

# NATIVE TITLE RIGHTS TO TAKE RESOURCES: EMERGING ISSUES IN RELATION TO COMMERCIAL RIGHTS

CATRIONA STRIDE\*

*Native title rights to take resources for unconstrained or commercial purposes were first recognised almost a decade ago, but the significance and uptake of such rights in Australia is now heightened. Resource ownership and management are critical components of global sustainable development and Indigenous interest holders play a key role in that space. The gradual acceptance of resource use by traditional owners in a modern economy reflects more developed trends overseas such as in Canada. Reluctance to concede the commercial exercise of native title rights may be due not only to evidential thresholds (required by state governments to enter consensual determinations), but also concerns about the possible consequential legal impacts for those governments and other interest holders. This article considers potential consequences of recognising native title rights to take resources for any purpose in several developing areas of native title jurisprudence including: quantum of native title compensation, the regulation of native title under resource management legislation enacted since the Native Title Act 1993 (Cth), competing claims to resource ownership and use, and the risks for government where prior assumptions of resource ownership are displaced by determined native title.*

## I INTRODUCTION

Native title content is sourced in the traditional laws and customs of the relevant First Nations group. Section 223 of the *Native Title Act 1993* (Cth) ('NTA') captures the findings of the High Court majority in *Mabo v Queensland [No 2]* ('Mabo')<sup>1</sup> regarding 'connection', including that rights and interests in relation to lands and waters are possessed under traditional laws and customs.<sup>2</sup> That provision also includes some examples of the exercise of native title rights and interests (hunting, gathering and fishing) without reference or restriction in respect of the purpose for which the rights can be exercised.<sup>3</sup> Factual findings about native title

---

\* National Judicial Registrar Native Title, Federal Court of Australia, Brisbane; Board Director, Aboriginal Carbon Foundation, Committee Member, Reconciliation Queensland. The author thanks those who have reviewed the article and provided invaluable comment, including the editorial team of the *University of Queensland Law Journal*.

<sup>1</sup> (1992) 175 CLR 1 ('Mabo').

<sup>2</sup> *Native Title Act 1993* (Cth) s 223(1) ('NTA').

<sup>3</sup> *Ibid* sub-s(2).

rights and interests are ascertained by the court from evidence led by the parties. However, the ambit of those rights and interests is a finding of law.<sup>4</sup> While it is not the common law that creates native title rights and interests, it is the court's role to make a declaration of those rights comprehensible to the common law. One commentator has observed that, in the context of litigation, 'it is only when a remedy is sought that the rights are enumerated'.<sup>5</sup>

When negotiating determinations by consent, it is the relevant state that is the arbiter of whether claims of specific rights and interests have been demonstrated to a 'credible evidence' standard by the applicant's connection material. This assessment should be primarily guided by the jurisprudence. However, there are inevitably other considerations that affect whether a beneficial or restrictive interpretation of the jurisprudence is adopted for the purpose of negotiation. This article considers whether some of these considerations may be impeding governments and other respondents from adopting a more expansive and beneficial approach to recognising unrestricted or commercial rights to take resources, despite recent jurisprudential precedent that would provide a legal platform on which to do so.

The article considers the courts' developing approach to evidencing and recognising native title rights generally (and to natural resources specifically) and compares that approach with analogous Canadian jurisprudence. This article also closely examines integrally linked jurisprudence on extinguishment, which is central to the extinguishment or survival of native title rights in the face of extensive regulation around natural resource management. It is appropriate in this context to have some regard to the undesirable litigation arising from fishing prosecutions whereby a limited defence is available to native title holders under s 211 of the *NTA* for cultural take that would otherwise contravene fishing legislation. Despite jurisprudential development allowing for a more expansive approach to native title resource rights, and the evident tensions where Indigenous people are constrained under mainstream resources regulation, advancement remains slow. The remainder of the article considers some factors that may contribute to a continuing conservatism in the negotiation of consent determinations. These include the implications of the emerging native title compensation regime, including those that might arise if the Crown's assumed right to benefit commercially from natural resources is displaced. More generally, governments may apprehend the potential for unanticipated court decisions about the application of resource management regimes, where determined native title holders hold commercial rights to resources.

---

<sup>4</sup> *Yanner v Eaton* (1999) 201 CLR 351, 396 [109].

<sup>5</sup> Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27(2) *Melbourne University Law Review* 523, 536.

## II THE LEGACY OF *WARD*: A HEIGHTENED BAR IN ORDER TO ESTABLISH A BUNDLE OF NATIVE TITLE RIGHTS

The High Court decision in *Western Australia v Ward* ('*Ward*')<sup>6</sup> is a seminal native title case insofar as it contributes to an enduring understanding of the content and character of native title. At trial,<sup>7</sup> Lee J found native title rights to be holistic and exclusive in nature, allowing for a modern form of exercise and, conceivably, for commercial exercise.<sup>8</sup> On appeal, the Full Court of the Federal Court ('FCAFC') adopted a more prescriptive approach to evidencing rights and interests, rejecting rights to resources (other than traditionally used materials such as ochre) and finding for a much higher level of extinguishment.<sup>9</sup> The High Court upheld the FCAFC findings regarding extinguishment and the need to particularise each element of each right held under identified law and customs.<sup>10</sup> Further, the High Court expressly excluded rights to minerals in Western Australia and instituted what has been criticised as a 'frozen in time' approach to proof of native title rights and interests.<sup>11</sup> Kirby J, in dissent, drew from Canadian jurisprudence to find that rights and interests could develop over time and still be recognised by the common law.<sup>12</sup>

The dual requirements initially established in *Ward* — (1) a high level of particularisation of rights that (2) stem from tradition — necessitates detailed evidence, which is costly both financially and in terms of preparation time. An even more devastating consequence of *Ward* is that it is often difficult if not impossible for native title applicants to produce contemporary evidence to the requisite standard of proof. Evidencing commercial rights against this bar is particularly challenging.<sup>13</sup> The Australian Law Reform Commission ('ALRC') intended to ameliorate this impact of *Ward* in its recommendation that s 223 of the *NTA* should be amended to allow for native title rights and interests to be possessed under traditional laws and customs expressly stated to be able to adapt, evolve, or otherwise develop.<sup>14</sup> That recommendation has not been subject to legislative amendment to date.

---

<sup>6</sup> (2002) 213 CLR 1 ('*Ward*').

<sup>7</sup> *Ward v Western Australia* (1998) 159 ALR 483, 485.

<sup>8</sup> See Graham Neate (ed), *Native Title Casenotes, 1971–2007* (LexisNexis, 2009) 67–8.

<sup>9</sup> *Western Australia v Ward* (2000) 99 FCR 316.

<sup>10</sup> *Ibid* 333–5 [40]–[43].

<sup>11</sup> Richard Bartlett, *Native Title in Australia* (LexisNexis, 4<sup>th</sup> ed, 2020) 74.

<sup>12</sup> *Ward* (n 6) 242 [567], 244 [574].

<sup>13</sup> Patrick McCabe, 'Pilki and Birriliburu: Commercial Native Title Rights after *Akiba*' (2015/2016) 19(2) *Australian Indigenous Law Review* 64, 67.

<sup>14</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) (Report No 126, April 2015) 29, recommendations 5–1, 5–5.

