ESCAPING THE NET: NATIVE TITLE AS A DEFENCE TO BREACHES OF FISHING LAWS

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Australian courts are still to define all the incidents of native title, but fishing is likely to be an integral right. In recent cases, native title has been raised as a defence to prosecutions for breaches of fisheries legislation. This article examines the effect on native title fishing rights of fisheries legislation, and the effect of the *Racial Discrimination Act* 1975 (Cth) and the *Native Title Act* 1993 (Cth) on such legislation. It concludes that, while general fisheries legislation may not evince a "clear and plain intention" to extinguish native title, it does not follow that general restrictions on fishing activities do not apply to native title holders.

I. INTRODUCTION

In November 1994, at the Court of Petty Sessions at Port Hedland, charges laid against three men under the *Fisheries Act* 1905 (WA) (the WA Fisheries Act) were dismissed. The learned Magistrate based his decision on evidence that the defendants were exercising native title rights to fish which had not been extinguished by the WA Fisheries Act.[1]

Justice Heenan of the Supreme Court of Western Australia allowed an appeal against this decision.[2] His Honour concluded that while Aboriginal communities in the Port Hedland area "probably" had a native title right to fish in the waters in question, the three defendants had failed to establish the extent of the right, or whether they were exercising it when they were apprehended. Rather, they were engaging in what Kirby P described in *Mason v Tritton*[3] as "just ... ordinary activity of a kind which is regulated in a way that is for the protection of Australians - Aboriginal and non-Aboriginal". An appeal against Justice

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1 *Sutton v Derschaw* (unreported, Court of Petty Sessions at Port Hedland, 8 November 1994) Note: the WA Fisheries Act is repealed by the *Fish Resources Management Act* 1994 (WA), s 265.

2 *Sutton v Derschaw* (1995) 82 A Crim R 318 at 324-5.

3 (1994) 34 NSWLR 572 at 595.

Heenan's decision was dismissed by the Full Court of the Supreme Court.[4] A majority of the Court agreed with Heenan J that the defendants had produced insufficient evidence that their actions were an exercise of native title rights, so as to raise a reasonable doubt as to their guilt.[5]

A native title defence was also unsuccessful in *Mason v Tritton.* There, a person of Aboriginal descent was convicted and fined for two offences under the *Fisheries and Oyster Farms (General) Regulation* 1989 (NSW). He had in his possession ninety two abalone. As a person not holding a licence or permit, he was entitled to possess only ten. The learned Magistrate rejected an argument that a native title right had to be extinguished before a person exercising the right was obliged to comply with legislation otherwise affecting it.[6] This argument was also referred to by Young J in the Supreme Court.[7] The defendant's appeal to the New South Wales Court of Appeal was dismissed on the basis that he had failed to prove that he was exercising a native title right to fish. There was at least an implication that the legislation may have been held not to apply to the defendant if he had established that he was exercising an unextinguished native title right.[8]

This was the approach of the learned Magistrate in the Port Hedland case. The appeal judges in the case also considered the matter on the basis of the sufficiency of the defendants' evidence about their exercise of native title fishing rights.[9]

There is nothing novel in the proposition that general fisheries management laws may not necessarily *extinguish* native title.[10] However, the application to native title holders of laws of general operation should not be confused with the non-extinguishment of native title by those laws. This article argues that, subject to any contrary intention, such laws should be construed as applying to persons exercising native title rights.

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4 *Derschaw v Sutton* (unreported, Full Court of the Supreme Court of Western Australia, Franklyn, Wallwork and Murray JJ, 16 August 1996)

5 *Ibid* at 24, per Franklyn J (Murray J agreeing) The High Court recently refused to grant special leave to appeal from the decision of the Full Court.

6 See the summary of the learned Magistrate's decision in *Mason v Tritton* note 3 *supra* at 596, per Priestley JA

7 *Mason v Tritton* (1993) 70 A Crim R 28 at 43.

8 *Cf Mason v Tritton* note 3 *supra* at 575, 595

9 In the appeal to the Full Court Wallwork J was in the minority The grounds on which his Honour would have allowed the appeal also included acceptance of an argument that s 56 of the WA Fisheries Act contravened s 10 of the *Racial Discrimination Act* 1975 (Cth): see note 4 *supra* at 14-15, 23 of his Honour's judgment This is discussed *infra.* See also J Gray, "O Canada - Van der Peet as Guidance on the Construction of Native Title Rights" (1997) 2 *AILR* 18 at 22-3

10 See, for example, D Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia" (1993) 16 *UNSWLJ* 97 at 125. This article was referred to by the learned Magistrate in the Port Hedland case. See also P Kilduff and N Lofgren, "Native Title Fishing Rights in Coastal Waters and Territorial Seas" Vol 3, 81 *Aboriginal Law Bulletin* 16 at 17, and R Bartlett, "Native Title and Fishing Rights" (1996) 1 *AILR* 365 at 369-73

II. THE LEGISLATION

It is useful to set out the relevant sections of the WA Fisheries Act that were considered in the Port Hedland case:

> 9(1) The Minister may, by notice published in the *Government Gazette*, prohibit *all persons or any class of person* specified in that notice from:
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> (a) taking any specified species of fish by any specified means of capture;
> (b) taking any fish whatsoever by any specified means of capture;
> (c) taking any specified species of fish by any means of capture whatsoever;
> (d) taking any fish whatsoever by any means of capture whatsoever;
> (e) taking any marine algal life whatsoever,
>
> in Western Australian waters or in any specified portion of those waters, during any specified term or until a further notice is so published [emphasis added].
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> 12(1) Every *person* who:
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> ...
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> (b) contravenes by act or omission any requirements of a notice of the Minister published in the *Government Gazette* under section 9 or section 10;
> (c) attempts to contravene any such proclamation or any requirement of any such notice; [or]
> (d) is in possession of fish taken in contravention of any such proclamation or any requirement of any such notice, or of any means of capture whatsoever intended to be used in contravention of any such proclamation or any requirement of any such proclamation or any requirement of any such notice;
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> ...
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> commits an offence [emphasis added].

Section 56(1) provided a limited exemption for persons of Aboriginal descent engaged in certain activities:

> 56(1) *Subject* to the provisions of this section and *to the restrictions imposed by or under sections* 9, 10, 23, 23A, 24 and 26 but notwithstanding anything contained in any other provisions of this Act, a person of Aboriginal descent may take in any waters and by any means sufficient fish for food for himself and his family, but not for sale [emphasis added].

