PARLIAMENT OF WESTERN AUSTRALIA

THIRTIETH REPORT

OF THE

STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

FISH RESOURCES MANAGEMENT ACT 1994

Presented by the Hon Derrick Tomlinson (Chairman)

30
NOVEMBER 1994

Members of the Committee

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Hon Bill Stretch, MLC
Hon Ross Lightfoot, MLC
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Report of the Legislative Council Standing Committee on Legislation

in relation to the

Fish Resources Management Act 1994

Reference

1 On 18 October 1994 the Legislative Council resolved:

> That sections 6 and 7 of part 1, and parts 10 and 14 of the Fish Resources Management Act 1994 be referred to the Standing Committee on Legislation for consideration and report[1].

The reference arose out of an agreement between the Government and the Opposition after concerns about the *Fish Resources Management Act* (*FRMA*) were expressed by the Opposition at the Second Reading stage.

The referred matters

2 Section 6 of the *FRMA* provides:

> An Aboriginal person is not required to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of the person or his or her family and not for commercial purposes.

3 Section 7 of the *FRMA* is concerned with exemptions from the *Act*. Exemptions may be granted by the Minister for Fisheries and, in certain circumstances, the Executive Director of the Fisheries Department.

4 Part 10 of the *FRMA* is concerned with the creation and regulation of designated fishing zones.

5 Part 14 of the *FRMA* is concerned with objections to decisions concerning authorizations. In particular, division 2 of part 14 deals with objections to authorizations on the basis of rights of traditional usage. The concept of rights of traditional usage is derived from the *Land (Titles and Traditional Usage) Act 1993*. The division parallels relevant provisions of that *Act*.

Aboriginal relationship with land

6 It is now generally accepted that Aboriginal peoples have a special relationship with land. An important part of that relationship is hunting, gathering and

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[1] 1994 WAPD 5386

fishing practices. These practices are the traditional methods of obtaining food of Aboriginal peoples. For many Aboriginal peoples they continue to be important, for traditional reasons and for the purpose of supplementing other sources of food now available to them.

7 In contrast to Aboriginal title to land, which has been extinguished by the Crown by grant of freehold or leasehold over large parts of Australia since colonisation, there has been relatively little interference with traditional Aboriginal hunting, gathering and fishing rights. Aborigines are in many cases throughout Australia exempt or partly exempt from the operation of legislation which regulates hunting, gathering and fishing rights. For example, in Western Australia Aborigines are permitted to take fauna and flora on any Crown land or other land, other than a nature reserve or wildlife sanctuary, with the consent of the occupier (if any) of that land for the purpose of food for themselves and their families, but not for sale[2]. There was a similar provision in respect of fish in the former *Fisheries Act 1905*[3].

Common law hunting, gathering and fishing rights

8 *Mabo*

The common law recognises Aboriginal rights of hunting, gathering and fishing. In *Mabo v Queensland (No 2)*[4] Deane and Gaudron JJ said[5]:

> [T]he pre-existing native interests with respect to land which were assumed by the common law to be recognised and fully respected under the law of a newly annexed British territory were not confined to interests which were analogous to common law concepts of estates in land or proprietary rights. Nor were they confined by reference to a requirement that the existing local social organisation conform, in its usages and its conceptions of rights and duties, to English or European modes or legal notions. To the contrary, the assumed recognition and protection extended to the kinds of traditional enjoyment or use of land which were referred to by the Privy Council in *Amodu Tijani*.

The Privy Council referred to native title in *Amodu Tijani v Secretary, Southern Nigeria*[6] in the following terms:

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2 Section 23 *Wildlife Conservation Act 1950*

3 Section 56 *Fisheries Act 1905*

4 (1992) 107 ALR 1; 66 ALJR 408; 175 CLR 1

5 107 ALR 1, 63

6 [1921] 2 AC 399, 403-4

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment...

Deane and Gaudron JJ cited this passage with approval[7] and went on to note a number of Canadian authorities (cited in *Amodu Tijani*) which dealt with indigenous peoples' hunting and fishing rights over vast tracts of land in Canada.

