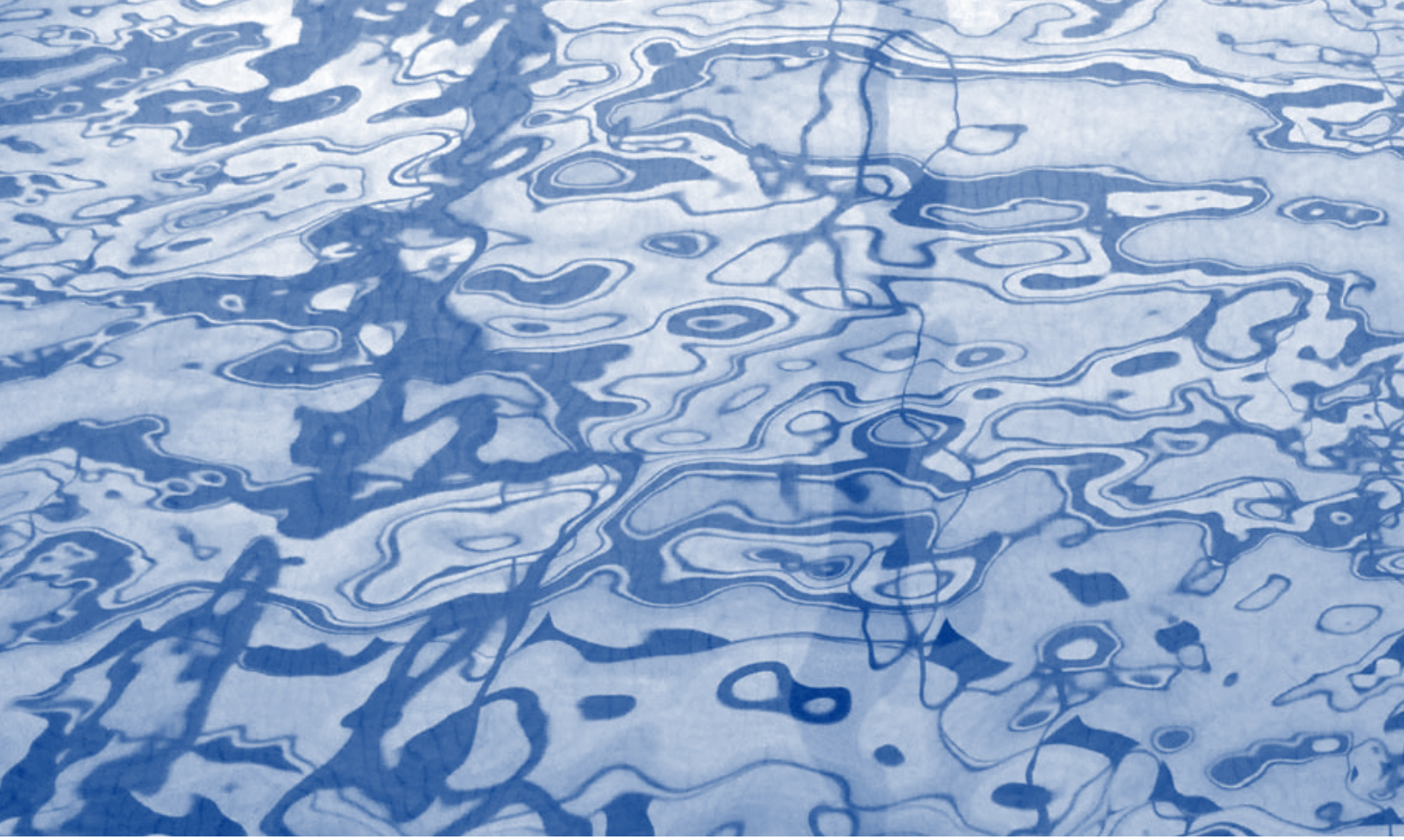
Native title rights to fish

Negotiating a framework for the exercise of native title rights to fish



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Negotiating a framework for the exercise of native title rights to fish

