

SUPREME COURT OF QUEENSLAND

CITATION: *Stevenson v Yasso* [2006] QCA 40

PARTIES: **BRENDA STEVENSON**
(complainant/appellant/respondent)
v
RICCARDO DURANTE YASSO
(defendant/respondent/applicant/appellant)

FILE NO/S: CA No 96 of 2005
DC No 113 of 2003
MC No 88438 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Rockhampton

DELIVERED ON: 24 February 2006

DELIVERED AT: Brisbane

HEARING DATE: 24 August 2005

JUDGES: McMurdo P, McPherson JA and Fryberg J
Separate reasons for judgment of each member of the Court,
McMurdo P and Fryberg J concurring as to the orders made,
McPherson JA dissenting

ORDER: **1. Application for extension of time within which to appeal granted**
2. Application for leave to appeal granted
3. Appeal allowed with costs to be assessed
4. Set aside the orders of the District Court of 25 February 2005 and instead order that the appeal under s 222 *Justices Act 1886* (Qld) be dismissed with costs to be assessed

CATCHWORDS: APPEAL AND NEW TRIAL - APPEAL-PRACTICE AND PROCEDURE - QUEENSLAND - TIME FOR APPEAL - EXTENSION OF TIME - where appellant applied for leave to appeal about two and half months out of time - where appellant's explanation for the delay was that the January holiday period made it difficult for him to access pro bono legal services - where possibility for confusion about when time began to run resulting from further order made by District Court judge - where answer to the question of whether in the interests of justice to grant the extension of time interlinked with merits of proposed appeal - whether an extension of time should be granted

PROCEDURE - INFERIOR COURTS - QUEENSLAND - where appellant contends the District Court lacked jurisdiction and issue should have been determined in the Federal Court - where appellant is one of a number of claimants in an undetermined native title claim under the *Native Title Act* 1993 (Cth) pending in the Federal Court - whether the appellant's pending native title claim prevented the appellant being prosecuted for an offence under the *Fisheries Act* 1994 (Qld) in the Magistrates Court or the District Court hearing and determining an appeal from the Magistrates Court

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - INTERFERENCE WITH DISCRETION OF COURT BELOW - JUDGE MISTAKEN OR MISLED - where appellant contends District Court judge erred in interpreting transcript evidence in the Magistrates Court - where appellant contends this error led District Court judge to err in determining other matters - where relevant part of transcript in the Magistrates Court was checked by the State Reporting Bureau after Court of Appeal hearing - whether any error in District Court judge's interpretation of transcript - whether District Court judge should have intervened in re-examination of a witness

PRIMARY INDUSTRY - FISH - OFFENCES - where appellant charged with unlawful possession of "commercial fishing apparatus" under s 84 *Fisheries Act* 1994 (Qld) ("the Act") - where appellant found not guilty of the charge in the Magistrates Court - where magistrate concluded that although the elements of the offence were made out the appellant was excused by s 14 of the Act as an Aborigine acting in the traditional way of an Aborigine taking fish by means of a net - where respondent successfully appealed to the District Court under s 222 *Justices Act* 1886 (Qld) - where District Court judge found that s 14 of the Act had no application for a charge under s 84 of the Act - whether s 14 of the Act has application to a charge under s 84 of the Act - whether s 84 of the Act applies to both commercial and non-commercial fishing apparatus

ABORIGINALS - CRIMES BY ABORIGINALS - CRIMINAL LIABILITY - where magistrate found that the appellant was able to rely on s 14 of the Act to excuse his possession of commercial fishing apparatus as he was an Aborigine and was acting in the traditional way of an Aborigine taking fish by means of a net - where District Court judge found that on the evidence the appellant was not an Aborigine - where District Court judge found that if the appellant was an Aborigine in order to rely on s 14 there needed to be evidence that he took fish under Aboriginal tradition and there was no such evidence - whether the appellant was an Aborigine - whether the appellant produced

sufficient evidence that he was in possession of the net by way of Aboriginal tradition - whether the Court should attempt an *a priori* enumeration of what must be proved to establish Aboriginal tradition as defined in s 36 *Acts Interpretation Act* 1954 (Qld) - whether the definition of Aboriginal tradition is best worked out in the context of actual cases

ABORIGINALS - GENERAL - APPLICATION OF LAW - where appellant contends that taking fish by means of a net is an Aboriginal tradition in accordance with s 14 of the Act - whether s 14 applies to modifications of Aboriginal traditions such as the use of modern fishing nets

CRIMINAL LAW - EVIDENCE - MATTERS RELATING TO PROOF - BURDEN OF PROOF - where District Court judge found that the appellant failed to discharge the burden of proof on him under s 14 of the Act of adducing some evidence of his Aboriginality and of possession of the net by way of Aboriginal tradition so that the prosecution were not required to negative the operation of s 14 of the Act - whether the burden of proof under s 14 of the Act is required to be discharged on the balance of probabilities

CRIMINAL LAW - GENERAL MATTERS - CRIMINAL LIABILITY AND CAPACITY - DEFENCE MATTERS - IGNORANCE AND MISTAKE OF LAW - where there was evidence that the appellant had honestly believed he was entitled to have possession of the net and use it for fishing because he had been given permission by an Aboriginal elder - whether on the evidence s 22 *Criminal Code* 1899 (Qld) could have application to the offence charged under s 84 of the Act - whether there was evidence sufficient to raise s 22 *Criminal Code* - whether the prosecution proved beyond reasonable doubt that s 22 *Criminal Code* had no application to the offence charged

Native Title Act 1993 (Cth), s 211, s 224

Acts Interpretation Act 1954 (Qld), s 7(1), s 36

Criminal Code 1899 (Qld), s 1, s 22(2)

District Court of Queensland Act 1967 (Qld), s 118(3)

Fisheries Act 1994 (Qld), s 3, s 10, s 11, s 14, s 84, s 85

Fisheries Regulation 1995 (Qld), s 68, s 71, Sch 8, Sch 17

Justices Act 1886 (Qld), s 222

Aldrich v Ross [2000] QCA 501; [2001] 2 Qd R 235,
cited

Attorney-General for British Columbia v Attorney-General for Canada [1914] AC 153, considered

Basso-Brusa & Ors v City of Wanneroo [2003] WASCA 103;
No 1140 of 2002, 14 May 2003 considered

Chapman v Luminis Pty Ltd (No 4) [2001] FCA 1106;
(2001) 123 FCR 62, considered

Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249, followed
Derschaw v Sutton (1997) 17 WAR 419, considered
Director of Public Prosecutions v United Telecasters Sydney Ltd (1990) 168 CLR 594, considered
Federated Carters and Drivers' Industrial Union of Australia v Motor Transport and Chauffeurs' Association of Australia (1912) 6 CAR 122, cited
Federation Insurance Limited v Wasson & Ors (1987) 163 CLR 303, considered
Garcia v National Australia Bank Ltd (1998) 194 CLR 395, considered
Gibbs v Capewell (1995) 54 FCR 503, considered
Jones v Bartlett [2000] HCA 56; (2000) 205 CLR 166, considered
Mabo v Queensland [No 2] (1992) 175 CLR 1, cited
Mason v Tritton (1994) 34 NSWLR 572, considered
Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors (2002) 214 CLR 422, cited
Molina v Zaknich [2001] WASCA 337; (2001) 24 WAR 562, considered
Mott v Mott [1929] QWN 38, cited
Muramats v Commonwealth Electoral Officer (WA) (1923) 32 CLR 500, cited
Ofu-Koloi v The Queen (1956) 96 CLR 172, cited
Ostrowski v Palmer [2004] HCA 30; (2004) 218 CLR 493, considered
Palmer v Ostrowski [2002] WASCA 39; (2002) 26 WAR 289, considered
Re Coldham; ex parte Brideson [No 2] (1990) 170 CLR 267, cited
R v Edwards [1975] QB 27, considered
R v Hunt [1987] AC 352, considered
R v Sparrow [1990] 1 SCR 1075, considered
R v Waine [2005] QCA 312; CA No 70 of 2005, 26 August 2005, considered
R v Zischke [1983] 1 Qd R 240, considered
Shaw v Wolf (1998) 83 FCR 113, considered
Vines v Djordjevitch (1955) 91 CLR 512, considered
Walden v Hensler (1987) 163 CLR 561, considered

COUNSEL: The applicant/appellant appeared on his own behalf
A M Preston for the respondent

SOLICITORS: The applicant/appellant appeared on his own behalf
C W Lohe, Crown Solicitor, for the respondent

- [1] **McMURDO P:** Mr Yasso was charged under s 84 *Fisheries Act* 1994 (Qld) ("the Act")¹ with unlawfully possessing on 19 March 2003 commercial fishing apparatus namely one monofilament net of dimensions greater than prescribed in s 12(4) of Pt 3 of Sch 8 of the *Fisheries Regulation* 1995 (Qld) ("the Regulation") while not

¹ The complaint refers to s 85(4) of the Act but it is common ground that the charge was under s 84.

the holder of an authority at Dadson's Beach via Zilzie near Rockhampton. He was found not guilty of that count in the Rockhampton Magistrates Court on 28 October 2003. The magistrate concluded that Mr Yasso was acting as an Aborigine under s 14 of the Act in the traditional way of an Aborigine taking fish by means of a net.

- [2] The respondent successfully appealed under s 222 *Justices Act* 1886 (Qld) to the District Court. On 20 December 2004 the learned District Court judge allowed the appeal. His Honour determined that s 14 of the Act had no application to a charge under s 84 of the Act; if s 14 did apply to s 84, Mr Yasso on the evidence was not an Aborigine; if Mr Yasso were an Aborigine, to enliven s 14 of the Act there must be evidence that he took fish under Aboriginal tradition and there was no such evidence. His Honour also held that the *Native Title Act* 1993 (Cth) had no application to a charge under s 84 of the Act. Mr Yasso's sentence was adjourned until April 2005. The record does not reveal whether Mr Yasso has now been sentenced but that question is not an issue in this application.
- [3] Mr Yasso, through his agent John Dalungdalee Jones (who is not a lawyer), did not attempt to file an application for leave to appeal until 12 April 2005, about two and a half months out of time. Mr Yasso now applies for an extension of time for leave to appeal from the District Court decision. Mr Yasso attended in person at the hearing of the appeal. He rejected the Court's offer to adjourn the matter and to recommend to Legal Aid Queensland that he be given legal representation. At his request he was given leave to have his father, Mr Yasso Senior, who is not a lawyer, appear on his behalf.
- [4] By way of explanation for the delay Mr Jones has sent letters to the Court in which he states that the delay was because the January holiday period made it difficult for Mr Yasso to have access to pro bono legal services. It seems there may also have been some confusion as to when the appeal period began to run because the learned District Court judge delivered a further order on 25 February 2005. Even so, Mr Yasso's application was well outside the statutory appeal period. His explanation for the delay in pursuing his right to apply for leave to appeal within the prescribed time period is far from convincing. This Court would not, however, refuse his application for an extension of time if he demonstrated that the interests of justice require the granting of the extension. The answer to this consideration is interlinked with the merits of the proposed appeal. In deciding whether leave should be granted, the relatively trivial nature of the statutory offence at the heart of the application and the fact that he has already had a hearing in the Magistrates Court and a second hearing in the District Court are not factors in Mr Yasso's favour.

Jurisdiction

- [5] The first point he wishes to pursue on appeal if he is successful in his applications for an extension of time and for leave to appeal is that the District Court lacked jurisdiction and the issue should have been determined by the Federal Court because Mr Yasso is one of a number of claimants in an undetermined native title application under the *Native Title Act* 1993 (Cth) ("The Commonwealth Act") apparently pending in the Federal Court. The fact that Mr Yasso is bringing, with others, an application for a native title claim under the Commonwealth Act in the Federal Court which has not been determined does not prevent the lawful prosecution of an offence under the Act in the Magistrates Court. Contrary to Mr Yasso's submissions, s 211 of the Commonwealth Act can only have application

to those who are native title holders under s 224 of the Commonwealth Act. There is no evidence that Mr Yasso was such a person. If this were the only matter for the determination of this Court, Mr Yasso's applications would fail.

The correctness of the transcript

[6] Mr Yasso next contends the learned District Court judge erred in interpreting transcript evidence from Mr Hatfield as to a meeting of Darumbal people to consider Mr Yasso's Aboriginality and that this led his Honour to err in determining that Mr Yasso was not a person of Aboriginal descent and had no traditional right to fish with the net in his possession.

[7] This contention can also be quickly disposed of. The learned primary judge referred to a portion of the transcript of Mr Hatfield's evidence given before the magistrate which recorded:

"[Mr Yasso] has applied for membership to my knowledge and he was given - he was approved as - and having associate membership and the reason why he was given an associate membership was you had to be a Darumbal person to be a full member of the organisation. So the meeting - the group decided that [Mr Yasso] was a Darumbal person and he was an associate member and that was approved".

His Honour considered " ... that the transcript probably does not accurately record Mr Hatfield's answer in that the last sentence should have read, or at least Mr Hatfield intended to say:

'... the group decided that [Mr Yasso] was **not** a Darumbal person ...'".

[8] I have had my associate contact the State Reporting Bureau to have checked the relevant part of the transcript in the Rockhampton Magistrates Court on 28 October 2003. The court reporters have now compared the audio tape and the transcript. They report that the original transcript was inaccurate and that the transcript should record "so the meeting - the group decided [Mr Yasso] wasn't a Darumbal person ...". The transcript has now been corrected. It follows that Mr Yasso has no cause for concern in this respect and that his Honour was right in thinking the transcript may have been inaccurate; it was.

[9] The essence of Mr Yasso's appeal is whether the learned primary judge was right in overturning the magistrate's finding that Mr Yasso was not liable under s 84 of the Act because of s 14. The determination of this issue requires a review of the relevant legislation, of the evidence before the magistrate and the District Court judge on appeal, and of both decisions.