### III INCONSISTENCY OF INCIDENTS TEST AND EXTINGUISHMENT OF NATIVE TITLE RIGHTS AND INTERESTS

The other relevant aspect of the *Ward* decision was the conceptual development of native title as a collection of discrete rights, each of which was vulnerable to permanent and partial extinguishment by the valid grant of an inconsistent non-native title right under the *NTA*. As a consequence, robust, meaningful native title could be incrementally diminished right by right and element of right by element of right. This approach meant that, even if commercial rights under traditional law and custom could be established, there was a strong chance of that aspect of the right being found to be inconsistent with a non-native title interest. The ‘inconsistency of incidents’ test has become the accepted means by which extinguishment of native title is assessed. It necessitates a detailed, legalistic consideration of the incidents of any tenure to ascertain, first, whether it is exclusive in nature (if not covered by and expressly deemed to be so by the *NTA*),<sup>15</sup> thus extinguishing all native title rights and, second, if not exclusive, which native title rights are entirely inconsistent. This susceptibility to irreversible extinguishment has been described as the central weakness of native title rights and interests.<sup>16</sup>

Prior to *Ward*, the High Court in *Fejo v Northern Territory* reinforced both the ‘bundle of rights’ analogy and the vulnerability of native title against non-indigenous rights of access and control.<sup>17</sup> It was held that all native title rights were validly and permanently extinguished by a freehold granted prior to the introduction of the *Racial Discrimination Act 1975* (Cth) (‘*RDA*’). The High Court rebuffed the relevance of overseas jurisprudence that offered heightened protection for Aboriginal title, including that relating to Canadian Aboriginal Law, due to differences in relevant historical, legal and constitutional circumstances.<sup>18</sup> The legacy of *Ward* heightened inherent fragilities of native title already evident in *Mabo* and has long rendered Australian native title a fragile and fragmented thing: it is difficult to prove due to the legal requirements for precision and establishing a continuing link to pre-sovereignty practices and easy to fracture and extinguish.<sup>19</sup>

<sup>15</sup> *Native Title Act 1993* (Cth) ss 14–15, 23B, 23C, 24JB, 24ID(1)(b), 24MD, 228, 229, 232B.

<sup>16</sup> Kate Stoeckel, ‘Case Note — *Western Australia v Ward & Ors*’ (2003) 25(2) *Sydney Law Review* 255, 259.  
<sup>17</sup> (1998) 195 CLR 96.

<sup>18</sup> *Ibid* 111.

<sup>19</sup> Simon Young, ‘The Increments of Justice: Exploring the Outer Reach of *Akiba*’s Edge towards Native Title Ownership’ (2019) 42(3) *University of New South Wales Law Journal* 825, 826.

#### IV *AKIBA*: A TURNING POINT FOR A MORE ROBUST VIEW OF NATIVE TITLE RIGHTS AND SUPPRESSION OVER EXTINGUISHMENT

The recognition of commercial rights received a setback in *Commonwealth v Yarmirr*,<sup>20</sup> in that the High Court decided that rights to trade and exchange fishing resources could only be recognised if exclusive native title were established.<sup>21</sup> At trial, Olney J held that exclusive native title in the territorial sea was necessarily inconsistent with the public rights of navigation and fishing and the obligation at international law to provide an innocent right of passage.<sup>22</sup> This finding was subsequently upheld on appeal.<sup>23</sup> Despite evidence of fishing for economic purposes having been given, the Court refused to recognise non-exclusive native title rights to trade and exchange fishing resources and found it appropriate to add a 'personal, domestic and non-commercial' qualifier to the right to take resources in the determination.<sup>24</sup> Rights to exploit seabed resources were also claimed unsuccessfully with Olney J noting that no evidence had been led in support.<sup>25</sup> In another early case, Mansfield J at first instance found in favour of commercial rights in *Alywarr v Northern Territory*.<sup>26</sup> However, that aspect of the decision was overturned on appeal.<sup>27</sup>

Recognition of native title rights to resources for trade, commercial or any purpose have slowly gained greater recognition in the courts since *Akiba v Queensland [No 2]*.<sup>28</sup> At first instance in that case, Finn J held that rights existed to access resources and use them for any purpose (including commercial purposes), based on strong evidence of both ancient and modern use of sea resources for trade in a non-exclusive native title determination. Further, he considered that the commercial element of the right to take could be severed from the head right so that only the commercial aspect could be the subject of extinguishment while the head right could continue.<sup>29</sup> The FCAFC overturned the decision on the basis that the fishing legislation entirely extinguished native title fishing rights.<sup>30</sup> However, the High Court preferred Finn J's view that the fishing legislation regulated traditional fishing rights without extinguishing them. It took a different (and more beneficial) view to Finn J regarding the purposive aspect of a native

<sup>20</sup> *Commonwealth v Yarmirr* (2001) 208 CLR 1.

<sup>21</sup> *Ibid* 75–6 [123]–[128].

<sup>22</sup> *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 53, [80].

<sup>23</sup> *Commonwealth v Yarmirr* (2001) 208 CLR 1, 61–2 [77] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 94–8 [188]–[202] (McHugh J).

<sup>24</sup> *Ibid* 83–4 [154]–[155] (McHugh J).

<sup>25</sup> *Ibid* 84–5 [158]–[159] (McHugh J), *Yarmirr v Northern Territory* (2001) 208 CLR 1, [117]; *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 53, [158].

<sup>26</sup> *Alywarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539.

<sup>27</sup> *Northern Territory v Alywarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* (2005) 145 FCR 442. (2010) 204 FCR 1.

<sup>28</sup> *Ibid*, [842], [847].

<sup>29</sup> *Commonwealth v Akiba* (2012) 204 FCR 260.

title right, being a separate or severable incident of the head right, stating that '[t]he purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.'<sup>31</sup> Underpinned by these two important findings (lack of extinguishment and relevance of right over exercise), the High Court found it appropriate to recognise a broad native title right to take resources for any purpose.

Subsequent cases in the Western Desert<sup>32</sup> and remote Northern Territory<sup>33</sup> followed from *Akiba v Commonwealth* ('Akiba'),<sup>34</sup> with the trial judges in those cases also recognising broad non-purposeive rights to take resources based on more limited lay Indigenous and expert anthropological evidence than in *Akiba*. The decision of North J in *Willis v Western Australia* in particular,<sup>35</sup> which was upheld on appeal,<sup>36</sup> should herald a less onerous approach to obtaining recognition of an unrestricted right to take resources. These decisions emphasise the importance of the evidence of traditional laws and customs to establish the existence of rights. However, they also pertain to areas of Australia where traditional systems are more intact than in many other parts, which points to the need for further jurisprudence in an urbanised context before unconstrained and commercial rights are likely to be embraced more generally.<sup>37</sup> These decisions also reflect the majority view in *Akiba*<sup>38</sup> that evidence of the activities themselves (including commercial activities) is not necessary, although it may assist in proving the existence of the right. Further, the mere fact that a right has not been exercised in a particular way previously, does not mean there is no capacity for it to be exercised in such a way.<sup>39</sup> Where the traditional laws and customs evidence is not as strong, governments are likely to seek a higher level of evidence specific to the right and exercise of the right, thus reverting back to a *Ward*-like approach, despite the jurisprudential progress. McCabe comments that '[t]hese decisions represent the first fruit of the tortuously slow development of the jurisprudence in this area.'<sup>40</sup>

The ALRC's *Connection to Country: Review of the Native Title Act 1993 (Cth)* was written after *Akiba* but prior to the three subsequent decisions discussed.<sup>41</sup> It recommended statutory clarification be provided for s 223(2) to expressly refer to

<sup>31</sup> *Akiba v Commonwealth* (2013) 250 CLR 209, 241 [66] (Hayne, Kiefel and Bell JJ) ('Akiba').

<sup>32</sup> *Willis v Western Australia* [2014] FCA 714; *BP (Deceased) v Western Australia* [2014] FCA 715.

<sup>33</sup> *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228.

<sup>34</sup> *Akiba* (n 31).