Legislation

9 The Commonwealth *Native Titles Act 1993* (*NTA*) commenced operation on 1 January 1994. Section 10 of the *NTA* provides that:

> Native title is recognised, and protected, in accordance with this Act.

Section 12 provides:

> Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.

Native title is defined in s 223 of the *NTA*. The definition expressly includes, among other things, "hunting, gathering, or fishing, rights and interests" (s 223(2)).

Western Australia has challenged the validity of the *NTA* in the High Court. The matter was heard in September, but the decision (at the date of writing) is still reserved[8].

10 The Western Australian *Land (Titles and Traditional Usage) Act 1993* (*LTTA*) came into operation on 2 December 1993. Section 7 of the *LTTA* extinguishes all existing native title and replaces it with "rights of traditional usage". Rights of traditional usage "are equivalent in extent to the rights and entitlements that they replace" (s 7(2)). While the section purports to equate rights of traditional usage with native title rights, it nevertheless expressly extinguishes native title rights. It therefore appears to be in direct conflict with the *NTA*, which expressly recognises and affirms native title rights.

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[7] 107 ALR 1, 62; see also per Brennan J at 42, Deane and Gaudron JJ at 83, Toohey J at 143.

[8] *Western Australia v Commonwealth*, decision to be delivered by 19 April 1995

The validity of the *LTTA* has been challenged in the High Court. The matter was heard in September, but the decision (at the date of writing) is still reserved[9].

Effect of legislation

11 The effect that these 2 pieces of legislation will have on Aboriginal hunting, gathering and fishing rights in Western Australia cannot be definitively determined until the relevant High Court decisions have been delivered.

12 Section 109 of the Commonwealth Constitution provides:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

13 In the context of s 109 of the Commonwealth Constitution, it is clearly possible that the *LTTA* will at least be read down to the extent that it is inconsistent with the *NTA*. If that is the case, then the provisions in the *FRMA* relating to Aboriginal fishing rights will be subject to any native title rights held by Aborigines which have not previously been restricted or abrogated by the Crown. In order to determine if the *FRMA* infringes on those rights, it will first be necessary to ascertain their nature and extent. This will require detailed consultation with Aboriginal peoples and relevant experts. It will also require an investigation of any possible restriction or extinguishment of relevant native title rights since 1829. The extent to which legislation (in particular, State legislation) can subsequently regulate such rights will require further consideration. If the *LTTA* is held to be invalid or is read down, portions of division 2 of part 14 of the *FRMA* may thereby also become invalid.

14 If the *LTTA* is held to be valid in its entirety, then its precise effect on the fishing rights of Aborigines must be determined. The principal question would then be a policy issue on the extent to which it is desired to regulate or extinguish Aboriginal native title fishing rights. In the first instance an analysis of what Aboriginal fishing rights have survived to the present time will be required. If the *LTTA* is held to be valid, it would seem that any such rights may be regulated or extinguished by legislation. If it is intended that they be extinguished, legislation designed to achieve that aim must evince a clear intention to do so[10].

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[9] *Wororra & anor v Western Australia* and *Biljubu & ors (on behalf of the Martu people) v Western Australia*, decisions to be delivered by 19 April 1995

[10] 107 ALR 1, per Brennan J at 46, per Deane and Gaudron JJ at 84 and per Toohey J at 160

Experience in Canada and New Zealand

15 Canada

Customary hunting, gathering and fishing rights of indigenous peoples have been recognised in Canada for many years. Canadian cases raise a number of issues of direct relevance to legislative interpretation and fisheries management (in the context of Aboriginal native title rights) generally[11]:

15.1 What are the existing common law hunting, gathering and fishing rights of indigenous peoples?
15.2 Do they include commercial fishing rights?
15.3 Are legislation, government policy and / or executive action capable of extinguishing such rights?
15.4 Are legislation, government policy and / or executive action capable of regulating such rights?
15.5 How is competition between the rights of indigenous people and, for example, commercial enterprises to be resolved?