A "person of Aboriginal descent" was defined as any person living in Western Australia who:

> (a) is wholly or partly descended from the original inhabitants of Australia; and
> (b) claims to be an Aboriginal and is accepted a such in the community in which he lives.[11]

III. THE FACTS IN THE *PORT HEDLAND* CASE[12]

The following Ministerial notice had appeared in the Western Australian *Government Gazette* on 27 January 1984:

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11 Section 56(3) of the WA Fisheries Act.

12 The following facts are taken from the learned Magistrate's Reasons for Decision in the Port Hedland case, together with the judgments in the appeals.

FISHERIES ACT 1905

Notice No 134

ACTING in exercise of the powers conferred by sections 9 and 11 of the Act, I hereby prohibit *all persons* other than those persons described in Schedule 2 of this notice from taking fish by means of nets other than the nets described in Schedule 3 of this notice in the waters specified in Schedule 1 of this notice [emphasis added].

HD EVANS
Minister for Fisheries and Wildlife

Schedule 1

(a) The waters of all creeks, and rivers in the Port Hedland area between the Yule River and the De Grey River inclusive.
(b) All Western Australian waters within a radius of 400 metres from the mouths of the creeks and rivers in part (a) of this schedule.

Schedule 2

Licensed Professional Fishermen whose licences are endorsed to exempt them from this notice.

Schedule 3

(a) Hand Trawl Nets, Hand Dip Nets and Hand Scoop Nets for taking prawns.
(b) Hand Scoop Nets and Drop Nets for taking crabs.
(c) Throw Nets when used in accordance with Regulation 3A(8)(aa) of the Fisheries Act Regulations.

In late February 1993 about three hundred people had gathered at an Aboriginal community near Port Hedland, after the funeral of a prominent member of the community. Three of the men present were asked to get fish to feed the people. They proceeded to a place near the mouth of Six Mile Creek, where they caught sixty six sea mullet with the aid of a net.

The waters where the men were fishing was within the area covered by Schedule 1 of the Ministerial notice. They were spotted by Fisheries officers and charged under s 12(1)(d) of the WA Fisheries Act with being in possession of fish taken with a net in contravention of the Ministerial notice. The defendants conceded all the main elements of the offence; that is, that they were not persons described in Schedule 2, and they were in possession of fish caught with the use of a net of a type other than those set out in Schedule 3. If proven, the offence carried a fine.[13]

All defendants gave evidence of their Aboriginal descent. This was not disputed. At least one gave evidence that he and other members of his family believed they had a 'right to fish', by any means, despite the prohibition on their

13 Section 12(2)(b) of the WA Fisheries Act.

activities in the particular area. He believed that the ban on fishing did not apply to persons exercising Aboriginal law.[14]

IV. THE DECISIONS IN THE *PORT HEDLAND* CASE

The learned Magistrate referred to the "special and enduring relationship" that Aboriginal people have with their land and surroundings. This extended to the living resources of the land, an important part of which is fishing. Fishing is also an integral part of Aboriginal culture.[15] The evidence supported the proposition that Aboriginal people had fished the area for centuries. He concluded that the defendants were acting in pursuit of a native title right to fish. The WA Fisheries Act had not extinguished the right. To the contrary, in his view s 56(1) acknowledged and recognised the existence of such rights. There was "no question" that the exercise of native title rights was a defence to the charges, and proof of it had been discharged to his satisfaction.[16]

Justice Heenan's judgment referred at length to the evidence given by the defendants. He concluded that it fell well short of supporting a defence to the charges based on native title.[17] A majority of the Full Court agreed.[18] None of their Honours really explored the threshold question of whether the exercise of native title rights is outside the regulatory regime of the WA Fisheries Act, although the issue was alluded to in the following statement by Justice Franklyn:

> The claim of native title fishing rights can only be properly seen as a claim that the same exempts them from the operation of the relevant provisions of the [WA Fisheries Act].[19]

But does a successful claim of native title have this result?

V. EXTINGUISHMENT PRINCIPLES

The High Court's decision in *Mabo v Queensland (No 2)*[20] *(Mabo No 2)* was a two-edged sword for indigenous Australians. In recognising native title, the Court also confirmed the power of the Crown to extinguish it. Extinguishment can occur as a result of an act, legislative or executive, which manifests a "clear and plain intention" to extinguish native title. This article is concerned with the effect of legislation.

The "clear and plain intention" test is firmly rooted in overseas native title decisions.[21] It flows from the seriousness of extinguishment of native title,

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14 See the learned Magistrate's Reasons for Decision note 1 *supra* at 3.
15 *Ibid* at 5.
16 *Ibid* at 14, see also note 4 *supra* at 2, per Wallwork J.
17 Note 2 *supra* at 324.
18 Note 4 *supra* at 16-18, 22-4, per Franklyn J (Murray J agreeing).
19 *Ibid* at 23.
20 (1992) 175 CLR 1.
21 *Ibid* at 64, 195-6, see also *Mason v Tritton* note 3 *supra* at 591.

which is a property right. As aboriginal or native title rights were recognised early on in the course of European settlement overseas, mainly by treaty or proclamation, the application of the test makes considerable sense. However, there is an element of unreality in its unqualified importation into Australia. Applying the test to laws passed for over two hundred years on the understanding that native title was not recognised by Australian law is surely a case of earlier parliaments now being asked to have been clairvoyants.[22]

A "clear and plain intention" to extinguish is likely to be a difficult test to satisfy for legislation enacted prior to the recognition of native title in June 1992.[23] The judgments in *Mabo No 2* give examples of legislation that will *not* have extinguished native title. Legislation which provides generally for the alienation of Crown lands will not be sufficient.[24] More significantly, "[a] clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title".[25]

This statement by Justice Brennan (as he then was) contains two elements. His Honour cites the Canadian Supreme Court decision in *R v Sparrow*[26] (*Sparrow*) as authority for the first, and *United States v Santa Fe Pacific Railroad Co*[27] as authority for the second.

Sparrow was analogous to the circumstances considered in the Port Hedland case. It was referred to by the learned Magistrate, and clearly influenced his decision, and by Wallwork J in his (minority) judgment in the Full Court.[28] It was also important in *Mason v Tritton*.[29] But it appears that the learned Magistrate approached the issue on the basis of the *second* element of Justice Brennan's statement: that is, because the fisheries regime did not *extinguish* native title fishing rights, the continued exercise of those rights was left wholly unaffected. It is submitted that this involves a misunderstanding of the legal position. Fisheries laws may not extinguish native title. But if, on a proper construction, they apply to native title holders, they can operate to *regulate* the exercise of their native title rights. It is the *first* element of Justice Brennan's statement which is relevant. It acknowledges that laws may regulate the enjoyment of native title. And it contains no reference to any requirement for such laws to manifest a "clear and plain intention" in order to do so.

