Talbot v Malogorski [2014] NTSC 54

PARTIES:	TALBOT, Graeme William Sydney v MALOGORSKI, Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 54 of 2013 (21142343)
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JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION (DARWIN)

CATCHWORDS:

CRIMINAL LAW – Justice Appeal – Appeal against finding of guilt – Fishing and catching fish contrary to Barramundi Fishery Management Plan – Application of s 53(1) of *Fisheries Act* (NT) – "Native title defence" – Magistrate's finding that appellant did not hold native title rights.

CRIMINAL LAW – Submissions by appellant that test under s 53(1) of *Fisheries Act* (NT) not reliant upon finding of native title – *Fisheries Act* (NT) regards right conferred on Aboriginal persons to fish in areas when they have traditionally used resources of area in a traditional manner – Parliament's intention to confer a limited right on Aboriginal persons to fish in traditional manner – Consideration of *Native Title Act* (Cth) – Definition of native title and associated rights markedly different under s 223 of *Native Title Act* (Cth).

CRIMINAL LAW – Consideration of meaning of "right" – Submissions by respondent as to establishment of a right capable of recognition or enforcement under statute or common law – Right must be sourced externally to s 53(1) of *Fisheries Act* (NT) – Discussion that that there can

be no right without a remedy – Proposition that a right emerging from traditional use regards customary law – Customary right subject to same requirements as establishing native title right – Test drawn from application of *Mabo v The State of Queensland [No. 2]* and *Native Title Act* (Cth) – Right is only as good as remedy that enforces or protects it.

CRIMINAL LAW – Consideration of meaning of "tradition" – Discussion of *Aboriginal Land Rights (Northern Territory) Act* (Cth) – Parliament's intention to enact fishing laws providing for a limited right of Aboriginal persons to use resources of an area – Meaning differs in native title context from application of s 53(1) of *Fisheries Act* (NT).

CRIMINAL LAW – Defences based on native title rights – Native title rights relevant to s 38 of *Fisheries Act* (NT) – Authorised contravention or failure to comply with *Fisheries Act* (NT) – Includes expression of statutory rights, native title rights or rights "akin to native title" – Consideration of s 26(1)(d) of *Criminal Code* (NT) – Native title rights may be authorised under general criminal law.

Held: Native title rights not determinative of s 53(1) of *Fisheries Act* (NT) – Application of s 53(1) *Fisheries Act* (NT) regards "right" of traditional use of the resources – "Right" not required to be recognised or granted by law – Proof of native title not required – Establishment of laws and customs pursuant to a native title claim not required – "Right" under s 53(1) of *Fisheries Act* (NT) limited in scope – "Right" as a defence to relevant offence of *Fisheries Act* (NT) – Appeal allowed – Finding of guilt quashed – *Fisheries Act* (NT), s 53(1).

Aboriginal Land Rights (Northern Territory) Act (Cth), s 3(1), 71, 73, 73(1)(d).

Criminal Code (NT) s 22, 26(1)(d), 440(1).

Crown Lands Act (Cth), s 24(2).
Firearms Act (NT), s 94(3).

Fisheries Act (NT) s 38(2)(c)(i), 38(2), 38(2)(c)(iv), 44, 53(1), 53(2).

Native Title Act (Cth) s 211, 223(1)(a), 223(1)(b), 223(1)(c), 223(2).

Wildlife Conservation and Control Ordinance (NT), s 36, 54

APLA Limited v Legal Services Commissioner (NSW) (2005) 224 CLR 322; *Campbell v Arnold* (1982) 56 FLR 382; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Creak v James Moore and Sons Pty Ltd* (1912) 15 CLR 426; *Dietrich v The Queen* (1992) 177 CLR 292; *Director of Public Prosecutions*

(Ref No.1 of 1999) (2000) 10 NTLR 1; *Doolan v Eaton* [2011] NTSC 52; *Karpany v Dietman* [2013] HCA 47; *Mabo v The State of Queensland [No. 2]* (1992) 175 CLR 1; *Mason v Tritton* (1994) 34 NSWLR 572; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 442; *Milirrpum v Nabalco* (1971) 17 FLR 141; *Native Title Case* (1994-95) 183 CLR 373; *Northern Territory v Arnhem Land Aboriginal Land Trust and Others* (2008) 236 CLR 24; *Police v Graeme William Sydney Talbot* [2013] NTMC; *R v Minor* (1992) 2 NTLR 183; *Stevenson v Yasso* (2006) 163 A Crim R 1; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Trenerry v Rivers* [2000] NTMC 19; *United Telecasters Sydney Ltd* (1990) 45 A Crim R 238; *Vines v Djordjevictch* (1955) 91 CLR 512; *Whittington* (2007) 19 NTLR 83; *Wik Peoples v Queensland* (1996) 187 CLR 1, referred to.

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REPRESENTATION:

Counsel:

Appellant:	W. Piper
Respondent:	M. Grant QC and R. Bruxner

Solicitors:

Appellant:	Pipers Barristers and Solicitors
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Talbot v Malogorski [2014] NTSC 54
No. JA 54 of 2013 (21142343)

BETWEEN:

GRAEME WILLIAM SYDNEY TALBOT
Appellant

AND:

MARK MALOGORSKI
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 14 November 2014)

Introduction

[1] This is an appeal against findings of guilt made by a magistrate sitting in the Darwin Court of Summary Jurisdiction on 17 December 2013 in respect of two charges against the *Fisheries Act* (NT). The appellant initially faced six charges on complaint: counts 5 and 6 were withdrawn at the commencement of the hearing; count 1 did not proceed after a finding of duplicity with another count was made; and the appellant was found not guilty of count 4 at the conclusion of the hearing. Findings of guilt were made with respect

to counts 2 and 3 the subject of this appeal. The charges relevant to the appeal are as follows:

> **Count 2**
>
> On 8 December 2011 at Shady Camp in the Northern Territory of Australia did possess a rod and line to which was attached a lure in a Closed Area, namely the Mary River Seasonally Closed Area:
>
> Contrary to clause 28(c) of the Barramundi Fishery Management Plan, averments pursuant to section 44 of the *Fisheries Act*.
>
> **Count 3**
>
> On 8 December 2011 at Shady Camp in the Northern Territory of Australia during the closed season in the Mary River Seasonally Closed Area took two barramundi.
>
> Contrary to clause 28(a) of the Barramundi Fishery Management Plan, averments pursuant to section 44 of the *Fisheries Act*.

