IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B58 OF 2012**

On appeal from
the Full Court of the Federal Court of Australia

BETWEEN: **LEO AKIBA ON BEHALF OF THE TORRES STRAIT REGIONAL SEAS CLAIM GROUP**
Appellant

AND: **COMMONWEALTH OF AUSTRALIA**
First Respondent

STATE OF QUEENSLAND
Second Respondent

NEIL WADE
Third Respondent

MARKIM HOLDINGS T/A BARRIER REEF LIVE CRAY
Fourth Respondent

ROBERT JOHN STEFAN STANDEN
Fifth Respondent

BARRY WILSON
Sixth Respondent

MARK WILLIS
Seventh Respondent

TASMANIAN SEAFOODS PTY LTD
Eighth Respondent

KAREN SKUDDER
Ninth Respondent

BRUCE ROSE
Tenth Respondent

Filed on behalf of the First Respondent by:

Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place
Sydney NSW 2000
DX444 Sydney

Date of this document: 3 December2012

Contact: Gordon Kennedy

File ref: 12069924
Telephone: 02 9581 7459
Facsimile: 02 9581 7734
E-mail: gordon.kennedy@ags.gov.au

QUEENSLAND ROCK LOBSTER ASSOCIATION

Eleventh Respondent

THEOPHANIS PETROU

Twelfth Respondent

ELFREDA PETROU

Thirteenth Respondent

PETER J PAHLKE

Fourteenth Respondent

ALISON NEWBOLD

Fifteenth Respondent

RAYMOND MOORE

Sixteenth Respondent

MABEL MOORE

Seventeenth Respondent

MARK MILLWARD

Eighteenth Respondent

KENNETH JAMES MCKENZIE

Nineteenth Respondent

JOHN STEWART MCKENZIE

Twentieth Respondent

STEVEN MACDONALD

Twenty First Respondent

M G KAILIS PTY LTD

Twenty Second Respondent

ROBERT BRUCE LOWDEN

Twenty Third Respondent

NOEL LOLLBACK

Twenty Fourth Respondent

BOB LAMACCHIA

Twenty Fifth Respondent

RICHARD LAURENCE JONES

Twenty Sixth Respondent

PHILLIP JOHN HUGHES

Twenty Seventh Respondent

ROBERT GEORGE GIDDINS

Twenty Eighth Respondent

LARRY HUDSON

Twenty Ninth Respondent

PAMELA HUDSON

Thirtieth Respondent

DIANNE MAREE HUGHES

Thirty First Respondent

AUSTRALIAN MARITIME SAFETY AUTHORITY

Thirty Second Respondent

BARRY EHRKE

Thirty Third Respondent

DENNIS FRITZ

Thirty Fourth Respondent

JENNY TITASEY

Thirty Fifth Respondent

AUGUSTINUS TITASEY

Thirty Sixth Respondent

GEOFFREY DONALD MCKENZIE

Thirty Seventh Respondent

ZIPPORAH GEAGEA

Thirty Eighth Respondent

PETER GEAGEA

Thirty Ninth Respondent

ROBERT GARNER

Fortieth Respondent

TROPICAL SEAFOOD OPERATION PTY LTD

Forty First Respondent

DIAKEN PTY LTD

Forty Second Respondent

CARL DAGUIAR

Forty Third Respondent

JIMMY ALISON

Forty Fourth Respondent

DANNY BROWNLOW

Forty Fifth Respondent

BEVERLEY JOAN BRUCE

Forty Sixth Respondent

GUY STEWART BRUCE
Forty Seventh Respondent
KIWAT LUI
Forty Eighth Respondent
TORRES STRAIT REGIONAL AUTHORITY
Forty Ninth Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

PART II ISSUES

2. Two issues are addressed by the Commonwealth and the following submissions made.

3. In relation to the extinguishment issue, the legislative regimes referred to in *Commonwealth v Akiba* (2012) 204 FCR 260 (***Akiba FFC***) at [41], severally, or together, evince a clear and plain intention to extinguish native title rights to take fish *for commercial purposes*. Those regimes operate by way of prohibition combined with the creation of new statutory rights to fish for commercial purposes and have thereby manifested a clear and plain intention to extinguish the native title right to fish for commercial purposes (**Section A**).

4. In relation to the "reciprocal rights" issue, rights to access, use and to take resources from an area that rely solely upon a person's "reciprocal relationship" with a holder of "occupation based" rights are not native title rights within the meaning of s 223(1) of the *Native Title Act* 1993 (Cth) (**NTA**). Neither the reciprocal rights, nor the persons who have those rights, have the requisite connection with the relevant land or waters (**Section B**).