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22 In *Wik Peoples v Queensland* (1996) 187 CLR 1 at 230, Kirby J acknowledged the "inescapable element of artificiality" in trying to reinterpret Australian legal history in light of the recognition of native title, see also his Honour's comment (at 247-8) about the presumed intention of the Queensland Parliament.

23 The *Queensland Coast Islands Declaratory Act* 1985 (Qld) was a striking exception. However, it was invalid and has since been repealed. Section 7 of the *Land (Titles and Traditional Usage) Act* 1993 (WA) was, of course, enacted in response to the decision in *Mabo No 2*. In any event, it too was invalid.

24 *Mabo No 2* note 20 *supra* at 111, 196.

25 *Ibid* at 64, per Brennan J In *Wik* note 22 *supra* at 186, Gummow J suggested that if acts which could be exercised as part of native title rights were prohibited by legislation, those rights might be extinguished. His Honour was not considering prohibitions contained in general regulatory laws, and his approach in such circumstances might be different.

26 (1990) 70 DLR (4th) 385.

27 314 US 339 (1941).

28 Note 4 *supra* at 10, 12-13, per Wallwork J

29 Note 3 *supra* at 592.

VI. *R v SPARROW*

This is consistent with the *Sparrow* decision, and subsequent Canadian cases in which the *Sparrow* principles have been applied and developed.[30] In *Sparrow*, the accused was an Indian member of the Musqueam band. He was charged under s 61(1) of the *Fisheries Act* 1970 (Can) with using a drift net longer than permitted by the band's Indian food fishing licence. The licence was issued under the *British Columbia Fishing (General) Regulations*, which were made under the *Fisheries Act* 1970 (Can). The facts alleged to constitute the offence were admitted. However, Mr Sparrow claimed that he was exercising an aboriginal (or native title) right to fish. The right, he submitted, was an existing right recognised and protected by s 35(1) of the Canadian Constitution. He argued that the net length restriction was inconsistent with the Constitutional protection, and was invalid.

The accused was convicted. An appeal to the County Court of Vancouver was unsuccessful. Both lower courts held that the only aboriginal rights that could be relied on were those supported by a treaty, proclamation or other legal instrument. Rights founded in tradition and exercised since before white settlement were not protected by s 35(1).

This approach was rejected when the matter came before the British Columbia Court of Appeal and then the Canadian Supreme Court. Mr Sparrow's conviction was set aside. Some important observations were made about the effect of fisheries laws on aboriginal or native title rights. It needs to be emphasised though that the Supreme Court did not order Mr Sparrow's acquittal. It affirmed the Court of Appeal's order for a new trial, where the questions of infringement of s 35(1) and, if necessary, justification, would be decided.

Section 35(1) of the Canadian Constitution provides as follows:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

Before s 35(1) commenced there was a line of authority that aboriginal fishing rights were subject to regulation by legislation and subject to extinguishment. This flowed from what was referred to in *Sparrow*[31] as the 'Derriksan line of cases', following *R v Derriksan.*[32] Other aboriginal rights (for example, to hunt), were similarly subject to legislation.[33] The fact that certain acts by Indians were exempt from a prohibition did not mean that other acts were not covered.[34]

While some of these decisions pre-dated the recognition of common law aboriginal rights in Canada,[35] others did not. In any event, it is clear from

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30 For example, *R v Badger* (1996) 133 DLR (4th) 324, a case dealing with aboriginal treaty rights, *R v Van der Peet* (1996) 137 DLR (4th) 289; *R v NTC Smokehouse* (1996) 137 DLR (4th) 532, *R v Gladstone* (1996) 137 DLR (4th) 648; *R v Côté* (1996) 138 DLR (4th) 385; *R v Adams* (1996) 138 DLR (4th) 657; see also *R v Gardner* (1996) 138 DLR (4th) 204, which deals with aboriginal rights to regulate gambling activities

31 Note 26 *supra* at 411.

32 (1975) 60 DLR (3d) 140

33 See *R v Sikyea* (1964) 43 DLR (2d) 150; *Sikyea v The Queen* (1964) 50 DLR (2d) 80

34 *R v Derriksan* note 32 *supra* at 142-3; *R v Sikyea* note 33 *supra* at 158.

35 *Cf* D Sweeney note 10 *supra* at 133-4

Sparrow that the Canadian Supreme Court did not regard the decisions as confined to proclamation or treaty rights. It accepted that they also covered "the aboriginal right to fish".[36] *Sparrow* presented the Supreme Court with its first opportunity to examine the strength and scope of the protection afforded by s 35(1), and the extent to which it limited the Parliament's power to regulate fisheries and other matters relevant to the exercise of common law Indian rights.

It was first necessary for the Court to decide what constituted "existing" rights. The Crown argued that there was no existing right protected by s 35(1) because the "progressive restriction and detailed regulation" of the fisheries under the *Fisheries Act* 1970 (Can) and its predecessors had extinguished native title. The regulation, so it was argued, constituted a complete code that was inconsistent with any continuing aboriginal rights.[37] The Court rejected this argument. It was of the opinion that the test of extinguishment to be adopted "is that the Sovereign's intention must be clear and plain if it is to extinguish any aboriginal right".[38] It concluded that:

> There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish.[39]

What they constituted was a regime to manage the fisheries, through licences and other measures.

The Court held that "existing" rights were those rights in existence when s 35(1) came into effect. In determining what they were, it was important to disregard the method by which their *exercise* was regulated by fisheries laws: "an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982".[40] So the rights protected by s 35(1) are those underlying any current restriction on their exercise imposed by government regulation. The use of the term *existing* also permitted the evolution of the rights over time. Accordingly, they might be exercised in a contemporary manner.[41]

It was next necessary to determine the extent of the protection. It was not absolute.[42] In a statement quoted by the learned Magistrate in the Port Hedland case, the Supreme Court said:

> Government policy *can*, however, regulate the exercise of the right, but such regulations must be in keeping with s 35(1).[43]

The Court then proceeded to describe the type and degree of regulation that was consistent with s 35(1).[44] It rejected Mr Sparrow's argument that, except

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36 Note 26 *supra* at 411

37 *Ibid* at 400.

38 *Ibid* at 401

39 *Ibid*

40 Note 26 *supra* at 376 See also P Kilduff and N Lofgren, note 10 *supra* at 17

41 Note 26 *supra* at 397, 402; *cf* the Supreme Court's discussion of the Court of Appeal's observations on the right to fish being a right "for a purpose" rather than relating to "a particular method", at 391-2, 411. This was also referred to in the Port Hedland case, note 4 *supra* at 13, 23, per Wallwork J.