[2] At the hearing before the Court of Summary Jurisdiction and on appeal, it was not disputed that the prosecution had proven the essential elements of both charges. The primary issue in contention was whether the appellant came within the provisions of s 53(1) of the *Fisheries Act*[1] which provides as follows:

> **53 Aboriginals**
>
> (1) Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of

[1] Section 53(2) of the *Fisheries Act* excludes commercial fishing activities from the ambit of the defence; it is not material here.

> Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.

[3] Although I expressed some uncertainty during the hearing of the appeal, I am satisfied s 53(1) of the *Fisheries Act* provides a defence by way of an exception to the general obligations under the Act. A defendant who seeks to rely on s 53(1) is required to satisfy the Court, on the balance of probabilities,[2] that they come within its terms. I have proceeded on this basis. It is not incumbent on the prosecution to negative any element of the defence or exception beyond reasonable doubt.[3]

Discussion of the learned magistrate's reasons

[4] The learned magistrate acknowledged that if the appellant was an Aboriginal person within the meaning of s 53(1) of the *Fisheries Act*, and if he was fishing and/or possessing fish in "a traditional manner on traditional land", the restrictions in clause 28 of the Barramundi Fishery Management Plan (the basis of the complaints) would not apply to him. In those circumstances he would be found not guilty of both counts.[4] Clearly that is the effect of s 53(1) of the *Fisheries Act*, save that there is no express requirement that the fishing take place on "traditional land" in order to enliven s 53(1). The section is directed to "traditional use of the resources of an area of land or

[2] Section 440(1) of the *Criminal Code*.
[3] The respondent helpfully provided relevant extracts from *United Telecasters Sydney Ltd* (1990) 45 A Crim R 238 at 250, per Toohey and McHugh JJ, citing the principle in *Vines v Djordjevictch* (1955) 91 CLR 512, in submitting that if an exception or proviso in relation to an obligation is not part of the definition of the obligation, the onus rests on the party relying on the exception.
[4] *Police v Graeme William Sydney Talbot* [2013] NTMC at [10].

water in a traditional manner from continuing to use those resources in that area in that manner". This will be discussed further.

[5] The defence provided by s 53(1) of the *Fisheries Act* was referred to throughout the learned magistrate's detailed reasons as "the native title defence". His Honour found the *Native Title Act* (Cth) informed the content of s 53(1). He was satisfied the provisions of the *Native Title Act* could apply alongside the provisions of s 53(1) of the *Fisheries Act* and could provide assistance with its interpretation.[5] He noted that neither "Aboriginals", nor the concept of "traditional use of the resources of an area of land or water", nor the concept "in a traditional manner" were defined by the *Fisheries Act*. That is clearly the case. The lack of definition of those concepts in the *Fisheries Act* presents construction difficulties, discussed further in these reasons.

[6] His Honour also observed that the *Native Title Act* was not enacted until five years after the *Fisheries Act*, when the *Fisheries Act* including s 53, came into force. This raises an issue of context given it may be questioned whether Parliament contemplated fishing rights specifically as an incident of native title at the time s 53 was enacted, although whatever the position, that is not to say that native title rights, subsequently and formally acknowledged by the law[6] could not be considered.

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[5] Ibid at [12].

[6] *Mabo v The State of Queensland [No. 2]* (1992) 175 CLR 1, followed by the statutory enactment in 1993 of the *Native Title Act* reflecting and liberalising some of the principles in *Mabo [No.2]* and providing mechanisms for establishing native title. The common law concept of 'native title' is

[7] On appeal, the respondent argued s 53 is ambulatory in its operation, in the sense it applies to both rights in existence at the time of the enactment of the *Fisheries Act* in 1988 and rights subsequently arising. This argument has significant attraction, but as will be seen, I have been drawn to the conclusion that a far more flexible approach to s 53 was intended, rather than the need for the positive establishment or identification of a "right", such as the right to fish, as an incident of native title or another right recognised by either the common law or by statute.

[8] Given the developments since *Mabo v The State of Queensland [No. 2]* ("*Mabo [No. 2]*")[7] and more particularly since the introduction of the *Native Title Act*, it seems uncontroversial that if a defendant can prove that they hold native title rights, in respect of the subject area, and an incident of native title includes fishing, the elements constituting the defence referred to in s 53(1) of the *Fisheries Act* would be well made out. What is contentious here however, is whether a failure to prove native title, or indeed an interest or right "akin to native title" (the apt expression his Honour at times used) will necessarily lead to a finding that the elements of s 53(1) have not been established and therefore the defence based on it must fail.

[9] It would seem to inevitably follow that if a defendant were to successfully prove a relevant "native title defence", in the conceivable cases, he or she

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incorporated into the definition contained in s 223(1) of the *Native Title Act*: the *Native Title Case* (1994-95) 183 CLR 373 at 452.

[7] (1992) 175 CLR 1.

would simultaneously make good the defence in s 53(1); but conversely the failure to make out native title or an interest or right "akin to native title" could not, in my view be determinative of the question of whether the defence under s 53(1) has been established. It is proof of the matters set out in s 53(1) that are essential to successfully raising the defence; nothing more is required.

[10] In any event s 38(2)(c)(i) or s 38(2)(c)(iv) of the *Fisheries Act* may well operate to provide a defence for a relevant native title holder or a person exercising another right recognised by the law, in the face of prosecution for an offence under the *Fisheries Act*. Section 38(2) of the *Fisheries Act* provides a number of defences, the burden in this instance is expressly stated to be on the defendant.