<sup>35</sup> [2014] FCA 714.

<sup>36</sup> *Western Australia v Willis* (2015) 239 FCR 175 ('Willis').

<sup>37</sup> Richard Bartlett, *Native Title in Australia* (Lexis Nexis, 4<sup>th</sup> ed, 2020) 93–4.

<sup>38</sup> *Akiba* (n 31) 244–5 [75]–[76] (Hayne, Kiefel and Bell JJ).

<sup>39</sup> *Willis* (n 36) 187–8 [34]–[38], 190 [43]–[44] (Dowsett J), 215–6 [99]–[101] (Jagot J).

<sup>40</sup> McCabe (n 13) 64.

<sup>41</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, April 2015).

trade in the non-exhaustive list of activities conducted under native title rights and interests, making clear that native title rights can be exercised for any purpose (both commercial and non-commercial).<sup>42</sup> However, those proposed amendments have also not been made since the ALRC Report and were not canvassed in the suite of NTA amendments enacted in March 2021. Recognition of broader native title rights to take resources therefore continues to be addressed on a case-by-case basis by governments and certain other respondent parties. In at least some states, respondent parties tend to emphasise that rights to take resources for commercial purposes will be difficult to establish and not a default position.

The recent decision of Rares J in *Rainbow v Queensland* covered a limited number of litigated matters that could not be agreed between all parties.<sup>43</sup> Queensland had accepted connection for the purpose of entering a consent determination, except in relation to the inclusion of certain apical ancestors in the claim-group description, a question regarding succession and the inclusion of a right to take resources absent the usual non-commercial, personal use qualifier. Those matters (among others) were litigated with evidence given on-country in the Gulf of Carpentaria an hour or so south-west of Karumba. Relevantly, Rares J referred to *Akiba*, noting that it involved a question of extinguishment whereas the relevant issue in the present case was how a pre-sovereignty right to take resources should be expressed by the common law in a determination under s 225(b) of the NTA.<sup>44</sup> His Honour noted that evidence of exchange transactions using resources of the claim area occurred traditionally both for maintaining relationships with other groups and to obtain a reciprocal benefit.<sup>45</sup> In a contemporary sense, Rares J considered evidence of commercial exploitation of sandalwood and development of a cattle station to be acceptable adaptations of those traditional rights.<sup>46</sup>

Rares J rejected a broad anthropological construct proposed by the State's expert, which did not distinguish between the right and its exercise but incorporated both in a proposed expression of the interest. His Honour drew on the comments of the FCAFC in *Commonwealth v Akiba*,<sup>47</sup> stating that ss 211 and 227 of the NTA make it clear that there is a distinction between the right and its manner or proscriptions on exercise. Moreover, Rares J considered that s 225(b) of the NTA requires the detail of the right, rather than the exercise of it, for the purposes of the determination, and that more detailed regulation is a matter for the internal operation of traditional laws and customs.<sup>48</sup> His Honour proposed

---

<sup>42</sup> Ibid 261 [8.166].

<sup>43</sup> [No 2] [2021] FCA 1251 ('*Rainbow v Queensland*').

<sup>44</sup> Ibid [311].

<sup>45</sup> Ibid [313].

<sup>46</sup> Ibid [322].

<sup>47</sup> (2012) 204 FCR 260.

<sup>48</sup> Ibid 102–3 [320]–[321].

that the determination included a ‘right to access and to take for any purpose resources in the [determination area]’,<sup>49</sup> consistent with the terminology used by the High Court in *Akiba* and by the Federal Court in *Rumburriya Boorooloolo Claim Group v Northern Territory* (*‘Rumburriya Borrooloolo’*).<sup>50</sup> At the time of writing, the parties are settling an agreement under s 87A of the *NTA* to give effect to Rares J’s findings.

The High Court’s decision in *Akiba* also marked the beginning of a trend for higher courts to prefer an interpretation that favours suppression of native title rights rather than extinguishment.<sup>51</sup> A more beneficial application of the ‘inconsistency of incidents test’ not only allows native title to continue to exist in general but provides a greater opportunity for broader rights and interests to be recognised. In recent years, the FCAFC heard the first two extinguishment cases in New South Wales (*Roberts v Attorney-General (NSW) [No 2]* and *Ohlsen v Attorney-General (NSW)*)<sup>52</sup> since the High Court decision in *Wilson v Anderson*,<sup>53</sup> in which certain leases were held to have entirely extinguished native title.<sup>54</sup> Unfortunately, on appeal, the Full Court decided that the largely beneficial decision of Rangiah J in *Roberts v Attorney-General (NSW) [No 2]*,<sup>55</sup> which held that s 47B of the *NTA* could apply where a particular type of reserve was in place at the date of claim, was not an appropriate separate question candidate. The effect of this decision was to negate the precedential value of the decision at first instance.<sup>56</sup> However, Griffiths J in *Ohlsen v Attorney-General (NSW)*<sup>57</sup> found that none of the eight different statutory interests considered entirely extinguished native title. The Attorney-General of NSW sought leave to appeal the decision to the FCAFC, which unanimously dismissed the appeal, upholding the findings of Griffiths J.<sup>58</sup> These decisions are reflective of a developing jurisprudence framing the content of native title as a broader, more resilient right in the context of potentially inconsistent state acts.

---

<sup>49</sup> *Rainbow v Queensland* (n 43) [306].

<sup>50</sup> (2016) 255 FCR 228.

<sup>51</sup> *Yanner v Eaton* (1999) 201 CLR 351 (*‘Yanner’*); *Queensland v Congoo* (2015) 256 CLR 239; *Western Australia v Brown* (2014) 253 CLR 507.

<sup>52</sup> *Roberts v A-G (NSW)* [2019] FCA 1158; *Ohlsen v A-G (NSW)* [2021] FCA 169.

<sup>53</sup> (2002) 213 CLR 401, [179], [206].

<sup>54</sup> See *Western Land Act 1901* (NSW) regarding leases that were not included as the extinguishing Scheduled Interests in the *Native Title Act 1993* (Cth).  
[2020] FCAFC 128.

<sup>55</sup> *Roberts v A-G (NSW) [No 2]* [2020] FCAFC 128.

<sup>56</sup> [2021] FCA 169.

<sup>57</sup> *A-G (NSW) v Ohlsen* [2022] FCAFC 38.



## V POST-*AKIBA* PARALLELS IN CANADIAN JURISPRUDENCE AND POTENTIAL FOR FURTHER FLEXIBILITY

Canadian jurisdiction distinguishes the requirements and tests for evidencing particular usufruct Aboriginal rights compared to those for comprehensive Aboriginal title. In relation to the former, a Canadian corollary to the High Court's findings in *Akiba*, which distinguished between the existence of a right and its exercise, is found in *R v Van der Peet* ('*Van der Peet*').<sup>59</sup> However, the *Van der Peet* test demonstrates a greater tolerance for a more tenuous link to past practices without the same need to demonstrate generation-to-generation continuity as in the Australia cases, at least up until the recent decision of Rares J in *Rainbow v Queensland*.<sup>60</sup> To ascertain whether Indigenous people hold an existing Aboriginal right capable of being protected under s 35(1) of the *Canadian Constitution*,<sup>61</sup> the *Van der Peet* test has been restated in subsequent cases as requiring the following:

1. Characterisation of the right;
2. determination, whether on the evidence, a relevant pre-contact practice, tradition or custom existed that was integral to that culture; and
3. determination whether the modern right is demonstrably connected to and reasonably regarded as a continuation of the pre-contact practice.<sup>62</sup>

The most restrictive aspect of the *Van der Peet* test, being the requirement for evidence that a practice was 'integral to that culture', was reconceptualised by the decision in *R v Sappier*.<sup>63</sup> In that case, the Supreme Court of Canada expressly recognised contemporary uses of resources for commercial and survival purposes. The Canadian jurisprudence has proven flexible enough to recognise particular rights where their exercise has been the subject of significant periods of hiatus, by use of contemporary methods or indeed entirely exercised through contemporary uses. The development of the jurisprudence has been overlooked by certain Australian courts, which have relied on the original *Van der Peet* test in the context of s 211 prosecutions,<sup>64</sup> on which more shortly.

