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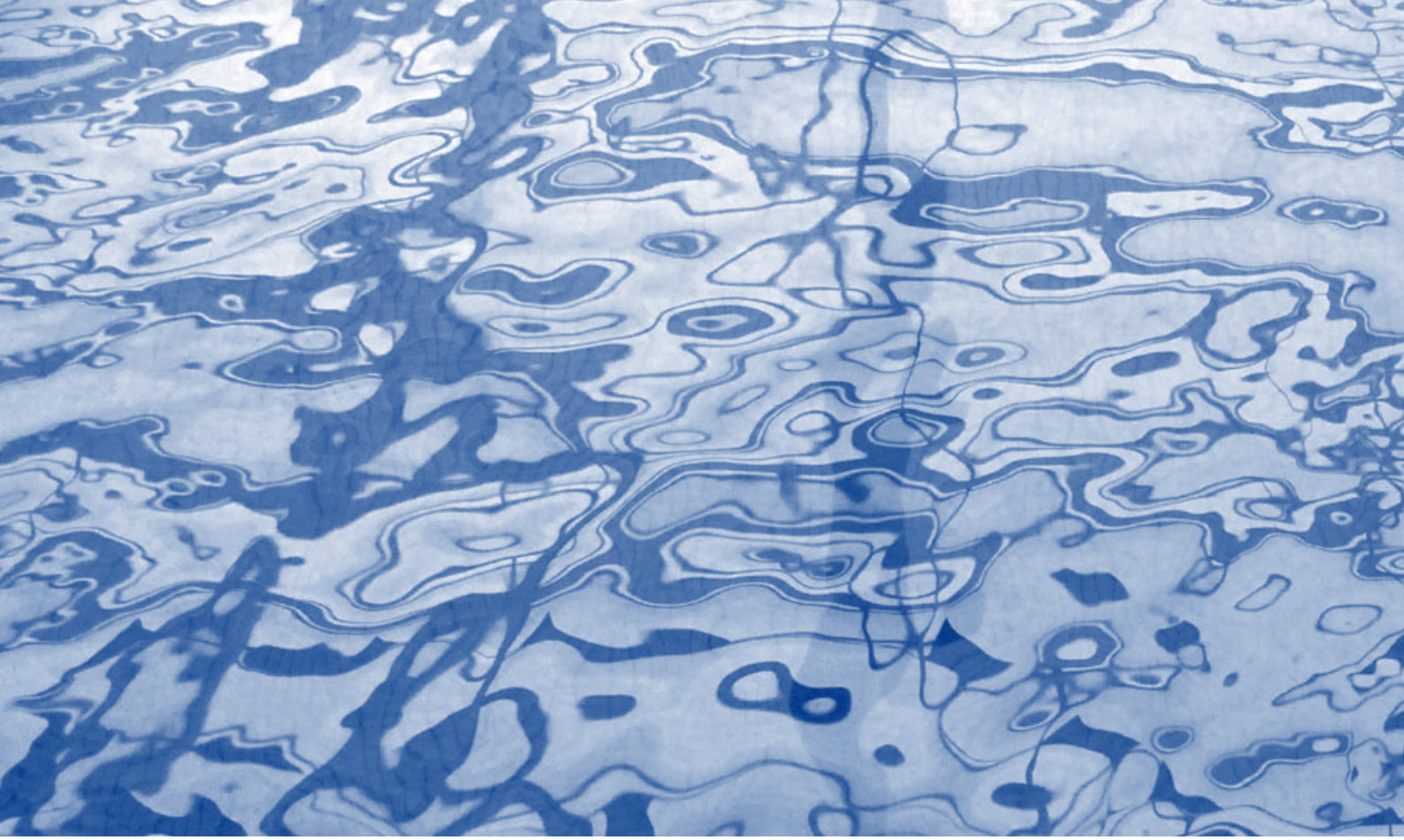

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Abstract

The ancient common law public right to fish has had increasing resonance in Australia since 2001 when the High Court in Yarmirr denied the existence of asserted exclusive offshore native title rights in large part because of the "fundamental inconsistency" between them and the public right to fish. The Yarmirr decision also established that non-exclusive offshore native title rights must be consistent with the public right. This creates the potential for litigation where it is asserted that actions of native title holders have infringed the public right or where recreational anglers purportedly exercising the public right in an area subject to a native title determination stray beyond the limits of the right. The public right to fish may also continue despite exclusive indigenous ownership rights over the foreshore (to the low water mark) where ownership rights exist under legislative land grants. Far from being a matter of mere historical curiosity, the public right to fish has resurfaced with prominence with respect to its intersection with indigenous fishing rights. Further, far from being regulated out of existence, in some jurisdictions the public right to fish has been enshrined in legislation. In New South Wales it has even been extended to non-tidal rivers and creeks. This paper examines the content of the public right to fish and assesses its enduring significance in light of Yarmirr and post-Yarmirr offshore native title determinations and litigation concerning Aboriginal land grants. It argues that the confusion surrounding the interaction between public and indigenous fishing rights may necessitate parliamentary action to allocate access rights vis-a-vis public and indigenous fishers.

Introduction

Following the famous 1992 Mabo decision[1] in which the High Court of Australia determined that the common law could recognise and afford protection to native title rights over land, the scene was set for a future case in which Aboriginal claimants would assert that they had native title rights in offshore areas. This duly occurred with the Yarmirr litigation which culminated in a complex High Court decision in 2001. A majority found that offshore native title rights can exist and be recognised by the common law but they cannot include any exclusive rights to control access to claim areas. Exclusive rights were denied because they would be fundamentally inconsistent with the public right to fish and navigate, as well as Australia's obligation under international law to allow foreign vessels innocent passage through the territorial sea.[2] The decision in Yarmirr was applied by the High Court one year later. In Ward the court went one step further and determined that the public rights of fishing and navigation had operated to extinguish any claimed exclusive offshore native title rights.[3] Further, the court determined that the public right to fish is an "other interest" within the meaning of section 253 of the Native Title Act 1993 (Cth) and as such it is proper to recognise the right within native title determinations.