[11] Section 38(2)(c) provides a defence for contraventions against, or failures to comply with the Act if those contraventions or failures are "authorised" by being: (i) "in the exercise of a right granted or recognised by law"; or (iv) "pursuant to an authority, permission, or licence lawfully granted". I venture that a native title right or other right recognised by the law (by the common law or by statute) would be capable of forming the basis of a defence pursuant to s 38(2)(c)(i) of the *Fisheries Act* as such a right is clearly "recognised by law". Perhaps the result is less clear with respect to s 38(2)(c)(iv); it may depend on whether a posited right recognised by law would constitute "authority" in failing to comply with a provision of the *Fisheries Act*. While his Honour considered native title to be relevant to a

finding under s 53(1), in my opinion a native title right, being a right "recognised by law" also finds expression in some of the defences provided in s 38 of the *Fisheries Act*.

[12] Similarly, the enjoyment of a "native title" right to fish may be considered "authorised" under the general criminal law within the meaning of s 26(1)(d) of the *Criminal Code* (NT). The offences the appellant was charged with are "regulatory offences", nevertheless, if "authorised" in the sense of s 26(1)(d) of the *Criminal Code* "pursuant to authority, permission or licence lawfully granted", [8] there could be no criminal responsibility.

[13] His Honour reasoned that given the provisions of the *Native Title Act* were capable of application, the *Native Title Act* could be regarded as a "law in force in the Territory" as provided by s 53(1). His Honour drew on the decision of *Karpany v Dietman*,[9] whereby the High Court found that the *Native Title Act* relevantly co-existed and informed the South Australian *Fisheries Act*, including those parts that pre-dated the *Native Title Act*.

[14] His Honour also adopted what had previously been said by Dr Lowndes SM (as his Honour then was) in *Trenerry v Rivers*:[10]

> "The purpose of s 211 of the *Native Title Act* is to permit native title holders to exercise their rights and interests in relation to any fishing activities which could be the subject of an exemption, provided they

[8] Section 38(1) of the *Fisheries Act*, read with s 22 of the *Criminal Code* indicates that "authorisation" may arise under the *Criminal Code* in a broad range of circumstances: for example, in the context of the exercise of police powers and "dangerous act", see *Whittington* (2007) 19 NTLR 83; consent to community punishment, see *R v Minor* (1992) 2 NTLR 183; the authority implied in some instances to lawfully enter a part of a building, see *Doolan v Eaton* [2011] NTSC 52, per Southwood J.
[9] [2013] HCA 47.
[10] [2000] NTMC 19.

> do so in accordance with subsection 2(a) and (b). Section 211 has the effect of permitting fishing or other activities incidental thereto by native title holders, contrary to the provisions of the *Fisheries Act* (NT), provided they comply with s 211. The provisions of s 38(2)(c) and 53 of the *Fisheries Act* allow the defendant to mount a native title defence based on the provisions of s 211 of the *Native Title Act*".

[15] It may be noted that in this passage Dr Lowndes referred to both s 38(2)(c) and s 53 of the *Fisheries Act* as capable of providing a defence based on native title. The two sections are cast in vastly different terms.

[16] Clearly the focus of his Honour's consideration in this case was on the question of whether the appellant had established he was a native title holder in respect of Shady Camp and the Wulna/Limilngaw people. His Honour found the alleged offending took place at Shady Camp Barrage at Shady Camp Billabong;[11] that Shady Camp Billabong is within the traditional lands of the Wulna/Limilngan Aboriginal people;[12] that the Wulna/Limilngan Aboriginal people have traditionally used the resources of the area in a traditional manner, including fishing, and have continued uninterrupted to do so;[13] that the appellant is of the Aboriginal race for the purposes of the *Native Title Act*;[14] and that the method employed by the appellant to catch fish at the material time was not inconsistent with fishing in a traditional manner, notwithstanding the use of modern equipment.[15]

[11] *Police v Graeme William Sydney Talbot* [2013] NTMC at [18].
[12] Ibid at [19].
[13] Ibid at [20].
[14] Ibid at [21].
[15] Ibid at [22]-[23].

[17] His Honour referred to much of the appellant's evidence to the effect that he had fished at Shady Camp Billabong "all my life" and he was taught to fish there by Felix Holmes who also taught him to catch only enough fish for his and his family's needs. His Honour noted the appellant's evidence to the effect that he believed he did not need permission from any person or class of persons to fish in the area, and that he could fish there in any season at any time provided he did so to provide for himself and his family.[16] Further, his Honour remarked that the appellant believed that Felix Holmes was a "blood relative" and called him "grandfather",[17] and he believed that his Limilngan heritage was derived through his father and Gwen Talbot.

[18] His Honour referred to Gwen Talbot's uncontested evidence, that her great grandmother was an Aboriginal woman of the Limilngam people.[18] Gwen Talbot also gave evidence that she met Felix Holmes in about 1989 and she believed him to be a Limilngan traditional owner of lands and water. He was said to have told her that her great grandmother "Lulu" was his "big sister".[19] His Honour was satisfied the appellant was a biological descendant of the Limilngan people who occupied and traditionally used the area, and that he genuinely believed he was of the Limilngan people.[20] His Honour found Caroline Baban, Eileen Baban, Gwen Talbot and Billy Talbot to be the relevant intermediate descendants between the identified Limilngan

[16] Ibid at [28]. On the point of permission, there was evidence to the contrary, indicating that the appellant was required to seek permission, however, this was not material to the findings in the Court below.
[17] Ibid at [29].
[18] Ibid at [33].
[19] Ibid at [35].
[20] Ibid at [37].

woman "Lulu" and the appellant.[21] His Honour concluded that the evidence did not establish that the appellant and the persons through whom he traced decent to the Wulna/Limilngan Aboriginal people continued uninterrupted to observe the traditional laws and customs of those people.[22]

[19] After detailed analysis of the lineage and associated evidence, including anthropological evidence, the learned magistrate determined that at the material time, the appellant did not hold native title rights in respect of Shady Camp Billabong.[23] On the basis of some of the anthropological evidence, his Honour found that any adoption of the appellant could not be accepted as capable of transmitting rights. As a consequence of these findings, his Honour concluded s 53(1) of the *Fisheries Act* had no application to the appellant.