42 Note 26 *supra* at 409

43 *Ibid* at 403 (emphasis in original)

44 The test expounded is not strictly relevant for Australian courts, as there is no equivalent to s 35(1) (*cf* D Sweeney note 10 *supra* at 137; see also D Tan, "The Fiduciary As An Accordion Term: Can the

perhaps in extreme situations,[45] s 35(1) operated to deny to Parliament any power to regulate Indian fishing rights under other provisions of the Constitution which dealt with the subjects of "Indians and Lands Reserved for the Indians" and "Sea Coast and Inland Fisheries".[46] The Court held that federal legislative powers continued, though they must be read together with the '"recognition and affirmation" of rights incorporated into s 35(1). Section 35(1) did not preclude the regulation of aboriginal rights, but such regulation must be justifiable according to a valid objective:

> While [s 35(1)] does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, *and where exhaustible resources need protection and management*, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s 35(1).[47]

What is justifiable depends on the circumstances of a particular case. In the fisheries context, an objective of preserving rights by conserving and managing a natural resource had long been recognised and would be valid and uncontroversial[48] so long as any procedures for the allocation of the resource gave priority to aboriginal rights over other users (such as commercial and recreational fishermen).[49]

Since *Sparrow*, Canadian courts have applied the justificatory test to fisheries and similar laws in a number of cases. As a result, some persons exercising

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Crown Play a Different Tune?" (1995) 69 *ALJ* 440 at 448) Further, Australian courts have not determined the existence of the general fiduciary duty on which the test is founded, at least in part (*Sparrow* note 26 *supra* at 408-9; *Van der Peet* note 30 *supra* at 302; *Gladstone* note 30 *supra* at 673, *Côté* note 30 *supra* at 415; *Adams* note 30 supra at 677. *cf* D Sweeney note 10 *supra* at 153-4, 158). In *Thorpe v Commonwealth (No 3)* (1997) 144 ALR 677, Kirby J (at 688) described the question of whether the Crown owes a fiduciary duty to the indigenous peoples of Australia as "an open question" which the Court has "simply not determined". In *Mabo No 2* only Toohey J accepted the plaintiffs' argument that a general fiduciary duty was owed to them by the Crown, note 20 *supra* at 199-205 The issue was raised again in argument in *Wik* note 22 *supra*, but not determined. Brennan CJ (at 96-7) rejected the proposition that the vulnerability of native title to extinguishment, and the position occupied by indigenous people vis-à-vis the government of a state, creates a free-standing fiduciary duty However, he accepted that a discretionary power conferred for the benefit of others might have to be exercised in the manner expected of a fiduciary (*Ibid*; see also *Mabo No 2* note 20 *supra* at 60) Gummow J (at 168) assumed that there was no fiduciary relationship between the claimants and the State of Queensland By contrast, Justice Kirby's judgment includes a statement (at 248) which might indicate an acceptance of such a relationship

45 Note 26 *supra* at 404.

46 Sections 91(12) and 91(24)

47 Note 26 *supra* at 410 (emphasis added).

48 *Ibid* at 412-16. See also *Adams* note 30 *supra* at 678-9.

49 Note though the limits since imposed on the "priority" to be accorded to aboriginal rights In *Gladstone* note 30 *supra*, a Supreme Court majority held that there was an exception to the notion of priority where the aboriginal right in question was commercial and had no internal limitation. To give priority to such a right would give to it an exclusive status over non-aboriginal participants in the commercial enterprise; see at 673-5 The majority also suggested (at 681-3) that issues of regional and economic fairness for others involved in the commercial exploitation of a resource were also relevant in determining whether a limitation on aboriginal rights was justified See also *Adams* note 30 *supra* at 679, where the position of commercial fishing and its economic importance to Canadian society is contrasted with that of sports fishing

aboriginal rights in contravention of those laws have been acquitted. But this does not alter the fact that even the existence of the s 35(1) Constitutional protection does not cause aboriginal rights to be immune from regulation. *Sparrow* and other Canadian cases are not authority for the unqualified proposition that unextinguished native fishing rights can be exercised with impunity, contrary to restrictions contained in national or provincial fisheries legislation of general application:

> *Sparrow* has held that aboriginal rights are not absolute and that they may be impaired or restricted by valid regulations. Thus, a provincial law of general application, incorporated as federal law by s 88 [of the *Indian Act* 1985 (Can)], may have the effect of interfering with the exercise of aboriginal rights without being unconstitutional.[50]

United States cases too acknowledge that State laws can regulate Indian fishing rights preserved in treaties ceding territory to the Federal Government, at least for conservation purposes.[51] The United States Supreme Court did not accept a claim that treaty rights gave "an unrestricted right to fish in the 'usual and accustomed places' free from state regulation of any kind".[52]

VII. NON-EXTINGUISHMENT AND THE APPLICATION OF LAWS TO NATIVE TITLE

So how can the fact that general fishing laws may not extinguish native title be reconciled with their application to persons exercising native title rights? The answer is that the extinguishment of native title, and its regulation, are separate matters.

Without the necessary "clear and plain intention", a fisheries law will not *extinguish* native title fishing rights.[53] But the "clear and plain intention" test is not determinative of whether the law has any application to the exercise of native title rights. In an article on native title fishing (and other) rights, Desmond Sweeney asserts that the "same principles logically apply in determining whether a regulatory regime imposed by legislation is intended to apply to Aboriginal rights".[54] However, as Sweeney concedes,[55] *Sparrow* did not expressly decide

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50 *R v Alphonse* (1993) 80 BCLR (2d) 17 at 37, per Macfarlane JA (Taggart, Hutcheon and Wallace JJA concurring). See also *Badger* note 30 *supra* at 354

51 *United States v Winans* 198 US 371 (1905) at 384; *Tulee v Washington* 315 US 681 (1942) at 683-5.

52 *Tulee* note 51 *supra* at 684.

53 See P Kilduff and N Lofgren, note 10 *supra* at 16-17, and R Bartlett, note 10 *supra* at 369-73. As has been suggested *supra*, the "clear and plain intention test" is likely to be difficult to satisfy in the case of pre-1992 legislation. But that is not to say that the test will never be satisfied Legislation vesting ownership in a resource in the Crown may have this effect, *cf Walden v Hensler* (1987) 163 CLR 561 at 566-7 and the discussion of s 7 of the *Fauna Conservation Act* 1974 (Qld), per Brennan J See also Justice Drummond's consideration of *Walden v Hensler* in *Wik Peoples v Queensland* (1996) 134 ALR 637 at 686 Justice Drummond also considered (at 676-87, especially 684ff) the effect of legislation which vested ownership of minerals and petroleum in the Crown. It is understood that the effect of 'vesting' legislation is an issue in an appeal currently before the Queensland District Court involving the prosecution of an Aborigine in possession of native fauna.