These decisions have been profoundly felt within coastal Aboriginal groups, particularly in light of the limited recognition and protection of Aboriginal fishing practices within the various state and territory fisheries laws. The decisions have shaped subsequent offshore native title claims by limiting claimants to assert only the existence of non-exclusive rights, notwithstanding that exclusive rights might exist as a matter of fact within traditional laws.

1 Mabo v Queensland (No 2) (1992) 175 CLR 1.
2 Commonwealth v Yarmirr (2001) 208 CLR 1, 68. See also Western Australia v Ward (2002) 213 CLR 1, 187.
3 Western Australia v Ward (2002) 213 CLR 1, 187 (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Upon this view it would seem that the extinguishment occurred at the time Britain claimed sovereignty over the relevant waters. The significance of this decision is that a native title right, once extinguished, cannot be revived.

This paper considers the content of the public right to fish and its impact on non-exclusive offshore native title rights. It also considers a new area of legal uncertainty arising from the Gumana litigation:[4] the implications of the existence of the public right to fish in areas subject to land grants under Aboriginal lands rights legislation (where these areas encompass rivers or the foreshore). The current state of the law is unclear and unsatisfactory from both legal and practical perspectives. It is contended that legislative action may be needed to better delineate rights vis-a-vis indigenous fishers and recreational anglers.

4 Gumana v Northern Territory (2005) 141 FCR 457; [2005] FCA 50, Gawirrin Gumana v Northern Territory (No 2) [2005] FCA 1425, Gumana v Northern Territory of Australia [2007] FCAFC 23.

The public right to fish

Origin and nature

The public right to fish is an enduring ancient feature of the common law. The accepted legal view is that it has been part of the common law of England since 1215 when the Magna Carta restricted the use of royal prerogative powers. One way it did this was to limit the power of the King to grant to subjects private fisheries over tidal waters.[5] However, the public right to fish in tidal waters and the high seas likely predates the Magna Carta in the sense of it having been an accepted customary practice of the King's subjects to fish since time immemorial. The obscure origins of the right lie in its ancient practice. Over time the Crown considered itself bound to protect the rights of subjects. Therefore, the emergence of the protection afforded to the public over their fishing practices subsequently founded the legal right.[6]

The public right to fish is substantially different in character from fishing rights created under statute. Whereas fisheries legislation typically regulates the activity of fishing (for example, the method and time of fishing, who may fish, and the size, quantity and species that may be taken), the public right scarcely touches on these issues. It does not, for example, include any measures to ensure stock sustainability. Rather, the right, being based on custom, is simply that persons may, unless otherwise regulated, fish where and when they like using any ordinary fishing method. Further, if persons catch free-swimming wild fish, those fish enter into their legal possession. The right relates to taking and owning free-swimming fish because these fish do not belong to anyone.[7] They are known as *ferae naturae*. A distinction is

5 The Magna Carta does not reveal on its face such a strict prohibition. Nevertheless, since Malcolmson v O'Dea (1863) 11 ER 1155, judicial authority has proceded on the assumption that it did. See Attorney-General for British Columbia v Attorney-General for Canada [1914] AC 153, 170 and Walrut, B. 2003. The public rights to use the sea and rivers. *Environmental and Planning Law Journal*, 20: 423-444, 429-430.
6 Attorney-General for British Columbia v Attorney-General for Canada [1914] AC 153, 169.
7 Even though some legislation, such as section 10(1) Fisheries Act 1995 (Vic), vests the Crown with property in fish, these Crown property rights are less than full beneficial ownership: Yanner v Eaton (1999) 201 CLR 351.

sometimes drawn between free-swimming fish and species that are attached to the seabed. Sedentary species such as mussels generally do not fall within the public right because in law they are seen as part of the seabed.[8] The seabed is considered to be a natural extension of land territory to which proprietary rights attach. In the case of lands permanently submerged by salt water, proprietary rights are vested in the Crown.[9] Ownership of the foreshore and riverbeds may be vested in private individuals or the Crown. As discussed below, there also exists a large variety of rights incidental to the public right to fish. It is these ancillary rights that have prompted the most litigation.[10]

A limit imposed on the public right to fish is that persons exercising the right must have regard to others exercising the right, as well as persons exercising other public rights. The main other public right which could lead to dispute is the public right of navigation. Although in most situations navigation and fishing rights can be conducted concurrently, if there is conflict, the right of navigation prevails.[11]

Landward limit

The extent to which the public right to fish can extend landwards is important because in addition to it determining the upper limit of where the right may be exercised, it also determines the lowest point at which private land owners can fish exclusively in waters flowing on their land. For example, Aboriginal people are likely to have exclusive fishing rights in rivers above the landward limit of the public right if the land under the river is within a native title determination or a legislative land grant.
The public right to fish is (almost) settled to extend landward as far in rivers as there is tidal influence.[12] This is because the Magna Carta limited the prerogative power of the Crown only with respect to the granting of private fishery rights over waters that were "arms of the sea". This is necessarily restricted to tidal waters (and arguably confined further to tidal waters that are also navigable). Above the limit of tidal influence the rights of the water follow the owner of the solum. The upper limit is the highest point at which the river is affected by the ebb and flow of normal (rather than exceptional)