PART III SECTION 78B NOTICE

5. The Commonwealth has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and has decided that it is not necessary to do so as no constitutional issues are raised by any party.

PART IV FACTS

6. Subject to the following clarifications in relation to the Appellant's submissions (**AS**), the factual background set out in Part V is not disputed.

7. As to [8], the determination of native title made by the primary judge on 23 August 2010 provides at [11] that to the extent of any inconsistency between the native title rights and the "other interests" identified in [10] and Schedule 6 of that determination, the native title rights yield.

8. As to [10], it is correct that the existence of a traditional right to take fish for any purpose, including for trade or commercial purposes, was not challenged on appeal to the Full Court. The Commonwealth's position at first instance was, however, that the evidence did not support a pre-sovereignty right to "trade". There was no appeal on this aspect of the primary judge's decision.

9. As to [13], the Appellant reproduces, in part, the reasons of the majority in *Akiba FFC* at [63]. The full quote also includes the following qualifier (in bold): "While it may be correct to describe the licensing regimes as concerned, in a general way, to regulate fishing, **it is necessary to observe that these regulatory schemes operate by way of a prohibition on unlicensed fishing for commercial purposes. That prohibition is not deprived of its plain effect because it is an element of a regime which can be described generally as regulatory of fishing"**.

10. As to [15], it should be added that the primary judge found that the relevant laws and customs founded on the reciprocity principle in relation to adoption and marriage did give rise to rights and interests in land and marine estates: *Akiba FC* at [194].

11. As to [16], Professor Scott also gave evidence of categorisation of rights, describing "reciprocity rights" as either "secondary rights" which are held by affines and are exemplified by a person's rights in their mother's land or sea areas,[1] or "tertiary rights" which are held either at a degree of genealogical distance of a second or a third cousin, or by a person in a tebud or friendship relationship: *Akiba FC* at [70].

12. As to [17], the "reciprocal relationships" which the primary judge held were not generative of rights and interests in land and waters were affines[2] or tebud/thebud[3] relationships: *Akiba FC* at [507], [508].

13. As to [18] the "considerable difficulties" in accommodating reciprocity based rights within the scheme of the NTA, referred to by his Honour in *Akiba FC* at [510], arise from [502] where his Honour noted, inter alia:

> The evidence in this matter is that reciprocal relationships have existed, and do exist, between members of the claim group and (a) other Torres Strait Islanders who were *not* members of the native title claim group, ie the Kaurareg; (b) Aboriginal persons on the nearby mainland and elsewhere; and (c) people from the PNG mainland or PNG islands such as Parama and Daru. (emphasis in original).

14. The Commonwealth agrees with the Appellant's Chronology filed on 9 November 2012, save as to two matters.

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1 Accordingly this category of "reciprocity rights" actually falls within the "occupation based" rights by virtue of descent from socially recognised prior ancestors.

2 A kinship link created by marriage, that is, ie "in-laws".

3 For example, hereditary trade friendships (*Akiba FC* at [70(a)), hereafter referred to as "tebud" except where used in direct quote.

15. First, concerning the commencement the *Fisheries Act 1968* (Cth) listed in Table 1 in the Chronology, s 3(1) commenced on 15 April 1970 and the remainder of the Act commenced on 9 December 1968.

16. Secondly, a reference to the "Errata to the First Respondent's Summary of Argument" that was filed in proceeding B19 of 2012 on 4 October 2012 is omitted from Table 2 in the Chronology.

PART V LEGISLATIVE PROVISIONS

17. The Commonwealth refers to the joint book of legislation to be filed in due course.

PART VI ARGUMENT

A Extinguishment (Grounds 3 and 4)

General principles

18. The following critical aspects of the legal principles for determining the extinguishment of native title are not in issue.

18.1. For extinguishment of native title to be brought about by an exercise of sovereign power through legislation, the legislation in question must manifest a clear and plain intention to extinguish native title: *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***) at [78].

18.2. The test is an objective one and does not involve an enquiry into the state of mind of the legislators: *Ward* at [78]; see also *Wik Peoples v State of Queensland* (1996) 187 CLR 1 (***Wik***) at 85 per Brennan CJ.