54 Note 10 *supra* at 133

that a "clear and plain intention" standard must be satisfied for a fisheries law to regulate native title. The most that can be said is that the decision might contain that implication.[56] Sweeney also concedes that limits may exist on the exercise of native title rights[57] and accepts that prohibitions in endangered species legislation should be treated differently from prohibitions in other laws.[58] But how are limits to be imposed if not by regulatory provisions?

Native title rights are not beyond the reach of legislative power.[59] It is submitted that the proper approach to determining whether general fisheries laws *regulate* the conduct of native title holders is to apply ordinary principles of statutory interpretation. No "clear and plain intention" or other higher standard should be imposed. In its terms, the offence created by s 12(1)(d) of the WA Fisheries Act applied to "every person". This and other unambiguous expressions such as "any person" or "all persons"[60] or "every one"[61] should be given their natural and ordinary meaning, and include native title holders.[62] This surely would be the approach to a permissive provision: "A person may apply for a fishing permit". It should make no difference where the expression occurs in a provision that restricts or prohibits conduct that is, inter alia, an incident of native title: "No person may fish without a permit".[63] It is not to the point that native title rights were unknown when s 12 was enacted; a statute may operate adversely upon existing legal or equitable rights which were unknown to the legislature at the time of its enactment, or even which could not be known.[64]

This approach is not inconsistent with the High Court's interpretation of the expression "any person" in *Mabo No 2*,[65] which was followed by some of the

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55 *Ibid* at 134.

56 *Cf* DW Elliot, "In the Wake of *Sparrow*: A New Department of Fisheries?" (1991) 40 *UNBLJ* 23 at 40 (note 115)

57 Note 10 *supra* at 144

58 *Ibid* at 125

59 *Mabo No 2* note 20 *supra* at 111; *Coe v Commonwealth* (1994) 118 ALR 193 at 201; *Walker v New South Wales* (1994) 126 ALR 321 at 322.

60 See the Ministerial notice set out *supra*.

61 See s 201(1) of the Criminal Code 1985 (Can), considered in *R v Gardner* note 30 *supra*.

62 *Cf Mason v Tritton* note 3 *supra* at 574, per Gleeson CJ; see also *Mason v Tritton* note 7 *supra* at 70, per Young J. Comments by Brennan J, in *Walden v Hensler* note 53 *supra*, support this conclusion His Honour observed (at 567) that a provision of the *Fauna Conservation Act* 1974 (Qld) which prohibited the taking or keeping of fauna without a licence and made it an offence "eliminated any right which Aborigines or others might have acquired lawfully to take and keep 'fauna' as defined in the Act, and any entitlement which Aborigines might have enjoyed at common law to take and to keep fauna (assuming that such an entitlement had survived the alienation by the Crown of land over which Aborigines had traditionally hunted)". Although the relevance of tribal or customary law was not argued, Brennan J was clearly conscious (at 565) of the potential significance of native title right, but he concluded that they made no difference This suggests that his Honour considered that such provisions apply to the exercise of native title rights (although his use of the word "eliminated" is difficult to reconcile with his later comments in *Mabo No 2* about *Sparrow* and the non-extinguishing effect of regulatory laws). Justice Deane made comments to similar effect (at 583)

63 *Cf* s 27(5) of the *British Columbia Fishery (General) Regulations*, considered in *Van Der Peet* and *Smokehouse* note 30 *supra*, and s 20(3) of the *Pacific Herring Fishery Regulations* considered in *Gladstone* note 30 *supra*

64 *Wik* note 22 *supra* at 185, per Gummow J.

65 Note 20 *supra* at 66, 114.

justices in *Wik Peoples v Queensland*.[66] The Court held that the expression was not directed at indigenous people exercising their native title rights. However, the issue in those cases was whether the provisions in which the expression appeared - provisions which made unlawful occupation of Crown land an offence - supported a conclusion that the lands legislation in question evinced the necessary clear and plain intention to *extinguish* native title.[67] Whether a general fisheries law applies to regulate the exercise of native title rights, when extinguishment is not an issue, is a separate question.

The exemption of certain traditional Aboriginal activities from a prohibition of general application does not mean that other provisions in a regulatory law do not apply to native title holders. When considering s 56(1) of the WA Fisheries Act, the learned Magistrate in the Port Hedland case seemed to accept that such exemptions are evidence that there was no clear and plain intention for the law to extinguish native title. This is probably correct. However, it does not determine the application of other provisions of the WA Fisheries Act - which Franklyn J characterised as a "regulatory" law[68] - to the exercise of native title rights.[69]

The native title rights remain regulated while the law is in force. If the regulations are changed, the rights are subject to the new conditions, provided they are valid.[70] If the regulations are lifted, native title rights can be freely exercised, so long as they have not been lost, for example through the practical effect of the regulation over a long period of time.[71]

All of this is, of course, subject to any contrary intention in the legislation. An example of a contrary intention is contained in s 88(2) of the *Fisheries Act* 1983 (NZ), which provides that "[n]othing in this Act shall affect any Maori fishing rights". It is clear from s 88(2) that persons exercising Maori fishing rights are exempt from the general prohibition on fishing activities.[72]

VIII. THE *NATIVE TITLE ACT*[73]

To explain the proposition another way, general fisheries laws have operated on native title in a similar way to most "permissible future acts" under the *Native*

66 Note 22 *supra* at 146-7, per Gaudron J, at 190-1, per Gummow J

67 *Ibid* at 146, 191

68 Note 4 *supra* at 25-7.

69 *Cf* Gleeson CJ in *Mason v Tritton* note 3 *supra* at 574, *Kruger and Manuel v The Queen* (1977) 75 DLR (3rd) 434 at 438; *R v White and Bob* (1965) 50 DLR (2d) 613 at 618, *Dick v The Queen* (1985) 23 DLR (4th) 33 at 58

70 *Cf* note 73 *infra*, ss 23, 235.

71 *Cf Mason v Tritton* note 3 *supra* at 593, per Kirby P.

72 *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680. See also the Memorandum of Agreement approved under the *Manitoba Natural Resources Act* 1970 (Manitoba), RSM ch N30 at [13], considered in *R v Sutherland, Wilson and Wilson* (1980) 113 DLR (3d) 374. It provided that although gaming laws applied to Indians, they were assured of the right to hunt, trap and fish all year on unoccupied Crown lands and certain other lands.

