 195–6 (Toohey J).

<sup>68</sup> See, eg, *Bienke v Minister for Primary Industries and Energy* (1993) 63 FCR 567.

<sup>69</sup> *Harper* (1989) 168 CLR 314, 330; *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 56–7 [22]; Hepburn, above n 20, 167.

<sup>70</sup> *Harper* (1989) 168 CLR 314, 330.

<sup>71</sup> *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24, 55–9 [19]–[31].

<sup>72</sup> *Ibid* 57–8 [26].

<sup>73</sup> *Ibid* 58 [27].

<sup>74</sup> *Attorney-General (British Columbia) v Attorney-General (Canada)* [1914] AC 153, 170. Justice Finn alludes in his judgment to ‘the protections accorded to native title rights’ as compared to public rights: *Akiba FC* (2010) 204 FCR 1, 211 [846].



common law rights.<sup>75</sup> By analogy, the Commonwealth suggests, if those features were present here, they would manifest a clear and plain intention to extinguish native title rights.<sup>76</sup> This question and analogy has the potential to be helpful. However, consideration of clear and plain intention in this context is clouded by the perceived similarities of the two licensing systems. The Commonwealth suggests that both licensing systems had an environmental basis<sup>77</sup> and that this demonstrates that the clear and plain intention of both was to extinguish all ‘common law rights’ to fish commercially.<sup>78</sup> This fails to consider the requirement of the licence for the exercise of native title rights in the case at hand, bringing it into line with these environmental aims.<sup>79</sup> This column will return to consider the arguments with respect to the licensing of native title rights.

Justice Mansfield suggests in the case at hand that the ‘special character’ of native title rights was recognised in *Yanner*.<sup>80</sup> *Ward* recognised that, ‘as *Yanner v Eaton* illustrates, statute may regulate the exercise of the native title right without abrogating it’.<sup>81</sup> In *Yanner*, an Indigenous man in Queensland caught two juvenile crocodiles on his traditional land, using traditional means.<sup>82</sup> He did not have a licence to catch crocodiles. The relevant Queensland legislation provided that fauna could not be taken without a licence.<sup>83</sup> In this way, the provisions were materially similar to this case. A key distinguishing feature in *Yanner* was that the crocodiles were taken for personal, rather than commercial, use. This meant that the *Native Title Act* s 211 could operate. This provides for the removal of prohibitions on native title holders in certain classes of activities. For example, where a law prohibits a person from carrying out fishing, it does not prohibit native title holders where they do so for ‘the purpose of satisfying their personal, domestic or non-commercial needs’ and in the exercise of native title rights.<sup>84</sup> Plainly in this case, the *Native Title Act* s 211 is not relevant. The majority in the Full Court argue that the *Native Title Act* s 211 played a pivotal role in the *Yanner*

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<sup>75</sup> Commonwealth, ‘First Respondent’s Submissions’, Submission in *Akiba v Commonwealth*, B58/2012, 3 December 2012, [26]–[29].

<sup>76</sup> *Ibid.*

<sup>77</sup> Mason CJ, Deane and Gaudron JJ in *Harper* note that ‘The licensing system ... is not a mere device for tax collecting. Its basis lies in environmental and conservational considerations which require that exploitation, particularly commercial exploitation, of limited public natural resources be carefully monitored and legislatively curtailed if their existence is to be preserved’: (1989) 168 CLR 314, 325.

<sup>78</sup> Commonwealth, above n 75, [29].

<sup>79</sup> The appellants also note that the native title rights are subject to ‘traditional rules relating to conservation as the primary judge found’: TSRA, ‘Appellant’s Reply to First and Second Respondents’, Submission in *Akiba v Commonwealth*, B58/2012, 17 December 2012, [9]. However, it must be acknowledged that the conservation measures under these ‘traditional rules’ may not match the aims of the licensing systems.

<sup>80</sup> *Akiba FFC* (2012) 204 FCR 260, 322 [226].

<sup>81</sup> *Ward* (2002) 213 CLR 1, 69 [26]. See also *Akiba FFC* (2012) 204 FCR 260, 313 [175] (Mansfield J). Note that *Ward* also contained a finding related to regulation but it was an absolute prohibition: at 152 [265].

<sup>82</sup> *Yanner* (1999) 201 CLR 351, 360 [1].

<sup>83</sup> *Ibid* 360–1 [2].

<sup>84</sup> *Native Title Act* s 211.

decision and that decision is therefore inapplicable.<sup>85</sup> The author submits that the majority erred in their view.