18.3. Extinguishment of native title by legislation may necessarily be implicit: *Wik* at 126 per Toohey J, 185-186 per Gummow J, 247, 249 per Kirby J; see also 155, 166 per Gaudron J. In ascertaining whether legislation has the effect of extinguishing native title, one must have regard to the language, character, and purpose which the statute was designed to achieve: *Wik* at 247 per Kirby J.

18.4. Native title rights will be extinguished where they are inconsistent with rights conferred by statute. The test to be applied in determining inconsistency is what is described as "the inconsistency of incidents" test: *Ward* at [78]-[85]; *Wik* at 185; *Fejo v Northern Territory* (1998) 195 CLR 96 (***Fejo***) at [43].

The key question

19. Whether the legislative regimes, being those referred to in *Akiba FFC* at [41], evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes is not, without more, resolved in favour of the Appellant merely by a characterisation that the "legislative regime taken as a whole" has a "regulatory" character. This would be to put the proposition too broadly and is not supported by the authorities: *Mabo v State of Queensland* (1988) 166 CLR 186 (***Mabo [No 1]***) at 224 per Deane J; *Mabo v State of Queensland* (1992) 175 CLR 1 (***Mabo [No 2]***) at 64 per Brennan J; *Wik* at 193 per Gummow J; *Brown v Western Australia* [2012] FCAFC 154 at [442] per Barker J.

20. As general propositions, a statutory prohibition on an activity that could otherwise be carried out pursuant to a native title right will extinguish native title (see *Ward* at [265]; *Wik* at 185-186 per Gummow J), while mere regulation of the way in which rights and interests may be exercised may not. However, in some cases regulation will shade into prohibition; and the line between the two may be difficult to discern: *Yanner v Eaton* (1999) 201 CLR 351 (***Yanner***) at [37] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, [115] per Gummow J, cf [57] per McHugh J, [156] per Callinan J.

21. Further, it has been this Court's approach to consider native title as a "bundle of rights", one or more of which can be extinguished without affecting the existence of other rights in the bundle. That is, if the licensing regimes are "concerned, in a general way, to regulate fishing" (*Akiba FFC* at [63]), that does not preclude a finding that the right to take fish for *commercial* purposes as an *incident* of the broader native title right to fish is inconsistent with specific provisions of the statutory regime. This follows from the "inconsistency of incidents" test: *Ward* at [78]; *Wik* at 185 per Gummow J.

The assistance to be derived from *Harper*

22. The majority of the Court below correctly relied upon, and applied, *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (***Harper***). In that case, this Court held that the scheme established by the *Fisheries Act 1959* (Tas) and the *Sea Fisheries Regulations 1962* (Tas) for the imposition of a general prohibition on exploitation of the abalone resource, coupled with the grant of statutory licences for the taking of limited quantities of abalone, resulted in the creation of new statutory rights in licence holders which necessarily abrogated the previously existing (public) right of all persons to fish for abalone: *Harper* at 325 per Mason CJ, Deane and Gaudron JJ, 329-332 per Brennan J (with whom Dawson, Toohey and McHugh JJ expressed agreement).

23. As a consequence of the licensing system established by the relevant Tasmanian legislation, Brennan J held (at 334-335) that "those who may lawfully take abalone do so not in exercise of a public right to fish but in exercise of the statutory right of a licensee". Similarly, Mason CJ, Deane and Gaudron JJ (at 325) described the right of a licensee under the Tasmanian legislation as "an entitlement of a new kind created as part of a [statutory] system...".

24. Following *Harper,* there is no doubt that a licence granted under a statutory licensing regime premised on a statutory prohibition confers a statutory right on licence holders to do what would otherwise be the subject of that prohibition. *Harper* stands in the way of an approach that would treat a licence in such a case, not as a right, but rather as a mere shield against prosecution under the prohibition. Likewise with the cases that have followed it.[4]

25. Thus the principles established by *Harper* have been applied in the context of the *Fisheries Act* 1952 (Cth), with the result that rights held under a fishing boat licence granted under that Act, again premised on a statutory prohibition, were found not to be common law rights but "a new species of statutory entitlement, the nature and extent of which depends entirely on the terms of the legislation".[5]

26. The Appellant does not challenge the correctness of *Harper*, but says that it is not authority for the proposition that native title rights are as freely amenable to abrogation as public rights: AS [41]. That is not the correct question. If *Harper* is to be used as an analogue, the task is to identify what aspects of the licensing regime in that matter manifested the clear legislative intention to abrogate the common law right there in issue, and to ask whether, if those same features were present in the Queensland and Commonwealth legislation, they manifested a clear and plain intention to extinguish native title rights. The Commonwealth does not disagree with the Appellant's general description of the various statutory regimes at AS [26]-[29].