Virginia Leek, Native Title Section, Attorney Generals Department of South Australia

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Abstract

This paper outlines the way that the law about native title (with particular reference to native title rights to fish) operates within the broader context of fisheries management. It argues that the operation of the Native Title Act 1993(Commonwealth) on native title rights prior to a determination of native title leaves the exercise of native title rights to fish at large. It also argues that the situation does not materially alter if a favourable determination of native title with nothing more is made. It concludes that this situation is unsatisfactory because it works a disadvantage to both claimants, users of other sectors and the managers of the resource. The paper describes the South Australian approach to dealing with the uncertainty surrounding the exercise of native title rights to fish and the inter-face with other fishing sectors.

In 2000 the South Australian government endorsed the Statewide Indigenous Land Use Agreement (ILUA) process in an attempt to resolve native title claims by negotiation rather than litigation. As part of this process a specific focus group of stakeholders in the fishing sector was established to develop a template ILUA specific to fishing and aquaculture. Out of this negotiation process evolved an ILUA tied to a management plan. The management plan is to be administered under the Fisheries Act 1985 (SA) or the proposed Fisheries Management Bill but the parameters are set in the ILUA.

A SET OF PRACTICAL WORKING DOCUMENTS WHICH DISPEL THE UNCERTAINTY SURROUNDING THE EXERCISE OF NATIVE TITLE RIGHTS TO FISH

South Australia's statewide ILUA process has allowed the government to be responsive to the need to create a traditional fishing sector and to do this by negotiation rather than prescription. It has had the effect of managing native title fishing rights, which until now have been at large and assisting the resolution of native title claims by negotiation.

What is native title?

In 1992 the High Court in its landmark judgement Mabo v The State of Queensland (nr 2)[1] (Mabo) held that the law of Australia recognises, where proved, the native title rights and interests of Aboriginal Australians. In order to obtain legal recognition of native title Aboriginal groups[2] have instigated claims through the courts seeking determinations about whether native title exists or not in their particular claimed area. To do this they must establish by evidence that the rights and interests claimed are possessed under traditional laws acknowledged and traditional customs observed and that by those laws and customs they have a connection with land or waters claimed. These rights and interests must be recognised by the common law of Australia.[3]

The Native Title Act 1993 (Commonwealth) as amended (the NTA) currently regulates native title. Among other things it deals with the way that native title rights and interests interact with other laws that pertain to land and waters. It governs the way applications for native title are to be determined by the courts; establishes what type of acts done in the past may have extinguished native title and how the two systems work together both before and after a determination is made.

Where claims are made over waters (which includes the seabed and the subsoil beneath water)[4] the courts have held that as a matter of law native title rights and interests can be recognised in the territorial sea (Commonwealth waters) and waters under state control[5], but that these rights cannot be exclusive rights and will yield to the public rights of navigation and fishing and the rights of innocent passage.[6] However each determination made by a court

1 (1992) 175 CLR 1
2 native title claim groups
3 section 223(1) Native Title Act 1993 (Commonwealth) as amended
4 NTA section 253
5 Gawirrin Gumana v Northern Territory of Australia (Nr1) [2005] FCA 50; Ibid (Nr2) [2005]FCA 1425; Daniel v State of Western Australia [2005] FCA 536; Sampi v State of Western Australia [2005] FCA 777
6 Commonwealth v Yarmirr (2001) 208 CLR 1 at 93

will be made on its own facts and will depend on the evidence presented. When courts make determinations about whether a native title right is made out they will do so by describing the area in which the right can be exercised but generally give very little guidance about the content of the right beyond whether it is an exclusive or non-exclusive right. For example in the case of Gawirrin Gumana v Northern Territory of Australia[7] the court determined that there was "The right to hunt, fish and gather and use the resources of the inter-tidal and outer water zones." The court in that case did however make it clear that the term "use" did not imply any commercial content to the right.

In South Australia only one native title claim has been concluded through the court process.[8] It was eventually successful but took 11 years to resolve and is estimated to have cost approximately $15 million. One of the casualties of the process was the relationship between the parties, who after all must co-exist in order to exercise their respective rights and interests over the land in question once the determination of native title has been made.