Due to the way *Yanner* was argued, the Court first had to consider whether the native title rights and interests on which Mr Yanner relied had been extinguished.<sup>86</sup> In *Yanner*, the state expressly disclaimed the contention that ‘legislation forbidding the taking or keeping of fauna except pursuant to licence would be sufficient to extinguish the rights and interests’ relied upon by Mr Yanner.<sup>87</sup> The majority in *Yanner* noted that this concession was rightly made and that:

[s]aying 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 existence of the rights and interests that Aboriginal law and custom recognises them as possessing.<sup>88</sup>

It is only after reaching this conclusion that the Court went on to note that the *Native Title Act* s 211 ‘assumes’ that the law does not sever connection in the circumstances of *Yanner*.<sup>89</sup> The section did not form the basis of the decision in *Yanner* and the assertions of the majority in *Akiba FFC* are, with respect, misguided.

Queensland and the Commonwealth have raised other distinguishing features between *Yanner* and the case at hand. These include: that the provision in *Yanner* was not a general prohibition; that the basis for extinguishment was the Crown’s declaration of ‘property’; and that this very different context was the reason for the concession on behalf of Queensland. These distinctions are valid but not determinative. *Yanner* is after all an ‘illustration’.<sup>90</sup>

Clearly, it is beyond the scope of this column to undertake a review of the legislative regimes involved. Yet the ‘clear constructional choices’ can be considered with a basic understanding that the scheme prohibits a person from engaging in commercial fishing unless that person holds a licence. The legislative intention of the legislation was (and is) conservation, management of fishing and fair fishing practices. Justice Finn held that both the Commonwealth and Queensland legislation raised constructional choices that should be answered in the same way.<sup>91</sup> His Honour drew attention to aspects of the legislation and the *Torres Strait Treaty* that had a ‘markedly beneficial and protective intent’.<sup>92</sup> The availability of licences to Islanders (indeed the encouragement for them to gain licences) meant that there was no clear and plain intention to extinguish native title rights.

The focus on *Yanner* and *Harper* in this case has left an underlying issue largely unexplored. Justice Mansfield stated that there was ‘no dispute’ as to the

<sup>85</sup> *Akiba FFC* (2012) 204 FCR 260, 294–5 [83].

<sup>86</sup> *Yanner* (1999) 201 CLR 351, 362–3 [8].

<sup>87</sup> *Ibid* 370–1 [31].

<sup>88</sup> *Ibid* 373 [38].

<sup>89</sup> *Ibid* 373 [39].

<sup>90</sup> *Akiba FFC* (2012) 204 FCR 260, 313 [175].

<sup>91</sup> *Akiba FC* (2010) 204 FCR 1, 214 [857].

<sup>92</sup> *Ibid* 212–13 [851]. Note also Mansfield J’s comments in *Akiba FFC* (2012) 204 FCR 260, 320 [216] with respect to the Commonwealth’s submissions that such focus led Finn J into error.

applicable extinguishment principles.<sup>93</sup> His Honour went on to first consider ‘clear and plain intention’ and, subsequently, without further elaboration as to why, found it ‘necessary’ to apply the ‘inconsistency of incidents test’<sup>94, 95</sup> This is to be contrasted with the majority’s argument that Finn J’s approach to extinguishment ‘sits uneasily with the orthodox approach ... whereby one looks to see whether the activity which constitutes the relevant incident of native title is inconsistent with legislation relating to that activity’.<sup>96</sup> Sitting in the middle is a contention from the Seas Claim Group that the ‘correct analysis’ involves:

[t]he identification of the character of the legislative regime as a whole and then the question whether it evinces a clear and plain intention to extinguish native title. Only if this is answered affirmatively is it necessary to consider the extinguishing effect of particular prohibitions.<sup>97</sup>

None of the judges has explicitly addressed this contention. The Seas Claim Group submits that this ‘correct analysis’ derives from *Yanner*.<sup>98</sup> This approach appears to explain the distinction between extinguishment and regulation. Regulation does not evince a clear and plain intention to extinguish; therefore there is no need to go on to consider inconsistency. It is beyond the scope of this column to consider this further. The principles of extinguishment are complex and the High Court has the opportunity to clarify this matter. The absence of exploration of this underlying issue has led to this case being ‘caught up’ in the two narrower questions explored above.