8 However, in a 1898 case in New South Wales, oysters on private land were considered to be ferae naturae: Ex parte Emerson and Ors (1898) 15 WN (NSW) 101, 102 (O'Connor J). See also Foster v Warblington Urban Council [1906] 1 KB 648, 681 (Fletcher Moulton LJ).
9 Coastal Waters (State Title) Act 1980 (Cth).
10
11 Walters, M.D. 1998. Aboriginal rights, Magna Carta and exclusive rights to fisheries in the waters of Upper Canada. Queen's Law Journal. 23: 301-368, 314.
12 See for eg Hargreaves v Diddams (1875) LR 10 QB 582, Pearce v Scotcher (1882) 9 QBD 162, and Canada v Robertson (1882) 6 SCR 52.

tides.[13] The debate about whether the public right to fish is restricted to tidal portions of navigable rivers focuses on the upper limit of the public right of navigation which is necessarily restricted to navigable tidal waters. However, it seems in Australia that the upper limit of the public right to fish does not coincide with this boundary. In Gumana (No 2), Mansfield J accepted that the position was that the public right to fish existed in tidal waters "whether those waters are navigable or not".[14]

The public right to fish may exist further upstream than the reach of tidal influence if the Crown is the owner of the submerged land. This is by virtue of the Crown's historical acquiescence in allowing unlicensed persons access to these waters for the purpose of fishing (and inferred by the existence of inland fishing regulations).[15] This is the view of the New South Wales Parliament in its note to section 3 in the Fisheries Management Act 1994 (NSW):

> "The public has no common law right to fish in non-tidal waters – the right to fish in those waters belongs to the owner of the soil under those waters. However, the public may fish in non-tidal waters if the soil under those waters is Crown land."

This assumption is also contained in section 38 which extends the public right to fish in New South Wales up rivers and creeks where the bed of those rivers and creeks are privately owned. Although the section is silent with respect to beds above tidal influence that are owned by the Crown, it was assumed by Parliament that the public right continued in waters above them.[16] Walrut goes further and argues that in cases where the Crown has encouraged fisheries exploitation in non-tidal rivers where the Crown owns the riverbed (such as the Murray River), then it is bound to protect persons exercising the public right to fish.[17] Even though it can be assumed the public right exists in non-tidal rivers by Crown acquiescence, because non-tidal waters are not arms of the sea they are not subject to the qualification on sovereignty established in the Magna Carta. This means that the right can be overridden in these waters by land grants pursuant to the prerogative (and not just by legislation).

13 Reece v Miller (1882) 2 QBD 626. See Moore, S.A. and Moore, H.S. 1903. The history and law of fisheries. (Stevens and Haynes, London), 97-107.
14 Gawirrin Gumana v Northern Territory (No 2) [2005] FCA 1425, [31]. Note the confusion in Brennan J's judgment in Harper v Minister of Sea Fisheries (1989) 168 CLR 314, 329-330. On some occasions he refers to the public right to fish in tidal waters, and on other occasions he refers to tidal navigable rivers.
15 See South Australian River Fishery Association and Warrick v South Australia [2003] SASC 38, [61].
16 Parliament of New South Wales, Legislative Assembly, 1994, Fisheries Management Act 1994 second reading speech, 5 May, at 2088 per Member for Maitland, Mr Peter Blackmore.
17 Walrut, B. 2003. The public rights to use the sea and rivers. *Environmental and Planning Law Journal*, 20: 423-444, 438.

So, in summary, the public right to fish exists to the ordinary reach of tidal waters, and it continues (on a different basis) further up rivers where the Crown owns the submerged land. The situation is different in New South Wales where the right has been extended further inland by section 38 of the Fisheries Management Act 1994 (NSW):

> "Right to fish in certain inland waters
> (1) A person may take fish from waters in a river or creek that are not subject to tidal influence despite the fact that the bed of those waters is not Crown land if, for the purpose of taking those fish, the person is in a boat on those waters or is on the bed of the river or creek."

Guidance for determining how far this right extends is provided by subsection 38(3):

> "In this section, "bed" of a river or creek includes any part of the bed of the river or creek which is alternatively covered and left bare with an increase or decrease in the supply of water (other than during floods)."

Significantly, the exercise of the right is limited to persons either being on a boat or on the bed of a river or creek for the purpose of fishing. This limits the right to the core right of fishing and precludes the operation of most of the incidental rights (discussed below). Even though the section defines "bed" in a non-exhaustive manner by the use of the word "includes", by construing legislation in accordance with the purpose behind it, it would seem the correct interpretation is that the upper limit of the right is where a bed can properly be described as being "alternatively covered and left bare with an increase or decrease in the supply of water (other than during floods)". This nevertheless means that the right is extended vast distances up the many rivers and creeks in New South Wales, and through vast areas of privately owned farmland. This places a potentially significant burden on freehold landowners in the enjoyment of their land where persons seek to exercise the public right in waters flowing on their land. This extends to lands acquired by the New South Wales Aboriginal Land Council under the Aboriginal Land Rights Act 1983 (NSW).[18]

18 Note that in New South Wales section 172(5) Crown Lands Act 1989 (NSW) provides that ownership of land bounded by a river does not entitle the owner "to any rights of access over, or to the use of, any part of the bed". No similar provision exists in any other Australian jurisdiction. In this case, it would seem that land owners fishing in flowing waters on their land would be doing so not pursuant to their rights as landowners, but pursuant to the public right to fish.