[20] His Honour did however, find that the appellant was fishing for the purpose of satisfying his personal and domestic needs within the meaning of the *Native Title Act*, and "that this was a use of the resources of the area in a traditional manner within the meaning of subsection 53(1) of the *Fisheries Act*".[24] He went on to hold that this was not sufficient to establish the defence in s 53(1) of the *Fisheries Act*; that it was also necessary to show that the resources were used "in exercise or enjoyment of their native title rights and interests" in accordance with s 211(2)(b) of the *Native Title Act*, and similarly for the purpose of s 53(1) of the *Fisheries Act*, it was

[21] Ibid at [46].
[22] Ibid at [52].
[23] Ibid at [71].
[24] Ibid at [24].

necessary to be one of the "Aboriginals who have traditionally used the resources" of the area.[25] In this instance, to establish the defence, his Honour said that this required the appellant to establish his connection with the Wulna/Limilngan people.[26]

[21] Although his Honour found no evidence of the appellant's "personal, physical or cultural connections with Wulna/Limilngan lands and traditional laws and customs", he qualified that finding by stating, "other than his regular fishing in the area and having done so over most of his life". He noted that the appellant spoke the Limilngan language to some degree as a child but that his present knowledge was of a few words. He also found that although the appellant "observes the relevant traditional laws and customs as to fishing, there is no evidence of his observing any other traditional laws and customs of the Wulna/Limilngan people".[27]

The ground of appeal

[22] At the commencement of the hearing of the appeal, and with the consent of the respondent, the following ground of appeal was substituted for the original grounds:

> The learned magistrate erred in that he applied the wrong test to determine whether the appellant was a person entitled to raise a defence under s 53(1) of the *Fisheries Act*.

[25] Ibid at [25].
[26] Ibid at [26].
[27] Ibid at [51].

[23] Essentially the appellant argued that because the learned magistrate relied entirely on native title principles and not on the particular wording of s 53(1), the approach unnecessarily restricted the scope of s 53(1) and the appellant was subject to a narrower test, in an attempt to establish the defence. The respondent argued the learned magistrate was not in error to examine whether the appellant could establish native title as it was the only "right" within the words of s 53 that the appellant could realistically raise. Even if the appellant attempted to establish he had a customary right to fish that could be sourced outside of a native title context, the respondent argued the same test to establish any posited customary right would apply.

Outline of arguments on appeal:

(a) On behalf of the appellant

[24] On behalf of the appellant it was argued s 53(1) itself confers a right on Aboriginal persons (as a class of persons) to fish in areas otherwise regulated by the *Fisheries Act*, when they have traditionally used the resources of an area in a traditional manner. On the appellant's argument this was to be distinguished from native title.

[25] The appellant argued that native title, by comparison with s 53(1), recognises entitlements of indigenous inhabitants in accordance with their laws or customs to their *traditional lands*.[28] It was pointed out that the expressions "native title" or "native title rights or interest" as set out in

[28] *Mabo v The State of Queensland [No. 2]* (1992) 175 CLR 1; preamble to the *Native Title Act*.

s 223(1) of the *Native Title Act* means communal, group or individual rights and interests of Aboriginal persons in relation to land or water[29] where those rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal persons.[30] Further, the definition requires that the Aboriginal persons by those laws and customs have a connection with the land or waters,[31] and that the rights and interests are recognised by the common law.[32] Section 223(2) of the *Native Title Act* expressly provides that "rights and interests" include hunting, gathering, or fishing. The appellant argued the definition and establishment of native title and associated rights is markedly different to the requirements of s 53(1) of the *Fisheries Act*.

[26] By definition, native title holders must have a strong connection with the relevant land and must prove a continuous connection with the land since prior to European settlement. On the appellant's argument, none of this is required to be proven to establish the exception provided under s 53(1) of the *Fisheries Act*.

[27] The appellant argued that by the inclusion of s 53(1) in the *Fisheries Act*, the Legislative Assembly in 1988 intended to confer a right to fish in a traditional manner on Aboriginal persons in the Northern Territory, at a time when fishing was to be regulated. It was argued s 53(1) should to be read as giving permission to persons who meet the criteria provided by s 53(1).

[29] Section 223(1) of the *Native Title Act*.
[30] Section 223(1)(a) of the *Native Title Act*.
[31] Section 223(1)(b) of the *Native Title Act*.
[32] Section 223(1)(c) of the *Native Title Act*.

Alternatively, the appellant argued that if the respondent's argument is correct, in the sense that s 53(1) is capable of referring to pre-existing rights, Parliament, by enacting s 53(1), was referring to the nature of a pre-existing right and was recognising the right of Aboriginal persons to fish in a traditional manner. Another way this argument was put, was that Parliament was expressing permission for a subset of people to continue to engage in an activity they had previously engaged in.

[28] Counsel for the appellant drew attention to comments by the majority of members of the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust and Others*.[33] That decision discussed public access to the tidal zone of the Northern Territory and whether the public right to fish, when combined with the *Fisheries Act*, preserved access to certain classes of fishers to the tidal zone covered by fee simple titles issued under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("*ALRA*"). The Court held that the *Fisheries Act*, in particular ss 10 and 11, abrogated any public right to fish in tidal waters in the Northern Territory that existed before the *Fisheries Act* was enacted.[34] The comprehensive statutory regulation of fishing in the Northern Territory provided by the *Fisheries Act* was held to have supplanted any public right to fish.