Recently, in the context of a prosecution case, the Canadian Supreme Court upheld protection of hunting rights by a citizen of the USA under the Canadian

<sup>59</sup> *R v Van der Peet* (1996) 137 DLR (4<sup>th</sup>) 289 (Supreme Court of Canada).

<sup>60</sup> *Rainbow v Queensland* (n 43).

<sup>61</sup> *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'); *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3 ('*Constitution Act 1867*').

<sup>62</sup> *Lax Kw'alaams Indian Band v A-G (Canada)* [2011] 3 SCR 535, 580. The original test was set out by Lamer J in *R v Van der Peet* (1996) 137 DLR (4<sup>th</sup>) 318–9.

<sup>63</sup> [2006] 2 SCR 686.

<sup>64</sup> Steven Churches, 'Aboriginal Fishing under the Native Title Act: An Illusion' (Law Society Paper, 27 July 2021) 17.

Constitution.<sup>65</sup> That citizen was held to come within the term ‘Aboriginal peoples of Canada, despite the relevant group having been progressively moved south of the USA–Canadian border and their hunting rights not having been exercised in Canada for some 90 years. While this demonstrates a level of flexibility yet to be seen in Australia, the majority in *R v Desautel* emphasised that the final two aspects of the adapted *Van der Peet* test are highly fact specific and, therefore, the trial judge is best placed to determine those matters.<sup>66</sup> This echoes the views of the Australian higher courts in *Akiba*, *Birriliburu* and *Rrumburriya Borroloola*, that due to the fact-specific nature of the inquiry, the trial judge is best placed to decide the issue. This necessitates an ongoing need to prepare comprehensive and focussed evidence of the particular traditional laws and customs in both countries. While there are commonalities between the two countries in the understanding of Aboriginal rights, and both share a quite mechanistic approach to non-exclusive rights, the Canadian test is a little more forgiving in relation to the extent of rights to resources, including contemporary exercise of the rights.

However, that is not the full extent of the more benevolent approach adopted in Canada, as recognition of Aboriginal title in that country (encompassing rights to resources) is squarely contextualised in the context of reconciliation and formal recognition of an Indigenous right to self-government.<sup>67</sup> Since *Delgamuukw v British Columbia*,<sup>68</sup> a distinct test has been employed by the Canadian courts for establishing Aboriginal title (as opposed to usufructuary rights), which is more akin to exclusive possession native title in Australia. If title is established, the holders are not limited to recognition of traditional uses of the land, and automatically have the exclusive rights to control and benefit from the land in respect of all resources,<sup>69</sup> including for commercial purposes,<sup>70</sup> subject only to an inherent limit on uses that are irreconcilable with continuing Aboriginal title into the future.<sup>71</sup> In contrast to Australia, even mineral rights remain intact for the benefit of First Nations groups where Aboriginal title is established.<sup>72</sup> The Canadian articulation of Aboriginal title content has been described as more expansive and culturally sensitive than its Australian counterpart.<sup>73</sup> Australian jurisprudence, while accepting that commercial rights

---

<sup>65</sup> *R v Desautel* [2021] SCC 17, [38].

<sup>66</sup> *Ibid* [55].

<sup>67</sup> Larissa Behrendt, ‘The Protection of Indigenous Rights: Contemporary Canadian Comparisons’ (Research Paper No 27 1999–2000, Parliamentary Library, Parliament of Australia, 27 June 2000), 9–10. (1997) [1997] 3 SCR 1010.

<sup>69</sup> Kent McNeill, ‘The Post-*Delgamuukw* Nature and Context of Aboriginal Title’ (Paper, Osgoode Hall Law School Toronto, May 2000) 17 <<https://fngovernance.org/wp-content/uploads/2020/09/content.pdf>>.

<sup>70</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

<sup>71</sup> *Ibid* 1088 [125].

<sup>72</sup> *Delgamuukw v British Columbia* (1993) 104 DLR (4<sup>th</sup>) 470, 530 (British Columbia Court of Appeal).

<sup>73</sup> Larissa Behrendt, ‘The Protection of Indigenous Rights: Contemporary Canadian Comparisons’ (Research Paper No. 27 1999–2000, Parliament of Australia, 27 June 2000).

may exist in relation to a non-exclusive right to take resources, does not apply any differing legal test or automatic beneficial consequence for exclusive native title. Generally, there has been a concerted attempt by government and mining parties to limit native title rights to resources. Mineral and petroleum resources in Australia have long been held to be absolutely owned by the Crown and that vesting extinguished any native title.<sup>74</sup>

## VI CAUTIONARY LESSONS FROM S 211 *NTA* LITIGATION

Much of the litigation concerning resource use by First Nations People in Australia has arisen in the context of s 211 of the *NTA*. These protracted state-driven prosecutions may well contribute to widespread reluctance by governments to readily accept commercial rights to take resources where the exercise of non-commercial rights already generates concern about exploitation of resources and consistency with traditional practice. Section 211 provides a defence for native title holders exercising a limited suite of native title rights and interests for personal, domestic, non-commercial communal purposes, where those activities are otherwise prohibited or restricted without a statutory permission. As noted previously, s 211 clearly contemplates that the native title right may continue to exist despite regulatory regimes impacting the exercise of such rights. This defence is only available where the relevant legislation has not extinguished native title rights in respect of the subject resource but merely regulates the taking of the resource.<sup>75</sup> This issue in relation to marine resources was definitively clarified by the High Court in *Karpany v Dietman*.<sup>76</sup> In that case, the High Court unanimously held that the South Australian State fisheries legislation had not extinguished native title. Furthermore, by operation of s 109 of the *Australian Constitution*, any state legislation purporting to prohibit such activity will be rendered invalid where the activity is conducted in the exercise of native title rights.<sup>77</sup>

As s 211 does not extend to commercial uses, litigation has predominantly focussed on either the threshold to establish common law native title prior to a determination being made,<sup>78</sup> or, whether the use was for the limited purposes protected under s211 or for commercial purposes.<sup>79</sup> Related debate has also occurred about whether s 211 should apply to traditional hunting of threatened

---

<sup>74</sup> *Ward* (n 6) 273 [640] (Callinan J).

<sup>75</sup> *Yanner* (n 51).

<sup>76</sup> (2013) 252 CLR 507.

<sup>77</sup> *Ibid* 518 [19].

<sup>78</sup> *Mason v Tritton* (1994) 34 NSWLR 572.