73 *Native Title Act* 1993 (Cth). Note that significant changes have been proposed to the *Native Title Act* in response to, amongst other matters, the High Court decision in *Wik* note 22 *supra*; see the *Native Title Amendment Bill* 1997 introduced into the House of Representatives on 4 September 1997.

Title Act.[74] Most "permissible future acts" do not extinguish native title. Rather, they "suspend" native title rights to the extent and for so long as is necessary to allow the acts to operate and have full effect.[75] While the acts continue, native title remains subject to them. However, if a "permissible future act" ceases to operate or is wholly removed, native title rights can again have full effect. If it ceases in part or is partly removed, the native title rights can again have effect to that extent.[76]

It is also instructive to refer to another provision of the *Native Title Act*. Section 211 was inserted by an amendment moved in the Senate by the WA Greens and supported by the (then) Government. Its general effect is to quarantine the exercise of specified native title activities - including fishing - from licensing requirements.[77] Where a Commonwealth, State or Territory law provides that fishing can only be carried on with a licence or permit and the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders, native title holders do not have to possess a licence or permit to fish where they do so in the exercise or enjoyment of their native title rights and to satisfy their personal, domestic or non-commercial communal needs.

The WA Greens were responding to concerns expressed to them by indigenous representatives that the activities covered by s 211 were critical to indigenous people, particularly coastal dwellers. For native title holders, particularly in south eastern Australia, their rights might now only extend to these activities, the remainder having been extinguished by two hundred years of settlement.[78] As the activities are integral to traditional rights, their exercise should not be prevented in circumstances where other people can do them under licence.[79]

It is important to note that, for the s 211 exemption to apply, native title holders must be exercising their native title rights. It does not exempt them from licensing requirements in areas where they do not have native title rights, or where their rights do not extend to fishing (or the other activities referred to in the section, as the case may be). It might not exempt native title holders from the need to obtain a licence under provisions which prohibit persons from fishing, but which allow Aboriginal persons or Torres Strait Islanders to fish under a licence; such a provision could be one which conferred benefits only on or for the benefit of Aboriginal or Torres Strait Islanders.[80] Finally, s 211 does not operate where fishing is prohibited.

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74 *Ibid*, s 235.

75 *Ibid*, ss 23(3), (4) and the definition of the "non-extinguishment principle" in s 238; see also *Western Australia v Commonwealth* (1995) 183 CLR 373 at 458.

76 Note 73 *supra*, ss 238(6), (7).

77 Section 211 had no application to the Port Hedland case because the events took place before its enactment. However, it has potential application to similar cases in the future.

78 See statements by Senator Chamarette, Australia, Senate 1993, Debates, vol S 161, p 5441.

79 In *Derschaw v Sutton*, Wallwork J noted that Schedule 2 of the Ministerial notice excluded from the prohibition "licensed professional fishermen whose licences are endorsed to exempt them from this notice" The result was that "licensed professional fishermen can . be given greater rights to fish than Aboriginal people exercising their native title fishing rights": note 4 *supra* at 9 of Justice Wallwork's judgment

80 Note 73 *supra*, s 211(1)(c)

Within these limitations, s 211 operates in the manner outlined. But s 211 is not needed if regulatory fisheries laws - including licensing requirements - do not operate on the exercise of native title rights at all. On this reasoning, s 211 would be unnecessary.

IX. THE *RACIAL DISCRIMINATION ACT* [81]

There is no Australian equivalent to s 35(1) of the Canadian Constitution with which fisheries laws must comply, although the *Native Title Act* now provides significant protection to native title. There have been suggestions[82] that State and Territory fisheries laws which restrict the exercise of native title fishing rights by rendering them unlawful might be inconsistent with the *Racial Discrimination Act*, and therefore may not apply to native title. Although this was not one of the grounds of appeal in the Port Hedland case, it was raised in argument before the Full Court, but did not form part of the reasons of the majority.[83]

The relevant provisions of the *Racial Discrimination Act* are ss 9 and 10. Section 9 makes it unlawful for a person to do an act involving a distinction, exclusion, restriction or preference based on race (amongst other things) which has the purpose or effect of nullifying or impairing the enjoyment of a human right or fundamental freedom. It does not apply to the enactment of legislation[84] or to a prosecution for breach of legislation where there was no evidence of discriminatory treatment.[85]

Section 10 requires equality before the law for all racial and ethnic groups in their enjoyment of human rights. Its application involves a comparison of the enjoyment of the human rights of one group - defined by race (among other things) - with those of others. Where one group suffers discrimination in its enjoyment of human rights, s 10 provides the rights necessary to give them equality. The relevant human rights in this context are the right to own property, the right not to be arbitrarily deprived of it and the right to inherit.[86] While

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81 *Racial Discrimination Act* 1975 (Cth)

82 See for example, J Blockland and M Flynn, "Fishing for Equality The Tide is High", in *Turning the Tide*, Selected Papers published by the Faculty of Law, Northern Territory University, from a Conference on Indigenous Peoples and Sea Rights, 14-16 July 1993 at 273-5. See also R Bartlett, note 10 *supra* at 377-9

83 *Derschaw v Sutton* note 4 *supra* at 24-5, per Franklyn J. His Honour did comment (at 27-8) that he did not consider that the regulation of Aboriginal fishing rights by the WA Fisheries Act was discriminatory The argument was, however, considered by Wallwork J (dissenting), and is discussed *infra*.

84 *Mabo v Queensland (No 1)* (1988) 166 CLR 186 (*Mabo No 1*) Query though whether this reasoning applies to delegated legislation (such as regulations or by-laws) and to administrative acts (such as Ministerial notices which have a legislative character, *cf Western Australia v Commonwealth* note 75 *supra* at 472-3)

85 *Gerhardy v Brown* (1985) 159 CLR 70 at 122.

86 *Mabo No 1* note 84 *supra* at 217-19, 230-1 Land and interests in land are clearly included *Western Australia v Commonwealth* note 75 *supra* at 437.

native title fishing rights may not extend to ownership of fish resources[87] or to exclusive possession of the waters in which the resources are found, for current purposes it is assumed that any such rights may still be proprietary in character, even though the public right to fish is not.[88]

Blockland and Flynn[89] and Bartlett[90] argue that fisheries legislation is inconsistent with s 10. Blockland and Flynn draw on the reasoning in *Mabo No 1*,[91] where a majority of the High Court held that the *Queensland Coast Islands Declaratory Act* 1985 (Qld) was inconsistent with s 10. That Act extinguished native title rights (property rights held by the people of a race) without compensation, while leaving the property rights of others unimpaired. Indeed, it confirmed those rights. As such, the Act constituted an arbitrary interference with the property rights of the race.