Seaward limit

The extension seaward of the public right to fish is less clear. There is an argument that the right extends only to the low water mark because the legal recognition of the right is sourced in the Magna Carta which limited the exercise of the royal prerogative powers to areas in which the Crown claimed sovereignty. In 1876 in R v Keyn the British Court of Crown Cases Reserved apparently determined that the limit of British sovereign territory was the low water mark.[19] It appeared to follow that the low water mark also provided the geographical limit of the common law. Therefore, the public right to fish would cease at the low water mark because the right is an incident of the common law. However, the majority of the High Court in Yarmirr did not confine the exercise of the common law in this way.[20] As a consequence of the ability of the common law to recognise the existence of rights outside the territorial limits of the states, the public right to fish in Australia might extend far beyond the low water mark.

Incidental rights

A large collection of ancillary rights are included with the public right to fish. These pertain to acts incidental to the exercise of the public right to fish. It is impossible to catalogue the full range and scope of these incidental rights. In the first place, because they exist at common law, they are only identified when relevant disputes are resolved by court determinations. Court decisions only arise when the exercise of a purported right is challenged by an affected party (in most cases by an aggrieved owner of land adjacent to the water). For example, the question of whether digging for bait on the foreshore was a right ancillary to the public right to fish first arose for determination in litigation in 1993.[21] Such determinations are necessarily confined to their facts. Further, the use of modern fishing practices, both recreational and commercial, can differ significantly from the practices in question during the old cases. This is relevant because the right is based on custom, and the customary activities of persons exercising the right may change over time. Secondly, there has been a dearth of litigation in the last century on the public right. Most of the litigation occurred during the 1800s, or earlier, long before the development of detailed fisheries legislation which comprehensively regulates fishing. This means that because most of the case law on the public

19 R v Keyn (1876) 2 Ex D 63.

20 Commonwealth v Yarmirr (2001) 208 CLR 1, 45 (Gleeson CJ, Gaudron, Gummow and Hayne JJ): "The territorial sea is not and never has been a lawless province" (McHugh J and Callinan J contra). Separately, it could be that the right continues to a maximum of 12 nautical miles by virtue of the extension of state sovereignty under the Law of the Sea Convention. This appears to be the view of Black CJ and Gummow J in Minister for Primary Industry and Energy v Davey (1993) 47 FCR 151, 160. However, in light of the majority High Court view expressed in Yarmirr, this argument is superfluous. The public right extends beyond the low water mark by virtue of it being sustained on the ground of jurisdictional competence rather than Crown property rights.

21 Anderson v Alnwick DC [1993] 3 All ER 613.

right to fish is very old and occurred in England and other common law jurisdictions, the cases do not have binding force in Australia. However, they may be determined at some point to have been received into Australian law. Nevertheless, the cases from other common law jurisdictions provide a guide as to the legal position in Australia. A review of the cases leads to the following non-exhaustive list of rights incidental to the public right to fish which are likely to exist at common law in Australia. The determination of whether a particular activity is a lawful public right is a question of fact to be determined by asking whether the activity is ancillary (or otherwise necessarily ancillary), to the public right to fish.[22]

Persons exercising the public right to fish may (subject to any legislative restrictions):

- use any ordinary mode of fishing;[23]
- use as many lines, nets hooks and boats as they please;[24]
- take shellfish on the foreshore;[25]
- dig for bait, and take worms, on the foreshore if they are intended to be used for bait for fishing (but not for commercial purposes);[26]
- incidentally use the foreshore (such as drawing and drying nets, and landing boats);[27]
- traverse the edge of private land above the high water mark to gain water access at high tide;
- temporarily affix nets to the solum underlying the intertidal waters (foreshore);[28]
- pass through the waters of the intertidal zone for the purpose of fishing;[29] and
- cross the foreshore in order to exercise the right.[30]

22 See Anderson v Alnwick DC [1993] 3 All ER 613, 621.
23 Attorney-General of Canada v Attorney-General of Quebec [1921] AC 413.
24 See eg Ward v Creswell (1741) 125 ER 1165, 1166 where it was held that where "a man have a right to fish, he may fish with as many boats as he pleases."
25 Bagott v Orr (1801) 126 ER 1391.
26 Commonwealth v Yarmirr (1999) 101 FCR 171, 221 (Beaumont and von Doussa JJ), and Anderson v Alnwick District Council [1993] 3 All ER 613. The right does not extend to taking shells on the seashore: Bagott v Orr (1801) 126 ER 1391, 1394.
27 In Ward v Creswell (1741) 125 ER 1165 the key issue was whether the plaintiff could, in accordance with practice since time immemorial, land his boats on privately owned land. The court considered that this could lawfully occur in situations of necessity. However, no such situation of necessity arose on the facts. As a result, the plaintiff failed in his challenge to the defendant's actions of seizing his boat and equipment.
28 See Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory) (2000) 170 ALR 1 and Director of Fisheries (Northen Territory) v Arnhem Land Aboriginal Land Trust (2001) 109 FCR 488, 514. Cf Attorney-General of Canada v Attorney-General of Quebec [1921] AC 413, 428 where it was stated that the public right to fish does not extend to fixing fishing equipment to the solum of the foreshore because "the solum is not vested in the public, but may be so in either the Crown or private owners".
29 See Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory) (2000) 170 ALR 1 and Director of Fisheries (Northen Territory) v Arnhem Land Aboriginal Land Trust (2001) 109 FCR 488, 514.
30 Anderson v Alnwick DC [1993] 3 All ER 613.

The right may also extend to mooring a boat temporarily on the foreshore if this is incidental to fishing and would not cause damage. However, the exercise of the public right to fish, and rights ancillary to them, are subject to a number of qualifications:

- the exercise of them is subject to any regulations;
- the exercise of the rights must have due regard to the interests of landowners;[31]
- persons cannot appropriate the foreshore for their own purposes;[32]
- boats may not be left above the high water mark for future use nor may nets be fixed to the soil above high water mark; and
- the exercise of the public right to fish must yield to persons exercising the public right of navigation.