27. The reason for the legislative scheme with which *Harper* was concerned was explained by Mason CJ, Deane and Gaudron JJ (at 325; see also Brennan J at 332), as follows:

> The licensing system...in relation to abalone fisheries in Tasmanian waters is not a mere device for tax collecting. Its basis lies in environmental and

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4 Cf AS [36]. See for example *Bienke v Minister for Primary Industries & Energy* (1996) 63 FCR 567 at 585: *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 160[B], 163[G] – 165[D], 168-9; *South Australian River Fishery Association Inc v South Australia* (2003) 85 SASR 373 at [185]; *Tasmanian Seafoods Pty Ltd v MacQueen (No 2)* [2004] TASSC 40 at [46]; *Alcock v Commonwealth* (2012) 203 FCR 114 at [17]-[19], [29].

5 *Bienke v Minister for Primary Industries & Energy* (1996) 63 FCR 567 at 585. .

> conservational considerations which require that exploitation, particularly commercial exploitation, of limited public natural resources be carefully monitored and legislatively curtailed if their existence is to be preserved. Under that licensing system, the general public is deprived of the right of unfettered exploitation of the Tasmanian abalone fisheries. What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold commercial licences. The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. This privilege can be compared to a profit a prendre. In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content.

28. The legislative intention discerned in *Harper* was that, in order to control the exploitation of a finite resource so as to preserve its existence, pre-existing common law (public) rights were replaced with a prohibition coupled with a limited and defined permission in the form of a statutory right to do the act that was prohibited.

29. That analysis can usefully be carried over to the licensing regimes in this case. The majority of the Full Court of the Federal Court correctly held that the purpose of the Queensland and Commonwealth legislation was to conserve fish stocks against uncontrolled exploitation, and that purpose was achieved by a blanket prohibition on the activity of commercial fishing save pursuant to a licence: *Akiba FFC* at [83]. The fact that the licensing regimes in question "[did] not permit of the employment by anyone other than the holder of a licence of the right to take fish from these waters for commercial purposes" was fundamental to the conclusion of the majority that the legislation manifested a clear intention to extinguish all common law rights to fish commercially, and that intention inevitably comprehended native title rights as well: *Akiba FFC* at [64], [66]. The "inconsistency of incidents" identified by the majority was as between a prohibition on unlicensed fishing for commercial purposes coupled with the creation of a defined and limited statutory right to fish for commercial purposes on the one hand, and the continued existence of a right to fish for commercial purposes derived from the common law or from native title interests recognised by the common law on the other hand: *Akiba FFC* at [63], [70], [73]. Contrary to the Appellant's submissions (at AS [40]), the inconsistency produced by the licensing regime was not as between "licensed native title rights" and "rights held under a licence by any other licence holder". The inconsistency arose because of the limited and defined creation of statutory rights to fish for commercial purposes which did not allow for the continued enjoyment of native title rights (sourced from traditional law and custom) to fish for those purposes.

30. The Appellant disputes that native title rights were extinguished by the licensing schemes but accepts that native title holders would have to obtain a licence under the legislation in order to lawfully engage in commercial fishing: AS [34]. The Appellant contends that the effect of the licence is that the *native title right* remains to be exercised but subject to the constraint that there must be compliance with the statute: AS [40]. The flaw in the Appellant's approach is that it requires a single statutory licence to have an entirely different character depending upon the identity of the licensee. Consistently with *Harper*, in the hands of a non-native title holder licensee, the licence would constitute a *statutory right* to fish commercially. In the hands of a native title holder licensee, it would be a mere instrument that permits the lawful exercise of a *native title right* to fish commercially without which the activity would be unlawful, so as to shield the licensee from prosecution.

31. The introduction of such a dichotomy into the licensing regime cannot be supported. In the context of legislation which has, as its primary purpose, the conservation of a finite resource in order to preserve its existence, there is no textual or structural reason to impute an objective intention to Parliament to differentiate, in terms of continuing existence, between native title rights and public rights, each to *commercially* exploit fish stocks: cf AS [41].

32. The Appellant argues that there was no possibility of the statutory objective being defeated since native title holders, along with everyone else, are bound by the law and required to obtain a licence: AS [34]. But that argument simply underscores that the legislative intention, objectively ascertained, was that *all commercial fishing* was to occur, if at all, only pursuant to a single and uniform statutory right.