South Australia has 20 unresolved native claims of which seven involve claims over the sea and two involve the River Murray. Other claims have asserted more peripheral interests in waters of inland lakes and waterways. If all these claims proceed down the litigation path resolution of them is many years away.

7 [2005] FCA 1425

8 Fuller v Anor v De Rose and Ors [2006] HCATrans 49 (High Court of Australia) De Rose v State of South Australia (nr 1) [2003]FCAFC 286 and De Rose v State of South Australia (nr 2) [2005] FCAFC 110 (Full Court of Federal Court of Australia).

What happens to native title rights before and after a determination is made?

Until a determination is made about native title one way or another by a court the NTA applies and operates on the basis that native title exists except where it has been extinguished by a valid past grant. An example of such a grant would be freehold title. If there is no extinguishing tenure then the NTA puts limitations on what can be done by other parties to a native title claim on land and waters affected by native title both before and after a determination.[9] As well, section 211 of the NTA specifically preserves and permits the exercise of native title rights that involve hunting; fishing; gathering or a cultural or spiritual activity where those activities are regulated by the general law. Section 211 also applies both before and after a determination. The protection afforded by section 211 to the exercise of these limited native title rights can only occur where:

- there is an existing licensing regime (eg under fisheries legislation) which regulates the take of certain species but does not contain a blanket prohibition on the taking of the particular species in question;
- native title has not otherwise been extinguished in the area in which the activity takes place; and
- the rights exercised concern activities directed to the native titleholders' personal, domestic or non-commercial, communal needs.

By its nature the application of section 211 will usually only fall for consideration in the context of a prosecution.

In the case of Yanner v Eaton[10] the High Court held that a native title claimant could exercise his native title rights to take crocodile and that in effect the state licensing regime had been suspended by section 211 NTA. The court also accepted the finding that the crocodile was taken for the

9 In particular section 24 HA allows the government to do future acts that deal with the management aquatic species in water.
10 (1999) 201CLR 351

purpose of satisfying the claimants' personal, domestic or communal non-commercial needs.

The South Australian experience has been that section 211 of the NTA has been raised as a defence in relation to prosecutions under the Fisheries Act 1982 (SA). Currently there are three fisheries prosecutions pending where it has been intimated that the section 211defence may be raised. Pleading this defence in every case where Aboriginal people assert native title rights to fish to satisfy communal needs in the face of alleged breaches of the fisheries legislation produces a highly unsatisfactory situation for all concerned.

It gives rise to:

- great uncertainty for native title holders when exercising their rights and knowing they could be subject to prosecution until cleared by the often humiliating court process;

- general uncertainty for all users of the fishing sector because the exercise of all native title fishing rights, pending determination, may only be decided by the negative, costly and cumbersome means of prosecution;

- recourse to an inappropriate court (i.e. Magistrates Courts) which are not equipped with specialist knowledge of native title. This will ultimately force matters into appeal courts thus protracting the process;

- the potential to divide Aboriginal communities whose members may not want to involve themselves in criminal prosecutions as witnesses for the defence on native title matters;

- difficulties for fisheries officers who may receive little guidance about who the native title holders are and what the native title rights are except in the limited factual situation of a previous prosecution; and

- ad hoc management of the resource because as the section 211 defence permits fishing for inter-alia "communal needs" difficulties will emerge about determining what communal needs are and how this type of fishing is impacting on the resource when the only information is coming from prosecutions

What to do about native title and aboriginal traditional fishing

The combined effect of a number of unresolved native title claims over waters in SA, which may take many years to clear through the courts, and the unsatisfactory nature of the holding pattern in the NTA for the exercise of native title fishing rights has led parties to native title claims in South Australia to devise a new approach where fishing and aquaculture is concerned.

The approach taken has been to create a separate fishing sector utilising an ILUA tied to a management plan in each claimed area. The management plan is administered under the Fisheries Act 1982 (SA) or the proposed Fisheries Management Bill but its parameters are set in the ILUA .