The types of ancillary rights are not closed. Further rights may emerge in future cases. Most of the cases will continue to arise where the activities of fishers have been disputed by landowners who own land either to the high water mark or the low water mark. There have been a number of trespass cases where owners of the foreshore have been able to successfully sue others for coming onto this area.[33]

Legislative curtailment of the public right to fish

Little attention has been given to the public right to fish in Australia. The right has received judicial consideration in only a handful of Australian cases. Few, if any, disputes between foreshore owners and persons exercising the right have been litigated, and none have been the subject of appellate court decisions. Principally this is because there have been (land rights legislation aside), few land grants to the low water mark. This reduces the prospect for dispute because landowners cannot assert interference with proprietary rights over the foreshore.

Another reason why the public right has not featured in court cases in Australia is because it has been continually whittled down by fisheries regulations. It is well established that the public right to fish is "is freely amenable to abrogation or regulation by a competent legislature".[34] There have been legislative restrictions on fishing in Australia from the early days of limited colonial self-government. People may now fish pursuant to

31 Walrut, B. 2003. The public rights to use the sea and rivers. *Environmental and Planning Law Journal*, 20: 423-444, 432.
32 Truro Corporation v Rowe [1902] 2 KB 709.
33 For eg, in Mace v Philcox (1864) 15 CNNS 600; 143 ER 920, it was held that the owner of the foreshore could maintain an action in trespass against people traversing their foreshore as they were not doing so in the exercise of the public right to fish or navigate. See also Blundell v Catterall (1821) 106 ER 1190. Similarly, there have been actions in trover for people gathering seaweed.
34 Harper v Minister of Sea Fisheries (1989) 168 CLR 314, 330 per Brennan J.

a statutory fishing right rather than rely on the public right. The view that fisheries legislation severely curtails, if not abrogates, the right is strongest with respect to commercial fishers who cannot fish without a licence or permit. It has been argued that statutory fishing rights have replaced public rights. This reasoning could be extended to recreational anglers who in some Australian jurisdictions also need to be licensed.

The degree to which the public right to fish, or ancillary rights, have been curtailed by regulations is to be ascertained on a case by case basis in each location as a matter of statutory interpretation. This would inevitably produce different results. Abrogation of the public right to fish might, for example, extend only to the taking of particular species or during a specified period. The question of what is left of the public right depends on the particular circumstances in a particular jurisdiction. Notwithstanding various judgments referring to "abrogation" or commentators referring to the public right as having been "removed" or "substituted" by fisheries regulations,[35] it is submitted that it is misleading to say fisheries regulations abrogate the public right, at least in its entirety. This view is based first on the statutory interpretation rule that a right can only be abrogated with clear intention and secondly because of the nature of fishing activities. In most cases aspects of the public right to fish would remain. For example, commercial fishers would rely on the public right when they take fish; this not being a matter spelled out in legislation. With respect to recreational fishing, each jurisdiction provides a number of exemptions from paying the licence fee, such as for children and pensioners. These persons when fishing would be exercising the public right because they do not posses statutory fishing licences. Further, most ancillary rights have not been abrogated (for example, those rights pertaining to the use of land near the water in the act of fishing). Also, some jurisdictions expressly or impliedly confirm the existence of the right (for example, New South Wales, Northern Territory, Tasmania, and New Zealand).[36] It cannot be assumed that the public right has been abrogated if it has been specifically affirmed by Parliament. Nevertheless, the public right in many aspects of fishing has been curtailed, such as by regulations specifying the daily take of certain species. But the regulations do not cover the field. For example, if a jurisdiction has not made regulations with respect to digging for bait on the foreshore, this activity would be undertaken pursuant to the public right. Many aspects of the public right to fish remain, particularly with respect to recreational fishing. Recreational fishing also provides more prospect for disputes with landowners because it generally occurs closer inshore and is often associated with other recreational activities.

35 Fisher, D.E. 2004. Rights of property in water: confusion or clarity. *Environmental and Planning Law Journal*, 21: 200-226, 204-205. Fisher goes so far as to state (at 205) "[A]ll rights in relation to water are now statutory". However, here it is argued that common law rights still exist and would be relied upon in relevant disputes.
36 Fisheries Management Act 1994 (NSW), s 38; Fisheries Act 1988 (NT), s 10(2); Living Marine Resources Management Act 1995 (Tas), s 10(1). The Foreshore and Seabed Act 2004 (NZ) has recognised the public right to fish (s 9) and possibly has expanded it (s 7).

Recent Australian judicial recognition of the public right to fish

The public right to fish in Australia emerged as a minor note in 1975 in New South Wales v Commonwealth in which two of the seven High Court judges recognised the existence of the right in tidal waters.[37] It next emerged in 1989 in the High Court case of Harper v Minister for Sea Fisheries in which Brennan J confirmed the existence of the right but noted that it does not operate to preserve fisheries from overexploitation.