[33] (2008) 236 CLR 24.
[34] *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust and Others* (2008) 236 CLR 24 at [58], per Gleeson CJ, Gummow, Hayne and Crennan JJ.

[29] In the context of the discussion about where a person may fish and how that may be affected by the abrogation of a public right to fish, the majority referred to s 53(1) of the *Fisheries Act* and stated:[35]

> "Reference should also be made to s 53(1), which permits Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner to continue to use those resources in that area in that manner".

[30] After setting out s 53, their Honour's continued:[36]

> But apart from the provisions that have been mentioned, the *Fisheries Act* does not deal with where persons may fish".

[31] Counsel for the appellant submitted this passage must refer to the sections previously discussed in the judgement, including the reference to s 53. It was submitted this discussion supported the appellant's contention that the content of s 53 granted permission, or a right to Aboriginal persons, to fish within the terms of the section. This was said to be further supported by the observations the majority made about the history of restrictions to fish and the eventual abrogation of the public right to fish.[37] The culmination of the reasoning of the Court was that whether and how a person may fish in the Northern Territory "are questions to be answered by resort to the Act, not any common law public right. The common law public right has been abrogated".[38] It was argued this supported the appellant's case to the effect

[35] Ibid at [35].
[36] Ibid at [36].
[37] Ibid at [21]-[28].
[38] Ibid at [28].

that s 53(1) is the source of the right for Aboriginal persons to fish in the Northern Territory.

[32] Caution must be exercised regarding over reliance on these passages from *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust and Others*, as the focus of the judgment was on issues associated with the *ALRA*. It does not stand as a definitive construction of s 53(1). The most I would be prepared to draw from these passages in this context is marginal support for the proposition that permission to continue traditional fishing is acknowledged by s 53(1), but the passages referred to do not define the content of any right. Section 53(1) is there referred to for a different reason.

(b) On behalf of the respondent

[33] The Solicitor General, Mr Grant QC for the respondent, argued that although a traditional fishing right recognised by the common law or enshrined in statute would suffice to enliven s 53(1), the appellant did not possess native title rights in respect of the subject area, nor did he enjoy other relevant rights conferred by statute, such as under the *ALRA*, and nor did he establish any relevant recognised common law right.

[34] Mr Grant argued that s 53(1) of the *Fisheries Act* required the appellant (or any person relying on s 53(1)) to establish the "right" that they were exercising when the acts that would otherwise constitute the offence occurred. He further argued that s 53(1) of the *Fisheries Act* did not create

the right that may be relied on by a defendant; but rather, a defendant must establish the "right" on which they rely. In short, it was put s 53(1) requires a defendant to demonstrate that they were acting in the exercise of a proven "right" associated with traditional use of resources by Aboriginals; that s 53 is not *itself* the source of the right, and that a "right" in this sense means an entitlement recognised or capable of recognition under statute or the common law, and is capable of enforcement under statute or by the common law or equity.

[35] It must be questioned whether use of the word "right" necessarily imports all of the qualities suggested. Depending on the context, "right" may well refer to rights that are perceived to exist unless or until they are removed by statute. There are many examples of benefits, claims or liberties conventionally referred to as rights. They are incapable of enforcement in the sense of providing a cause of action, but nevertheless are regarded as rights unless and until they are lawfully abrogated or restricted.[39]

[36] In support of the argument that s 53(1) does not create the right, attention was drawn to the use of the word "limit" within s 53(1) with the result, it was submitted, that the section must be considered to be concerned with the extent to which the *Fisheries Act* affects or impairs an existing "right". The provision was said to be ambulatory in its operation, capable of application to "rights" in existence at the time of its enactment in 1988 and those

[39] For example, "Free speech" is conventionally referred to as a "right", although the limits of it are subject in some instances to statutory regulation and the common law; the remedies available to protect or enforce it are limited to confined circumstances: *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.

subsequently arising or recognised. It was argued that if s 53(1) did not require the establishment of a recognised right, the "defence" would be wholly self-referential, a consequence far from ideal.

[37] It was argued that by choice of the word "right" in s 53(1), the legislature intended that a right sourced externally to the section be established to successfully invoke the defence; otherwise, it was argued, the legislature would have provided only that the offence provisions had no application to Aboriginal persons using the resources "traditionally", with no need for the inclusion of reference to a "right".

[38] In support of the respondent's arguments that rely on the principle that there can be no right without a remedy, Mr Grant referred the Court to a number of authorities. For example, Isaac J in *Creak v James Moore and Sons Pty Ltd*[40] observed:

> "A Judge is neither an Eastern Cadi nor an arbitrator. He expounds the law which fixes the standard of right, and to that, whatever it may be, the Judge adheres. When a man claims a right or sets up a defence in a court of justice he must, apart from statutory provisions, be able to point to some definite principle of the common law which creates the right or permits the defence. Otherwise, rights and liabilities, unless rigidly defined by Statute, would vary with the moral intensities of the Judges".

[39] Similarly, Kirby J in *APLA Limited v Legal Services Commissioner (NSW)*[41] said:

[40] (1912) 15 CLR 426 at 437.
[41] (2005) 224 CLR 322 at 356.

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal".

[40] In *Dietrich v The Queen*,[42] Toohey J referred to the maxim *ibi jus ibi remedium* – there is no wrong without a remedy, in reference to whether there was a "right" to legal representation.

[41] In relation to the application of the principle to traditional Aboriginal rights, attention was drawn to what was said by Kirby J in *Wik Peoples v Queensland*:[43]

> The source of the enforceability of native title in this or in any other Australian court is, and is only, as an applicable law or statute provides. Different considerations may arise in different societies where indigenous peoples have been recognised, in effect, as nations with inherent powers of a limited sovereignty that have never been extinguished. This is not the relationship which the indigenous people of Australia enjoy with the legal system of Australia. For Aboriginal legal rights, including to native title, to be enforceable in an Australian court, a foundation must be found within the Australian legal system.