Blockland and Flynn argue that the effect of fishing legislation is analogous to the abovementioned Act in that it extinguishes a property right (to take fish) without providing compensation. This treatment is unequal, so it is said, even though the public right to fish is subject to the same restrictions. The inequality arises because the incidents of native title cannot be compared to the public right to fish, or any other right. Bartlett puts a similar case.[92] An argument to this effect was also put to the Full Court in the Port Hedland case, and was regarded as persuasive by Justice Wallwork (dissenting).[93]

The suggested approach is very narrow. Given the uniqueness of native title, it could mean that no benchmark was ever appropriate for the making of a comparison for the purposes of s 10, with the consequence that native title rights were effectively immune from any restriction. It would be curious indeed if native title could be extinguished by legislation but not subjected to legislative regulation.

Inequality is a relative concept and involves the making of a comparison. In order to evaluate whether legislative restrictions on fishing have an unequal effect on native title holders, an appropriate benchmark must be identified so that the relative enjoyment of the human right of native title holders to fish can be assessed. This may not be easy. But, at least in coastal areas, the public right to fish in seas and tidal waters may be the nearest equivalent right.[94] Clearly, the

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87 Compare the statements in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330 on the public nature of fishing rights, at least offshore and in tidal rivers; see also *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 at 169-70, referred to in *Gladstone* note 30 *supra* at 679. The notion that a section of the public could own fish before they are caught seems to be inconsistent with those statements.

88 *Harper* note 87 *supra* at 330; *Mason v Tritton* note 3 *supra* at 594.

89 Note 82 *supra* at 274-5.

90 Note 10 *supra* at 377-9.

91 Note 84 *supra*

92 Note 10 *supra* at 379.

93 *Derschaw v Sutton* note 4 *supra* at 14-15, 23, per Wallwork J.

94 As recognised by the High Court in *Harper* note 87 *supra* The as yet unresolved issue of whether native title is capable of recognition offshore, that is in areas beyond the limits of the States or Territories, is irrelevant in circumstances like the Port Hedland case where the events took place in an area where native title clearly is capable of existing on the application of the principles in *Mabo No 2* note 20 *supra*; see also *Western Australia v Commonwealth* note 75 *supra*.

comparison is not perfect. Native title rights and the public right to fish are not identical. They have different historical and cultural roots. They also have different cultural values now, since native title rights would continue to be exercised for the purposes of subsistence (by and large) whereas public fishing rights are generally exercised (though not exclusively) for recreational purposes.

However, it is noted that in *Western Australia v Commonwealth*[95] the High Court did not regard as inappropriate the "freehold" benchmark set by the *Native Title Act* for acts affecting native title rights to land, even though native title rights with respect to land did not derive from legislation or a Crown grant, and could be vastly different from the rights of freeholders.[96] Further, in considering the effect of the *Racial Discrimination Act*, the Court observed that s 10(1):

> ... ensures that Aborigines who are holders of native title have the same security of enjoyment of their traditional rights over or in respect of land *as others who are holders of title granted by the Crown* and that a State law which purports to diminish that security of enjoyment is, by virtue of s 109 of the *Constitution*, inoperative.[97]

The s 10 argument, which was also put in *Mason v Tritton* but rejected, albeit without reasons, by Kirby P,[98] resembles a proposition advanced by Lambert JA in *R v Alphonse*[99] in considering whether s 27(1)(c) of the *Wildlife Act* 1982 (British Columbia) was a law of general application for the purposes of s 88 of the *Indian Act* 1985 (Can). Section 27(1)(c) made it an offence to hunt, take or kill wildlife except in the open season. Lambert JA took the view that s 27(1)(c) discriminated against Indians in a qualitative sense in that it prevented the exercise of their "aboriginal hunting rights" while it only regulated the statutory rights of others to hunt game:

> ... the right is derived from the customs, traditions and practices of the Indian people in question and has been nurtured and protected as an integral part of their distinctive culture since before British sovereignty was first asserted, and has been incorporated into the common law and protected by the common law ever since. When an Indian is prevented from exercising such a right ... he is suffering a qualitatively different consequence than the consequence that is visited on both Indians and non-Indians when their statutory hunting privilege is not extended to the closed season.[100]

This reasoning was rejected by the other members of the Court.[101] It is submitted that a similar approach to s 10 of the *Racial Discrimination Act* should

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95 Note 75 *supra* at 483.

96 And the Court compared the rights of holders of statutory titles, including compensation rights, with the "rights of traditional usage" created by the *Land (Titles and Traditional Usage) Act* 1993 (WA) in considering whether the latter were inconsistent with s 10 of the *Racial Discrimination Act*: *Western Australia v Commonwealth* note 75 *supra* at 438-50

97 Note 75 *supra* at 438 (emphasis added). See also at 437. A similar comment was made in *Mabo No 1* note 84 *supra* at 219.

98 Note 3 *supra* at 594. See also the rejection of the argument by Young J in the Supreme Court note 7 *supra* at 40-1, 43.

99 Note 50 *supra* at 57-9.

100 *Ibid* at 59

101 *Ibid* at 33-5

also be rejected.[102] Given their sui generis character, native title rights may often be affected differently from rights or privileges enjoyed by the community as a whole. However, the operation of s 10 ought not be triggered where a law applies universally and to regulate all rights, and privileges, whatever their source.

But if s 10 *does* apply to regulatory laws in the way suggested, what is its effect on those laws in their application to native title rights? In *Mabo No 1*, the High Court held that the *Queensland Coast Islands Declaratory Act* was inconsistent with s 10. As a consequence, it was inoperative and of no effect by virtue of s 109 of the Constitution.[103]

If s 10 has a similar effect on regulatory fisheries laws, as Bartlett argues,[104] and as was contended by the applicants before the Full Court in the Port Hedland case,[105] then those laws that were enacted before 1 July 1993 (including the WA Fisheries Act) would be "past acts" for the purpose of ss 14 and 19 of the *Native Title Act*.[106] That is, they would have been "invalid" to an extent due to the existence of native title.[107] "Invalidity" in this context includes not having full force and effect.[108] Laws which apply in their terms to "all persons" but which are denied application to those exercising native title rights due to s 10 of the *Racial Discrimination Act*, and s 109 of the Constitution, do not have full force and effect. In *Western Australia v Commonwealth* the High Court acknowledged the *Racial Discrimination Act:*

> ... [a]s the chief, and perhaps the only, way in which the existence of native title might have produced invalidity in a past act attributable to a State or Territory ... [and] ... the definition of past acts gathers in those *legislative* and other acts which discriminated, albeit unintentionally, against the Aboriginal and Torres Strait Islander holders of native title.[109]

If it is a "past act", the WA Fisheries Act has now been validated by Western Australia.[110] It and similar laws would be "Category D past acts"[111] to which the "non-extinguishment principle" applies.[112] This means that native title fishing rights have no effect, and native title holders are subject to the laws while they remain in force and in their terms apply to them.[113] As has been submitted, provisions in general terms do so apply. Accordingly, the position of native title

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102 See *Mason v Tritton* note 3 *supra* at 593, per Kirby P, see also the judgment of Young J note 7 *supra* at 40-1, 43 The majority in the Port Hedland case implicitly rejects the argument· note 4 *supra* at 27-8, per Franklyn J.