The majority raised one final hurdle — the ‘incoherence’ of the claim for a native title right that would require a licence.<sup>99</sup> The Commonwealth also submits that a single statutory licence cannot have an ‘entirely different character depending on the identity of the licensee’.<sup>100</sup> This submission seems circular in the context of the mere regulation of native title. A licence is one way to regulate. The requirement of licences under the legislative regime, in itself, should not be the reason for extinguishment. This was clearly confirmed by the comments in *Yanner*.<sup>101</sup> Conversely, ‘the survival of native title rights does not relieve the holders of rights of their obligations of citizenship to comply with the law’.<sup>102</sup> Therefore, if a licence is required it must be held.

While it may be true that ‘regulation shades into prohibition’, a correct understanding of *Yanner* must be the basis for the High Court to make the ‘clear

<sup>93</sup> *Akiba FFC* (2012) 204 FCR 260, 312 [170].

<sup>94</sup> *Ibid* 213 [171], 314 [186].

<sup>95</sup> The High Court approved the ‘inconsistency of incidents test’ for extinguishment in *Ward* (2002) 213 CLR 1: ‘The inconsistency of incidents test requires a comparison between the legal nature and incidents of the statutory right which has been granted and the native title rights being asserted. The question is whether the statutory right is inconsistent with the continuance of native title rights and interests’: at 90 [79].

<sup>96</sup> *Ibid* 287 [63]. This is followed by a statement about ‘clear intention’: 287 [64].

<sup>97</sup> *Ibid* 287 [61].

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* 295 [85].

<sup>100</sup> Commonwealth, above n 75, [30]–[31].

<sup>101</sup> *Yanner* (1999) 201 CLR 351, 373 [38] and 397 [115]; *Akiba FFC* (2012) 204 FCR 260, 314 [185], 322 [222].

<sup>102</sup> *Akiba FFC* (2012) 204 FCR 260, 314 [185].

constructional choices' required. Nonetheless, *Yanner* does not support a general proposition that a regime that prohibits subject to a licence will always be 'mere regulation'. There is no clear and plain intention to extinguish, or necessary inconsistency with, commercial native title rights to fish. Therefore, there is no extinguishment and the 'mere regulation' precedent of *Yanner* can and should be applied.

## **B Reciprocal Rights: Is there a requirement for a 'direct connection' and what does that mean?**

Although the claim to reciprocal rights has been rejected by all four Federal Court judges, it is (and remains) central to this matter. Two parties have sought to intervene only in respect of this issue — Western Australia and the Nomads (on behalf of the Warrarn People).<sup>103</sup> Western Australia seeks to intervene to support the Commonwealth and Queensland. The Nomads seek to intervene on the basis of the recent decision of Bennett J in *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)*.<sup>104</sup> In that case, the Nomads<sup>105</sup> claimed native title rights and interests 'on the basis of a standing licence or permission given to them by the Ngarla'.<sup>106</sup> Justice Bennett held that the Nomads' claim was not made out.<sup>107</sup> This case can be distinguished from the Seas Claim on a number of fundamental grounds, including the different natures of the societies in the cases and the fact that the Ngarla Peoples denied that permission had been granted for some of the rights asserted.<sup>108</sup>

<sup>103</sup> Attorney General for Western Australia, 'Written Submissions of the Attorney General for Western Australia (Intervening)', Submission in *Akiba v Commonwealth*, B58/2012, 10 December 2012, [2] and Biddy Bunwarrie and Others (Nomads) on behalf of the Warrarn People, 'Written Submissions of Biddy Bunwarrie and Others (Nomads) on behalf of the Warrarn People (Intervening)', Submission in *Akiba v Commonwealth*, B58/2012, 30 January 2013, [2].

<sup>104</sup> [2012] FCA 1268 (*AB (decd) v WA (No 4)*).

<sup>105</sup> Justice Bennett noted that: 'Although the terms "Warrarn" and "Nomads" have sometimes been used interchangeably in this proceeding, there is difficulty in equating the Warrarn with the Nomads. That is, not all members of the Nomads group are leaders in the Law, one of the group membership criteria for the Warrarn. However, all of the Warrarn are members of the Nomads group': *AB (decd) v WA (No 4)* [2012] FCA 1268 [51].