The Act and the Regulation

[10] Part 1 of the Act deals with preliminary matters including the objectives² of the Act and definitions.³ The Act's main purpose "is to provide for the use, conservation and enhancement of the community's fisheries resources and fish habitats in a way that seeks to -

(a) apply and balance the principles of ecologically sustainable development; and

² The Act, s 3; amended by s 12 *Primary Industries Legislation Amendment Act 2002* (Qld), Act No 49 of 2002, assented to and effective from 24 September 2002.

³ The Act, s 4.

(b) promote ecologically sustainable development."⁴

[11] The main purpose of the Act is to be achieved by providing for matters including the management of commercial, recreational and indigenous fishing.⁵

[12] Part 1 of the Act is headed "**PRELIMINARY**", Division 4 of which is headed "**Operation of Act**" and contains s 10 to s 14. Section 10 states that the Act binds all persons including the State; s 11 deals with the general application of the Act, particularly as to potential areas of confusion between Queensland and Commonwealth jurisdiction; s 12(a) to (d) sets out four specific circumstances where the Act does not apply; s 13 provides that a person may be exempted from the Act or a provision of the Act by regulation and makes it an offence to contravene a condition of an exemption under a regulation.⁶ Section 14 of the Act is headed "**Aborigines' and Torres Strait Islanders' rights to take fisheries resources etc**" and relevantly provides:

"(1) An Aborigine may take, use or keep fisheries resources,⁷ or use fish habitats,⁸ under Aboriginal tradition, ...

(2) However, subsection (1) is subject to a provision of a regulation or management plan that expressly applies to acts done under Aboriginal tradition ...

(3) A regulation or management plan mentioned in subsection (2) may be developed only after cooperating with Aborigines ... considered by the chief executive to be appropriate, to reach agreement, or reasonably attempt to reach agreement, about the proposed regulation or plan".

[13] The terms "Aborigine" and "Aboriginal tradition" are not defined in the Act. The *Acts Interpretation Act 1954 (Qld)* defines "Aborigine" as "a person of the Aboriginal race of Australia", "Aboriginal people" as "people of the Aboriginal race of Australia" and "Aboriginal tradition" as "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships".⁹

[14] The Explanatory Notes to s 14 of the Act provide that the section:

"... protects the rights of Aboriginal ... persons to take, use or keep fisheries resources or use fish habitat under Aboriginal tradition ...

A regulation or management plan which affects traditional or customary use of fisheries may be made, after consultation with Aborigines ... Conservation, environmental or sustainability concerns are examples of the circumstances in which this provision might be used. The clause does not allow Aboriginal ... persons to exploit the resource in a commercial manner without compliance in all respects with the [Act]. The clause is intended to preserve the

⁴ The Act, s 3(1); amended by s 12 *Primary Industries Legislation Amendment Act 2002 (Qld)*, Act No 49 of 2002, assented to and effective from 24 September 2002.

⁵ The Act, s 3A(b)(ii); inserted by s 12 *Primary Industries Legislation Amendment Act 2002 (Qld)*, Act No 49 of 2002, assented to and effective from 24 September 2002.

⁶ The Act, s 13(3).

⁷ In the Schedule to the Act "'fisheries resources' includes fish and marine plants".

⁸ In the Schedule to the Act "'fish habitat' includes land, waters and plants associated with the life cycle of fish, and includes land and waters not presently occupied by fisheries resources."

⁹ Section 36 *Acts Interpretation Act 1954 (Qld)*.

traditional and customary rights within the framework of proper resource management."

[15] It is common ground that there was no regulation or management plan under s 14(2) of the Act in existence at the relevant time.

[16] Section 84(1) of the Act makes it an offence punishable by up to 300 penalty units to unlawfully use or possess fishing apparatus. Under the dictionary in the Schedule to the Act "fishing apparatus" means:

"anything used, or capable of being used, to take fish, or assist in the taking of fish, and includes, for example -

...

(b) a ... net ...".

[17] Section 85 of the Act relevantly provides:

"Sale etc of commercial fishing apparatus prohibited in certain circumstances

(1) In this section -

'commercial fishing apparatus' means fishing apparatus that may be used, bought or possessed only by the holder of a particular type of authority, and includes netting material ordinarily used in the manufacture of commercial fishing apparatus.

...

(4) If commercial fishing apparatus may be used or possessed only by the holder of a particular type of authority, a person must not use or possess the fishing apparatus unless the person is the holder of an authority of that type.

Maximum penalty - 300 penalty units.

..."

[18] Under s 96(2) of the Regulation a recreational fisher may use or possess only fishing apparatus permitted under Sch 8 of the Regulation or a management plan. It is not contentious that the monofilament net that Mr Yasso was found to have in his possession on 19 March 2003 was of a dimension greater than that prescribed in s 12(4) of Pt 3 of Sch 8 of the Regulation.¹⁰ Nor is it contentious that Mr Yasso did not have the authority under s 68(3) of the Regulation allowing him to possess "commercial fishing apparatus".

The evidence

[19] The prosecution case turned on two witnesses, Mr Broadsmith and Mr Hatfield. Mr Broadsmith, a district officer with the Queensland Boating and Fisheries Patrol, gave evidence that he approached Mr Yasso on 19 March 2003. Mr Yasso was in possession of a bag containing a fishing net which exceeded the size allowed for recreational fishers under the Act and the Regulation.¹¹ Mr Yasso gave his date of birth as 24 March 1972. He initially said that he found the net on the beach. When asked about his cultural descent he said he was a South Sea Islander. Mr Yasso then admitted that he owned the net, dragged it about an hour earlier and was then in possession of it. When asked again about his descendency he said that he was Aboriginal and South Sea Islander; he did not know the tribe but his nana was "an

¹⁰ The Regulation prescribes a 16 m long net with a 28 mm mesh size whilst Mr Yasso's net was 53 m long with a two inch [51 mm] mesh size.

¹¹ See the Regulation, s 96, Sch 8.

Alberts". He was asked if he had permission from local elders to use a net such as that in his possession. He said "I think it's in the Native Title Act that I'm allowed to use it. Ivan Miller told me I could do it". Mr Yasso then went to his car, showed Mr Broadsmith a laminated double-sided page containing s 211 of the Commonwealth Act and indicated that he believed he was entitled to use the net. On 21 March 2003 Mr Broadsmith telephoned Mr Yasso and asked him what Indigenous district he was in. He said: "I was in my grandmother's at Darumbal". Mr Broadsmith asked "What is your tradition to take fish?" He replied "I've been doing it all - we've been doing it all our life". Mr Broadsmith said "How have you been taking fish traditionally?" Mr Yasso replied "With nets, spears and lines".

[20] David Wesley Hatfield gave evidence that he is a Darumbal Aboriginal person and chairman of the Darumbal-Noolar Murree Aboriginal Corporation for Land and Culture ("the Corporation"),¹² a body he described as the representative body for Darumbal people when consulting with State and Federal governments on community issues. He was at the time of the Magistrates Court hearing in October 2003 a councillor and deputy chair of the Central Queensland Aboriginal and Torres Strait Islander Commission Regional Council. As Chairman of the Corporation he was appointed to represent the elders of the Darumbal people and the Council of Elders ("the Council") and the members and associate members of the organization. Fishing was very much part of the Darumbal people's culture and people from other areas had no traditional right to fish in the Darumbal area. The Corporation met with the Marine Park Authority and after consultation with the Council agreed to stop the use of "gill" nets.¹³ The Council is composed of 10 people and represented a consensus of the views of the Darumbal community. He has known Mr Yasso for eight to 10 years. He was unaware of any approval from the Council to Mr Yasso to use a net of the type the subject of this charge. He regarded Mr Yasso as a South Sea Islander. Mr Yasso was an associate member of the Darumbal-Noolar Aboriginal Corporation for Land and Culture. This was because only Darumbal persons could be full members of the organization. He said that if Mr Yasso was to involve himself in cultural matters "he should actually wrote [sic] a letter or actually spoke [sic] to someone about it". He agreed that he knew Mr Lewis Mann who was regarded as both a South Sea Islander elder and a Darumbal elder. Mr Lewis Mann was one of the 10 elders on the Council. It was possible for one elder to give permission for someone to fish if that person was speaking on behalf of the whole Council. In cross-examination he agreed that traditional Aboriginal people use nets for fishing but added that they should not do so on other people's country.

[21] Mr Yasso gave evidence and called two witnesses, Mr Willie and Mr Lewis Mann. Mr Yasso said that his grandfather was a South Sea Islander who married a Darumbal Aboriginal woman. They produced his father who was half South Sea Islander and half Aboriginal. Mr Yasso's mother is of South Sea Islander background. Mr Yasso learnt to net and spear fish from his family. On 19 March 2003 he was fishing with his cousin, Dwayne Mye, when Mr Broadsmith took his net and about 25 kg of mullet and whiting. He told Mr Broadsmith that under s 14 of the Act he had the right to take the fish but Mr Broadsmith told him he would have to prove it. Mr Yasso told the court that he had permission from a Darumbal

¹² This Corporation was registered under the *Aboriginal Councils and Associations Act* 1976 (Cth) on 14 February 1994.

¹³ Later evidence established that a gill net is a net with mesh large enough to trap fish by the gills: see [24] of these Reasons. This also accords with the Macquarie Dictionary definition of gill net.

elder, Lew Mann, that he was entitled to net for fish by way of practising his culture. To fish in this way was Darumbal culture. He did not accept Mr Hatfield's view that the Darumbal people did not now allow gill net fishing.

- [22] In cross-examination Mr Yasso said that he had been taught fishing all his life by his grandfathers and that Mr Lew Mann, a Darumbal elder, gave him permission to fish in this way in Darumbal territory. He agreed he was only an associate member of Mr Hatfield's Corporation but he nevertheless considers himself to be a Darumbal person. Lorna McGuire, also a Darumbal elder, accepted him as a Darumbal person. Mr Yasso was born in Bowen and lived there until he was 16 years old. He has since lived in the Rockhampton area. He was presently employed as a correctional services officer. He agreed that he told Mr Broadsmith that Ivan Miller gave him permission to net fish. Ivan Miller was of South Sea Islander and Aboriginal descent and lived in Rockhampton; he was the uncle of Mr Yasso's cousin.
- [23] Derek Willie gave evidence that he was a Kappaburra and Burrida Aboriginal person and his people were close to the Darumbal. He was familiar with the type of net found in Mr Yasso's possession. It was 53 m long, with about a two inch gap between the netting and was used for dragging. He said he would not class it as a commercial net because it fitted into the traditional Indigenous customary ways of using nets. Aboriginal people originally used nets made of fibre from plants for fishing and catching birds. When monofilament nets were developed Aboriginal people adapted and commenced to use them. By analogy, canoes had been replaced by Aboriginal people exercising traditional cultural rights by motorized boats. Traditionally, Aboriginal people made nets according to what they intended to catch with them; nets with wider gaps were made for netting larger fish. Drag-netting was certainly a traditional hunting method. Not all Darumbal people were represented by the Corporation and those Darumbal people not represented by the Corporation had a right to carry out their traditional ways. In his view gill net drag-fishing was fishing in a culturally traditional way for the Darumbal people. The traditional way, which he understood was adopted by Mr Yasso, was to share the catch with family and friends but never to sell it.
- [24] In cross-examination Mr Willie agreed that a gill net was a net with mesh large enough to trap fish by the gills. He maintained that many Aboriginal people who identified as Darumbal did not consider they were bound by the decisions of the Council.
- [25] Mr Lewis Mann gave evidence that his father was an Aboriginal man and his mother a South Sea Islander woman. He was regarded as and regarded himself as an elder for the Darumbal Aboriginal people. He is also closely associated with the local South Sea Islander community and has input into both South Sea Islander and Aboriginal culture. He described netting as a cultural way of catching fish. He no longer had a net because the fishing inspectors took it off him sometime last year. For the last 30 years or so Aborigines in the area had fished with 50 m drag-nets. He did not know whether Aborigines had fished in this manner before this time. As a Darumbal elder he and his cousin William Mann represented the Manns and Yassos in the Darumbal native title claim. He gave permission to Mr Yasso to fish by using a net of the type the subject of the charge.

- [26] In cross-examination he said he had never been a member of the Darumbal-Noolar Murree Aboriginal Corporation and had not sat on that Corporations' Council of Elders. He gave Mr Yasso permission to use the nets "could be a few years ago ... probable [sic] six or seven, I don't know".
- [27] Mr Yasso then indicated to the magistrate he had called all his evidence. At the invitation of the magistrate, Mr Hatfield, who had been in court when Mr Willie and Mr Mann gave their evidence, was recalled, and reminded of his oath.¹⁴ Mr Hatfield said that the Corporation worked closely with the Fisheries, Marine Park Authority and other agencies to advise on cultural issues. Illegal fishing that went beyond recreational fishing was a problem. He reiterated that the Council comprised 10 elders, including Lew Mann, Kevin Mann, William Mann and two other elders now deceased, and it had made its decision collectively for the Darumbal people. The Council had decided that for the time being there was to be no traditional taking of fish by gill net.

The magistrate's decision

- [28] The magistrate noted that s 14 of the Act did not directly state that it was applicable to an offence of possession of commercial fishing apparatus; it applied to taking, using or keeping fishing resources. He determined, however, that the purpose of the Act was consistent with s 14 being available as a defence to an offence under s 84 of the Act.
- [29] The magistrate found that Mr Yasso, although only an associate member of the Corporation, did identify himself as an Aborigine and was therefore an Aborigine under s 14 of the Act.
- [30] The magistrate then found that Aboriginal tradition can be expected to change over the years to take advantage of modern technology. He accepted Mr Yasso's evidence, supported by Mr Willie, that it was within the realms of Aboriginal tradition to use a net of the type the subject of the charge under Aboriginal tradition to drag for fish. He concluded that the taking of fish by means of dragging with a net is a traditional way of taking fish. He was not satisfied that merely because the Council had determined that gill net fishing should not take place in the area this was sufficient to change that tradition. That Council did not seem to represent all the Darumbal people in the area. The magistrate concluded that on the date charged he was satisfied that Mr Yasso was acting in the traditional way of an Aborigine in taking fish by means of a net which was in his possession for the purpose of taking fish under Aboriginal tradition. His Worship found that Mr Yasso had "some form of permission through Mr Mann to fish in the area". Although Mr Yasso was in possession of the net as charged he was excused under s 14 of the Act so that he was not unlawfully in possession of it.