[42] Although dealing with the application of the general criminal law in respect of alleged offending on *ALRA* land, the Northern Territory Court of Appeal adopted the statement of Kirby J in *Director of Public Prosecutions (Ref No.1 of 1999)*:[44]

> So far as traditional law is concerned, we adopt with respect what Kirby J said in *Wik Peoples v Queensland* (supra) at 213:

[42] (1992) 177 CLR 292.
[43] (1996) 187 CLR 1 at 214.
[44] (2000) 10 NTLR 1 at [33].

> "To the extent that the tide of history has not washed away traditional laws and real observance of traditional customs, their legitimacy and content rest upon the activities and will of the indigenous people themselves."
>
> Consequently, that law is not legally binding and enforceable in this Court, even upon an indigenous person who submits himself to it, save and except to the extent to which Australian law is prepared to recognise and enforce it: cf *Yanner v Eaton* (1999) 166 ALR 258, where the traditional hunting rights of the appellant were held to be protected by s 211 of the *Native Title Act 1993* (Cth).

[43] It was argued that even if the posited right, characterised as a native title right, was not the appropriate test to be used in the context of s 53(1), in the circumstances, any customary "right" asserted by a defendant would be subject to the same requirements as those relevant to establishing native title rights.

[44] It was submitted that if the right emerges out of a "traditional use" as contemplated by the appellant's argument, this would take the argument into the realm of customary law. The ultimate test for whether customary law is recognised by the common law is to be derived from *Mabo [No.2]*,[45] in that, such a law must emerge from traditional observances of a group of people and, the members of the group who subscribe to the law, must show unbroken attachment and must have observed the custom from time immemorial. *Mason v Tritton*[46] was emphasized by the respondent. There the appellant Mason had been charged with having more than the permitted quantity of abalone in his possession without a licence. He unsuccessfully

[45] (1992) 175 CLR 1 at [58]-[62]; referred to in [40] above.
[46] (1994) 34 NSWLR 572.

claimed that he was asserting his traditional right to fish under a native title recognized at common law. The New South Wales Court of Appeal found Mason had failed to establish the native title claim. He gave no evidence of any recognisable system of rules governing the taking of abalone; nor had he shown how his abalone collecting activities fell within the scope of such a rule.[47] It is significant that the New South Wales legislation under which Mason was prosecuted did not contain a section comparable with s 53(1). Ultimately, it was submitted that when considering the recognition of customary law by the common law, the test for recognition is the same as a right established by communal native title and recognised as such. Applying those principles here, it was submitted that in theory, a customary right to fish can exist outside of a native title framework, but to be recognised, the test was to be drawn from *Mabo [No .2]*. It was also pointed out that what is reflected in s 223 of the *Native Title Act* is a statutory statement of what was said in *Mabo [No .2]*, although for practical purposes, particularly ease of proof issues, the mechanisms of the *Native Title Act* may be utilized in a given case.[48] The *Native Title Act* is not however, a codification of the common law.[49]

[45] The respondent identified potential sources of "rights" capable of recognition by statute or the common law, and sourced externally to s 53(1).

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[47] *Mason v Tritton* (1994) 34 NSWLR 572, per Gleeson CJ at 574-575, 584; per Kirby at 584 and 594-595. The permitted quantity of abalone was 10 and the appellant was found in possession of 92 abalone.
[48] As discussed by Priestley JA in *Mason v Tritton* (1994) 34 NSWLR 572 at 600.
[49] Explanatory Memorandum Part B, *Native Title Bill 1993*, 76-77, as reproduced in the Respondent's written submissions at [31].

This included potentially, recognition by the common law of a right to fish either within or outside of a native title context as already discussed.

[46] In relation to examples of *potential* rights under statute, it was pointed out that s 71 of the *ALRA* provides that "an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land". Cleary the appellant does not have rights under the *ALRA*; the area concerned is not Aboriginal land under the *ALRA*.

[47] Another example of a statute providing such a "right" was the *Wildlife Conservation and Control Ordinance* (1962-1964) which provided that laws prohibiting the killing, possessing, selling or exporting of certain species without a permit did not apply to "an Aboriginal native of Australia", pursuant to s 54, except in relation to selling or bartering any partly protected animal, under s 36.[50]

[48] A further example given as a potential source of a right was the type available by operation of a statute with the common law, for example, pastoral lands legislation that historically provided pastoral leases must contain a reservation in favour of Aboriginal persons preserving traditional use and occupation of the land for that purpose.[51]

[50] See, the respondent's written submission at [26].
[51] See, the respondent's written submissions at [26].

[49] From the respondent's perspective, rights such as those contained in reservations would be capable of enforcement and are the type of "right" envisaged by s 53(1). In *Campbell v Arnold*,[52] Forster CJ dealt with an appeal against a conviction by an Aranda man for having discharged a firearm against the *Firearms Act*. Section 94(3) of the *Firearms Act* provided a defence:

> "It is a defence to a prosecution for an offence against sub-section (1) [offence of discharging a firearm on land owned or occupied by another] that the defendant was authorized by or under another law in force in the Territory to discharge the firearm".

[50] Forster CJ traced the history of the *Crown Lands Act* to the *Crown Lands Ordinance* (1927) that had provided for a reservation in favour of "all Aboriginal inhabitants of North Australia and their descendants full and free right of ingress, egress and regress, into, upon and over the leased land and every part thereof… and to take and use for food, birds and animals *ferae natureae* in such manner as they would have been entitled if the lease had not been made".

[51] His Honour commented on the narrowing of the reservation to the form in force at the material time, noting that its previous form referred to "all Aboriginal inhabitants", as opposed to the restriction of "Aborigines who, in accordance with Aboriginal tradition are entitled to inhabit the leased land". There are some similarities between s 24(2) of the *Crown Lands Act* and s 53(1) of the *Fisheries Act*, particularly the use of the word "traditional",

[52] (1982) 56 FLR 382.

although additionally s 24(2) of the *Crown Lands Act* required establishment of an "entitle[ment] to inhabit". Establishment of such a "right" such as this, on the respondent's argument, would be capable of separate enforcement and therefore make good a relevant defence. Notwithstanding use of the word "right", the scope, purpose and perceived intent of s 53(1) of the *Fisheries Act* is remarkably similar to the types of reservations in favour of Aboriginal persons that historically have marked legislation that may impact on traditional fishing, hunting and associated activities.