33. There is no requirement for a legislative scheme to be "directed at" native title rights and interests, or to even advert to their existence, in order to manifest a clear and plain intention to extinguish native title: *Wik* at 85 per Brennan J, at 168, 185 per Gummow J; *Ward HC* at [78]. The majority in *Akiba FFC* was correct to so find: at [73].

The assistance to be derived from *Yanner*

34. The Appellant's case seeks to erect a general proposition that legislation that prohibits an activity, save pursuant to a licence, should be regarded, in truth, as something other than a prohibition of the unlicensed activity, and the authority for this proposition is said to be *Yanner* at [38], [115]: AS [32], [33]. The Appellant is driven to contend, without saying so, that nothing short of an "absolute prohibition" on an activity that is the subject of a native title right is capable of manifesting a clear and plain intention to extinguish the native title right: AS [33].

35. That proposition should be rejected. It is inconsistent with express statements by the majority in *Yanner* (at [37]) that regulation may shade into prohibition and that the line between the two may be difficult to discern.

36. Three points must be noted about *Yanner*:

36.1. the argument for extinguishment was based on provisions very different to the present;

36.2. the argument for extinguishment was based on provisions in that scheme (particularly a vesting of fauna in the Crown as part of a royalty scheme) not present in this case; and

36.3. in the very different context of that scheme, neither the Commonwealth nor Queensland argued that the specific provision for a prohibition plus licence of itself worked extinguishment.

37. And the Court's statement at [31] of *Yanner* that the respondent's concession was rightly made must be understood as stated in the context of the scheme in that case and the arguments there put. The Court was not asked to grapple with a prohibition in a scheme like the present, nor with the implications of *Harper*.

38. Nothing in the reasons in *Yanner* denies that legislation that is necessarily inconsistent with the continued enjoyment of native title rights extinguished those rights. As the majority in *Akiba FFC* point out (at [74]), neither *Yanner*, nor any other decision, supports a general proposition that a law which prohibits an activity, save pursuant to a licence, is not, in truth a prohibition of an unlicensed activity.

39. There is nothing in *Yanner* that detracts from the approach of this Court in *Ward* or *Wik* to extinguishment of native title (and the inconsistency of incidents approach) – or to deny that legislation which was necessarily inconsistent with the continued enjoyment of a native title right to take marine resources for commercial purposes, extinguished those rights.

B Reciprocal rights (Ground 5)

The key question

40. In relation to the second issue in this appeal, the key question is whether "reciprocal" rights, as identified by the Appellant, satisfy the requirements of s 223(1) of the NTA.

41. The key terms of s 223(1) provide that "native title or "native title rights and interests" mean "the communal, group or individual rights and interests of

Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where":

41.1. the rights and interest are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

41.2. the Aboriginal people or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

41.3. the rights and interests are recognised by the common law of Australia.

42. To resolve this question, it is necessary to address how the Appellant advanced its case at trial, and what findings the Court made.

43. At trial, the Appellant's basic model of the "system of traditional rights and interests", in relation to the sea claim area, introduced two categories of rights:

43.1. "ancestral occupation based rights" or "emplacement based rights" being rights in respect of marine territory held by a group of descendants of the ancestors who originally occupied that area, and the wives of the members of the group;[6] and

43.2. "reciprocal relationship based rights" or "reciprocity based rights" being rights to access and use the waters of another individual (who has occupation based rights in that area) premised only on the fact of a relevant reciprocal relationship (that is, kinship or *tebud* relationship) with an occupation based rights holder.[7]

What should not be in issue

44. There is no question in this case that the former type of relationships, based upon descent from a relevant ancestor, give rise to native title rights. For example, if the relevant relationship relied upon is between an occupation based rights holder and his or her sister's son, or brother's daughter, there would be no doubt, on the Appellant's model, that the sister's son or brother's daughter are native title holders because they fall within the group of occupation based rights holders as descendants of prior occupying ancestors.[8]

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6 *Akiba FC* at [69(a)]. Hereafter called "occupation based rights".

7 *Akiba FC* at [70(a)]. Hereafter called "reciprocal rights".

8 Cf AS at [54] which erroneously places "sister's brother" and "brother's daughter" into the category of reciprocal rights holders, rather than occupation based rights holders.

45. To be clear, the Commonwealth's argument on this point does not exclude as native title holders those persons who may have a relationship with a member of the occupation based rights holding group (such as an ambilineal or matrilateral link) which may be relied upon to show descent from a relevant ancestor, thus demonstrating membership of a local "descent" group having an "occupation based" connection with a particular area of land and waters.