If such a need arises then it is up to Parliament to act:

> "The public right of fishing in tidal waters is not limited by the need to preserve the capacity of a fishery to sustain itself. The management of a fishery to prevent its depletion by the public must be provided for, if at all, by statute."[38]

At this point it would seem that the public right to fish has little legal relevance, except that it still operates to preclude the Crown (but not Parliament) from granting private property rights with respect to land over which tidal waters flow. However, the common law affords protection to public rights. Nevertheless, an unresolved issue is the extent to which courts will protect persons exercising the public right to fish. An interference with a public right might amount to the tort of public nuisance. The tort concerns nuisances that are widespread in their range or indiscriminate in effect. It must first be established that there has been an interference with a public right. Many of the litigated cases have concerned obstructions to public highways or navigable rivers. An action in public nuisance can be instigated by the Attorney-General or a private person. It is far more common for actions to be initiated by private persons but in order to bring an action they, unlike the Attorney-General, must have suffered some special disadvantage which is different from, or greater than, that suffered by the public at large. This could be through personal injury, property damage or economic loss.[39] An action will not lie if the interference is permitted by legislation, such as where the construction of a bridge interferes with the public right of navigation. Fishers may be able to establish public nuisance where an event has interfered with their fishing operations. However, it is difficult to establish the tort in these circumstances.[40] The tort has been successfully invoked by fishers in the United States where there was pollution of water.[41] However, in similar circumstances, fishers were unable to establish the tort in three Canadian cases, despite the courts accepting the proposition that pollution of fishing

37 New South Wales v Commonwealth (1975) 135 CLR 337, 419, 421, 423, 489 (Stephens and Jacobs JJ).
38 Harper v Minister of Sea Fisheries (1989) 168 CLR 314, 330.
39 Benjamin v Storr [1874] 9 LR 400.
40 See Ball v Consolidated Rutile [1991] 1 QR 524, 547 (Ambrose J).
41 See, for eg, Burgess v M/V Tamano 370 F Supp 247 (D Me 1973). Fishers successfully recovered lost profits in negligence in the case of Union Oil Company v Oppen, 501 F 2d 558 (9th Cir. 1974).

waters might be a public nuisance (particularly if it results in fish kills).[42] In each case the action failed because the fishers did not suffer special loss greater than the public.[43]

Following the High Court's declaration in 1992 in Mabo that the common law recognises native title, the scene was set for a reconsideration of the contemporary legal significance of the public right to fish in the inevitable decision to follow as to whether native title rights exist offshore. In 2001 this issue made its way to the High Court in the Yarmirr case. A majority of the High Court found that offshore native title rights can exist (following the Mabo test), but the key asserted claim of exclusive rights (as can occur in land native title) cannot be recognised by the common law because of the "fundamental inconsistency" between them and other existing public rights. As such, the public right to fish was influential in denying the recognition of exclusive offshore native title rights. A separate issue arises with respect to indigenous fishing rights founded not upon native title but as an incident of exclusive property rights granted to Aboriginals under legislative land grants. This is an issue that was considered by the Federal Court in 2005 and the Full Federal Court in 2007 in the Gumana litigation. We will next consider the two issues of (1) the potential for conflict between persons exercising the public right to fish and persons exercising non-exclusive offshore native title rights and (2) the intersection of the public right to fish and exclusive fee simple property rights.

Indigenous fishing rights

Indigenous fishing rights fall into three categories. First, specific fishing rights may be granted to indigenous persons in fisheries legislation. The degree to which traditional Aboriginal fishing practices have been incorporated into legislation differs markedly across Australia. It ranges from simply an exemption from paying the recreational fishing fee in New South Wales to specific approval to hunt otherwise protected species such as dugong and turtles in Queensland. Such rights are paramount to the public right to fish because they are sourced in legislation rather than the common law. The two remaining types of indigenous fishing rights are those that are recognised to exist within native title determinations and those existing specifically or by implication within an area of legislative Aboriginal land grant over which water flows. We consider this with respect to tidal rivers and the foreshore.

42 Hickey v Electric Reduction Company (1970) 21 DLR (3d) 371.
43 Fillion v New Brunswick International Paper Company (1934) 3 DLR 22, 26 (Baxter J), McRae v British Norwegian Whaling Company Ltd (1927-31) Newfoundland LR 274, 282 (Kent J), Hickey v Electric Reduction Company (1970) 21 DLR (3d) 371, 371-372 (Furlong CJ).

Offshore native title

The Yarmirr decision confirmed that native title could extend below the low water mark.[44] At first sight it seems puzzling that it can be recognised below the low water mark[45] because it is a "land" right sourced in the doctrine of tenures.[46] A narrow majority in Yarmirr determined that the common law could recognise native title beyond territorial limits. Further, the Native Title Act 1993 (Cth) is not expressed to apply only within territorial limits, and it would be inconsistent with the purpose of the Act to hold that it does. However, unlike terrestrial native title rights, offshore native title cannot include exclusive rights to control access to claim areas. This means that offshore native title has little content. The most notable feature of offshore native title is that it exempts holders from purchasing licences for non-commercial fishing where these are required by fisheries legislation. Such fishing needs to be conducted within the other limits imposed by general fisheries regulations.[47]

The Federal Court applied Yarmirr in Lardil Peoples v Queensland. The court rejected the argument that exclusive offshore native title could exist subject to the public rights to fish and navigate. This was because the claimed exclusive rights were not qualified in this manner in traditional law.[48] This means that holders of offshore native title cannot exclude anyone, including people not exercising the public rights of fishing and navigation.[49] Although offshore native title can extend to the conduct of traditional ceremonies at culturally significant sites (such as enabling holders to "maintain" places of importance), the exercise of this right cannot be done in a manner that excludes other people from the area, including recreational anglers.[50]

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44 Yarmirr is a complicated decision. Two judges found no offshore extension of native title, others did but by different reasoning. For our purposes, we can take it that a majority of the High Court has confirmed that non-exclusive native title rights can be recognised and protected by the common law so long as the establishment test is satisfied. This test, as enshrined in the Native Title Act 1993 (Cth), is the common law test enunciated in Mabo. Note that Kirby J held in dissent that exclusive offshore native title rights can be recognised by the common law. This was similar to the view taken by Merkel J in his dissenting judgment in Yarmirr v Commonwealth [1999] FCA 1668. Offshore native title can be recognised some distance from the low water mark. For eg in Lardil it was recognised to five nautical miles: Lardil Peoples v Queensland [2004] FCA 298. The non-recognition of exclusive indigenous fishing rights is consistent with Canadian jurisprudence eg R v Sparrow (1990) 70 DLR (4th) 385.