The District Court appeal

- [31] The respondent appealed to the District Court under s 222 *Justices Act* 1886 (Qld) contending that the magistrate erred in finding that Mr Yasso was a member of the

¹⁴ Neither at trial nor on appeal has Mr Yasso objected to this most unusual course which may have resulted in the prosecution wrongly splitting its case: *Shaw v The Queen* (1952) 85 CLR 365, 379 - 380; *R v Chin* (1985) 157 CLR 671, 676 - 677, 685 - 687; *R v Soma* (2003) 212 CLR 299, 308 and *R v Goode* [2004] QCA 211; CA No 405 of 2003, 25 June 2004. Because it has not been raised as an issue and because of the ultimate conclusions I reach on the grounds of appeal that have been raised, this has not, in any case, amounted to a miscarriage of justice.

Darumbal people; that he had permission from the Darumbal people to take fish using the net in their traditional area; that the taking of fish by use of the net was a traditional way of taking fish for the Darumbal people; and that s 14 of the Act applied to Mr Yasso.

- [32] The appeal was heard on 30 November 2004 and the learned District Court judge delivered his reasons on 20 December 2004. His Honour found that the gravamen of the offence under s 84(1) of the Act was the possession of a particular type of fishing apparatus; because the explanatory notes to s 14 of the Act indicated that the clause was not intended to allow Aboriginal persons to exploit fishing resources in a commercial manner without compliance with the Act, he was of the view that s 14 did not apply to an offence against s 84 of the Act.¹⁵
- [33] In any case, his Honour found that neither Mr Mann nor Mr Willie gave evidence that Mr Yasso was an Aboriginal person¹⁶ and that Mr Hatfield's evidence, which was not challenged by Mr Yasso before the magistrate, was consistent with him not being an Aboriginal person.¹⁷
- [34] His Honour found that, regardless of whether Mr Yasso was an Aborigine, there was no evidence given by or on behalf of Mr Yasso as to the content of the body of traditions, observances, customs and beliefs¹⁸ of Aboriginal people generally or of any particular community or group of Aboriginal people to support a finding that the possession of the net the subject of the charge was consistent with using fisheries resources under Aboriginal tradition. Mr Hatfield's evidence established that non-Darumbal people should not fish in Darumbal areas without permission and Darumbal people had decided to ban net fishing.¹⁹ There was no evidence from Mr Yasso or his witnesses which would authorize the possession or use by him of the net which was found in his possession.²⁰ Mr Yasso failed to discharge the evidentiary burden on him under s 14 of the Act of adducing some evidence of his Aboriginality and of possession of the net by way of Aboriginal tradition so that the prosecution were not required to negative the operation of s 14 of the Act. In any case, the prosecution had adduced sufficient evidence to discharge any onus;²¹ the element of unlawfulness was made out so that the magistrate should have convicted Mr Yasso.²²
- [35] The judge invited submissions as to the appropriate orders to be made. On 25 February 2005 his Honour allowed the appeal with costs to be assessed, set aside the order of the magistrate and adjourned the matter for the hearing of submissions as to sentence.

Discussion

- [36] The appeal under s 222 *Justices Act* 1886 (Qld) was by way of rehearing: s 223. His Honour was required to make his own determination of the issues on the evidence, giving due deference and attaching a good deal of weight to the magistrate's view: *Federated Carters and Drivers' Industrial Union of Australia v*

¹⁵ Reasons for judgment, [17].

¹⁶ Above, [34] - [35].

¹⁷ Above, [30] - [31].

¹⁸ Above, [41].

¹⁹ Above, [47].

²⁰ Above, [48].

²¹ Above, [51].

²² Above, [61].

Motor Transport and Chauffeurs' Association of Australia;²³ *Re Coldham; ex parte Brideson [No 2]*;²⁴ *Aldrich v Ross*;²⁵ *Mott v Mott*.²⁶

(a) Can s 14 apply to an offence under s 84 of the Act?

[37] Neither the terms of s 14 of the Act,²⁷ nor the Explanatory Notes²⁸ suggest that the magistrate was wrong in concluding that the legislature intended s 14 of the Act to have application to the present charge. There was no evidence that fishing with the type of net found in Mr Yasso's possession was not ecologically sustainable or outside a framework of proper resource management and in any case there was no regulation or management plan under s 14(2) and (3) of the Act. These factors persuade me that the learned primary judge erred in concluding that s 14 of the Act had no application to an offence under s 84 of the Act. That would not, however, justify the granting of leave in this case unless it was open to the magistrate to find that s 14 of the Act assisted Mr Yasso.

(b) An Aborigine?

[38] There was in my view ample evidence to support the magistrate's finding that Mr Yasso was an Aborigine. That word should be given its ordinary meaning subject to the assistance given in the *Acts Interpretation Act 1954 (Qld)*²⁹ and relevant judicial interpretation. It does not require an ethnological inquiry of a scientific, historical or scholarly character: see *Muramats v Commonwealth Electoral Officer (WA)*;³⁰ *Ofu-Koloi v The Queen*.³¹ Pertinent considerations are whether the person said to be an Aborigine is of Aboriginal descent, identifies himself or herself as an Aborigine and is recognized in the Aboriginal community as being an Aborigine; see the discussion of this issue by Drummond J in *Gibbs v Capewell*³² and Merkel J in *Shaw v Wolf*.³³ The undisputed evidence was that Mr Yasso was of Aboriginal descent, his grandmother being a Darumbal woman. There was also evidence from Mr Yasso, strongly inferentially supported by the evidence of Mr Willie and Mr Lewis Mann, that Mr Yasso identified as a Darumbal Aboriginal person and was recognized by Darumbal people as Darumbal. The learned primary judge erred in reasoning that the magistrate was obliged to accept Mr Hatfield's unchallenged evidence. Although Mr Yasso, who was not legally represented, did not formally challenge Mr Hatfield's evidence on this point, he plainly conducted his case on the basis that he was an Aborigine. The magistrate recalled Mr Hatfield on this issue so that Mr Hatfield had the opportunity to put his view of Mr Yasso's Aboriginality which the magistrate was not obliged to accept. On this evidence the magistrate was reasonably entitled to find that Mr Yasso was an Aborigine.

²³ (1912) 6 CAR 122, Higgins J, 123.

²⁴ (1990) 170 CLR 267, 274.

²⁵ [2000] QCA 501; [2001] 2 Qd R 235, 254-255 [37].

²⁶ [1929] QWN 38.

²⁷ Set out in these Reasons, [12].

²⁸ Set out in these Reasons, [14].

²⁹ See these Reasons, [13].

³⁰ (1923) 32 CLR 500, Higgins J, 506 - 507.

³¹ (1956) 96 CLR 172, Dixon CJ, Fullagar and Taylor JJ, 175.

³² (1995) 54 FCR 503, 507 - 508.

³³ (1998) 83 FCR 113, 118 - 122, 137.

(c) Aboriginal tradition

- [39] Nevertheless this error would not justify the granting of leave unless his Honour was also wrong in concluding that there was insufficient evidence that Mr Yasso was in possession of the net the subject of the charge under Aboriginal tradition so that the prosecution had established the element in the charge of unlawfulness. Was there evidence before the magistrate sufficient to raise the statutory defence provided by s 14 of the Act that Mr Yasso was in possession of the net the subject of the charge under Aboriginal tradition?
- [40] The respondent emphasizes the cases of *Mason v Tritton*³⁴ and *Derschaw v Sutton*.³⁵ In *Mason v Tritton* Mr Mason, who had been charged with having more than the permitted quantity of abalone in his possession without a licence,³⁶ unsuccessfully claimed that he was asserting his traditional right to fish under a native title recognized at common law in accordance with *Mabo v Queensland [No 2]*.³⁷ The New South Wales Court of Appeal found that Mr Mason had failed to establish that native title claim as discussed in *Mabo [No 2]*,³⁸ nor had Mr Mason shown how his abalone collecting activities fell within the scope of such a rule.³⁹ It is significant that the legislation under which Mr Mason was prosecuted did not contain a section comparable to s 14 of the Act.
- [41] In *Derschaw v Sutton* Mr Derschaw and his colleagues were charged with possessing fish contrary to the *Fisheries Act* 1905 (WA). They contended they were acting in pursuit of a common law native right to fish. As in *Mason v Tritton*, there was no statutory equivalent to s 14 of the Act. The Western Australian Full Court⁴⁰ applied *Mabo [No 2]* and *Mason v Tritton* and found that it was necessary in order to rely on a claim of native title fishing rights to establish that there were traditional laws and customs of the kind relied upon by Mr Derschaw exercised by an Aboriginal community immediately before the Crown claimed sovereignty over the area; that the claimant and his intermediate descendants continued uninterrupted to observe those traditional laws and customs; and that the taking of fish on the occasion the subject of the charge was in exercising those laws and customs. An evidentiary burden lies on a defendant who wishes to rely upon a defence of native title fishing rights, the onus then shifting to the Crown to negative the claim.⁴¹
- [42] An important distinction between the present case on the one hand and *Mason v Tritton* and *Derschaw v Sutton* on the other is that it was not necessary for Mr Yasso to satisfy the magistrate of native title fishing rights as discussed in *Mabo [No 2]* to raise s 14 of the Act. That section relevantly provides that an Aborigine may take, use or keep fisheries resources under Aboriginal tradition.
- [43] McPherson JA and Fryberg J consider that the legislature intended to place the burden on Mr Yasso of proving on the balance of probabilities that he was an Aborigine acting under Aboriginal tradition. I am not persuaded of that. Mr Yasso

³⁴ (1994) 34 NSWLR 572.

³⁵ (1997) 17 WAR 419.

³⁶ The permitted quantity was 10; Mr Mason was found in possession of 92 abalone.

³⁷ (1992) 175 CLR 1, applied to s 223(1) *Native Title Act* 1993 (Cth) in *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* (2002) 214 CLR 422, Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ, Gaudron and Kirby JJ dissenting.

³⁸ *Mason v Tritton*, Priestley JA (with whom Gleeson CJ agreed), 604, Gleeson CJ, 574.

³⁹ *Mason v Tritton*, Gleeson CJ, 574, Kirby P, 575, 584 and 595.

⁴⁰ *Derschaw v Sutton*, Franklyn and Murray JJ, Wallwork J dissenting.

⁴¹ Above, Franklyn J, 431, Murray J, 445.

was liable, if convicted of the offence charged under the Act, to a penalty of 300 penalty units enforceable under the *State Penalties Enforcement Act 1999 (Qld)*⁴² with the ultimate sanction of imprisonment.⁴³ The burden of proving the guilt of an accused person, whether charged summarily or on indictment, is on the prosecution beyond reasonable doubt but for the defence of insanity and statutory exceptions⁴⁴: *Woolmington v Director of Public Prosecutions*.⁴⁵ There is nothing in the Act directly stating that the legislature intended to place the onus of proof on a person relying on s 14 of the Act. But the statutory exceptions referred to in *Woolmington* are not confined to express legislative statements: see *Director of Public Prosecutions v United Telecasters Sydney Ltd*.⁴⁶ Whether the onus of proof shifts to a defendant will depend upon the construction of the statute: *Director of Public Prosecutions v United Telecasters Sydney Ltd*;⁴⁷ *R v Hunt*.⁴⁸ There is nothing in the Explanatory Notes referred to earlier in these reasons⁴⁹ to suggest that the legislature intended the onus of establishing reliance on s 14(1) to be placed on a defendant. In *Hunt* Lord Griffiths, with whom Lord Keith of Kinkel and Lord Mackay of Clashfern agreed and Lord Ackner substantially agreed, said that an analysis of the relevant cases showed that those where courts have held that the burden lies on a defendant are cases where the burden can be easily discharged, such as where it is a simple matter for a defendant to show that he had a relevant licence at the time of the charged offence.⁵⁰

[44] Section 76 *Justices Act 1886 (Qld)* provides:

"If the complaint in any case of a simple offence or breach of duty negatives any exemption, exception, proviso, or condition, contained in the Act on which the same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant shall be called upon to prove the affirmative thereof in the defendant's defence."

[45] This legislative provision seems to do no more than state the position at common law and is of no real assistance in determining the onus and burden of proof in this case. Clearly, the many matters in the Act and Regulation which are plainly exceptions, exemptions or excuses to the offences contained in a different subsection of the same section require proof by the defendant relying upon them on the balance of probabilities: see, for example, s 68(3) of the Regulation; s 89(3) of the Regulation and *Riley v Fuchs*⁵¹ and s 96(2) and s 96(3) of the Regulation.

[46] The determination of the issue of whether a defendant is an Aborigine or Torres Strait Islander acting under Aboriginal tradition or Island custom can ordinarily be expected to be much more complex than issues of whether a defendant has a

⁴² See s 13(1) and the definition of "infringement notice offence" in that Act and *State Penalties Enforcement Regulation 2000 (Qld)* s 4(1), Schedule 5.

⁴³ See *State Penalties Enforcement Act 1999 (Qld)* s 119.

⁴⁴ See for example s 15D *Crimes Act 1914 (Cth)* (repealed: see *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001 (Cth)*, Sch 51) or s 210(5) and s 215(5) *Criminal Code 1899 (Qld)* and *R v Carr-Briant* [1943] KB 607; *R v Cole* (1994) 77 A Crim R 91.