46. Nor does the Commonwealth's argument exclude wives, who are (or should be) included as native title holders because they are occupation based rights holders on the model proposed by the Appellant at trial.[9] Indeed, the Commonwealth accepted in this matter that spouses (whether husbands or wives) may have native title rights in the sea area of their wife or husband.[10]

47. In any given case, whether spouses (or other persons) are native title holders may properly depend upon the particular laws and customs which give rise to the rights and interests in land or waters. In this respect, the Appellant (at AS [58] and [59]) refers to cases where the rights of spouses, members of neighbouring estates or persons with ritual authority arose because they were rights and interests those persons had in those areas through the laws and customs of the society, not through any kind of personal relationship of the kinds contemplated in the present case. In each case, the required connection to the land and waters was by the laws and customs, and did not need to depend solely on a relationship with another person who was a native title holder.[11] These cases present no issue for this Court.

The key issue refined

48. Thus the "reciprocal rights" in issue[12], which this Court is called upon to consider, reduce to - and only to - two categories:

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9 See also First Respondent's Summary of Argument dated 5 July 2012 on the Special leave Application at [49] referring to occupation based rights being held by wives; *Akiba v Commonwealth* [2012] HCATrans 245 at p17, line 48ff: see also *Akiba FC* at [69(a)] and [70].

10 See "The Commonwealth of Australia's Submissions in response to the Applicant's Submissions on Native Title" dated 19 June 2009 at [6]. Cf AS at [58] and [59]. To the extent that wives (or spouses) do not fall within the description of native title holders in Schedule 5, the Commonwealth would consent to a variation which would reflect the findings of the primary judge in this respect.

11 See the requirement in *Bodney v Bennell* (2008) 167 FCR 84 (*Bennell FC*) at [165].

12 "The Commonwealth of Australia's Submissions in response to the Applicant's Submissions on Native Title" dated 19 June 2009 at [6] state: "As a matter of fact and law, the Commonwealth does not accept that access and use of an area which arises by way of only of a tebud (friendship) relationship or an affinal (in-law) relationship with another Torres Strait islander gives rise to recognisable native title rights and interests."

48.1. rights of the kind described as "tertiary rights" by Professor Scott, held either at a degree of genealogical difference, or by persons in a friendship or *tebud* relationship: *Akiba FC* at [190], [507], [508]; or

48.2. rights arising from affinal ties (in-law relationships), which were described by Professor Scott as rights "related to moveable property, not to land or marine estates": *Akiba FC* at [193].

49. In *Akiba FC* at [506] his Honour usefully set out examples of the reciprocal rights in practice. They are:

49.1. to provide an assured welcome, accommodation or sustenance to a visiting friend;

49.2. give them a place to sleep;

49.3. to go fishing with him or her;

49.4. to be provided with something you need;

49.5. to provide something to your friend if requested.

Rights based on a relationship with another person

50. Some of the reciprocal rights put forward appear to have the ultimate effect of rights of access to and use of waters (for example, to go fishing with your host). However, the relevant point is that these "reciprocal rights" to access and use land and waters depend *solely* upon the person's "reciprocal relationship" with a person who does have "occupation based rights" to access and use the waters (which were properly recognised as native title): *Akiba FC* at [507].

51. To clarify what is essential to these rights, one can ask whether a person who was not otherwise a native title holder in a particular area and did not have a relevant reciprocal relationship (that is, *affinal* (in-law) or *tebud* (friendship)) with a native title holder in that area, would under the traditional laws and customs, have rights of access or use of that area. The answer given by the evidence is clearly "No": see, for example, *Akiba FC* at [298], to the effect that *tebud* need permission.

52. No doubt, the primary judge was satisfied that:

> ...there are, under Islander laws and customs, status based relationships, for example, of an affine or tebud with a person having occupation based rights, which give rise to rights and obligations that are reciprocal in character in the

sense that they will be enjoyed and discharged by one or other of the parties as the situation requires.[13]

53. That is, under the traditional laws and customs, a relationship with another person (who is connected with an area of land and waters) may give rise to reciprocal rights in that area which are held by reciprocal rights holders (being *affines* or *tebud*).