<sup>106</sup> *AB (decd) v WA (No 4)* [2012] FCA 1268, [14]. The rights and interests claimed were the right to carry out obligations to 'establish or open and maintain and protect law grounds'; 'look after sites of importance and cultural significance in accordance with the traditional laws acknowledged and traditional customs observed'; 'conduct ceremonies and ritual'; and 'teach children and kin and initiate them into the Law associated with places': at [32(1)]. Further, in order to carry out these obligations, the rights to: '[r]eside with their families and kin'; '[h]unt, collect and prepare foods and obtain and use resources ... for residential purposes'; '[c]reate, collect, store, keep safe and preserve objects used in ritual and ceremony and create shrines to ancestral beings'; '[p]articipate with their families and kin in ceremonies and rituals' and '[p]articipate, with the native title holders with descent based connections and other leaders in the Law, in decisions about the use, enjoyment and management of the land and waters': at [32(2)].

<sup>107</sup> *Ibid* 1268 [675].

<sup>108</sup> Justice Bennett noted: 'It is not in dispute between the parties that some form of permission has been granted by the Ngarla to the Warrarn in the past and that some form of permission persists at present in relation to at least some of the Warrarn ... However, the nature and extent of the permissions are in dispute. In particular, the State disputes that whatever occurred should be characterised as "permission" and both the Ngarla and the State dispute that the Warrarn have native title rights and interests... including by virtue of a licence or standing permission': *ibid* at [35].

Justice Finn held that his rejection of the claim to reciprocal rights ‘does not deny such rights their character as rights *under the Islanders’ traditional laws and customs*’ (emphasis added).<sup>109</sup> This has not been appealed. At trial, reciprocal rights were described as being held by:

each person who had or group of persons who have a relevant reciprocal relationship (whether based in kinship or of another kind, such as *tebud/thubud*<sup>110</sup> (for example, hereditary trade friendships)) with an ancestral occupation based rights holder.<sup>111</sup>

‘Kinship’ in this context appears to relate to affinal relationships, that is, relationships created by marriage (in-law relationships).<sup>112</sup> Although it was not made clear in Finn J’s final judgment, it appears to be accepted by both Queensland and the Commonwealth that his Honour held that relationships of marriage and adoption (on the facts of this case) are separate to kinship relationships because the person becomes a member of the group who has emplacement-based rights (therefore, the relationship is closer).<sup>113</sup>

Western Australia’s High Court submissions are correct in pointing out that there has been a ‘failure’ to ‘identify the components of the bundle of rights contended by the claimants to be such reciprocal rights’.<sup>114</sup> Justice Finn stated the rights included ‘reciprocal shared access and use which permits the same activities as may be done by the person or group upon whom the right depends’.<sup>115</sup> There does not seem to be a more precise articulation in Finn J’s reasons. The Seas Claim Group states in its High Court submissions that the content sought is ‘the same as the content of the rights already the subject of determination, namely rights related physically to waters concerned’.<sup>116</sup> Of the various examples provided in evidence, it seems that rights to fish (that is, to go fishing with the ‘host’ or, with permission, to go fishing in waters of the ‘host’<sup>117</sup>) are the main reciprocal rights claimed. The Sea Claims Group now clearly states that recognition is not sought in respect of reciprocal rights that they admit are not rights in relation to waters, such as the rights to an ‘assured welcome, accommodation and sustenance to a visiting friend’.<sup>118</sup> This then requires a distinction to be made between reciprocal rights that are said to be in relation to waters and those that are not. Western Australia has suggested that no logical distinction exists.<sup>119</sup> The simple answer must be that only

<sup>109</sup> *Akiba FC* (2010) 204 FCR 1, 131 [509].

<sup>110</sup> The terms *tebud* and *thubud* (and sometimes *tubud*) mean the same thing but are from different language groups: *ibid* 67 [223]. The terms are defined as ‘customary trading relations’: at 28 [43], or ‘hereditary trade friendships’: at [70].

<sup>111</sup> *Ibid* 34 [70].

<sup>112</sup> See, eg, *Akiba FC* (2010) 204 FCR 1, 129 [504]. There is some confusion relating to this in the High Court submissions: TSRA, above n 34, [54] and Commonwealth, above n 75, [44] (particularly fn 8).

<sup>113</sup> *Akiba FC* (2010) 204 FCR 1, 34 [69(a)]–[70]; 62–3 [196]–[201]; Queensland, above n 34, [66]; Commonwealth, above n 75, [47].

<sup>114</sup> Attorney General for WA, above n 103, [8].

<sup>115</sup> *Akiba FC* (2010) 204 FCR 1, 127–8 [493].

<sup>116</sup> TSRA, above n 34, [44].

<sup>117</sup> Although the trial judge used the word ‘host’, note the Appellant’s Submissions in Reply on this issue: TSRA, above n 79, [18].

<sup>118</sup> TSRA, above n 34, [44].