⁴⁵ [1935] AC 462, 481.

⁴⁶ (1990) 168 CLR 594, Brennan, Dawson, Gaudron JJ 601, Toohey and McHugh JJ 611.

⁴⁷ Above, 601.

⁴⁸ [1987] AC 352, 375.

⁴⁹ See these Reasons [14].

⁵⁰ Above, 374 - 375.

⁵¹ [2001] QDC 85; No 2 of 2000, 18 May 2001.

relevant licence, authority, is complying with a management plan or has a reasonable excuse for what would otherwise constitute an offence. In my view s 14 when considered in the scheme of the Act does not amount to an exemption, exception, proviso or condition to an offence under the Act disclosing a legislative intention to impose upon a defendant the onus of bringing the defendant within it on the balance of probabilities. The sections of the Act and the Regulation creating offences are all successive to s 14. Section 14 has the effect that the Act operates in a different way in respect of Aborigines and Torres Strait Islanders taking, using or keeping fisheries resources under Aboriginal tradition or Island custom. An element of the offence with which Mr Yasso was charged which must be proved beyond reasonable doubt is that he committed the offence *unlawfully*. Once he establishes some evidence of the pertinent matters contained in s 14(1) (subject to s 14(2) and (3)) it is for the prosecution to negate those matters beyond reasonable doubt to establish the element of unlawfulness. But in the end, the result I have reached in this appeal is not in any case affected by the onus and burden of proof under s 14.

- [47] The definition of "Aboriginal tradition" in the *Acts Interpretation Act 1954* (Qld) does not require the establishment of a native title under the common law as described in *Mabo [No 2]* but refers to "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people". The ordinary meaning, consistent with the dictionary definition of "tradition", is "the handing down of statements, beliefs, legends, customs, etc., from generation to generation, especially by word of mouth or by practice".⁵² In *Chapman v Luminis Pty Ltd (No 4)*⁵³ von Doussa J accepted that the word "tradition" in such a context required a degree of antiquity, perhaps more so than the words "observances, customs or beliefs" but that those words nevertheless carry with them the notion that there has been a handing down from generation to generation in accordance with the understanding of Aboriginal lore and practice.⁵⁴
- [48] The evidence before the magistrate as to the traditional fishing rights on which Mr Yasso claimed to rely was not extensive. Mr Hatfield stated that fishing, including the use of nets, was very much part of the traditional culture of the Darumbal people. The magistrate could accept that evidence without accepting Mr Hatfield's further evidence that the Council had decreed for all Darumbal people that there was to be no exercise of traditional fishing rights by gill net fishing for the time being or that Mr Yasso was bound by this and could not exercise his traditional Aboriginal fishing rights irrespective of such a decision. Mr Yasso's evidence was that he had permission from Mr Lew Mann, a Darumbal elder, to net for fish by way of practising his culture and that this was Darumbal culture. Mr Hatfield agreed that Mr Lewis Mann was an elder for the Darumbal Aboriginal people. Mr Mann described netting as a cultural way of catching fish for the Darumbal people and that he knew that for the last 30 years or so Aborigines in the Darumbal area had fished in this manner with 50 m drag-nets like the one the subject of this charge. He was unable to say whether before this time Aboriginal people had fished in this manner. He maintained that as a Darumbal elder he gave Mr Yasso permission to use the nets some years ago. Mr Derek Willie, a Kappaburra and Burrida Aboriginal person gave evidence that the use of the net the subject of Mr Yasso's charge was

⁵² The Macquarie Dictionary, Federation Edition, Macquarie Library 2001.

⁵³ [2001] FCA 1106; (2001) 123 FCR 62.

⁵⁴ Above, 143 - 144, [275].

consistent with the traditional customary ways of Aboriginal people using nets; although it was made of monofilament, its use was consistent with Aboriginal people adapting their traditional methods to take advantage of modern technology.

- [49] In *R v Sparrow*⁵⁵ Dickson CJ and La Forest J of the Canadian Supreme Court observed that the Aboriginal people of Canada were entitled to exercise traditional rights in a contemporary manner.⁵⁶ It follows that the fact that Mr Yasso's net was not made of traditional fibre did not in itself mean that he was not in possession of the net under Aboriginal tradition.⁵⁷
- [50] The evidence supported the conclusion that fishing by nets of the type the subject of the charge was an Aboriginal tradition in that it was handed down from generation to generation amongst Aboriginal people generally and also amongst the Darumbal Aboriginal people. There was no contrary evidence. The fact that fishing may also be a common tradition handed down from generation to generation in non-Aboriginal culture does not make it any less an Aboriginal tradition, as the plain words of s 14 of the Act recognize. There was certainly sufficient evidence that Mr Yasso was acting under Aboriginal tradition in his possession of the net the subject of the charge to raise s 14 of the Act. The learned District Court judge erred in finding to the contrary. To disprove the application of s 14 of the Act the prosecution relied on the evidence of Mr Hatfield. Mr Hatfield's evidence was that traditional Aboriginal people used nets for fishing although not in other people's country. His evidence that Mr Yasso was not a Darumbal person and even Darumbal people were not gill-netting at this time was contradicted by Mr Yasso's own evidence and inferentially by the evidence of Mr Willie and Mr Mann. Mr Mann's evidence was that as a Darumbal elder he gave Mr Yasso permission to fish in this way in Darumbal territory. Mr Hatfield's evidence did not require the magistrate to be satisfied that Mr Yasso was acting unlawfully in that he was not acting under s 14 of the Act when he was in possession of the net the subject of the charge. The learned District Court judge was required to reconsider the issues on the evidence but giving proper weight to the magistrate's view of the facts.⁵⁸ It may be that another magistrate may have reached a different conclusion on the same evidence but the magistrate's finding here was certainly open on that evidence. It follows that his Honour was wrong in overturning it. The magistrate did not specifically advert to the onus or standard of proof. He stated that he was satisfied that on the date charged Mr Yasso was acting in the traditional way of an Aborigine in taking fish by means of a net which was in his possession for the purpose of taking fish under Aboriginal tradition so that he was not unlawfully in possession of it. Even were the onus of proof of the matters under s 14(1) of the Act on Mr Yasso on the balance of probabilities, the magistrate was entitled to conclude as he did.
- [51] The interests of justice require the granting of the applications for an extension of time and of leave to appeal. The appeal should be allowed and the decision of the District Court judge set aside.

⁵⁵ [1990] 1 SCR 1075; cited with approval in *Mabo [No 2]* by Dawson J, 134, Toohey J, 196.

⁵⁶ Above, 1099; cited with approval in *Western Australia v Ward* (2002) 213 CLR 1 by Kirby J, 244, [574].

⁵⁷ See *Mabo [No 2]*, Brennan J, 70; *Commonwealth v Yarmirr* (2001) 208 CLR 1, Kirby J, 132; *Derschaw v Sutton*, Wallwork J (diss), 440.

⁵⁸ See the cases referred to in [36] of these reasons.

(d) Section 22 *Criminal Code* 1899 (Qld)

- [52] Another interesting and important point raised at the hearing of the application for leave to appeal was whether on the evidence s 22 *Criminal Code* could have application to the offence charged; if so, was there evidence sufficient to raise s 22 and did the prosecution prove beyond reasonable doubt that s 22 had no application to Mr Yasso's case.
- [53] Section 22 *Criminal Code* relevantly provides:
- "(1) Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.
- (2) But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.
- ... "
- [54] The term "property" is defined in s 1 *Criminal Code* relevantly as including:
- "(a) every thing animate or inanimate that is capable of being the subject of ownership; ... "
- [55] Section 36(1) *Criminal Code* has the effect that s 22 applies to all persons charged with any criminal offence against the statute law of Queensland.
- [56] It is well accepted that s 22 *Criminal Code* does not only apply to a claimed proprietary or possessory right in property⁵⁹ but also to a claim to be entitled to act in respect of property: *R v Waine*.⁶⁰ In that case Keane JA, with whom the other members of the Court agreed, observed:
- "What is important is the honest belief that one is legally entitled to do to the property that which one is doing. That belief as to entitlement may come equally from the consent of the owner, or from a person believed to be the owner, as well as from a mistaken belief as to one's own title."⁶¹
- [57] There was clear evidence before the magistrate that Mr Yasso believed that he was entitled to have possession of the net and to use it for fishing because the Darumbal Aboriginal elder, Mr Lew Mann, gave him permission. The magistrate found that Mr Yasso had, and inferentially therefore honestly believed he had, some form of permission through Mr Mann to fish in the area with the net. That evidence suggests that Mr Yasso was claiming a right to possess the net, potentially raising s 22(2) *Criminal Code* and requiring the prosecution to prove beyond reasonable doubt that Mr Yasso was not in possession of the net in the exercise of an honest claim of right and without intention to defraud. The net was property as defined in s 1 *Criminal Code* but is an offence against s 84 of the Act "an offence relating to property" and can possession of a net be "an act done or omitted to be done by [Mr Yasso] with respect to any property"?

⁵⁹ Cf *R v Walsh* [1984] 2 Qd R 407.

⁶⁰ [2005] QCA 312; CA No 70 of 2005, 26 August 2005.

⁶¹ Above, [25].

- [58] Some assistance in answering those questions is gained from the decision of the High Court of Australia in *Walden v Hensler*.⁶² Mr Walden was found to be an unlicensed person in possession of a bush turkey carcass and a live bush turkey chick contrary to s 54(1)(a) *Fauna Conservation Act 1974* (Qld). That Act contained no statutory equivalent to s 14 of the Act. Mr Walden claimed that he believed he was entitled to take the turkey as "bush tucker" in accordance with Aboriginal custom and his own life practice. Brennan, Deane and Dawson JJ (Toohey and Gaudron JJ dissenting) found that s 22 *Criminal Code* did not provide a defence to that charge. All five judges gave separate reasons for their conclusions. An analysis of those reasons suggests that s 14 of the Act has the effect that s 22(2) *Criminal Code* has application to Mr Yasso's case.
- [59] Brennan J was of the view that s 22 *Criminal Code* applied only to offences in which the causing of another to part with property or the infringing of another's rights over or in respect of property was an element.⁶³ On that view s 22(2) *Criminal Code* does not assist Mr Yasso.
- [60] Deane J considered that the prohibited fauna was property for the purposes of s 22 *Criminal Code* because under s 7 of the *Fauna Conservation Act 1974* (Qld) it was the "property of the Crown". Deane J nevertheless rejected the applicability of a defence under s 22 *Criminal Code* because, even accepting Mr Walden's honest belief of the special entitlement to possess the bush turkeys, he only had a defence under s 22 *Criminal Code* if that entitlement (assuming it existed) would constitute an answer to the offence charged.⁶⁴ The general words of s 54(1) make the taking or keeping of fauna by a person an offence regardless of whether that person would have had rights of ownership or traditional hunting rights with respect to that fauna.⁶⁵ Mr Walden's assertion of traditional rights was no more than an assertion that he was unaware that the relevant criminal law applied to override those rights.
- [61] Dawson J found that s 22 *Criminal Code* was inapplicable because s 54(1)(a) plainly imposed a general prohibition against the keeping of fauna irrespective of any proprietary or lesser right in the fauna so that there was no scope for the exercise of any claim of right.⁶⁶ It seems that had there been an equivalent to s 14 of the Act his Honour's view may have been to the contrary.
- [62] Toohey J considered there was no warrant for reading down s 22 *Criminal Code* in the way preferred by Brennan J. Section 22 *Criminal Code* by way of s 36 *Criminal Code* unequivocally applied to the *Fauna Conservation Act 1974* (Qld) and the definition of property in s 1 *Criminal Code* was applicable to the turkeys in Mr Walden's possession. An offence under s 54 was an offence to which s 22 *Criminal Code* had application because it related to the taking or keeping of something which answers the description of property.⁶⁷
- [63] Gaudron J also preferred a wide interpretation of s 22 *Criminal Code* and considered that Mr Walden's claim of right based on his membership of an Aboriginal community and the customs of that community laid a sufficient

⁶² (1987) 163 CLR 561.

⁶³ Above, 574 - 575.

⁶⁴ Above, 580 - 581.

⁶⁵ Above, 583.

⁶⁶ Above, 593 - 594.

⁶⁷ Above, 598 - 599.

foundation for the applicability of s 22 *Criminal Code*, provided that the claim was made by reference to some supposed operation of law, not merely a moral or non-legal regime. If a claim of right based on the customs of the Aboriginal community is asserted on the basis that the customs are recognized by law, the claim is within s 22 *Criminal Code*.⁶⁸ Mr Walden's evidence was that before his hunting trip he sought and obtained permission to hunt from the manager of the property from which the birds were taken and he thought that his claim derived from that permission or that such permission was a condition precedent to the exercise of a right recognized by law.⁶⁹

- [64] The approaches taken by Deane, Toohey and Gaudron JJ, and perhaps Dawson J, support the application of s 22 *Criminal Code* to an offence against s 84 of the Act where the honest claim of right relates to a claim under s 14 of the Act to be acting under Aboriginal tradition. Those views are consistent with the use or possession of fishing apparatus under s 84 of the Act being an offence relating to property (the net) for an act done with respect to property (the possession of the net) within the meaning of s 22(2) *Criminal Code*.
- [65] This approach is also consistent with that of the Full Court of Western Australia in *Molina v Zaknich*.⁷⁰ Mr Molina was charged under s 82B(1) *Police Act 1892* (WA) with remaining on premises without lawful authority. McKechnie J, with whom Templeman J agreed, analysed *Walden v Hensler* and concluded that the effect of the judgments of Deane, Toohey and Gaudron JJ was that the majority of judges in *Walden v Hensler* found that s 22 *Criminal Code* should be given its literal and broad effect so that it applied to offences such as those under s 82B of the *Police Act*.⁷¹ Malcolm CJ considered that the defence under s 22 *Criminal Code* was available for the reasons given by McKechnie J and added that in *Walden v Hensler* "a majority of the Justices in the High Court, namely Deane, Toohey and Gaudron JJ, disapproved of the narrow view of s 22 expressed by Virtue J in *Pearce v Paskov*^[72] which limited the scope of s 22 to offences 'relating to property and contracts' in Pt VI of the *Criminal Code*".⁷³
- [66] Olsson AUJ in *Palmer v Ostrowski*,⁷⁴ relying on *Molina v Zaknich*, observed that s 22 *Criminal Code* is to be accorded a liberal interpretation and is applicable to any situation in which an act is done with respect to property in the exercise of an honest claim of right and without intention to defraud; s 22 *Criminal Code* is not restricted in its application to offences relating to property under Pt VI *Criminal Code*.⁷⁵ Although *Palmer v Ostrowski* was overturned in the High Court on a different basis⁷⁶ these observations were not the subject of that appeal. That approach to s 22 *Criminal Code* was also cited with approval in *Basso-Brusa & Ors v City of Wanneroo*⁷⁷ where Pullin J observed that s 22 *Criminal Code* may well have

⁶⁸ Above, 608 - 609.