Approach adopted to the construction of s 53(1) of the *Fisheries Act*

[52] As may be obvious, the construction of s 53(1) of the *Fisheries Act* is not without difficulty.

[53] As between the available approaches to the construction of s 53(1), having regard to the express words of s 53(1), its context as a defence to charges within the *Fisheries Act* and the broader relevant legislative regimes that operate within the Northern Territory, in my opinion, the approach contended for on behalf of the appellant is to be preferred.

[54] It was not necessary for the appellant to satisfy the Court of Summary Jurisdiction of native title rights as discussed in *Mabo [No.2]*. In my opinion, s 53(1) acknowledges a right according to Aboriginal tradition to fish, in the same sense that by its terms, it grants permission to Aboriginal persons who traditionally fish in an area to continue that activity, notwithstanding the balance of the *Fisheries Act*. It is not a broad based

declaration of a right of Aboriginal persons to fish. The right is limited in its scope to the defence of charges under the *Fisheries Act*. It is not necessary in my view to go beyond the provision.

[55] The approach suggested by the respondent potentially enlarged the matters required to be proven by a defendant beyond what is authorized by the words of the provision. If establishment of the defence provided by s 53(1) is to be read as the establishment of an externally sourced "right", the essence of s 53(1), in the "right of Aboriginals who have traditionally used the resources... in a traditional manner" will have no operation. The "traditional use" would be established simultaneously with any of the conceivable externally sourced rights, or would be fully subsumed by factors external to s 53(1). Any posited external "right" would potentially conflict with the elements to be clearly established by s 53.

[56] All of the potential "rights" identified, including statutory rights, native title or rights "akin to native title", would in any event find expression in the defences set out in s 38(2) of the *Fisheries Act*, especially, s 38(2)(c)(i) "in the exercise of a right granted or recognised by law".[53] The defences in s 38(2) of the *Fisheries Act* require establishment of a "right granted or recognized by law", to be distinguished from s 53, specifying simply "the right of Aboriginals…" If s 53(1) had used a similar expression, "right granted or recognised by law" rather than simply "right", the meaning would be clear and the right would need to be established accordingly.

[53] Discussed above at [10]-[11].

[57] Even without the defences available in s 38(2) or s 53(1) of the *Fisheries Act*, if native title were to be established, the *Native Title Act* has its own regime to deal with laws of the Commonwealth, a State or a Territory that may impinge on the enjoyment of native title. Section 211 of the *Native Title Act*, depending on the circumstances, may require that legislation such as the *Fisheries Act* operate in a manner that does not affect the freedom of a native title holder to enjoy the usufructuary rights enumerated in s 211(3)(b) of the *Native Title Act*, including fishing.[54] A "native title" defence may well be relevant to a charge under the *Fisheries Act*, but s 53(1) does not require proof of native title, nor a right "akin to native title".

[58] Especially in the context of the establishment of a defence to a criminal charge (albeit a regulatory offence) the approach contended for by the respondent adds elements to the establishment of the defence not manifest from a plain reading of s 53(1). There is no mention of "traditional laws acknowledged or customs observed" in s 53, yet "traditional laws acknowledged and customs observed" are central to the definition of "native title" whether referring to the *Native Title Act* (s 223(1)(a)) or to Brennan J's statement in *Mabo [No.2]* that native title has "its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory".[55] In

[54] As was held to be the case in *Karpany v Dietman* [2013] HCA 47 at 33-37, where the appellant/defendant in a prosecution under the *Fisheries Management Act* (SA) successfully invoked s 211 of the *Native Title Act*.
[55] See discussion in *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [116]-[117], per McHugh J.

Members of the Yorta Yorta Aboriginal Community v Victoria,[56] Gleeson CJ, Gummow and Hayne JJ said that "traditional" in the native title context referred to the body of "law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty";[57] and that "laws and customs are inextricably interlinked".[58] Although any fishing under s 53(1) must be in accordance with tradition, there is no additional requirement of the establishment of "laws acknowledged and customs observed" in the same sense as native title.

[59] The meaning of "tradition" itself is markedly different in a native title context than its ordinary meaning that appears in s 53(1). "Traditional" for native title purposes differs from its ordinary meaning because in a native title context "tradition" necessarily extends back to pre-sovereignty. In *Members of the Yorta Yorta Aboriginal Community v Victoria,*[59] Gaudron and Kirby JJ refer to the question of whether present day beliefs and practices can be said to constitute acknowledgment of "traditional laws" and observance of "traditional customs". At para [112] their Honours note the different usage of the word "traditional" when it is not used in a native title context:[60]

> As the focus of much of the argument in this case has been upon the word "traditional", it is convenient, at this point, to consider the nature and extent of the continuity necessary before laws and customs can properly be described as traditional. As a matter of

[56] (2002) 214 CLR 442.
[57] Ibid at [86].
[58] Ibid at [55].
[59] Ibid at [111]-[112].
[60] Ibid at [112].

> ordinary usage, the word "traditional" does not necessarily signify rigid adherence to past practices. Rather, it ordinarily signifies that that which it describes has been handed down from generation to generation, often by word of mouth".[61]

[60] Nothing in s 53(1) refers to the need on the part of a defendant relying on it to establish a native title right or other right based on customary law that the common law or another statute may recognise. There is no definition of how the elements of any particular right may be established within the section, nor any mechanism to deal with the establishment of a right that may conflict with the ordinary meaning of "traditionally" in the balance of the section. Even though there is significant force in the approach taken on behalf of the respondent, to the effect that the section is ambulatory in nature and capable of adaption depending on the right asserted, such an approach does not sit well with the use of the words, Aboriginals who have *traditionally used* the resources of an area of land or water in a *traditional* manner.