45 See the judgment of Callinan J in Commonwealth v Yarmirr (2001) 208 CLR 1.

46 Selway, B. 2000. The role of policy in the development of native title. *Federal Law Review*, 28: 403-452, 442.

47 See eg s 34C(2)(f) Fisheries Management Act 1994 (NSW) and Mason v Tritton (1993) 70 A Crim R 28.

48 Lardil Peoples v Queensland [2004] FCA 298, [188] – [189].

49 For eg, holders of offshore native title cannot sue for trespass in the intertidal zone. See Lardil Peoples v Queensland [2004] FCA 298, [175], [235] – [240] (Cooper J).

50 Yarmirr v Northern Territory [No 2] (1998) 82 FCR 533, 589 Lardil Peoples v State of Queensland [2004] FCA 298, [185], Gumana v Northern Territory (2005) 141 FCR 457, 522. A recreational angler who has been a long user of an offshore location for fishing could assert unlawful interference with the public right in situations where a native title holder (or anyone) prevents them from fishing in the area.

The litigation to date confirms that the exercise of offshore native title rights must yield to other rights, including the public right to fish.[51] This issue may arise in litigation if, for example, recreational anglers stray beyond the limits of the public right by utilising land above high water mark (in the absence of necessity) where native title rights exist. It is a matter of ongoing grievance for Aboriginals that activities that impinge on traditional practices can be conducted in areas within native title determinations. For example, non-indigenous recreational take may impact culturally significant species or places. The issue is even more complex with respect to the rights that inhere in holders of legislative Aboriginal land grants where these extend to the low water mark.

Legislative land grants to the low water mark

An area of considerable uncertainty is how the public right to fish intersects with rights that exist pursuant to legislative land grants. Land grants can extend to the low water mark because this is the extent of the Crown's territory. This has been done on many occasions under land rights legislation. Approximately 80 per cent of the Northern Territory coastline is subject to legislative land grants.[52] The intertidal zone in northern Australia covers enormous areas because of large tidal movements. Much of this area is popular for the recreational fishing sector, as well as commercial fishing, and there is the potential for dispute between persons exercising the public right to fish and holders of Aboriginal land grants. A further complication is that Northern Territory legislation also enables Aboriginals in coastal areas to engage in traditional activities in coastal waters with minimal interference. Areas of the sea within two kilometres of Aboriginal owned land may be 'closed' under the Aboriginal Land Act 1978 (NT).[53]

The issue was central to the decision in the 2005 Federal Court case of Gumana. In that case, the applicants, holders of land grants under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) in part of Blue Mud Bay in Arnhem Land, sought to establish that they could exclude fishers and others from the intertidal zone and that the Northern Territory lacks legislative and executive power to issue fishing licences within the intertidal zone and the adjacent sea within two kilometres of the low water mark.

Justice Selway considered that the traditional owners had the power to exclude all others from the area within the low water mark (including the waters that flow over the intertidal zone) pursuant to their rights as

51 Selway argues that this is a decision based on policy rather than binding authority: Selway, B. 2000. The role of policy in the development of native title. Federal Law Review, 28: 403-452, 444.
52 Palmer, L. 2004. Fishing Lifestyles: 'Territorians', Traditional Owners and the Management of Recreational Fishing in Kakadu National Park' 42 *Australian Geographical Studies* 60-76, 61.
53 Aboriginal Land Act 1980 (NT), s 12.

landowners in fee simple. In this situation, any of the provisions of Northern Territory fisheries legislation that are inconsistent with the Commonwealth legislation (under which the land grant was made) would have no operation within the intertidal zone. However, Selway J was unable to hold that this was the case because the matter was not free from judicial authority. He considered himself bound to follow the decision of the Full Federal Court in Yarmirr[54] and hold that rights of fee simple in the foreshore "is qualified in that the rights of the applicants do not include rights to exclude those exercising public rights to fish or navigate".[55] The Yarmirr decision appeared to be based on the assumption that the land rights legislation is applicable only to "land", leaving unaffected the common law public rights to fish and navigate in tidal waters.

A number of difficulties arise if the determination that land ownership rights to the low water mark must yield to public rights is based on the assumption that land grants strictly pertain to land and have no application to overlying waters. In this situation, the holders of the land grant would have no right to stop anyone on the water in the foreshore, no matter what they were doing there (but it would be a trespass to place anything on the submerged land, such as an anchor). However, this qualification of proprietary rights would need to continue into inland waters because there is no legal basis to distinguish river water and tidal water. This poses great conceptual difficulties with respect to airspace. Airspace to a reasonable height falls within the exclusive use of landowners. Does this mean owners of the foreshore can control access over the land and airspace, but not the water column between them? Are foreshore owners unable to control airspace above incoming tidal waters? Can foreshore owners exclude everyone from the foreshore at low tide, but people may enter while on the water during an incoming tide? Can foreshore owners build a jetty over the foreshore and prevent recreational fishers from using it?[56] Justifying the determination that land grants to the low water mark create no rights in the water column on the basis that the grants only pertain to "land" would create interminable confusion. It involves complex vertical stratification of landowners' rights and a possible ever-moving boundary with incoming and outgoing tides.