⁶⁹ Above, 609.

⁷⁰ [2001] WASCA 337; (2001) 24 WAR 562.

⁷¹ Above, 579, [101].

⁷² [1968] WAR 66.

⁷³ *Molina v Zaknich*, 566, [13].

⁷⁴ [2002] WASCA 39; (2002) 26 WAR 289.

⁷⁵ Above, 304, [101].

⁷⁶ *Ostrowski v Palmer* [2004] HCA 30; (2004) 218 CLR 493.

⁷⁷ [2003] WASCA 103; No 1140 of 2002, 14 May 2003.

application to offences under the *Town Planning and Development Act 1928* (WA).⁷⁸

- [67] All this suggests that whilst the law as to the operation of s 22 *Criminal Code* may not be entirely settled, the issue of Mr Yasso's entitlement to possess the net in the exercise of an honest claim of right under s 22 *Criminal Code* was raised on the evidence. It must follow from the magistrate's conclusion that Mr Yasso was acting in the traditional way of an Aborigine in his possession of the net, that the magistrate was also satisfied that the prosecution had not disproved beyond reasonable doubt that Mr Yasso was in possession of the net whilst acting under an honest claim of right by way of Aboriginal tradition under s 14 of the Act. That conclusion also supports the orders I propose.

An observation

- [68] If the responsible authorities are concerned as to the potential impact of this decision on the ecological sustainability of fisheries resources and fish habitats, the legislature can address this by the provision of a suitable regulation or management plan under s 14(2) and (3) of the Act.

Order

- [69] I would grant the extension of time within which to apply for leave to appeal; grant the application for leave to appeal; allow the appeal with costs to be assessed and set aside the orders of the District Court of 25 February 2005 and instead order that the appeal under s 222 *Justices Act 1886* (Qld) be dismissed with costs to be assessed.

- [70] **McPHERSON JA:** By complaint made by a fisheries inspector, Riccardo Durante Yasso was charged that on 19 March 2003 at Dadson's Beach, which is near Yeppoon in central Queensland, he unlawfully possessed commercial fishing apparatus in the form of a monofilament net of dimensions greater than prescribed in s 12(4) of Part 3 of Schedule 8 of the *Fisheries Regulation 1995* while he was not the holder of an authority under the legislation. For reasons that will appear, the magistrate at Rockhampton found Mr Yasso not guilty of the offence and dismissed the complaint. An appeal to the District Court was allowed by Britton DCJ and the order dismissing the complaint was set aside. His Honour fixed a date for hearing submissions on sentence; but, before that date arrived, Mr Yasso applied to this Court under s 118(3) of the *District Court of Queensland Act 1967* for leave to appeal against the order allowing the appeal from the magistrate. This is his application for leave.

- [71] At the hearing of the complaint in the magistrates court, there was uncontradicted evidence that Mr Yasso was found at or near the beach in possession of a 52 metre monofilament net, which he admitted to be his, with a mesh of approximately two inches, or about 50 mms or more. He was also found with some 25 kg of mullet and whiting in his possession; but it is important to emphasise that he was not charged with taking or keeping fish contrary to provisions of the *Fisheries Act 1994* or the *Fisheries Regulations*, but with being in possession of the offending net or "commercial fishing apparatus" without being the holder of an authority to possess such a net. The fish, which he admitted he had caught with the net, are irrelevant to that charge. The outcome of the complaint would or ought to

⁷⁸ Above, [14] - [17].

have been the same even if, for example, the net had been found in his possession in a cupboard at his home, or in his car on the way to Dadson's Beach on the day in question. He was charged not with using the net to take fish, but with possessing a net of the dimensions averred in the complaint. The net, and the fish, were seized and a receipt (ex 3) was given for them as required by s 157 of the Act. The offence with which Mr Yasso was charged is created by s 84(1) which provides that "a person must not unlawfully use or possess fishing apparatus". Fishing apparatus is defined in the schedule to the Act as meaning "anything used, or capable of being used to take fish" including, for example, "(b) ... a ... net".

[72] To discover the content and meaning of the word "unlawfully" in s 84(1) of the Act, it is necessary to go to the *Fisheries Regulations*. Regulation 68(3) provides that:

"(3) A person may possess commercial fishing apparatus only if the person holds an authority allowing the person to possess the apparatus".

As was shown by a certificate (ex 1) admitted in evidence under s 184(4)(c) of the Act, Mr Yasso possessed no such authority. Section 85(4) provides that if commercial fishing apparatus may be possessed only by the holder of a particular type of authority, a person "must not ... possess the fishing apparatus" unless he is the holder of an authority of that type. There may be an element of doubling up in the two statutory provisions referred to. Section 85 of the Act is however, concerned principally with "sales etc" of commercial fishing apparatus; and I think that reg 68(3), which appears in **Part 8 Fisheries offences**, is the critical provision for the purpose of determining what is "unlawful" about possessing such apparatus. In what follows I will refer to it rather than to s 85(4).

[73] "Commercial fishing apparatus" is defined in the statutory dictionary in Part 2 of Schedule 17 of the Regulations to mean fishing apparatus "other than fishing apparatus that may be used or possessed by a recreational fisher under schedule 8 or a management plan". No management plan is shown to exist or to have existed in respect of Dadson's Beach, so that the only question is whether the net in question is one that may be possessed by a recreational fisher. Under schedule 8 the expression "recreational fisher" is in turn defined in the schedule 17 dictionary as meaning:

"a person, including a fisher, who takes or possesses fish, other than

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- (a) for trade or commerce; or
- (b) in the exercise or enjoyment of native title rights and interests in relation to land or matters under the *Native Title Act 1993 (Cwlth)*".

There is no suggestion in the evidence that Mr Yasso was taking or possessing fish in trade or commerce as defined, or that he was a native title holder within the meaning of s 211 and 224 of the Commonwealth Act. Exhibit 2 shows that there are native title claimants to land at Dadson's Beach, but Mr Yasso is not among them.

[74] Mr Yasso was therefore a "recreational fisher" in terms of the definition of "commercial fishing apparatus" in the schedule 17 dictionary. To find out what fishing apparatus such a fisher may lawfully possess calls for a detour to reg 12 in Part 3 of schedule 8 of the *Fisheries Regulation*. Schedule 8 is entitled

Recreational fishing – use of fishing apparatus. Regulation 12(1) of Part 3 provides that fish may only be taken by using cast, scoop or seine nets. Regulation 12 of that Part of schedule 8 under the heading **Permitted ways of taking fish** provides in s 12(4) that:

“(4) A seine net must not be longer than 16m and must have a mesh size of not more than 28 mm”.

[75] A seine net is defined to mean “a beach or haul seine net, with or without a pocket, shot in a way to partly encircle fish”. A haul seine net is defined to mean a seine net that is hauled, without the use of a boat, to complete the taking of fish. Although the evidence on the point is not as specific as it might be, there is no dispute that the net in question answered this description, and that Mr Yasso and his companion on 19 March 2003 were using it in that way. Because, as I have said, the net was 50 metres long and had, according to the evidence, a mesh size of 2 inches, it exceeded by a considerable margin the dimensions specified in reg 12(4) of Part 3 of schedule 8. The net does not appear to have been tendered in evidence at the magistrates court hearing, but it was described in evidence, and there is no doubt or dispute about its identity or dimensions. The certificate (ex 1) admitted at the hearing proved that on 29 March 2003 Mr Yasso did not have authority under the Act to use, or possess commercial fishing apparatus such as the net seized from him that day. Why, then, was he not convicted by the magistrate?

[76] The answer is said to lie in s 14(1) of the *Fisheries Act* –
 “An Aborigine may take, use or keep fisheries resources.... under Aboriginal tradition...”.

By definition, “fisheries resources” includes fish. The insuperable obstacle to using the provisions of s 14(1) as a means of avoiding conviction in this case was and is that Mr Yasso was not charged with taking, using or keeping (which includes possessing) fish, but with possessing commercial fishing apparatus in the form of a seine net with dimensions exceeding those specified in the Regulation. This makes it difficult to discuss in any relevant way the matter of Aboriginal tradition or whether the net was possessed under such a tradition. In his reasons for dismissing the complaint, the magistrate said that “it would ... seem generally from the evidence that it is not beyond the realms of tradition to use a net which could be 50 metres in length”; but the question is not whether the use of a net of that size to catch fish was authorised under s 14(1), but whether the possession of a net of those dimensions was permitted by that provision. I am unable to see that it was or is.

[77] It is true that catching fish almost inevitably involves the use of some kind of apparatus or equipment. The definition in the Act of “fishing apparatus” includes as examples hook, line or rod, net, pitch fork, spear gun or trap. Tickling trout, as gypsies are said to do, may be the only method left out of this collocation; but, as I suspect I have already said more than once, it was not for taking fish that Mr Yasso was prosecuted but for being in possession of the offending net or “commercial fishing apparatus”. Doing so remained an offence whether or not he caught fish with it, and whether in taking fish with it he was doing so under Aboriginal tradition.

[78] The most that can be said in support of the magistrate’s order dismissing the complaint is that it would hardly be possible to take, use or keep fish under Aboriginal tradition except by using one of the forms of defined “fishing apparatus” including a net, and using a net necessarily involves having it in one’s possession.

To that extent, s 14(1) may be said to authorise the use and incidental possession of a net to take fish under Aboriginal tradition. The question then is, what kind of net may be used under that tradition? May it be a net of any dimensions in length and mesh size, or only a net that does not constitute “commercial fishing apparatus” within the meaning of the Regulations?

[79] This is a question of statutory interpretation or construction of the Act as a whole, which by s 7(1) of the *Acts Interpretation Act 1954* includes the Regulation. One starts with the proposition in s 10 that the Act “binds all persons”; and that by s 11(1) it applies to persons, things and acts on or in land within the limits of the State and Queensland waters. The net here was seized on or near the beach. In providing that an Aborigine may take fish under Aboriginal tradition, s 14(1) states an exception to the generality of ss 10 and 11(1). But it does so only in respect of the taking of fish under that tradition and not possessing “commercial fishing apparatus” as defined.

[80] Aborigines have, it may be accepted, long possessed and used nets for the purpose of catching fish. There is evidence to that effect in this case; but it is another matter to say that they may lawfully possess nets answering the definition of “commercial fishing apparatus”. A person may possess such equipment only if he holds an authority allowing him to do so: reg 68(3), and he may use such equipment only if authorised in that behalf: reg 68(1). He may take fish for trade and commerce only if he is a commercial fisher or holds “another authority” allowing him to take fish for trade or commerce: reg 71(1). These provisions are specific in the prohibitions they create and quite general in the range of persons to whom they apply. The effect of reg 68(3) read with reg 12(4) of Part 3 of schedule 8 is that a person may possess a seine net larger than 16m with a mesh size more than 28 mm only if he holds an authority to possess such equipment. Section 14(1) of the Act does not qualify or limit those provisions in any way, so as to exclude them from applying to Aborigines taking fish under Aboriginal tradition. An Aborigine may take fish under that tradition, but not if it involves him in possessing “commercial fishing apparatus”. Being an Aborigine with traditional fishing rights does not confer on him “authority” to possess such apparatus. There is nothing in s 14(1) to suggest that it does.

[81] As a matter of interpretation or construction, therefore, I conclude that, in authorising fishing under Aboriginal tradition, s 14(1) does not create an exception to the provisions of the Regulation prohibiting the possession of commercial fishing nets. If I am wrong about this, it is necessary to determine whether the relevant Aboriginal tradition was established in the case of Mr Yasso. To qualify under s 14(1), I am prepared to accept that Mr Yasso is an Aborigine. He at first said he was a South Sea Islander, which in Queensland generally means a person of Melanesian race whose ancestors originated in Vanuatu or the Solomon Islands, many of whom were forced or lured to Australia in the 19th century to work on the cane fields. Mr Yasso was born in Bowen, and said his grandmother was an Aborigine of the Darumbal people who inhabit the area of Dadson’s Beach. Darumbal people are pursuing the native title claim previously referred to. It seems that Mr Yasso identifies with both the Aboriginal community and the South Sea Islander community. Although there could have been more evidence on the subject, I consider that Mr Yasso’s Aboriginality was sufficiently established for the purposes of s 14(1).