<sup>79</sup> *Ibid*; *Stevenson v Yasso* [2006] 2 Qld R 150; *Fisheries Act 1994* (Qld) s84; *Wanganeen v Dietman* (2021) 139 SASR 170; *Fisheries Management Act 2007* (SA) s74.

species, or whether such hunting amounts to unacceptable animal cruelty.<sup>80</sup> Following detailed consideration of fishing prosecutions in which a s 211 NTA defence has been deployed, Churches outlines the complex issues around sufficiency of evidence and onus of proof, which are not clarified in the NTA. In the South Australian context, he particularly addresses onus where there is a statutory presumption of intent about the reasons for resource take in the relevant state legislation.<sup>81</sup> He concludes ‘that the application of the NT Act to ascertaining native title as it relates to fishing rights as performed by the courts has deprived the NT Act of any realistic utility. The result is that State Fisheries Departments are free to run their “one size fits all” approach to regulating State fisheries, exactly not what the NT Act intended.’<sup>82</sup>

In New South Wales and South Australia there have been extensive prosecutions where abalone have been taken (including in large quantities) by Indigenous people, generating alternative commentary about both the scope of taking for communal and traditional purposes and consideration of whether the defence allows a loophole for poaching.<sup>83</sup> In *Wanganeen v Dietman*,<sup>84</sup> the South Australian Supreme Court considered an appeal from the decision of a magistrate who found that abalone taken by three Narungga men, purportedly for a 21<sup>st</sup> birthday party, to be outside the scope of s 211. In distinguishing between cultural and commercial use, the Court found that the purpose of the take is a relevant consideration and quashed the Magistrate’s finding that the take was necessarily for commercial purposes, clarified matters of who bears the onus of proof to what standard, and remitted other counts to the Magistrate for a fresh trial.<sup>85</sup> The years and costs involved in these prosecutions to achieve glacial clarification of the law would seem better expended on developing a positive statutory inclusion in state legislation expressly permitting cultural take. Amendments were made in 2009 to the *Fisheries Management Act 1994* (NSW) (‘FMA’), including a provision authorising take for cultural fishing purposes, however this provision has still not commenced.<sup>86</sup> There is also a very real issue about whether the FMA can regulate the proprietary interests of native title holders at all given that s 287 expressly

<sup>80</sup> Dominique Thiriet and Rebecca Smith, ‘In the Name of Culture: Dugong Hunting is Simply Cruel’, *The Conversation* (Article, 8 April 2013) <<https://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463>>.

<sup>81</sup> Churches (n 64); *Wanganeen v Dietman* (2021) 139 SASR 170; *Fisheries Management Act 2007* (SA) s 72(3)(a).

<sup>82</sup> Churches (n 64).

<sup>83</sup> Elizabeth Harvey, ‘Hunting, Shooting, Fishing: The Content of Native Title Rights and the Right to Take and Use Resources for Commercial Purposes’ (Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Conference, 7 June 2017) <<https://aiatsis.gov.au/publication/116630>>.

<sup>84</sup> (2021) 139 SASR 170 (Full Court).

<sup>85</sup> *Ibid* 200–1 [154]–[164], 215 [245].

<sup>86</sup> *Fisheries Management Act 1994* (NSW) s 21AA.

states that the FMA does not affect the operation of the NTA.<sup>87</sup> This is a frequently employed device where the government introduces legislation that would otherwise constitute a future act under the NTA.<sup>88</sup> The consequence, however, is that the legislation cannot bind native title holders, and this complex legal position is not well understood by those responsible for implementing the legislation. It seems to be a mechanism that delays reckoning with impact on native title rights to another day. That day may be approaching.

Many s 211 cases do not proceed to court, are settled prior to hearing<sup>89</sup> or do not pertain to situations where there is a pre-existing native title determination, let alone one recognising native title rights to use resources for unconstrained purposes. It will be interesting to watch this issue evolve in the assessment of connection evidence in *NSD1331/2017 South Coast People v Attorney-General (NSW)*,<sup>90</sup> which covers the area in which most of the NSW prosecutions have occurred. There are a number of fishing prosecutions running in parallel with the native title application in this area.<sup>91</sup> The Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') has published a study of mutton fish (abalone) traditionally taken for subsistence and trade between the Indigenous groups and historically with the Chinese on the South Coast of NSW. This one source, at least, appears supportive of the existence of a native title right to fish commercially in the region.<sup>92</sup>

The s 211 experience has probably had some bearing on the reservation of some state governments to recognise native title rights to resources on an unrestricted basis. In consent determination negotiations on the East Coast, there

<sup>87</sup> See *ibid* s 287. Section 287 states that this 'Act does not affect the operation of the *Native Title Act 1993* of the Commonwealth or the *Native Title (New South Wales) Act 1994* in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect.'

<sup>88</sup> See *Native Title Act 1993* (Cth) s 233. Section 233 defines a 'future act' in relation to land or waters. There is some complexity to the definition but generally it refers to legislation (post 1 July 1993) or other acts (post 1 January 1994) that affect native title.

<sup>89</sup> Kate Lockley, '"They Call It Black Market, We Call It Survival": Far South Coast Fishermen Denounce Abalone Arrests', *Illawarra Mercury* (online, 11 February 2017) <<https://www.illawarramercury.com.au/story/4461326/they-call-it-black-market-we-call-it-survival-south-coast-fishermen-denounce-abalone-arrests/>>.

<sup>90</sup> *South Coast People v A-G (NSW)* (Federal Court of Australia, NSD1331/2017, commenced 3 August 2017).

<sup>91</sup> *Ibid*; *Lavender v Commonwealth* (Federal Court of Australia, NSD1590/2019, commenced 26 August 2017); *Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development* (2018) 359 ALR 96; Lilli Ireland, 'Under the Sea: Sea Country Connections on the South Coast of New South Wales' [2021] (1) *AIATSIS Native Title Newsletter* 1, 4; Joshua Becker and Adriane Reardon, 'Indigenous Cultural Fishers Call for Immediate Suspension of Fishing Prosecutions amid Native Title Claim', *ABC* (Article, 22 October 2021) <<https://www.abc.net.au/news/2021-10-21/indigenous-fishers-in-nsw-south-coast-targeted/100555658>>; Nicola Pain and Georgia Pick, 'Balancing Competing Interests in the Criminal Justice System: Aboriginal Fishing Rights in Coastal New South Wales' (2020) 43(4) *University of New South Wales Law Journal* 1383, 1395.

<sup>92</sup> Beryl Cruse, Liddy Stewart and Sue Norman, *Mutton Fish: The Surviving Culture of Aboriginal People and Abalone on the South Coast of NSW* (Aboriginal Studies Press, 2005) [27]–[28].

is a commonly employed default qualifier that rights to take and use natural resources be for ‘personal, domestic, non-commercial communal’ purposes only. This qualification replicates the type of rights already protected by s 211 of the NTA, allowing no further expansion.

All s 87 (or s 87A agreements) in support of a consent determination include a clause under s 225(d) of the NTA (regarding the relationship between native title and non-native title rights and interests) that the determined native title rights are subject to the laws of the State and the Commonwealth. However, there is limited jurisprudence about how that takes effect in practice. The assumption is that the native title rights and interests concede to valid non-native title interests included for the purpose of s 225(d).<sup>93</sup> In relation to statutes enacted prior to the NTA future act regime taking effect, generally it is accepted that those statutes will either extinguish or regulate relevant native title rights and interests depending on the extent of inconsistency. However, where a native title right is affected by a statute enacted after 24 December 1993, (unless the statute expressly states that it does not affect native title rights and interests or has been subject of future act processes), relevant provisions will either be invalid for native title purposes<sup>94</sup> or, if s211 of the NTA applies, the native title right can still be exercised without the need to obtain any interest required by regulation. As the NTA was enacted, in part, to give effect to *Mabo*, s 225(d) was intended to clarify the situation where there is no extinguishment but where there is temporal suppression or regulation of native title by co-existing non-native title rights and interests.<sup>95</sup>

Therefore, if there were a determined commercial right to take and use resources and a particular resource was subject to a valid statutory commercial exploitation regime, then any native title holder would need to comply with that regime in the same way as a non-naïve title holder does or be entirely prevented from exercising the native title right in that manner for the period the regime is in place. It seems increasingly inappropriate for a hard-won native title right to use resources for any, or commercial, purposes to be incapable of exercise. While there are broader public interest and sustainability considerations for government, the determined native title holders should hold a unique place in the

<sup>93</sup> Robert Hudson, ‘The Jurisprudential Basis to the Common Law Notion of Indigenous Title: Some Comparisons’ (2018) 18(2) *Global Jurist* 29170037:1–19, 16; Tran Tran and Claire Stacey, ‘Wearing Two Hats: The Conflicting Governance Roles of Native Title Corporations and Community/Shire Councils in Remote Aboriginal and Torres Strait Islander Communities’ (2016) 6(4) *Land, Rights, Laws* 1, 6, 11, 17.

