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The High Court holds that a native title right that allows fishing for commercial purposes is not extinguished by State and Commonwealth legislation prohibiting commercial fishing without a licence

In [Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth \[2013\] HCA 33](#) (7 August 2013), the High Court held that Queensland and Commonwealth legislation that prohibits commercial fishing without a licence does not extinguish the native title rights of certain Torres Strait Island communities to take marine resources for any purpose.

The High Court also held that reciprocal rights between native title holders are not native title rights under s 223 of the *Native Title Act 1993* (Cth) (Native Title Act).

Background

In 2001 a native title claim, known as the 'Torres Strait Sea Claim', was lodged over most of the sea and seabed in the Torres Strait between Australia and Papua New Guinea.

At first instance, Finn J made a native title determination over the sea and seabed of most of the claim area. This included the right 'to take for any purpose resources in the native title areas'. The main types of resources that are covered by this right are fish and other forms of marine life. Furthermore, the right was framed broadly enough to allow fish to be taken for commercial purposes.

On appeal, the Full Court of the Federal Court overturned this order (Keane CJ and Dowsett J, Mansfield J dissenting). The Court held that Queensland and Commonwealth legislation that prohibits commercial fishing without a licence extinguishes the native title rights to take fish or other aquatic life for commercial purposes. The Court amended the determination to provide that it did not extend to taking fish and other aquatic life for sale or trade.

The decision

Licensing legislation does not extinguish the native title right to fish for commercial purposes

The High Court unanimously held that Queensland and Commonwealth legislation prohibiting commercial fishing without a licence was not inconsistent with the continued existence of the native title right to take fish from defined areas of water. It follows that the legislation did not extinguish the native title right. The Court restored the finding of Finn J that the native title extended to the right to take fishing resources for any purpose.

In a joint judgment, French CJ and Crennan J held that legislation that regulates the exercise of rights for a particular purpose does not necessarily extinguish native title rights (unless the legislation suggests otherwise). If a statute that may affect the exercise of a native title right can be viewed as merely *regulating* the action and not *extinguishing* the underlying right, it should be interpreted in that way (at [29]). This reflects the 'general principle' that statutes should not be read to extinguish property rights unless no other interpretation is reasonably open (at [24]). On this basis, French CJ and Crennan J concluded that legislation prohibiting

commercial fishing without a licence could not be taken to extinguish the native title right to take fish for commercial purposes.

In a separate judgment, Hayne, Kiefel and Bell JJ noted that, to extinguish native title, legislation must demonstrate a 'clear and plain intention' to do so and this requires an objective assessment of the legislation (at [62]). Their Honours held that regulation of a native title right to take resources from land or waters is not inconsistent with the continued existence of that right (at [64]). Merely limiting the way that others can use the land or water does not sever the connection that the Torres Strait Islanders have with those waters (at [63]).

It was not suggested in the Federal Court or the High Court that the exercise of the native title right to take fish was unaffected by regulation of fishing (see [70]). The determined native title rights are subject to Queensland and Commonwealth laws on fishing and are non-exclusive – that is, they do not extend to preventing others from fishing (at [14]–[15]).

Reciprocal rights are not native title rights

The High Court held that certain claimed 'reciprocal rights' are rights of a personal character dependent upon status (at [45] and [47]). These rights are not native title rights over the waters covered by the native title determination. Therefore, the Court considered that reciprocal rights cannot be considered 'native title rights or interests' within the meaning of s. 223 of the Native Title Act.

The Commonwealth was represented by AGS (Sally Davis and Gordon Kennedy) with Solicitor-General Justin Gleeson SC, Raelene Webb QC and Nitra Kidson as counsel.

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