[82] The real question, as the magistrate recognised in his reasons, is whether Mr Yasso was taking or catching fish “under” (which I take to mean “by virtue of”) Aboriginal tradition. Statute apart, everyone, Aboriginal or not, in Australia, may under the common law exercise the right or privilege of fishing in tidal waters: see *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153, 168. There can be little doubt that long before the advent in Australia of the common law, Aboriginals fished in tidal waters like Dadson’s Beach. That is something of which I would be prepared to take judicial notice based on texts, judgments and Acts of Parliament. There is a question, however, whether, when an Aborigine fishes, he is doing so in the exercise of his common law rights, or as a member of the Aboriginal community under Aboriginal tradition, or both. Unless there is something distinctive about Aboriginal or European fishing methods, I do not see how the question can be resolved by evidence. As Gleeson CJ said in *Mason v Tritton* (1994) 34 NSWLR 572, 574, fishing is an activity which is natural to people who occupy or visit coastal regions. It is more likely than not that Mr Yasso did not, on 19 March 2003, analyse his activities sufficiently to be able to say whether or not he was exercising his fishing rights by virtue of the common law or of Aboriginal tradition. I would regard him on this occasion as claiming to exercise his rights under both regimes if both are available to him.

[83] This raises in rather acute form the question whether the method of fishing enters into the process of determining if the activity engaged in by Mr Yasso on 19 March 2003 was “under Aboriginal tradition”. The answer depends in part on the period of time during or from which the tradition must be shown to have existed. Section 14(1) does not elucidate this question. The definition of “Aboriginal tradition” in s 36 of the *Acts Interpretation Act* expands “tradition” to mean “the body of traditions, observances, customs and beliefs of Aboriginal people generally” or of a particular group of them, and includes any such traditions, observances etc, “relating to particular... objects”. It does not specify, however, how far back the particular tradition must be proved to have existed.

[84] Decisions concerning native title to land and waters adopt the date of the extension of British sovereignty to New South Wales in 1788 as the critical event; but that is because the Crown’s radical title to land and its power to grant lands is an incident of sovereignty, and the Aboriginal title must therefore be shown to have existed at that date. It is less clear whether, if all that is involved is a “tradition” of exercising a right like that envisaged by s 14(1), it is necessary to show that it existed as far back as 1788. In *Mason v Tritton* (1994) 34 NSWLR 572, which is one of the few cases in which a comparable tradition was alleged, in that instance of diving and taking abalone, Kirby P thought it was necessary to show that the traditional “right to fish” existed before the Crown claimed sovereignty over eastern Australia in 1788: see 34 NSWLR 572, 584. But it is noteworthy that Priestley JA, with whom Gleeson CJ agreed, considered the question in terms of whether the claimed native fishing right was “part of a recognisable system, in existence immediately before the common law became the law of the colony of New South Wales” (at 601).

[85] If that is the date of occasion for determining whether a traditional fishing right existed, and exists now, then in any view the relevant date in the present case was 25 July 1828, when s 24 of the imperial *Australian Courts Act* 1828 extended English common and statute law to the whole of eastern Australia. Before that date, the application of English law depended on the common law colonial birthright

doctrine adopted in *Anonymous* (1722) 2 P Wms 75; 24 ER 646, under which British subjects were regarded as carrying English law with them to places where they settled. In *R v Ballard* [1829] NSWSC 26 (reported as *R v Dirty Dick* in *Dowling's Select Cases* (NSW) 2), the Supreme Court of New South Wales held that English law did not apply to Aborigines so as to render one of them liable to prosecution for killing another. They were, said Forbes CJ, like the indigenous Red Indians of the North American British colonies, not then considered a British subject or entitled to the protection of English law. "I know", said his Honour, of "no principle of municipal or national law, which shall subject the inhabitants of a newly found country to the operation of the laws of the finders in matters of dispute, injury or aggression between themselves. If part of our system is to be introduced amongst them, why not the whole?"

[86] Section 24 of the *Australian Courts Act* 1828 changed that state of affairs by applying the common and statute law of England to the whole of eastern Australia by force of a paramount Act of Parliament as from 25 July 1828. Before that event, I find it difficult to accept that the colonial birthright doctrine extended the application of English law to Aborigines living in the geographical area that since 1859 has been Queensland. The penal settlement at Brisbane was not established until 1825 and English law would not at that time have been carried to central Queensland by British settlers. In my view, the relevant *terminus a quo* for deciding whether the right or privilege of catching fish under Aboriginal tradition in this part of Queensland was recognised at common law is 1828, when English law was extended to it by the imperial Act of that year.

[87] In my view, therefore the earliest date at or from which Aboriginal tradition under s 14(1) must be proved to have existed is 25 July 1828. This, rather than 1788, can however make little difference to the determination of the tradition requirement in the present case. No doubt Aborigines were fishing under tradition long before then. The question is, however, what that tradition of fishing encompassed. There was evidence before the magistrate that Aborigines traditionally used fibre nets to catch fish. I have already referred to the magistrate's observation that it is "not beyond the realms of tradition to use a net which could be 50 metres in length". If this is a finding of fact there is a little (but very little) evidence to support it. Mr Derek Willie, who is a member not of the Darumbal people but of the Burrilda from "up north", said that "nets have been here since white man come here"; it was, he said, traditional to use a dragnet 50 metres long, one bloke at either end, to drag for fish. His evidence on the use of nets appears to have been derived from documentation, dating back to 1901, held at the University of Queensland and emanating from anthropologists; from sources at Griffith University; and from speaking to Darumbal people. Was it, he was asked, a traditional way of fishing to drag a 50 metre net? "Oh yeah", he said, "you can drag any size net". The question and answer were stated in a form that raised the very issue which the magistrate had had to decide.

[88] Mr Lewis Mann was another witness called by the defence. He was 68 years old, of part Darumbal and part South Sea Islander ancestry, and had been a fisherman all of his life, mostly doing line fishing. Asked whether using drag nets with one bloke at either end was a traditional way of catching fish, he said he didn't know. He had seen Aborigines using "maybe" 50 metre nets, which they dragged or set. His knowledge went back 30 years, and he did not know what Aborigines had done 50 or 100 years ago.

[89] It is not clear from the magistrate's reasons how much of this evidence was accepted, though he said the matter of tradition caused him "the greatest concern". He said he was prepared to accept that the "taking of fish by means of dragging with a net is a traditional way of taking fish"; and that on the date in the complaint Mr Yasso "was acting in the traditional way of an Aborigine of taking fish by means of a net". I do not consider that this was a sufficient statement of the specific evidence of witnesses whom the magistrate accepted. It is rather a finding of the ultimate issue of whether the method of fishing used on this occasion was traditional without providing any indication as to which witnesses, and in what respect, their evidence was accepted. At best for the defendant, there was evidence that Aborigines in the subject area used drag netting techniques 30 years ago, and that there were university anthropologists who had written papers on the subject as long ago as 1901 suggesting the Aboriginal use of nets of 50 m in length. Neither the anthropologists nor the papers were produced. The evidence falls well short of proving "a system of rules" (*Mason v Tritton* (1994) 34 NSWLR 572, 598) that were being observed by an identifiable group of people. And, even if "system" may be abstracting the matter too much, there was no evidence of "bodies of normative rules" which have in fact "given rise to rights and interests" (*Yorta Yorta v Victoria* (2002) 214 CLR 422, 442) in relation, in this case, to fishing or drag net fishing, under Aboriginal tradition, whether from 25 July 1828 or any other date more than 30 years ago. Here, as in *Mason v Tritton* (1994) 34 NSWLR 572, 594, there is no evidence at all to show what quantity of fish might be taken, or the purposes for which it could be taken.

[90] In saying this, I am conscious that the decisions referred to, and others of similar kind, have been concerned **with native title rights and interests** recognised either at common law or under the *Native Title Act 1993* (Cth). However, in *Yorta Yorta v Victoria* (2002) 214 CLR 422, 444, specifically with reference to "traditional" in s 223(1)(a) of that Act, the High Court said:

"A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. But in the context of the *Native Title Act* 'traditional' carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are 'traditional' laws and customs".

By s 223(2) of the same Act, the expression **rights and interests** in s 223(1) includes fishing rights and interests. Inconsistency in the meaning of "tradition" in s 14(1) of the *Fisheries Act 1994* (Qld) with s 223 would spell invalidity for s 14(1) of the State Act under s 109 of the Constitution. A generation is usually computed at 30 years (Shorter Oxford English Dictionary). Thirty years of usage does not prove a tradition or usage that has passed from generation to generation.

[91] With the qualification that, as I have suggested, the "Aboriginal tradition" in s 14(1) need only be traced back to the application of English law to what is now Queensland in 1828, the foregoing statement applies in the present case. There is no sufficient evidence here to demonstrate an Aboriginal tradition of using 50 m long drag nets to catch fish in 1828 or at any time prior to 30 years ago, and none at all to

show that monofilament nets of the dimensions here in question (50 m with a 2 inch mesh size) were ever used as part of that tradition; or what quantities and for what purposes fish might be taken under that tradition.

[92] I do not wish it to be supposed that, in saying this, I am adopting the “frozen in time” approach to Aboriginal fishing traditions. I accept, as did Branson and Katz JJ in *Yorta Yorta v Victoria* (2001) 110 FCR 244, 279, that “it is common for something to be described as traditional which has long-established roots notwithstanding that it incorporates some modern elements”. Their Honours went on:

“a tradition of hunting in a certain area may be maintained notwithstanding that the wildlife available to be hunted may have changed over time (for example, from possum to rabbit), or the tools may have changed over time (for example, from spear or throwing stick to rifle)”.

[93] To adapt that illustration or analogy to the present case, however, involves a comparison not between a spear and a rifle, but between a spear or rifle and a machine gun. The vice of the monofilament net with a wide mesh used in the way this one was evidently is that it traps too many larger fish by the gills. There is evidence from Mr Hatfield, who is the chairman of the Darumbal–Noolar Murree Aboriginal Corporation, that the community had placed a ban on gill netting because “we can see the dangers of it all”. The authority to impose this ban and its impact on the tradition of Aboriginal fishing is open to debate, and was not resolved at the hearing; but, to my mind, it does nothing to suggest that Aboriginal tradition encompassed or encompasses the use of a commercial fishing net like the one in question. In Canada, the right to barter fish in exchange for money or goods has been shown to be an activity engaged in by certain native tribes or groups as long ago as the 18th century: see, for example, *R v Van der Peet* [1996] 2 SCR 506 (possession of ten salmon); *R v Gladstone* [1996] 2 SCR 723 (sale of herring spawn on kelp); but it is another matter to attempt to sell fish commercially: *R v NTC Smokehouse Ltd* [1996] 2 SCR 672. The problem here is that the evidence, such as it is, referred to none of these questions of quantity, size or purpose, but simply asserted a tradition going back some 30 years of using nets to take fish.

[94] This in turn raises the question of where the onus of proof lies and to what standard. It is not clear that the magistrate addressed himself to this question. He presumably applied to the prosecution the standard of proof beyond reasonable doubt. Having had the advantage of reading the President’s reasons on this appeal, I notice that her Honour considers that, once there is some evidence of an Aboriginal tradition of taking, using or keeping fisheries resources, it is for the prosecution to prove beyond reasonable doubt that s 14(1) of the Act does not apply and that the offence under s 84 was committed unlawfully. With great respect, I am unable to agree with this conclusion. I will now briefly state why.

[95] Section 10 of the Act declares that the Act binds all persons, and s 11 that it applies to persons things and acts on or in land in the State or Queensland waters. Section 14(1) provides that an Aborigine may take, use or keep fisheries resources under Aboriginal tradition. Section 14(1) thus operates as an exception in favour of a particular class of people in catching fish. It therefore attracts the application of the rule of construction stated in *Vines v Djordjevitch* (1955) 91 CLR 512, 519-520:

“But, in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter”.

The rule and the English authorities supporting it were considered at length in *R v Edwards* [1975] QB 27, where Lawton LJ, delivering the judgment of the Court of Appeal, said (at 40) that it is:

“... limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. ... If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception”.

[96] In the later case of *R v Hunt* [1987] AC 352, 375, Lord Griffith regarded this statement “as an excellent guide to construction rather than as an exception to a rule”. The High Court referred to the matter and to these decisions in *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594, 600-601, saying:

“The rule laid down in *Woolmington v Director of Public Prosecutions*, that the burden of proving every element of an offence charged rests at all times upon the prosecution, was expressed to be ‘subject to ... the defence of insanity and subject also to any statutory exception’. It is made clear in *R v Edwards* and *R v Hunt* that the statutory exceptions referred to are not confined to those which expressly cast the burden of proof upon the accused... but extend to cases in which an intention to do so is necessarily implied. Such cases will ordinarily occur where an offence created by statute is subjected to a proviso or exception which, by reason of the manner in which it is expressed or its subject matter, discloses a legislative intention to impose upon the accused the ultimate burden of bringing himself within it. That burden may, of course, be discharged upon the balance of probabilities”.

Their Honours concluded by saying that each case must turn upon the construction of the particular enactment. See also Bennion, *Statutory Interpretation*, 4th ed, at 938, where a series of rules is formulated in these terms.

[97] Approached in this way, I do not doubt that the burden of proving on the balance of probabilities that in taking fish, Mr Yasso was an Aborigine acting under Aboriginal tradition rested on him and not on the complainant. He was a person of a specified class claiming exemption from the provisions of the *Fisheries Act* and Regulations because of a particular privilege bestowed by the Act which created an exception in his favour. It is right to add that, as was recognised in *R v Hunt* [1987] AC 352, at 374, it may be relevant, if all else fails, to consider the relative difficulty that the respective parties would encounter in discharging the burden of proof.

Proving that someone like Mr Yasso is not an Aborigine would be almost impossible for the prosecution in a case of this kind, to say nothing of proving the particular tradition under which he claimed the right to take fish. For the reasons I have given, I do not consider that Mr Yasso discharged that burden on the balance of probabilities.

[98] As I keep saying, however, the question is not whether Mr Yasso caught or took fish under Aboriginal tradition, but whether he was in possession of “commercial fishing apparatus” in contravention of reg 68(3), the complainant having proved that he had under that provision no authority allowing him to possess such apparatus. What now remains, therefore, is whether Mr Yasso was protected by s 22(2) of the Criminal Code. This issue was not raised either in the magistrate’s court or the District Court, and there are consequently no direct findings of fact relevant to the issue in either of those courts.