<sup>94</sup> See *Native Title Act 1993* (Cth) s 24OA. Section 24OA provides that if a future act is not covered by a preceding provision of division 3, it is invalid for native title purposes. This would cover legislation that affects native title rights and interests but is not covered by s 24MD (ie the legislation does not disadvantage native title holders to any greater extent than if they were freehold owners of the land or adjoining land).

<sup>95</sup> *Mabo* (n 1) 76, 79, 81; *Native Title Act 1993* (Cth) ss 23G(1)(b)(ii), 238 (non-extinguishment principle).

resource management arena in recognition of their relationship to country and lengthy exclusion from economic exploitation of resources. Not only does the jurisprudential development increase pressure on state governments to amend legislation to facilitate Indigenous rights to resources without needing to have recourse to s 211, but it raises the type of issues expanded upon below. The validity and application of certain legislation under both general law and for native title purposes is increasingly likely to be tested in the courts if used to constrain exercise of a First Nations right to take and use of resources.<sup>96</sup>

## VII COMMERCIAL NATIVE TITLE RESOURCE RIGHTS AND EXISTING STATUTORY REGIMES

The interface between native title rights recognised under the *NTA* and state resource management legislation more generally is a largely unaudited matter that may also contribute to government hesitancy in recognising commercial native title rights. While consent determinations contain the clauses under s 225(d), as referred to above, this will be of little comfort should the practical effect of such a relationship clause regarding resources ever be litigated and found to be inadequate or be interpreted to have an unanticipated effect. Governments have traditionally managed and profited from commercial exploitation of certain natural resources as the assumed owner under state legislative regimes.

There are many cases where statutes are ambiguous about whether natural resources (apart from minerals or petroleum) are vested in the Crown absolutely or just for the management purposes. As outlined above, this factor is critical to whether native title rights in those resources continue to exist. Where the Crown does not have absolute ownership but has benefited from royalties and licence fees, a question arises about not only the native title holders' future act rights, but potentially financial recompense if they held commercial rights to those resources. An example for consideration is raised in the *Forestry Act 1959* (Qld) ('FA'), which provides for the issue of sales permits for the commercial sale of 'Forest Products' including quarry materials and sandalwood throughout Queensland.

The Chief Executive of the relevant department is empowered to sell any Forest Products where they are the 'absolute property of the Crown' and to grant licences and permits to others under s 56 of the FA, subject to fees and royalty arrangements. The status of the Crown as absolute owner is a rebuttable presumption. No doubt exclusive native title over the Crown land would disprove that presumption and possibly non-exclusive native title would also suffice. If

---

<sup>96</sup> See *Native Title Act 1993* (Cth) s 24OA. Section 24OA provides that a future act is invalid unless covered by a provision of the Act. Section 233 of the *NTA* defines a 'future act' to include the making, amendment or repeal of legislation that takes place after 1 July 1993.

that is the case, then can the State validly grant those permits at all and would native title holders also be entitled to royalties?

This issue was raised by an application filed in the Federal Court on 30 June 2020 by the Registered Native Title Body Corporate ('RNTBC') for the determined Kowanyama native title holders. The RNTBC sought declaratory relief and damages for the issue of sales permits by the Queensland Government over the determined area, on the grounds that it did not hold absolute property in the quarry resources allowing it to issue the permits. The 2014 Kowanyama determination included some areas of exclusive native title, but only rights for personal, domestic, non-commercial communal purposes in the non-exclusive areas.<sup>97</sup> The matter has been settled and discontinued after the State, Applicant and Local Council negotiated a confidential ILUA, which avoids such vexed issues being considered by the Court. However, the recognition of commercial rights to take resources would inevitably seem to amplify the consequences in such situations.

### VIII COMPENSATION CONSIDERATIONS ARISING FROM RECOGNISED COMMERCIAL RIGHTS TO TAKE RESOURCES

Another line of jurisprudence that may be contributing to the slow and conservative recognition of commercial rights to take resources is native title compensation and potential implications for commercial rights. This is an emerging area of jurisprudence, many aspects of which, including compensation quantum for exclusive and commercial native title rights to resources, remain untested. An entitlement to compensation on just terms for loss, diminution, or impairment of native title is provided for in pt 2 div 5 of the *NTA*. The *NTA* provides little guidance, however, regarding methodology to determine quantum of the compensation or how it is to be calculated for different types of native title rights and interests that have been determined. Section 61 of the *NTA* requires that there be an approved determination of native title in place before a determination of native title compensation can be made.<sup>98</sup>

Despite connection assessment by the state or territory as first respondent in all native title claims applications being explicated purely on evidentiary grounds, it is difficult to accept that there is no correlation between government reticence to accept commercial (and exclusive) native title rights and the advent of compensation litigation.

---

<sup>97</sup> National Native Title Tribunal, 'Extract from the National Native Title Register', *National Native Title Register Details: Daphney v Queensland* (NNTT Register Extract, 11 March 2015) <[http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/NNTR\\_details.aspx?NNTT\\_Fileno=QCD2014/016](http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/NNTR_details.aspx?NNTT_Fileno=QCD2014/016)>.

<sup>98</sup> *Jango v Northern Territory* (2006) 152 FCR 150, 165–6 [40]–[41] (Sackville J).



In *Mabo*, the High Court was clear that the Crown has the power to extinguish native title by clear and plain legislation.<sup>99</sup> It was also accepted by the majority that any compensation for loss or impairment of native title relied on the enactment of the *RDA*, rather than being available at common law,<sup>100</sup> as reflected in the *NTA* compensation regime. Whether native title rights in natural resources have been extinguished, impaired or merely suppressed, relies upon the clear and plain intent of the relevant legislation as to its impact on native title rights on the relevant resource. Bartlett summarises the impact of all state minerals and petroleum legislation, which had, by the late 19<sup>th</sup> century, vested those resources in the Crown. In doing so, any native title rights to those resources were extinguished prior to 1975 and any claim to native title compensation for the loss of the resource itself is precluded.<sup>101</sup>

However, much of the legislation involving non-mineral resources is more recent, including post-1975 and post-1994 statutes that will squarely raise these compensation and future act considerations, engendering some uncertainty for governments in respect of other types of resources. Compensation may be payable for suppression of rights to those resources where the Crown merely regulates use, or for loss or impairment of rights to resources where there has been some level of legislative extinguishment by application of the inconsistency of incidents test. It is a matter of logic that compensation for commercial rights to these resources would be at a higher quantum than for non-commercial purposes.

## IX GRIFFITHS

In a first hearing in relation to whether (under three separate applications that proceeded together to trial) the Ngaliwurru and Nungali People held native title in accordance with s 223 of the *NTA*, Weinberg J held, contrary to the Applicants' submissions, that they had established non-exclusive and non-commercial native title rights and interests.<sup>102</sup> These findings were reflected in the resulting determination, which was subsequently appealed to the Full Federal Court. The appeal was successful. The Full Federal Court found that exclusive native title existed over parts of the determination area,<sup>103</sup> and confirmed a non-exclusive right to 'share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purposes)' in the non-exclusive areas.<sup>104</sup>

---

<sup>99</sup> *Mabo* (n 1) 75–6, 195 (Brennan J), 214–6 (Toohey J).