ILUA's are agreements, authorised by the NTA, that can be struck between the parties to a native title claim or some of them about the whole or part of the claim area or specific sectoral issues within a claim. These agreements can modify the application of the NTA especially in the way that it deals with land and waters pending a determination and can deal with issues such as the nature and extent of native title rights and their exercise.

The parties to claims over waters in South Australia, through negotiation between peak body representatives (and with the benefit of on-ground negotiations with Narungga Nation), have devised the template Fishing ILUA linked to a management plan to provide (in many cases and under certain conditions) for the withdrawal of native title claims over waters.

It is hoped that the claimants will have the confidence to enter into these agreements as they provide certainty of access to fisheries in order to exercise agreed native title rights.

In addition ILUA's will contain agreed financial and other assistance to ensure claimants access to the commercial sector. This accommodates the agreed principle that native title rights to fish do not have a commercial

character while at the same time allowing the government to pursue social and economic development objectives. These objectives are separate to fisheries management issues and are therefore dealt with within the existing fisheries management framework for commercial fishing.[11]

Such a scheme also benefits the resource by ensuring responsible management of a new fishing sector that has emerged from the recognition in law of native title rights to fish.

11 Note: The template accommodates the NIFTWIG definition of aboriginal traditional fishing rights to ensure consistency of approach across Australia .

The scheme in the template

The template creates a system for recognising native title rights as Aboriginal traditional fishing rights. These are codified and then can only be exercised in accordance with a management plan. It provides that the operation of section 211 of the NTA is suspended in the ILUA area for the term of the ILUA. The ILUA codifies Aboriginal Traditional Fishing Rights by among other things:

- identifying species that can be fished;
- specifying the methods and times in which certain types of fishing can occur;
- defining community catch; and
- identifying areas of special significance for the claim group in which other fishing activities may need to be modified.

These benchmark rights can only be exercised in accordance with the management plan. The management plan is the province of the fisheries authority in South Australia, PIRSA, under the Fisheries Act 1982(SA) but the ILUA directs that it is worked out in collaboration with the claim group and representatives from the South Australian Fishing Industry Council and the Seafood Council. The plan must also comply with the standards set for it in the ILUA. These relate, among other things, to monitoring and compliance, identification of claimants; the method and timing for review of the plan and the period of the plan and subsequent plans.

The ILUA is not for a fixed term and so continues indefinitely. The parties may however terminate it in certain circumstances including where the management plan has become unworkable. Even where this occurs the state may elect not to terminate the plan but to suspend its operation for a fixed period in order for the claim group to work with the other parties to resolve any problems.

Conclusion

The template fishing ILUA was devised with the benefit of on the ground negotiations with the Narungga Nation. All of its provisions were fully negotiated between the parties and all parties have benefited from the frank exchange of views and information, which has led to an improved understanding of how Aboriginal traditional fishing can find its own niche.

Should parties to a native title claim adopt the scheme under the template then litigation will be avoided and native title rights can be fully exercised without years of delay and the uncertainty that accompanies a system that is only regulated by prosecution.

The creation of a separate sector for Aboriginal traditional fishing that is properly managed is of benefit to the resource and all other sectors as previously these rights were at large and unmanageable. It ensures that Aboriginal people will be fully consulted with and participate in the management of their own fishing sector.

A determination of native title on its own would have done little to help any of the parties know what the content of the rights and interests were and how they could be exercised. Ultimately native title rights to fishing that had been the subject of a determination would still run the gauntlet of prosecution and as the ILUA itself will survive any determination of native title (unless a determination is made in favour of another Aboriginal group) the arrangements contained in the ILUA offer secure and clear guidance about how court determined rights are to be exercised.

South Australia's statewide ILUA process has allowed the government to be responsive to the need to create an Aboriginal traditional fishing sector and to do this by negotiation rather than prescription. It has had the effect of managing native title fishing rights, which until now have been at large and at the same time assist with the resolution of native title claims by negotiation.