# CASE NOTES

Court of Summary Jurisdiction

Trenerry v Rivers

Decision of Lowndes SM delivered 3 July 2000

## CRIMINAL LAW - FISHERIES REGULATIONS - NATIVE TITLE HOLDERS

**The defendant was charged under the Fisheries Regulations with the offence of being in possession of a gill net in the absence of a licence, permit or authority.A maximum fine of $10,000 is specified by s37 of the *Fisheries Act (NT)*.**

The defendant admitted that he was in May 1998 found in possession of the net in the Bul Gul area, which forms part of the Wagait Trust.He told the Court he did not know he needed a licence.His Worship accepted expert evidence which identified the defendant as being a member of the Wadjigan people who owned the western Wagait area "from time immemorial".

The defendant claimed authority to possess a gill net pursuant to s.211 of the *Native Title Act, 1993 (Cth)*. This section, broadly speaking, preserves to native title holders the right to carry on various *activities* (including fishing) on a non-commercial basis and in the exercise of their native title rights and interests.This provision thus renders nugatory the permit requirement of s37 of the *Fisheries Act* in respect of native title holders.

Section 38(2)(c) of the *Fisheries Act* provided a defence to the charge if the defendant could prove, on the balance of probabilities, that his possession of the net *was* authorised by being "...in the exercise of a right granted or recognised by law".Section 53 of that Act protects the right of Aboriginal people who have traditionally used the resources of an area to continue to use such resources in that manner.

The decision of the Court did not, however, depend upon these defences in the *Fisheries Act* being made out. (see commentary below).

At the time of the alleged offence the defendant was aged in his mid thirties.He had lived in the Bul Gul area since the early 1980's where he fished with the net, utilising a drag netting technique taught to him by his grandmother.She was a traditional owner of the area.The defendant also stated in evidence that :

(i) he did not know whether fishing with a large net was a traditional fishing method;

(ii) he only used the net to feed himself and his three children, although he sometimes gave surplus fish to other families or returned them to the sea; and

(iii) he caught a variety of fish with the net which increased his chances of catching fish while avoiding catching undersize fish.

### HELD

1. The defendant is a native title holder who possessed the net pursuant to the exercise by him of his native title right to carry out a defined *activity*, being fishing.
2. It is immaterial that the charge did not actually involve the activity of fishing because the possession of the net was a necessary incident of carrying on the *activity* of fishing.
3. It is not fatal to the defendant's case that he did not know whether or not his method of fishing was traditional.
4. Charge dismissed.

His Worship found that the evidence established a traditional method of fishing by the Wadjigan people with a spear or bush net. The critical element of this traditional custom was its domestic purpose and the fact that fish caught were not wasted. The custom recognised the importance of preserving the traditional stockpile of fish. The Court noted that the Act demonstrates a legislative intent to prevent or minimise depletion of Territory marine resources.

Lowndes SM further noted that the use of bush nets by the Wadjigan people has evolved into a practice which utilises larger mesh nets of European origin.Such nets have been made by the Wadjigan people and for two generations used by them. Use of the net as a drag net was consistent with traditional fishing methods and an appropriate adaptation

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of that method, in the same way that hunting with a firearm may be an accepted adaptation of a traditional method of hunting.

### Appearances

Prosecution - Woodcock / DPP

Defence - Strickland / NAALAS

### Commentary

Lowndes SM stated that the defendant had sought to rely upon the defences set out in s38(2)(c) and s53 of the *Fisheries Act*. The acquittal, however, seems to have been based upon His Worship's application of s.211 of the *Native Title Act, 1993 (Cth)* and the decision of the High Court in *Yanner v Eaton* (1999) 166 CLR 258 (adaptation of traditional hunting methods). The defendant had also made reference to this provision and authority in submissions.

His Worship stated "The provisions of section 38(2)(c) and 53 of the Fisheries Act allow the defendant to mount a native title defence based upon the provisions of section 211 of the Native Title Act". It seems that the Court considered the *Fisheries Act* defences to be relevant only in so far as their existence prevented the defendant, as a native title holder, from being hooked by s38(1) which identifies *Fisheries Act* offences as being regulatory.

Commonwealth legislation is superior. It is argued that the application of s211 of the *Native Title Act* cannot depend upon the nature of offences created under subservient Territory legislation.It is contended that s.211 of the *Native Title Act* should have assumed relevance in this proceeding only if neither of the defences under the *Fisheries Act* was made out.

**Case Notes is supplied by Mark Hunter, a barrister in Darwin.**