[99] Section 22(2) provides that a person is not criminally responsible “as for an offence relating to property” for an act done with respect to property “in the exercise of an honest claim of right and without intention to defraud”. Section 22(2) applies to any offence under the Code or any other offence created by statute law in Queensland. It is therefore capable of applying to the offence of unlawfully possessing commercial fishing apparatus of the kind proscribed in s 12(4) of Part 3 of Schedule 8, if otherwise relevant to that offence. Further, in referring to “an offence relating to property”, “property” is to receive the meaning given to it in s 1 of the Code so as to include anything that is capable of being the subject of ownership. So much is settled by, if it was not already clear before, the recent decision of this Court in *R v Waine* [2005] QCA 312.

[100] In *R v Waine* the appellant was charged with having unlawfully damaged a building belonging to the Crown by having spray painted it contrary to s 469 of the Code. In *R v Zischke* [1983] 1 Qd R 240, spray painting a building was held to constitute damage within the meaning of s 469. In *Waine* the appellant spray painted letters on the building in the belief that she was “authorised” to do so by a person who was not, but who claimed to be, the owner of the building. The Court held this raised in her favour a defence or ground of exemption or exculpation under s 22(2) of the Code. Keane JA said (para 25):

“What is important is the honest belief that one is legally entitled to do to the property that which one is doing. That belief as to entitlement may come equally from the consent of the owner, or from a person believed to be the owner.”

His Honour said (para 30) that in order to establish an honest claim of right under s 22(2), it was necessary to show that the rights claimed “would, if well founded, preclude what was done from constituting a breach of the relevant criminal law, which an accused is presumed to know”. Under s 22(2) once the issue is raised, the onus lies on the prosecution of proving that the offending act was not done in the exercise of such a belief.

[101] The authority from which the foregoing proposition was adopted by Keane JA is the statement to that effect in the reasons for judgment of Deane J in *Walden v Hensler* (1987) 163 CLR 561, 580-581. As Deane J added there, “it is not to the point to establish an honest belief of a special relationship with property which,

even if it existed, would not constitute an answer to the offence charged”. Or, as his Honour went on to say later on the same page (at 581):

“a defence of claim of right will not be well-founded unless what was claimed or believed would, if it were the fact, have negated an element of the actual offence or provided a good defence to it”.

[102] The offence with which Mr Yasso was charged was possession of commercial fishing apparatus, being the monofilament net with dimensions greater than those prescribed in s 12(4) of Part 3 of Schedule 8 of the *Fisheries Regulation*. Would an honest belief that under s 14(1) of the Act he was entitled to catch fish under Aboriginal tradition have negated an element in that offence, or provided a good defence to it, or constituted an answer to a charge of that offence? In my opinion, it would not, and does not do so. The fact that by s 14(1) an Aborigine may “take, use or keep fisheries resources” under Aboriginal tradition cannot provide an answer or defence to a charge of the offence of possessing a commercial fishing apparatus or net of the dimensions proscribed. The offence of possessing such a net is constituted quite independently of any element of catching fish with it. It would, as I have said, have been committed if Mr Yasso had never caught fish with the net, but had simply kept it at home and never used it at all. It follows that the fact that he believed he was entitled to use it in catching fish, whether or not under Aboriginal tradition, cannot under s 22(2) of the Code excuse his possession of it. In relying on s 22(2), Mr Yasso was claiming a right that was not an answer to the charge of possessing the net in breach of the statutory prohibition.

[103] Some reliance has been placed by the President in her reasons on the decision of the Full Court of Western Australia in *Molina v Zaknich* (2001) 24 WAR 562, in determining the *ratio decidendi* of the High Court in *Walden v Hensler* (1987) 163 CLR 561. In doing so, their Honours arrived at a ratio by combining the reasons of the two minority dissenting Justices, who were Toohey and Gaudron JJ, with those of Deane J, who was one of the majority consisting of Brennan CJ, Dawson J and Deane J. With great respect, this is, I think, not a legitimate course to follow. In *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303, 314, Mason CJ, Wilson, Dawson and Toohey JJ agreed in saying:

“Certainly, it would not be proper to seek to extract a binding authority from an opinion expressed in a dissenting judgment”.

And in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, 417, Kirby J said “the opinions of judges in dissent are disregarded for this purpose, however valuable they may otherwise be”. I know that in *Jones v Bartlett* (2000) 205 CLR 166, 225, Gummow and Hayne JJ have since said that, where a binding authority cannot be extracted from the majority judgment, a dissenting judgment may “deserve respectful consideration”. But in *Walden v Hensler*, the majority was unanimous in deciding, unlike the minority, that s 22(2) afforded the appellant with no ground of exemption or exculpation in respect of the offence he had committed under s 54(1)(a) of the *Fauna Conservation Act 1974* of taking or keeping fauna. Their conclusion that, as a matter of sentencing discretion under s 657A of the Code, the conviction should not be recorded did not affect their decision that it should stand as a conviction according to law.

[104] I do not consider, however, that the decision or the reasoning in *Molina v Zaknich* (2001) 24 WAR 562 calls for a different result to be reached in the present case. In my opinion the offence under the Act and Regulations of possessing a

prescribed net was proved against Mr Yasso beyond reasonable doubt. It was not an offence of taking or keeping fish. The fact that he was under s 14(1) of the Act entitled to “take” or catch fish under Aboriginal tradition afforded him with no answer to the charge laid in the complaint.

[105] The application for leave to appeal against the order of the District Court setting aside the order of the Magistrates Court dismissing the complaint, and to extend the time within which to do so, should be dismissed. I would so order.

[106] **FRYBERG J:** I begin with two irritating but ultimately unimportant formal points. The respondent in this court was named as Department of Primary Industries in the application for leave to appeal. Presumably that was done because that was how the complainant was described in both the reasons for judgment and the order of the District Court. It accorded with the nomenclature adopted on the cover sheet of the transcript by the State Reporting Bureau. Its origin is unclear. It is however a misdescription. The appellant in the District Court was Brenda Stevenson, who was the complainant in the Magistrates Court. That is clear from the notice of appeal to the District Court. The Registrar should amend the notice of appeal to correct the record of this court.

[107] What Ms Stevenson said in the complaint which initiated the prosecution was:

“On the NINETEENTH day of MARCH 2003 at a place known locally as Dadsons Beach via Zilzie within the Magistrates Court District of ROCKHAMPTON in the said State one **RICCARDO DURANTE YASSO** did unlawfully possess commercial fishing apparatus namely one (1) monofilament net of dimensions greater than prescribed in Section 12(4) of Part 3 of Schedule 8 of the *Fisheries Regulation 1995* while not the holder of an authority”.

The complaint bore an annotation referring to s 85. However, in the courts below and before us, the case has proceeded on the basis that the charge was brought under s 84 of the *Fisheries Act 1994* (“the Act”). The wording of the charge suggests some confusion as to whether it was brought under s 84 or s 85(4). In my view, we should decide the application on the basis adopted to date.

The relevant statutory provisions and the proceedings below

[108] It is desirable to refer to the statutory provisions upon which the complainant relied. In what follows I acknowledge the assistance I have obtained from the reasons for judgment of McPherson JA, which I have had the benefit of reading. Section 84 provided, “A person must not unlawfully use or possess fishing apparatus.” Fishing apparatus was defined in the schedule to the Act to mean “anything used, or capable of being used, to take fish ...”, including, by way of explicit example, a net. “Unlawfully” was there defined to mean “without authority under this Act or other legal authority, justification or excuse under an Act.” That was a somewhat unusual definition. Ignoring its second limb for the moment,⁷⁹ it had the consequence that all possession of fishing apparatus was unlawful under s 84 unless authority could be found for it under the Act.

⁷⁹ The second limb was relevant only if s 22 of the *Criminal Code* applied, a question referred to below, para [156].

[109] Authority to possess fishing apparatus “under this Act” was conferred by the *Fisheries Regulation 1995*.⁸⁰ Only two sections of the regulation were potentially relevant in the present case: s 68 and s 96. Section 68 provided:

“(3) A person may possess commercial fishing apparatus only if the person holds an authority allowing the person to possess the apparatus.”

“Commercial fishing apparatus” was defined in sch 17 to mean “fishing apparatus other than fishing apparatus that may be used or possessed by a recreational fisher under sch 8 or a management plan.” No relevant management plan existed, so it is necessary to discover the position of a hypothetical recreational fisher under sch 8. That schedule was entitled “Recreational fishing - use of fishing apparatus”. Nets were dealt with in part 3 of the schedule. That part did not in terms set out what fishing apparatus might be possessed by a recreational fisher. However, as regards use, cl 12 provided:

“Permitted ways of taking fish

- (1) Fish may only be taken by using cast, scoop or seine nets.
- (2) A cast net must not have a length of more than 3.7 m and must have a mesh size of not more than 28 mm.
- (3) A scoop net must not be more than 2 m in any dimension and must have a mesh size of at least 25 mm and a handle or shaft not longer than 2.5 m.
- (4) A seine net must not be longer than 16 m and must have a mesh size of not more than 28 mm.
- (5) A seine net’s drop must not be more than 3 m.
- (6) A seine net must not contain a pocket or be fixed.”

On any view of the evidence, the net in Mr Yasso's possession was not one which conformed to that clause. It was therefore commercial fishing apparatus within the meaning of the definition. Because he held no authority allowing him to possess it, his possession was not authorised by s 68.

[110] Section 96 permitted a recreational fisher to possess certain fishing apparatus. It provided:

“(2) A recreational fisher may ... possess only fishing apparatus permitted under schedule 8 or a management plan.”

(That provision is poorly expressed, but its meaning is clear enough for present purposes.) For the reasons given in the previous paragraph, the net in Mr Yasso's possession was permitted under neither sch 8 nor a management plan. Consequently it was not authorised by s 96.

[111] On this approach it is unnecessary to determine whether Mr Yasso was a recreational fisher within the meaning of that term in the Regulation.⁸¹ It might have been otherwise had he been charged with being a recreational fisher who had possession of fishing apparatus other than as permitted by s 96 (if such a charge existed). Deciding whether he was a recreational fisher would involve determining whether he took or possessed fish other than in the exercise or enjoyment of native title rights and interests in relation to land or waters under the *Native Title Act 1993* (Cth). On behalf of Mr Yasso it has at all stages been strongly argued that he did

⁸⁰ *Acts Interpretation Act 1954*, s 7.

⁸¹ The definition is quoted in the reasons for judgment of McPherson JA.

take and possess fish in the exercise of such native title rights. As will appear, I find it unnecessary to resolve that point. It does not arise in the course of identifying the elements of s 84 of the Act.

- [112] Mr Yasso was not legally represented at any stage of the proceedings. Identifying his attitude to the charge at the time of the trial is not as simple as it might have been. However it seems tolerably clear that he accepted (or at least did not challenge) that the foregoing elements had been proved by the evidence. His case at trial was principally directed toward establishing that s 84 did not prohibit him from having possession of the net by reason of s 211 of the *Native Title Act* 1993. The prosecutor, who was a barrister working with the Department of Primary Industries, seems to have been aware from the start that this would be Mr Yasso's position. In the course of his opening he said:

“Your Worship, as the matters go on, it will become evident that what we're - the main point of contention that we may have here is - is who are the traditional owners of this area where this incident occurred. ... And whether or not Mr Yasso is a member of that group. Now there are - you will hear in the course of evidence, evidence relating to people from the Darumbal group, ... Of the Darumbal people and people from the Wakka Wakka ...”.

He then tendered two maps showing areas the subject of native title claims on behalf of those two peoples. Dadsons Beach lay in the area claimed by the Darumbal. He opened a witness who would give evidence “in relation to aboriginal culture as in traditions”. There would be evidence, he said, that the Darumbal people “don't condone the use of gill nets in their area.” In this context the prosecutor referred to a possible defence under s 14 of the Act.

- [113] As it turned out, the prosecutor's evidence that Dadsons Beach lay in the area over which the Darumbal people claimed to exercise traditional rights was unchallenged. It seems that in order to demonstrate that Mr Yasso did not belong to the Darumbal people, the prosecutor had intended to lead evidence of his identification with the Wakka Wakka people. In his closing address he accepted that this evidence had not come out, but submitted that there was evidence to support a conclusion that Mr Yasso was “not a Darumbal person” and was not accepted by those people as such.
- [114] Mr Yasso led evidence to demonstrate that he belonged to the Darumbal people. He accepted that he was primarily of South Sea Islander descent, but denied that this was inconsistent with belonging to the Darumbal. The prosecutor did not suggest otherwise. Issue was joined on whether Mr Yasso belonged to the Darumbal people. The prosecutor did not suggest to Mr Yasso that he was not an aborigine. The focus of his questions was, what sort of aborigine?
- [115] The second point, according to the prosecutor, was whether the method of fishing adopted by Mr Yasso was in accordance with Darumbal tradition. Importantly, the prosecutor did not challenge the existence of a tradition of fishing among the Darumbal. I agree with McPherson JA that judicial notice can be taken of the fact that long before the advent in Australia of the common law, aborigines fished in tidal waters like Dadsons Beach. In any event the main prosecution witness, Mr Hatfield, who testified that he himself was a traditional owner, also testified in evidence-in-chief that fishing was “very much a part of the Darumbal people's

culture, our history. Very much a part of what we do as a people. Fishing is very much a part of our culture ...” and the magistrate seems to have accepted that fact. The thrust of the prosecution case was that use of a gill net, the sort which the prosecutor submitted was in Mr Yasso's possession, did not accord with Darumbal tradition. Mr Hatfield's evidence was directed principally to that point. In his closing address, the prosecutor did not go so far as to admit that the tradition encompassed the use of nets, particularly not nets as long as that possessed by Mr Yasso; but his central submission was that the evidence showed that in recent years the Darumbal elders had modified the tradition so as to prohibit the use of gill nets. (It was, of course, implicit in the evidence in support of this submission that nets had in fact traditionally been used. Mr Hatfield conceded that cast nets were used; and in re-examination he agreed that only gill nets had been banned, adding that this ban was only until such time as the use of nets was again allowed). Local aboriginal people could determine their own traditions, and that was what had happened in this case. Mr Yasso's evidence that he had permission from an elder was confused and inconsistent, and his credibility left “a little bit to be desired”.