54. However, the key point, on which the Commonwealth supports the conclusion of the primary judge, upheld by the Full Court, is that the relevant reciprocal rights of *affines* and *tebud* are not native title rights within the meaning of s 223(1) of the NTA, for two reasons:

54.1. the rights are not to be characterised as "rights in relation to land and waters", but instead should be treated as "rights in relation to persons";[14]

54.2. the reciprocal rights holders do not have the necessary connection with the particular area of land and waters under traditional laws and customs are required by s 223(1)(b) of the NTA.[15]

"in relation to land and waters"

55. That the rights and interests must exist in relation to land and waters was one of the elements of the definition of native title identified in *Ward* at [17]. At [577], Kirby J identified it as the "critical threshold question" which requires a "real relationship, or connection, between the [right or] interest claimed and the relevant land or waters".[16] And see the definition in s 253 of the NTA of:

> Interest, in relation to land or waters, means...any other right ...over, or in connection with...the land or waters

56. As explained in the joint judgment in *Ward* at [64], whether there is a relevant connection "depends, in the first instance, upon the content of the traditional law and custom and, in the second, upon what is meant by 'connection' by those laws and customs". Although the "connection" there discussed was of the people with the land and waters, Kirby J took a similar approach when considering the question of connection between rights and interests and land

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13 *Akiba FC* at [507.1-5].

14 *Akiba FC* at [508]; *Akiba FFC* at [129]-[132].

15 *Akiba FFC* at [129]-[132].

16 Albeit accepting that the phrase "in relation to" is to be interpreted broadly, his Honour confines its meaning within the particular statutory context. Cf AS at [45]-[47].

and waters. That is, "[t]he issue of connection must be considered in light of Aboriginal tradition...".[17]

57. The question then becomes: Is there a real relationship or connection between the reciprocal rights propounded and the relevant land and waters, in light of the laws and customs?

58. It is important to appreciate that the reciprocal rights asserted as native title were rights to access and use the land and waters of *another* group because and only because of a status based relationship with a member of that group; by sharp contrast the occupation based rights were rights to access and use the land and waters of *that very* group of which the person was a member because of descent from an original occupier of the area (or because of marriage into the group).

59. Furthermore, the reciprocal rights which bear a relationship to another group's land and waters persisted only as long as the relationship with a member of the other group lasted; although not routinely done, reciprocal relationships could be ended, for example, by denying a partner in reciprocity.[18] On the other hand, the primary judge held that "descent as a rule provides an indispensable element of a person's identity",[19] so that the occupation based rights could not be denied: hence the reference in *Akiba FFC* at [131] to reciprocal rights as propounded in this case arising by reason of "who you know" (and, implicitly while you know them), rather than native title rights in conformity with s 223(1)(a) and (b) of the NTA existing by virtue of the identity of the native title holder; that is, "who you are".

60. So understood from the point of view of a reciprocal rights holder, it can be seen that the "real relationship, or connection" is between the rights of access and use and the person who is obligated under Islander laws and customs to afford those rights to you (the rights holder). If the relationship ceases, so do any reciprocal rights in the land and waters.

61. By sharp contrast, there is, a "real relationship or connection" (which is undeniable) between an occupation based rights holder's right to use and access the relevant land and waters so as to satisfy the requirement in s 223(1) of the NTA that those rights are "in relation to land or waters".

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17 *Ward HC* at [577].

18 *Akiba FC* at [190.12-14], [507.11-14].

19 *Akiba FC* at [183].

Section 223(1)(b) connection

62. The second issue is whether the reciprocal rights holders (*affines* and *tebud*) have, by Islander law and custom, a s 223(1)(b) connection with the relevant area to which their particular "reciprocal rights" pertain; that is the marine estate in respect of which the person with whom they have a reciprocal relationship has occupation based rights.

63. As was emphasised in *Commonwealth v Yarmirr* (2001) 208 CLR 1 (***Yarmirr***) at [9], the requisite connection with land and waters must be a direct connection of the native title holders, by their laws and customs, with the particular land or waters. This direct connection is explained in *Ward* at [64]:

> Section 223(1)(b) requires consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a connection with the land or waters. That is, it requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a connection of the peoples with the land or waters in question.

64. Neither *Yarmirr* nor *Ward* contemplate that the requisite connection could be satisfied merely by a relationship with another person who themselves have a connection with the relevant land or waters. The reciprocal rights (of *affines* and *tebud*) in this case are conceptually different from the rights referred to in AS at [58]-[59], for the reasons set out at [47] above.

65. In *Akiba FC* at [546]-[551] the primary judge sets out the applicable legal principles for a s 223(1)(b) connection drawn from *Bennell FC*.