Given the similarities between Canadian and Australian experience generally on issues involving indigenous peoples and the Canadian experience specifically dealing with hunting, gathering and fishing rights of indigenous peoples, it would appear that it may be beneficial to study the Canadian experience in some depth. This should be considered after the nature and extent of Australian Aboriginal fishing rights has been investigated so that meaningful comparisons can be made and conclusions drawn.

16 New Zealand

The issue of common law aboriginal fishing rights has not been judicially conclusively settled. As legislation has resolved the issue of Maori fishing rights, it is unlikely to be settled in the immediate future. The New Zealand legislation was the subject of much controversy and resulted in legal action which went to the New Zealand Court of Appeal (but was discontinued before final determination). The action concerned Maori rights of commercial fishing. In the result the Maori succeeded in obtaining substantial concessions (including a $150 million payment and a share in the quota of the Government managed "quota management system" for fisheries) from the Government in exchange for extinguishment of any Maori commercial fishing rights (based on native title, customary law or the *Treaty of Waitangi*) and discontinuance of litigation concerning those rights.

The New Zealand experience provides a lesson for government on the pitfalls of legislating for fisheries without duly consulting with indigenous peoples. The New Zealand position is complicated by the *Treaty of Waitangi*, but valuable

[11] Note, in particular, *R v Sparrow* [1990] 1 SCR 1075; 70 DLR (4th) 385

insights may nevertheless be gained from an examination of the situation in that country.

Conclusions

17 The effect of native title on the *Fish Resources Management Act 1994* cannot definitively be determined until the High Court challenges to the validity of the Commonwealth *Native Title Act 1993* and Western Australian *Land (Titles and Traditional Usage) Act 1993* have been decided.

18 The *FRMA* was referred to the Committee after it had been enacted. The Committee is therefore powerless to make specific recommendations to the Legislative Council which will assist it in its consideration of the legislation. Consequently the Committee has confined its comments to the general matters referred to in this report.

Recommendation

19 **The Committee recommends that, after the High Court has delivered its decisions in the cases challenging the validity of the *Native Title Act 1993* and the *Land (Titles and Traditional Usage) Act 1993*, the *Fish Resources Management Act 1994* be referred to a Select Committee for the purpose of reviewing the *FRMA* in the context of native title or rights of traditional usage.**

MINORITY REPORT

The Minority is of the opinion that the Committee ought to have invited submissions from Aboriginal people and others with respect to possible curtailment of traditional Aboriginal fishing rights.

Concern has been expressed that the *Fisheries Act Amendment Act 1979* (No. 60 of 1979; s 15, amending s 56 of the principal Act) effected a very substantial reduction in the rights and privileges of Aboriginal people in regard to the taking of fish in Western Australia.

This amendment was passed after the 1975 Commonwealth *Racial Discrimination Act* and involved no payment of compensation to Aboriginal people.

Many Aboriginal groups and others have expressed the view that the *Fish Resources Management Act 1994* compounds the error made in 1979 and reduces or restricts the rights and privileges of Aboriginal people in regard to the taking of fish.

This matter was raised vigorously in the second reading debate in the Legislative Council by the Hon Tom Stephens, the Member for Mining and Pastoral Region.

Despite assurances from the Government to the contrary, there appears to have been little consultation with Aboriginal groups and individuals prior to the passage of the 1994 Bill.

The Minister for Fisheries, The Hon Monty House, did, however, give an undertaking to Opposition members of the Legislative Council that the matter of Aboriginal fishing rights would be referred to the Legislation Committee and that if the Committee found there to be a reduction or diminution in traditional rights and privileges, amendments to the legislation would be introduced.

The Minority recognises the impact that the 1995 High Court determination may have on all Australian legislation affecting native title and the value of the select committee to review the *Fish Resources Management Act* in the light of such determination.

The Minority is of the opinion, however, that it was remiss of the Committee, given the assurance of the Minister, not to provide an opportunity for Aboriginal people and others to comment on the *Fish Resources Management Act*, even at this late stage in the process.

It is regrettable that the Aboriginal people in particular have been denied the opportunity of having their views heard prior to the proclamation of the *Fish Resources Management Act 1994*.

Hon John Cowdell
Hon Cheryl Davenport