<sup>119</sup> Attorney-General for WA, above n 103, [21].

rights in relation to land and waters can be claimed under the *Native Title Act*. There is nothing preventing the Seas Claim Group from so limiting their claim.

The origin of these rights in ‘personal relationships’ has been emphasised by both the bench and other parties as the reason why these rights cannot comply with the *Native Title Act* s 223(1). Arguments raised include: the need for permission; the potential for denial of that permission; the right only lasting for the length of the relationship; the lack of sanction for denial of the rights (and the alleged ‘incoherence’ of the sanction being the end of the relationship); and the lack of connection to the waters of *others*.<sup>120</sup> Crucially, Finn J noted that the evidence of Islanders does not resonate with the rights being ‘in relation to’ land and waters.<sup>121</sup> It is clear that much of the Torres Strait Islander evidence is premised on the strength of the personal relationships.

This is the context within which the Seas Claim Group must argue.<sup>122</sup> Therefore, this case comes down to the requirement of ‘directness’. The question is whether, as the majority states, the relationship so described in the *Native Title Act* s 223(1) must be ‘one subsisting directly between the peoples who possess those rights to land and waters to which they are connected’ or whether it can be mediated through a personal relationship (and be subject to the potential limitations identified above).<sup>123</sup> No authority is cited for the notion of ‘directness’ by the majority.<sup>124</sup> There is nothing in the wording of the *Native Title Act* s 223(1) which suggests that rights cannot be ‘in relation to’ waters because they are held pursuant to a personal relationship.

Queensland raised the denial of a right to protect the misuse of cultural knowledge in *Ward* on the basis that it was not connected to land.<sup>125</sup> However, the majority in *Ward* did not seek to use the language of directness. Rather, their focus was on the argument that such a right would be an ‘incorporeal right akin to a new species of intellectual property’.<sup>126</sup> Justice Kirby dissented on this point, stating that the authorities on connection regarded the relationship ‘as either a “sufficient” connection, albeit indirect, or a “direct” connection but not a merely “incidental”

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<sup>120</sup> *Akiba FFC* (2012) 204 FCR 260, 306 [131]–[133]; Commonwealth, above n 75, [59]–[61]; Attorney-General for WA, above n 103, [15]. The notion of ‘permission’ was considered in *AB (decd) v WA (No 4)* [2012] FCA 1268, [568]–[570]. However, Bennett J stated: ‘While the Warram submissions may be helpful in theory, it does not assist in this case. Under the normative system of the Ngarla, the permission-based rights asserted by the Warram do not accord with native title rights under the NTA’: at [570]. Bennett J also considers whether persons with permission have a ‘connection’, noting that the Ngarla submit that the persons with permission granted by the native title holders ‘cannot have a connection: with the land and waters in respect of which the permission has been granted’: at [559].

<sup>121</sup> *Akiba FC* (2010) 204 FCR 1, 130 [508].

<sup>122</sup> Counsel for the appellants stated that they did not seek review of fact finding: Transcript of Proceedings, *Akiba v Commonwealth* [2012] HCATrans 245 (5 October 2012) 185–9.

<sup>123</sup> *Akiba FFC* (2012) 204 FCR 260, 305 [129].

<sup>124</sup> *Ibid* 305–6 [130]. The majority notes that in *Yarmirr HC* it was said that ‘those people, by those laws and customs must have a ‘connection’ with the land or waters’ (emphasis of the majority). However, that is not helpful here as it could be argued that the laws and customs of reciprocity give the reciprocal rights holder a connection with the waters.

<sup>125</sup> Queensland, above n 34, [58].

<sup>126</sup> *Ward* (2002) 213 CLR 1, 84 [59].

connection'.<sup>127</sup> Even if we consider the notion of directness in Kirby J's reasons, one cannot say that reciprocal rights are incidental. The evidence was clear that these reciprocal rights were and are an important part of Islander society. There are also obvious differences in the relationship to land, or waters, of a right to protect cultural knowledge and the reciprocal rights in this case. The only other case that references 'direct connection' appears to be *Bodney v Bennell*.<sup>128</sup> The joint judgment recognises that laws and customs 'presuppose or envisage direct connections with land or waters or will, if acknowledged and observed, link community members to each other and to the land or waters in a complex of relationships'.<sup>129</sup> It could be argued that the laws and customs of reciprocity link specific members of the larger Torres Strait society to *others and to their [the others']* land and waters.<sup>130</sup>

It is clear from the majority of the Full Court and the submissions of the Commonwealth that an underlying part of their argument is that the exclusive nature of 'ownership' in Torres Strait society (other than specifically identified 'shared' areas) precludes the relevant connection to waters.<sup>131</sup> The Commonwealth submits that such a personal relationship is not sufficient to constitute a connection 'when the connection requirements for native title holders of a marine estate is based primarily on a concept of ownership ... which is said to be pre-eminent on the Islander laws and customs'.<sup>132</sup> However, this argument can be turned on its head. The strong sense of 'ownership' by each group exemplifies the strength of the connection of the reciprocal rights holder to that particular area they are allowed to access.