103 Note 84 *supra*. See also *Western Australia v Commonwealth* note 75 *supra* at 438.

104 R Bartlett, note 10 *supra* at 379.

105 Note 4 *supra* as summarised at 15, per Wallwork J.

106 The following reasoning also applies to acts done under those laws, such as a Ministerial notice under ss 9 and 11 of the WA Fisheries Act.

107 Note 73 *supra* - see the definition of "past act" in relation to legislation in s 228(2)(a)(i), (b).

108 Note 73 *supra* - see the definition of "valid" in s 253, and the consideration of its derivatives in *Western Australia v Commonwealth* note 75 *supra* at 453, 469.

109 Note 75 *supra* at 454 (emphasis added). See also at 462

110 *Titles Validation Act* 1995 (WA), s 5. All States and Territories have enacted validating legislation to the same effect.

111 Note 73 *supra*, s 232.

112 *Ibid*, s 15(1)(d); see also note 110 *supra*, s 9.

113 Note 73 *supra*, s 238

holders under any fisheries laws that were inoperative in respect of them by virtue of s 10 of the *Racial Discrimination Act* and s 109 of the Constitution is the same as if the laws were not so affected.

In the main, this would also be the position with respect to fisheries laws enacted after 1 July 1993, and administrative actions authorised by them. In so far as they affected native title, they would be "future acts".[114] In their application to *offshore* native title they are "permissible future acts".[115] They are also "permissible future acts" in relation to native title rights over *onshore* waters provided they satisfy s 235(2) of the *Native Title Act*, in relation to legislation, and s 235(5)(b)(ii), in relation to other acts. "Permissible future acts" are valid.[116] The "non-extinguishment principle" applies to them,[117] but native title holders would be subject to such laws and administrative acts. It is unlikely that the *Racial Discrimination Act* will have any application to "permissible future acts".[118]

X. THE *PORT HEDLAND* CASE AGAIN

These principles can now be applied to the Port Hedland case. For present purposes, let us accept that the WA Fisheries Act lacks any clear and plain intention to extinguish native title fishing rights. The learned Magistrate's reliance on s 56 to support this conclusion was clearly warranted. It can also be accepted that he was correct in the following crucial observation of the effect of s 56:

> In my view s 56 recognises the aboriginal right to fish *and then purports to restrict the "right" by way of the other regulatory sections of the Act 9, 10, 23, 23A, 24 and 26.*[119]

It is submitted that he proceeded to ignore this observation, and that he was incorrect in concluding that there was "no question" that native title was available as a defence to charges under the WA Fisheries Act.[120] This undoubtedly influenced the manner in which the matter was dealt with on appeal.

Native title rights may well be within the activities covered by the s 56 exemption. However, even if they are, as the learned Magistrate acknowledged, s 56 is itself subject to restrictions, including those imposed by a Ministerial notice made pursuant to s 9. Section 56 does not confer immunity from prosecution under s 12(1)(d) for activities prohibited by a Ministerial notice. The offence created by s 12(1)(d) applies to "every person". These words should be given their ordinary meaning. The defendants admitted to engaging in

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114 *Ibid*, ss 226, 227, 233(1)(a)(i), 235.
115 *Ibid*, s 235(8)(a).
116 *Ibid*, s 23(2).
117 *Ibid*, s 23(4)
118 *Western Australia v Commonwealth* note 75 *supra* at 483-4.
119 Note 1 *supra* at 8 of the learned Magistrate's Reasons for Decision (emphasis added).
120 Note 16 *supra*

activities that were within the terms of the notice. Accordingly, those activities constituted an offence under s 12(1)(d) and it is unnecessary to examine whether they involved an exercise of native title rights (except perhaps in relation to the appropriate penalty).

If, in their application to native title rights, the WA Fisheries Act or the Ministerial notice were invalid due to the *Racial Discrimination Act*, they have now been validated. Further, they are taken always to have been valid.[121] Section 211 of the *Native Title Act* has no possible relevance as the activities occurred before its commencement.

XI. CONCLUSION

Fish resources are under serious threat. Regulatory provisions are in place to control the activities of people who exploit the resources. Often the measures are regarded as so necessary that they attract a penalty if they are breached. It is not to the point that the depletion of stocks is not the fault of native title holders, nor is it relevant that excluding traditional fishing rights from regulatory provisions will not cause "open slather".[122] The same can be said about isolated breaches by non-native title holders. The remaining resource is diminished no matter who it is who now takes fish.

The legislative objective is perverted if the courts adopt a selective approach to the application of provisions that are plainly universal. As Kirby P said in *Mason v Tritton*:

> I do not take it to be the intent of the High Court in *Mabo* that successful claimants to a form of native title should then be able to remove themselves from the ordinary regulatory mechanisms of Australian society. In the particular context of this case, the control and the regulation of fishing activity applies to all those who fish, *regardless of the nature of the fishing right* which they severally purport to exercise.[123]

On a more general level, Chief Justice Mason's comments in *Walker v New South Wales*[124] are also relevant:

> It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle... Just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burden those laws impose. The presumption applies with added force in the case of the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated.

Later on he noted:

> There is nothing in *Mabo [No 2]* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.[125]

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121 Note 73 *supra*, s 19(1)

122 D Sweeney, note 10 *supra* at 113

123 Note 3 *supra* at 593 (emphasis added).

124 (1994) 126 ALR 321 at 323.

125 *Ibid* at 324.

These comments are directly applicable to offence provisions contained in general fisheries legislation.

If there is an imbalance between the needs of native title holders and other indigenous people, and the legislative protection afforded to living resources, this is a matter to be addressed by Australia's parliaments. The special needs of indigenous people are already recognised in many fishing laws - s 56 of the WA Fisheries Act is an example, and s 211 of the *Native Title Act* gives special rights to native title holders. If necessary, the measures can be extended by appropriate amendments to the legislation.