66. In *Bennell FC* at [165], it was emphasised that:

> ...connection is not simply an incident of native title rights and interests as such. The required connection is not by the Aboriginal people's rights and interests. It is by their laws and customs.

67. Further, the s 223(1)(b) inquiry is area specific. That is, it is necessary to establish that there is a connection to the relevant part of the claim area: see *Bennell FC* at [179].

68. In any native title case, it is necessary to look to the particular laws and customs to establish whether the laws and customs are generative of rights and interests in land and waters, and whether by those laws and customs, particular persons or groups of persons are connected with the particular land and waters.

69. In this case it is important to understand that the reciprocal rights in issue are not rights said to be held by a person as a member of a community of native title holders; they are individual rights.[20] Nor are the native title rights and interests held communally by all members of the claim group; rather they are group rights held by subsets of the wider Torres Strait society in respect of their own respective areas, where the relevant connection is by a particular group with its own particular area.[21]

70. In answer to the "short question" whether Islander laws and customs and the acknowledgement and observance thereof, connect the occupation based rights holders to their marine estates, his Honour said:[22]

> The Islander evidence of their knowledge of their own marine estate and of where those merge into the adjacent estates of others (usually in a shared area) is probably explained, to use the State's own words, by –
>
> > ...the pre-eminent importance of this "ownership" of country by the people concerned. ... Each of the witnesses described the area appropriate to his or her community as deriving from the community's historical association with the area.
>
> I would make the additional comment that the most notable feature of the Islanders' evidence in relation to both land and waters, was that their appreciation of what was theirs or shared was accentuated by their appreciation of what belonged to others and of what that difference signified under their laws and customs ...
>
> Islander knowledge of areas, when coupled with the deep and transmitted sea knowledge that many of them possess, is itself a potent indicator of connection, and continuing connection at that, to their marine estates – the more so because under their laws and customs they have, and do exercise, traditional rights to use and forage there ...

71. Importantly, "laws and customs on permission and relatedly, on *ailan pasin* in its marine aspects, connect Islanders directly to their own estates...".[23]

72. In respect of the reciprocal rights holders here in issue (*affines* and *tebud*), the question is whether the Islander laws and customs connect them to the marine estates of others, as per the requirement in s 223(1)(b).

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20 See *Akiba FC* at [493].

21 *Akiba FC* at [542]-[543]. Cf *Bennell FC* at [165]-[166], discussing connection at a "communal" level with intramural allocation of rights.

22 *Akiba FC* at [648.5-12] – [649.1-4].

23 *Akiba FC* at [650.3-4]. There is no scope to view the required connection on a broader scale, given the findings as to connection of subgroups of the society with their own marine areas: cf AS at [70].

73. That a reciprocal rights holder may have rights in a particular area (a marine estate of another group) does not constitute a connection with land and waters for the purposes of s 223(1)(b).[24]

74. Furthermore, Islander laws and customs themselves do not accord to reciprocal rights holders rights to access and use the marine estates of others; those rights arise out of a personal relationship with a person who is an occupation based rights holder for the relevant area.[25]

75. Such a relationship with a member of a group holding native title to a marine estate is not sufficient to constitute a connection between reciprocal rights holders and that marine estate, by Islander laws and customs. This is particularly so when the connection requirement for native title holders of a marine estate is based primarily on a concept of "ownership" of marine estates which is said to be pre-eminent on the Islander laws and customs.[26]

PART VII ESTIMATED HOURS

76. It is estimated that two hours will be required for the presentation of the Commonwealth's oral argument.

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Justin Gleeson SC
Acting Solicitor-General
Telephone: 02 6141 4146
Facsimile: 02 6141 4149
justin.gleeson@ag.gov.au

Raelene Webb QC
Telephone: 08 8901 7704
Facsimile: 08 8901 7719
raelene.webb@magayamirr.com

Nitra Kidson
Telephone: 07 3221 3785
Facsimile: 07 3221 7781
nkidson@higginschambers.com.au
Counsel for the First Respondent

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24 *Bennell FC* at [165].

25 Noting that the particulars in the Fourth Amended Points of Claim at [36], which expressly refer to Reciprocity and exchange (relied upon to sustain the reciprocal rights) as including "rights and obligations arising out of (and sustaining) particular relationships between people". Hence the primary judge's reference in *Akiba FC* at [508] to the "relationship sustaining purpose" of the reciprocal rights.

26 As to which see *Akiba FC* at [648]-[649].