This column has sought to define the content of reciprocal rights, note the context that the Seas Claim Group now faces and suggest some arguments to support the recognition of reciprocal rights. Justice Finn and the majority in the Full Court noted the 'foreseeable difficulties' involved in recognition of reciprocal rights.<sup>133</sup> This was not significantly expanded upon.<sup>134</sup> However, it appears the difficulties relate to defining rights with respect to permission.<sup>135</sup> It is clear that the order currently proposed by the Seas Claim Group is inadequate as it does not identify the need for permission to be sought.<sup>136</sup> The order must be precise, and this will be aided by the discussion of the content above, but the need for permission is not a barrier to such an order being made.

<sup>127</sup> *Daniel v State of Western Australia* [2003] FCA 666, [412], summarising *Ward* (2002) 213 CLR 1, 245–6 [577].

<sup>128</sup> [2008] FCAFC 63.

<sup>129</sup> *Bodney v Bennell* (2008) 167 FCR 84, 128 [169].

<sup>130</sup> See also TSRA, above n 34, [70].

<sup>131</sup> *Akiba FFC* (2012) 204 FCR 260, 306 [133]; Commonwealth, above n 75, [75].

<sup>132</sup> Commonwealth, 'First Respondent's Submissions', Submission in *Akiba v Commonwealth*, B58/2012, 3 December 2012, [75].

<sup>133</sup> *Akiba FC* (2010) 204 FCR 1, 131 [510]; *Akiba FFC* (2012) 204 FCR 260, 306 [132].

<sup>134</sup> Western Australia has provided commentary with reference to the Western Desert Cultural Bloc but does not significantly expand upon the potential difficulties: Attorney-General for WA, 'Written Submissions of the Attorney-General for Western Australia (Intervening)', Submission in *Akiba v Commonwealth*, B58/2012, 10 December 2012, [23] ff.

<sup>135</sup> The *Native Title Act* s 225 requires the nature and extent of native title interests to be set out.

<sup>136</sup> TSRA, 'Appellant's Submissions', Submission in *Akiba v Commonwealth*, B58/2012, 9 November 2012, [76(4)(c)].

## IV Conclusion

This matter presents the High Court with two significant opportunities. The first is the chance to clarify the distinction between partial extinguishment and regulation. The Court must decide where the approach in *Yanner* ‘fits’ and whether native title rights and public rights have different extinguishment requirements. With respect to the first, *Yanner* is best used as an illustrative example of ‘mere regulation’. In relation to public rights, there are different extinguishment requirements and *Yanner* is an example of the ‘special character’ of native title.

The High Court has a second opportunity to recognise a new type of native title right. The lack of definition has, understandably, made the courts wary of recognition. However, this column has sought to define the rights and identify some of the arguments the High Court could consider in favour of recognising reciprocal rights. There is nothing in the *Native Title Act* and no case law authority preventing the High Court from recognising such rights.

Whichever way the court decides, the decision should signal the start of a timely reconsideration of the approach Australia has taken to recognising Indigenous marine governance. Recent years have seen the beginnings of non-native title mechanisms such as Sea Country Indigenous Protected Areas and Traditional Use of Marine Resources Agreements.<sup>137</sup> However, these mechanisms are often intertwined with the underlying recognition of native title rights. Australia’s approach to recognition of Indigenous marine governance needs to stretch beyond the limitations of native title that are clear from this case.

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<sup>137</sup> Commonwealth Government of Australia, *Sea Country Indigenous Protected Areas* (10 January 2010) Department of Sustainability, Environment, Water, Population and Communities <<http://www.environment.gov.au/indigenous/ipa/sea.html>> and Commonwealth Government of Australia, *Traditional use of Marine Resources Agreements* (2011) Great Barrier Reef Marine Park Authority <<http://www.gbrmpa.gov.au/our-partners/traditional-owners/traditional-use-of-marine-resources-agreements>>.