<sup>100</sup> *Ibid* 84 (Brennan J); Richard Bartlett, *Native Title in Australia* (LexisNexis, 4<sup>th</sup> ed, 2020) 25; *Native Title Act 1993* (Cth) s 7.

<sup>101</sup> Bartlett (n 104) 412–3.

<sup>102</sup> *Griffiths v Northern Territory* (2006) 165 FCR 300, 374–5 [795]–[798] (Weinberg J).

<sup>103</sup> *Griffiths v Northern Territory* (2007) 165 FCR 391, 428–9 [127]–[128] (French, Branson and Sundberg JJ).

<sup>104</sup> *Ibid* annexure 1, 441 [5(h)].

A series of applications collectively known as the ‘*Griffiths* compensation’ litigation ensued, resulting in findings about what could be claimed and consequential amendments to the compensation application,<sup>105</sup> questions of extinguishment by non-native title interests and liability,<sup>106</sup> and the quantum of compensation arising.<sup>107</sup> His Honour determined that the loss of rights by compensable acts was compensable against economic and non-economic (cultural loss) heads to which interest was applied. The decision only applied to non-exclusive native title to which Mansfield J ascribed 80% of the total freehold value when considering economic loss. On appeal, the Full Court generally endorsed the methodology employed and the evidentiary findings of the primary judge, while reducing the total quantum including by adjusting the economic value of non-exclusive native title to 65% of the freehold value.<sup>108</sup>

Two of the three appeals from the Full Court decision were heard by the High Court. The grounds of appeal from the Commonwealth and Northern Territory Governments included that the compensation award was ‘manifestly excessive’.<sup>109</sup> In brief, the High Court found that Mansfield J demonstrated no legal error in the approach taken in applying s 51(1) of the NTA and agreed that the effect of the compensable acts was incremental and cumulative.<sup>110</sup> Rather than considering compensation quantum for the loss or impairment of each native title right, at all levels, the Court adopted a more formulaic and holistic approach to valuing loss of non-exclusive rights and interests. The High Court ultimately decided that the suite of non-exclusive rights in *Griffiths* attracted 50 per cent of the freehold economic value. Adopting the ‘intuitive’ approach of Mansfield J (valuing cultural loss, having regard to the evidence of the nature of the group’s connection and the effect of the compensable acts on that connection within the broader area held by the group), the High Court did not disturb the amount of \$1.3 million endorsed by the Full Federal Court.<sup>111</sup> The quantum method in this case did not have to cover commercial rights to take resources, as the determined rights and interests were expressly limited to exclude commercial uses. Although it is likely that existence of recognised commercial rights to resources would increase the quantum in some manner, there is no clarity to guide quantum of that additional liability. The High Court did however expressly uphold the Full Federal Court’s findings that commercial contracts entered into in relation to use of land and resources in that case were immaterial to the compensation assessment but could be considered ‘pre-estimates’ of compensatory value.<sup>112</sup>

<sup>105</sup> *Griffiths v Northern Territory* [No 2] [2006] FCA 1155 (Weinberg J).

<sup>106</sup> *Griffiths v Northern Territory* [2014] FCA 256 (Mansfield J).

<sup>107</sup> *Griffiths v Northern Territory* [No 3] (2016) 337 ALR 362 (Mansfield J).

<sup>108</sup> *Northern Territory v Griffiths* (2017) 256 FCR 478, 520 [139], 589 [465] (North ACJ, Barker and Mortimer JJ).

<sup>109</sup> *Northern Territory v Griffiths* (2019) 269 CLR 1, 102–3 [211] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>110</sup> *Ibid* 105–6 [223]–[224], 109–10 [237].

<sup>111</sup> *Ibid* 87–9 [161]–[165].

<sup>112</sup> *Ibid* 108 [233].

At first instance, Mansfield J referred to the potential for evidence to justify the application of compound, rather than simple, interest as from the date of the compensable act, if the native title holders could establish that they were likely to have used any compensation monies paid contemporaneously with the act for commercial activities or investment.<sup>113</sup> The High Court agreed that compound interest may be appropriate in some cases, but not on the facts in *Griffiths*.<sup>114</sup> Eddie Cubillo has commented that this preference for simple interest as a default position is an act of thinly-veiled racism, again missing an opportunity for Aboriginal People to participate in economic growth. He observes that Australians routinely benefit from compound interest simply from the compulsory contributions to superannuation and yet, in *Griffiths*, there was an assumption made that the group would not have invested any monies owed and are therefore only entitled to simple interest.<sup>115</sup>

It seems somewhat self-evident that, if native title rights to take resources include commercial uses, and particularly if the exercise of them was profitable, that it would be easier to mount a case for compound interest to apply. Given the extreme difference in the ultimate award depending on which type of interest applied, potential liability for compound interest to apply is something governments would understandably be cautious about facilitating and native title parties understandably interested in exploring further.

## X CURRENT POSITION IN CONSENT DETERMINATIONS

Having regard to the variety of potential factors of both a jurisprudential and risk-management character, the cautious take up of commercial rights to resources in consent determinations is perhaps unsurprising. However, it also somewhat parsimonious in the context of more progressive Canadian and New Zealand developments in this space, some of which have been discussed in this article. By 2019, there were still relatively few consent determinations that include unlimited or commercial rights to take and use natural resources, despite the jurisprudential advances post-*Akiba*. This prompted Young to observe that ‘the tighter knots in the Australian doctrine will take some untying’.<sup>116</sup> In the context of a consent determination where the existence of commercial rights is the final outstanding matter in dispute, it is difficult, if not impossible, for the court to make a decision solely about the sufficiency of evidence without it amounting to

---

<sup>113</sup> *Griffiths v Northern Territory* (2016) 337 ALR 362, 413 [275]–[277] (Mansfield J).

<sup>114</sup> *Northern Territory v Griffiths* (2019) 269 CLR 1, 76–7 [133] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>115</sup> Eddie Cubillo, ‘An Indigenous View on the Timber Creek Decision — The Trauma that is Native Title’, *Linkedin* (Web Page, 24 March 2019) <<https://www.linkedin.com/pulse/indigenous-view-timber-creek-decision-trauma-native-cubillo-eddie>>.

<sup>116</sup> Simon Young, ‘The Increments of Justice: Exploring the Outer Reach of *Akiba*’s Edge Towards Native Title Ownership’ (2019) 42(3) *University of New South Wales Law Journal* 825, 828.

a judicial advisory opinion. Moreover, there is no legal standard for the court to decide whether the ‘credible evidence’ standard used for consent determinations has been reached and it cannot compel a state to settle a native title application by entering into a consent determination pursuant to a s 87 agreement where it asserts the credible evidence standard has not been achieved.<sup>117</sup> Obiter from North J<sup>118</sup> and Jagot J<sup>119</sup> about evidentiary requirements to underpin a consent determination were made in the context of an early evidence hearing in *Lovett* and the parties having already reached the necessary agreement on all rights and interests in *Widjabul*.<sup>120</sup>

Recently, and prior to *Rainbow v Queensland*,<sup>121</sup> the Queensland Government and other respondent parties entered a first consent determination in favour of the Waanyi people over an area including part of the Doomadgee DOGIT, which includes a right to ‘take Natural Resources from the area’ absent the usual restrictive qualifier.<sup>122</sup> There are no NSW determinations to date that include an unrestricted non-exclusive right to take resources. In contrast, most recent Western Australian consent determinations since *Atkins v Western Australia*<sup>123</sup> include a non-exclusive right to take resources ‘for any purpose’<sup>124</sup> or without any qualifier.<sup>125</sup> A Northern Territory determination has also included recognition of rights to ‘access and to take for any purpose the resources of the area’.<sup>126</sup>

Recently, an application to vary the existing determination in *Ngajapa v Northern Territory*,<sup>127</sup> under ss 13(1)(b) and 16(1) of the NTA, was successfully made in the Northern Territory to remove the qualifier on the right to take and use resources only for personal, communal, domestic and non-commercial purposes and replace it with ‘for any purpose.’<sup>128</sup> This application was made with the consent of the Northern Territory Government, which, with the applicant, jointly sought that the Court adopt the findings in *Rrumburriya Borroloola Claim Group v Northern Territory*<sup>129</sup> in support of the variation, as the claim groups in both matters had substantial overlap and were subject to the same system of laws and customs. Jagot J was satisfied, on the basis of the adopted findings and evidence in the matter, that ‘it is unjust for the MacArthur River Pastoral Lease ...