[61] Section 53 refers only to the traditional use of resources in an "area"; there is no requirement the Aboriginal person be a traditional owner or a native title holder with particular attachments to the "area" concerned that ordinarily would be implicit within those concepts. It is conceivable that fishing rights may exist independently from proprietary rights under other

[61] Footnote 116 from *Members of the Yorta Yorta Aboriginal Community v Victoria* is set out here. See also, *Macquarie Dictionary* (Macquarie Library, 3rd ed, 1997) 2242, which defines "tradition" as "the handing down of statements, beliefs, legends, customs, etc, from generation to generation, especially by word of mouth or by practice"; *Australian Oxford Dictionary* (Oxford University Press, 3rd ed, 1999) 1419, which defines "tradition" as "a custom, opinion, or belief handed down to posterity esp orally or by practice. B this process of handing down. 2 esp an established practice or custom".

regimes, hence use of the word "area" would seem apt. It signifies a more flexible approach.

[62] There is an intertemporal issue of some relevance to the construction of s 53 of the *Fisheries Act*. The respondent pointed out that a provision in similar terms was included in the *Fisheries Act* of 1979. This provision continued in its current form, with s 53 of the *Fisheries Act* enacted in 1988. Native title and associated customary rights were not formally recognized by the law of Australia in 1979 or 1988. This does not in itself present a barrier to acceptance of the respondent's argument, however, it is relevant in terms of the objective assessment of what was intended by the enactment of s 53(1), and its predecessor in 1979. It is unlikely that at the time of its enactment Parliament contemplated native title rights recognized by the common law, although it cannot be ruled out that such rights may have been perceived as emerging.[62] More broadly, it cannot be ruled out and it is more likely in my view that Parliament perceived a "right" of Aboriginal persons in the Northern Territory to pursue traditional fishing activities within the terms and limits of s 53.

[63] The Court was reminded by senior counsel for the respondent, that the *ALRA* was passed in 1976. Section 73 of *ALRA* permitted the Legislative Assembly of the Northern Territory to make laws for sacred sites and the entry of persons on Aboriginal land, with a right of Aboriginal persons to

[62] See, *Milirrpum v Nabalco* (1971) 17 FLR 141which rejected the doctrine of communal native title as part of the law of Australia.

enter land in accordance with Aboriginal tradition. It also permitted the Legislative Assembly to make laws related to wildlife and fishing. Of interest is s 73(1)(d) of the *ALRA*, permitting the Northern Territory to make laws relating to fishing activities within 2 kms of Aboriginal Land, as long as any such laws "shall provide for the right of Aboriginals to enter, and use the resources of, those waters in accordance with Aboriginal tradition".

[64] The definition of "Aboriginal tradition" both in its original and current form in the *ALRA*, is as follows:[63]

> "the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships".

[65] "Tradition" in this sense bears greater resemblance to the ordinary meaning attributed to "tradition" as opposed to what is associated with native title. There is no requirement of continued observance uninterrupted from time immemorial.

[66] Although this case is not dealing with *ALRA* land or waters, clearly under the *ALRA* it was envisaged that the Northern Territory would or could make fishing laws "provid[ing] for the right" of Aboriginals to use the resources of an area. This is an indication that the Northern Territory legislated accordingly, in the sense of exempting fishing according to Aboriginal

[63] Section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act*.

tradition, when fishing was being regulated. Section 53(1) and its predecessor achieved this.

[67] At the relevant time the legislature must have perceived and acknowledged some claim by Aboriginal persons (as occurred in other jurisdictions) to maintain traditional hunting and fishing practices. The statutory and common law examples provided on behalf of the respondent are representative of a host of statutes with similar provisions, by way of exception or reservation for Aboriginal persons.[64] It was and is not uncommon in Australia for Aboriginal persons to be exempt, partially or wholly from statutes regulating hunting and fishing and similar rights.

[68] It is accepted that many of the similar provisions that attempt to achieve this objective do not contain the word "right" but, the overall effect and intent is the same.[65] Section 53 and its predecessor were enacted, it would appear, congruent with what was expected under *ALRA* by providing the relevant right. The "right" is however limited. It is accepted that a right is only as good as the remedy that enforces or protects it. The "right" is enforceable only in the terms of s 53(1) in respect of a defence to a relevant charge. Its reach and content is no greater than s 53(1); it provides no remedy beyond the defence as defined. The section anticipates that the right under s 53(1) may be subject to further restrictions by use of the words "unless and to the

[64] In 1986, the Australian Law Reform Commission Published Report No.31, Vol 2 'The recognition of Aboriginal Customary Laws', see, chapter 35 detailing Australian legislation as it affects 'traditional' hunting, fishing and gathering activities of Aborigines.
[65] *Stevenson v Yasso* (2006) 163 A Crim R 1 discusses a similar issue with respect to s 14 of the *Fisheries Act* (Qld), although the section does not refer to "right"; see, Mc Murdo P at [10]-[18] for discussion of that section.

extent to which it is expressed to do so". The test applied by the Court below imposed requirements outside of the scope of s 53(1). In doing so, his Honour fell into error.

[69] In my opinion the findings of and evidence before the Court of Summary Jurisdiction set out above,[66] well supports a conclusion that at the time of the alleged offences the appellant was an Aboriginal person who had traditionally used the resources of the area in a traditional manner and was continuing to do so.

[70] Despite respectable and challenging arguments put on behalf of the respondent, I have come to the conclusion that the purpose of the section is to provide permission to Aboriginal persons to fish in a traditional manner in accordance with s 53(1) and subject to its limitations.

Orders

[71] The appeal is allowed.

[72] The findings of guilt made in the Court of Summary Jurisdiction in respect of counts two and three are quashed.

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[66] See, [19]-[21].