Another option for explaining the decision is that ownership of land to the low water mark includes the right to exclude others from the foreshore except

54 The issue was not discussed by the High Court in Yarmirr. Also cf Mansfield J in Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory) (2000) 170 ALR 1 who considered that the land grant made pursuant to the land rights legislation did not abolish the public right to fish in waters in the intertidal zone (although it did in waters above the high water mark: at 20). Likewise, Sackville J in Director of Fisheries (Northern Territory) v Arnhemland Aboriginal Land Trust [2001] FCA 98, [156] considered that the grant of fee simple to the low water mark did not create exclusive rights to fish in those waters and thus the rights of the Arnhem Land Trust in those waters are qualified by the public right to fish.

55 Gumana v Northern Territory (2005) 141 FCR 457, 486. This was confirmed in Gawirrin Gumana v Northern Territory (No 2) [2005] FCA 1425.

56 See Georgeski v Owners Corporation SP49833 (2004) 62 NSWLR 534.

persons exercising the right to fish or navigate, or ancillary rights. However, this option is also problematic: foreshore owners could exclude other persons (such as bathers) from these waters where their activities are not pursuant to a common law right. Yet the legal basis for this option is suspect. It involves a legislative proprietary right yielding to a common law right which only restricts the use of prerogative (not legislative) powers. However, this option better reflects persons' legal rights in the sense that people with no legal right to be in the foreshore, such as bathers, can be excluded by owners of the foreshore. This option would mean that, for example, proprietors of the solum could sue passers by who take mussels. This would bring the public right to the fore and would require elucidation of what activities properly fall within the right, and what is entailed by having "due regard" to the interests of landowners. People straying beyond the right would be liable to actions in trespass, and possibly nuisance. It also means landowners cannot use the foreshore in any manner that would impede the exercise of the public right to fish.[57] Both options for explaining the decision are legally suspect and present practical difficulties.

Justice Selway's decision, that rights in the foreshore held under the legislative land grant were qualified by the public rights to fish and navigate, produced an unhappy result for the Aboriginal claimants and left great confusion surrounding the operation of the public right to fish. The decision was appealed to the Full Federal Court.[58] In 2007, it was determined that the Fisheries Act 1988 (NT) has no application in relation to areas to which the land grant applies and therefore the Northern Territory parliament lacks the power to grant licenses or permits to allow persons to enter that area to take fish.[59] The Full Court also expressed its view that the legislative land grant to the low water mark enabled holders of the grant to exclude those seeking to exercise a public right to fish or to navigate.[60] It was the court's view that the legislative land grant operated to abrogate the public rights of fishing and navigation.[61] The intent of the land grant legislation and the terms of the grant were decisive. The court also stated that "fishing in the tidal zone from a boat would be no less a trespass on the land in question than would fishing from the surface of the land in that zone".[62] This decision has significant ramifications for users of the intertidal zone. A final appeal to the High Court is likely.

57 See Attorney-General of Canada v Attorney-General of Quebec [1921] AC 413, 431.
58 Gumana v Northern Territory of Australia [2007] FCAFC 23.
59 Gumana v Northern Territory of Australia [2007] FCAFC 23, [105] (French, Finn, and Sundberg JJ).
60 Gumana v Northern Territory of Australia [2007] FCAFC 23, [90] (French, Finn, and Sundberg JJ).
61 Gumana v Northern Territory of Australia [2007] FCAFC 23, [100] (French, Finn, and Sundberg JJ).
62 Gumana v Northern Territory of Australia [2007] FCAFC 23, [103] (French, Finn, and Sundberg JJ).

Conclusion

There is a lack of clarity regarding the rights of holders of land grants to the low water mark. In 2005, a single judge of the Federal Court ruled that their rights are subject to the public right to fish. However, in 2007, the three judges of the Full Federal Court who heard the appeal of the 2005 decision stated that they were

> "satisfied that a grant of an estate in fee simple to the low water mark under and in furtherance of the purposes of the Land Rights Act as revealed in its text and context conferred a right to exclude from the inter-tidal zone including a right to exclude those seeking to exercise a public right to fish or to navigate."[63]

A final, authoritative determination is yet to be made, and can only be made by the High Court. In 2002, the High Court considered the question of whether holders of fee simple have the right to control access to the superjacent water but left the question unresolved.[64] Justice Selway's reasoning (but not his final decision) in Gumana (which was supported on appeal by the Full Federal Court), that holder of land grants to the low water mark have the right to exclude others, is compelling from a legal perspective, but it is unlikely to be welcomed by recreational and commercial inshore fishers. Each of the three options available to the highest appellate court about the extent of legislative land rights to the low water mark (1. exclusive; 2. exclusive subject to common law public rights; 3. exclusive but inapplicable to the water column) have significant ramifications for users of the intertidal zone. The court will be faced essentially with a policy choice if it decides to read down property rights. Australian Parliaments have abdicated to the courts the responsibility to elucidate native title rights,[65] and this is also the case with respect to rights under legislative land grants. The inevitable

63 Gumana v Northern Territory of Australia [2007] FCAFC 23, [90] (French, Finn, and Sundberg JJ).
64 Risk v Northern Territory (2002) 210 CLR 392, 405 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).
65 Selway, B. 2000. The role of policy in the development of native title. *Federal Law Review*, 28: 403-452, 452.

tension that will arise from the final determination in Gumana is likely to demand a legislative response. Should the High Court affirm Selway J's decision, consideration should be given to legislatively preclude recreational and commercial take from within some areas of legislative land grants in a manner similar to marine protected areas (for example, with respect to species or places that are especially significant for indigenous communities). However, should the High Court adopt Selway J's preferred view, there will be strong calls for legislation that eliminates the prospect of all recreational and commercial fishers being excluded from the vast areas of the intertidal zone that are within legislative land grants.