<sup>117</sup> *Widjabul Wia-Bal v A-G (NSW)* (2020) 274 FCR 577 [44],[73] (Reeves, Jagot and Mortimer JJ); *Malone v Queensland* (2021) 287 FCR 240 [231] (Rangiah, White and Stewart JJ).

<sup>118</sup> *Lovett v Victoria* [2007] FCA 474 [18]–[19],[37]–[38].

<sup>119</sup> *Western Bundjalung People v A-G (NSW)* [2017] FCA 992 [44]–[45].

<sup>120</sup> Aaron Moss, ‘Reconceptualising Current Issues in the Law and Practice of Consent Determinations under the Native Title Act 1993 (Cth)’ (2018) 41(4) *University of New South Wales Law Journal* 1187, 1208. *Rainbow v Queensland* (n 43).

<sup>121</sup> *Rockland v Queensland* [2021] FCA 1139.

<sup>122</sup> *Atkins v Western Australia* [2017] FCA 1465.

<sup>123</sup> See, eg, *Forrest v Western Australia* [2021] FCA 1489.

<sup>124</sup> *Gilla v Western Australia [No 3]* [2021] FCA 1338.

<sup>125</sup> *Wavehill v Northern Territory* [2018] FCA 1602.

<sup>126</sup> [2015] FCA 1249.

<sup>127</sup> *Top End Aboriginal Corporation RNTBC v Northern Territory* (2022) 403 ALR 666.

<sup>128</sup> [2016] FCA 776.

<sup>129</sup>

determination to remain on terms preventing the members of that claim group from using resources on their claim area for any purpose'.<sup>130</sup> The variation application was also brought as a precursor to the hearing of the compensation application brought by the same group, which would appear to lend credence to the proposition that the resource issue and native title compensation considerations are closely linked.

Although difficult to precisely ascertain the outstanding matters impeding finalisation of a consent determination, there are a number of recent mediation referrals and filed case-management timetables that refer to certain rights being an outstanding subject of controversy in current native title applications. This provides some indication that natural resource issues remain something about which some governments are holding firm.<sup>131</sup> It seems likely that a more beneficial approach to recognising unconstrained native title rights to natural resources would be accompanied by an Indigenous Land Use Agreement ('ILUA') addressing practical implementation issues. These negotiations necessarily frontload the financial and time investment, which may also be a deterrent given court timeframes and the limited resources of all parties in the system.

Of note is the approach of the Victorian Government in the *Traditional Owner Settlement Act 2010* (Vic) ('TOSA') that was introduced as a more inclusive, less legalistic, alternative to the NTA. An agreement between the State and the traditional owner group under the TOSA may or may not be supported by a native title determination. Traditional owner rights that may be recognised include 'the ability to take natural resources on or depending on the land' without any further qualification on those rights.<sup>132</sup> It may include a natural resource agreement<sup>133</sup> in relation to a defined suite of natural resources that does not include minerals.<sup>134</sup> Regarding the type of activities and use of resources in a natural resource agreement, the TOSA provides a similar approach to the Canadian jurisprudence

<sup>130</sup> *Top End Aboriginal Corporation RNTBC v Northern Territory* (2022) 403 ALR 666, 671–2 [20] (Jagot J).

<sup>131</sup> Angela Braun and Others on behalf of the Jirrbal People, 'Joint Progress Report', Filed Document (18 March 2021) in *Braun v Queensland [No 4]* (Federal Court of Australia, QUD983/2015, commenced 22 October 2015) [8]; Order of Reeves J in *Braun v Queensland [No 4]* (Federal Court of Australia, QUD983/2015, 26 March 2021) — Order 3 refers outstanding issues between the applicant and the State of Queensland to mediation; Order of Registrar Stride in *Rockland v Queensland [No 2]* (Federal Court of Australia, QUD747/2018, 17 December 2020) — Order 2 requires a notice to be filed regarding native title rights and interests still in dispute and proposed orders for the hearing of any separate questions; Order of Jagot J in *Widjabal Wia-Bal People v A-G (NSW)* (Federal Court of Australia, NSD1213/2018, 6 May 2021) annexing a timetable that includes resolution of commercial native title rights and interests as the last remaining connection dispute; Elaine Ohlsen & Others on behalf of the Ngemba/Nyiyampaa People, 'Joint Progress Report', Filed Document (12 December 2018) in *Ohlsen v A-G (NSW)* (Federal Court of Australia, NSD415/2012, 14 December 2018); Order of Griffiths and Jagot JJ in *Ohlsen v A-G (NSW)* (Federal Court of Australia, NSD415/2012, 14 December 2018) referring outstanding connection issues (explained in the Joint Report as regarding commercial and exclusive native title rights and interests) to mediation.

<sup>132</sup> *Traditional Owner Settlement Act 2010* (Vic) s 9(1)(f).

<sup>133</sup> *Ibid* s 80.

<sup>134</sup> *Ibid* s 79.

outlined previously, where use of resources is only subject to an inherent restriction consistent with enduring title and, in the Victorian case, ‘commercial purposes that are consistent with the purpose for which the land is managed’.<sup>135</sup>

## XI CONCLUSION

There may be instances where determined native title covers areas and resources over which native title rights were assumed to be extinguished by other interests or legislative regimes, but which, on a contemporary application of ‘the inconsistency of incidents’ test, would continue to exist. There are also many statutes that either expressly or impliedly state that they do not affect native title rights and interests.<sup>136</sup> Extant native title may displace a government’s assumed ability to deal with the resource and benefit commercially from it. What further impact determined rights to use that resource for all or commercial purposes could have in such situations, and for the purpose of assessing compensation awards and damages, is uncertain but raises complex and real questions for governments and First Nations parties to be alive to in their negotiations.

In addition to the evidentiary hurdles of proving traditional commercial rights to take under Australian native title jurisprudence, it seems likely that the issues canvassed in this article currently have a bearing on the continuing conservative assessments of commercial rights for the purpose of entering into consent determination negotiations. Absent progressive policy developments, this approach is likely to continue until there is an authoritative, litigated outcome of broader application embracing the more forgiving and contemporary approaches evident in comparative Canadian law and the *TOSA*. At that point, if not before, it is clearly a more productive use of parties’ resources to negotiate meaningful resource-sharing regimes and agreements, rather than pursue protracted legal wrangling as evidenced in the s 211 prosecutions. Alternatively, express provision for cultural take of resources outside of existing state statutory management regimes and consistent with the increasingly expansive tenor of emerging native title jurisprudence, could provide a clearer and fairer path forward.

---

<sup>135</sup> Ibid s 84(b).

<sup>136</sup> See, eg, *Fishing Management Act 1994* (NSW) s 287.