- [116] Mr Yasso sought to prove that fishing with nets was part of the Darumbal tradition. He gave evidence of learning to use nets as a child. He did not challenge the evidence that the elders had placed a ban on gill nets, but said that he was unaware of that ban. He had permission from an elder, Mr Lewis Mann, to use nets. Mr Mann gave evidence that netting was a cultural way of catching fish. He said that he had seen nets up to about 50 m in length when fishing with aboriginal people. He confirmed he had given Mr Yasso permission to use nets, but in cross-examination admitted that this had occurred some six or seven years earlier.
- [117] The prosecutor's submissions were principally directed toward rebutting the application of s 14 of the Act. He disposed of s 211 of the *Native Title Act* 1993 in short measure. He submitted that Mr Yasso was not a “native title holder” within the meaning of that Act because “you only become a holder once the Federal Court has made a determination or an agreement's been reached ... by consent and the Federal Court has okayed it”. On the evidence there were only claimants under that Act, not holders.
- [118] Although legally unrepresented, Mr Yasso was “assisted” during the hearing by a Mr Jones. He delivered a closing address to the magistrate on behalf of Mr Yasso. He submitted that the evidence showed Mr Yasso was a Darumbal person. His submissions on the question of tradition were somewhat confused, but clearly encompassed the idea that nets of at least 50 m in length had been used under the Darumbal tradition. He seems also to have submitted that a tradition could not be changed by the elders alone and that dissenting members of the people could not be deprived of their customary manner of fishing. He did not refer to s 14 of the Act, but relied on s 211 of the *Native Title Act* 1993, submitting that Mr Yasso was a traditional owner under that Act and citing High Court authority for the proposition that an indigenous society could not surrender a traditional right by modifying its ways.
- [119] The magistrate decided the issues put before him. He accepted the prosecutor's submission that the *Native Title Act* 1993 had no application to the case because Mr Yasso was not a native title holder. However, he held that s 14 of the Act could be used by Mr Yasso on the charge. He held that Mr Yasso “assimilates [*sic*] himself as an aborigine” and that he fell within the Darumbal group. He accepted

that netting would be within the aboriginal traditional method of taking fish and that it was “not beyond the realms of tradition to use a net which could be 50 m in length, as was the instance in this case.” He was not satisfied that “the group that Mr Hatfield represents can speak for all people” and, without deciding whether a tradition could be modified, he seems to have held that he was not satisfied that the Darumbal tradition had been modified in the manner alleged by the prosecution. Consequently, he dismissed the charge.

[120] In the District Court, Mr Yasso applied for leave to adduce further evidence. That application was refused, save for a couple of documents to which there was no objection and which the judge held did not assist Mr Yasso. The appeal was therefore conducted as a rehearing on the original evidence.⁸² Given that Mr Yasso was not legally represented, it was important for the judge to identify what had been in issue in the Magistrates Court and not allow the complainant to raise fresh issues of fact which might prejudice Mr Yasso’s position.

[121] The complainant's appeal was allowed. The judge held:

- s 14 of the Act had no application in relation to a charge of an offence under s 84
- in any event Mr Yasso had not satisfied the evidentiary onus upon him in relation to the question whether he was an aborigine
- moreover Mr Yasso had not satisfied the evidentiary onus upon him in relation to the question of aboriginal tradition
- there was no evidence that Mr Yasso was a native title holder; therefore it was unnecessary to give consideration to the provisions of the *Native Title Act*.

His Honour set aside the order of the Magistrates Court, ordered Mr Yasso to pay the costs of the appeal and set the matter down for hearing submissions in relation to sentence. It is implicit in that order that he convicted Mr Yasso.

[122] Before this court the respondent supported the conclusions reached by the judge and renewed the submission rejected by the magistrate that the elders’ ban on gill net fishing meant that Mr Yasso’s possession and use of such a net was not “under Aboriginal tradition”. It therefore remains important to focus on what was in issue in the Magistrates Court. It is too late for fresh issues of fact to be raised or to rely on issues first raised in the District Court. The first issue the subject of the judge's findings, however, was one of law. To that issue I now turn.

The interpretation of s 14

[123] I confess at once to experiencing some difficulty with the language in which the judge’s first finding is phrased. Section 14 is not in terms expressed to “apply” to anything. Using that word in its ordinary sense, however, one could fairly say that the section applies to aborigines and Torres Strait Islanders. One could probably also say that it applies to fisheries resources and fish habitats. One might even stretch the language to say that it applies to aboriginal tradition and island custom. I do not think that one could say that it “applies” (or that it does not apply) to s 84. That observation is not purely a piece of pedantry. It is a trite proposition that the answer to many an issue of law depends upon the terms in which the issue is stated. Expressed at its broadest, the real question in the context of this case was in my

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Justices Act 1886, s 223.

view whether, notwithstanding proof of the elements of s 84 against him, Mr Yasso could be convicted under that section if at the time of the possession he was an aborigine and his possession was an incident of taking fish under aboriginal tradition. The answer to that question depends upon the interpretation of the Act.

- [124] Section 14 is the last of five sections in a division entitled “Operation of Act”. Section 10 provides that the Act binds all persons, including the State. Presumably that has the effect of negating the operation of s 13 of the *Acts Interpretation Act 1954* in relation to the Crown in right of Queensland. It is however expressed in terms which are wider than would be required simply to achieve that effect. It seems to be intended to bind the Crown in all its other capacities (including the Commonwealth and the other states)⁸³ and any foreign sovereign. The section therefore seems intended to extend the operation which the Act would have in its absence. Section 11(1) defines geographical areas within which the Act is to operate. It might also be argued that the subsection limits the application of the Act to persons, things, acts and omissions, although it is not easy to see what wider category there might be to which it might otherwise apply. Section 11(2) then specifies a number of exceptions defined by reference to various activities having a relationship with Commonwealth law. Section 11(3) extends the application of the Act to certain activities in the Australian fishing zone (ie outside the area specified in s 11(1)) and s 11(4) and s 11(5) provide exceptions to this. Section 12 excludes the application of the Act to certain unintentional activities and certain activities incidental to fishing. Section 13 provides for the making of a regulation to exempt a person from the Act or a provision of it. Section 14 confers certain rights (or privileges or liberties or immunities - whatever they may be called) upon aborigines and Torres Strait Islanders. By implication it excludes the application of the Act to conduct involving the exercise of those rights.
- [125] In my judgment the remainder of the Act must be read in the light of, and subject to, the provisions of this division. All of those provisions are concerned to define the ambit of operation of the succeeding provisions. *A fortiori*, they define the ambit of operation of the Regulation. For example, a gaff is not among the fishing apparatus which may be used by a recreational fisher under sch 8 of the Regulation. It is therefore commercial fishing apparatus under sch 17. Under the terms of s 68 of the Regulation, it follows that it may be used only if the user holds an authority allowing its use and may be possessed only if the person possessing it holds an authority allowing him to do so. Section 12(d) of the Act provides that the Act does not apply to the use of a gaff to secure fish taken by other fishing apparatus. In my view that must mean that in the circumstances therein described, the prohibitions on use in s 68(1) of the Regulation and s 84(1) of the Act have no application. Similarly in my judgment, those prohibitions have no application to the use of fishing apparatus in the exercise of the right conferred by s 14.
- [126] Of course s 84(1) of the Act is also concerned with the possession of fishing apparatus. Whatever methods of taking fish may have existed under gypsy tradition, I cannot imagine that the Act intended it to be unlawful to possess fishing apparatus as an incident of using it in circumstances to which the Act did not apply. In my judgment neither s 68(3) of the Regulation nor s 84(1) of the Act makes unlawful the possession of a gaff for use as described in s 12(d) of the Act; nor do they make unlawful possession of other fishing apparatus as an incident of

⁸³ Subject, of course, to s 9 of the *Acts Interpretation Act 1954*.

exercising the right conferred by s 14. To my mind any other construction would inhibit the operation of s 12 and s 14 to the point of rendering them dysfunctional.

[127] On this issue the District Court judge held:

“It seems to me that there is merit in the argument that s 14 does not have any application in relation to a charge of an offence under s 84. In my view the appellant’s argument on this point is well made. Section 14 is expressed to apply to the taking, use or keeping of fisheries resources or use of fish habitats. The gravamen of the offence created by s 84(1) is the possession of fishing apparatus of a particular type. The type of fishing apparatus which is caught by s 84 is what may be generally described as “commercial fishing apparatus” and the explanatory notes to the Bill make it clear that clause 14 is not intended to allow Aboriginal or Torres Strait Islander persons to exploit fisheries resources in a commercial manner without compliance in all respects with the Bill.”

I do not agree that the gravamen of the offence created by s 84(1) is the possession of fishing apparatus of a particular type. The terms of the section do not support such an interpretation: “A person must not unlawfully use or possess fishing apparatus.” The section is equally applicable to a person who unlawfully possesses non-commercial fishing apparatus. Such possession would be unlawful if the person were neither a recreational fisher,⁸⁴ nor the holder of any other justification for possession of the apparatus. In my judgment s 84 should not be read as limited to, or even as primarily intended to deal with, cases involving commercial fishing apparatus.

[128] Counsel for the respondent referred us to the explanatory notes to the Act relating to this section. They provided:

“*Clause 14* protects the rights of Aboriginal and Torres Strait Islander persons to take, use or keep fisheries resources or use fish habitat under Aboriginal tradition or Island custom.

A regulation or management plan which affects traditional or customary use of fisheries may be made, after consultation with Aborigines or Torres Strait Islanders. Conservation, environmental or sustainability concerns are examples of the circumstances in which this provision might be used. The clause does not allow Aboriginal or Torres Strait Islander persons to exploit the resource in a commercial manner without compliance in all respects with the Bill. The clause is intended to preserve the traditional and customary rights within the framework of proper resource management.”

That note may be used in the circumstances set out in s 14B(1) of the *Acts Interpretation Act 1954*. This is not a case where either para (a) or para (b) of that provision applies; as to para (c), the note does nothing relevant to confirm the interpretation conveyed by the ordinary meaning of s 14(1) of the Act. To my mind that section is intended (among other things) to allow aborigines and Torres Strait Islanders to take fisheries resources in trade or commerce or “in a commercial

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As would be the case if the person took fish for trade or commerce with non-commercial fishing apparatus, or possessed such apparatus without taking or possessing fish at all: see the definition of “recreational fisher” in sch 17 of the Regulation (quoted by McPherson JA) and also s 96.

manner” without compliance in all respects with the Act, although it should be noted that this was not what Mr Yasso was doing.⁸⁵ If it were part of an aboriginal tradition to take fish in commercial quantities for sale or barter to another tribe (say, an inland tribe), I see no reason why that tradition would not be included under “Aboriginal tradition” in s 14(1). If in the interests of proper management of the resource it were necessary to control such activities, that could be achieved by making a regulation or management plan under s 14(2). The Minister recognised this in his second reading speech when he said, “Within these arrangements, it is also possible to develop management plans for particular fisheries of interest to aboriginal and Torres Strait Islander groups.” The note does not assist in the proper interpretation of the section.

- [129] It follows that in my judgment, notwithstanding proof of the elements of s 84 against him, Mr Yasso could not be convicted under that section if at the time of the possession, he was an aborigine and his possession of the net was incidental to taking fish under aboriginal tradition.

Mr Yasso's aboriginality

- [130] The judge's second finding was that Mr Yasso had not satisfied the evidentiary onus upon him in relation to the question whether he was an aborigine. With great respect to his Honour, that finding was not in my judgment open to him. It was not open for two reasons: first, because the point had not been in issue in the Magistrates Court; and second, because the magistrate had made a finding in Mr Yasso's favour on the point, based in part upon his assessment of Mr Yasso's credibility.

- [131] In the Magistrates Court the prosecutor accepted that Mr Yasso was an aborigine. What was in issue was whether he belonged to the Darumbal people. That is apparent from what the prosecutor said in opening his case and from the manner of his examination and cross-examination of witnesses. It was in my view explicitly acknowledged in the prosecutor's closing address:

“Now there’s been no evidence that – there’s been evidence that Mr Yasso is not recognised as a Darumbal person or part of the Darumbal people. That he may have some claim through relationships to be a Darumbal but he’s not recognised as a Darumbal and that’s also proof that he’s only an associate member of the Darumbal-Noolar Murree Aboriginal Corporation, and the evidence we heard about that was that’s because he’s not recognised as a Darumbal person.

Now the case law on this stuff, we’re stuck with the common law. The case law on this basically refers to when you talk about – *well there’s no contention that Mr Yasso may – can claim himself to be Aboriginal*,⁸⁶ but my understanding is that you can be Aboriginal if you have – if you’re just accepted as the Aboriginal community to be Aboriginal, and there has been some communication – I don’t know

⁸⁵ In the course of a poorly-taken objection to a question asked by Mr Yasso, the prosecutor said “Your Worship, there’s no hint that there’s any commercial activity ...”.

⁸⁶ My emphasis.

if it came out in evidence – that he’s an accepted member of the Wakka Wakka – the Wakka Wakka Aboriginal community.

BENCH: No. There wasn’t any evidence.

MR FARRAH: Wasn’t come out, no. But there is – well the evidence is though of course that he’s not a Darumbal person.”

And in his reply:

“Just one thing. There’s no - there's never been disputed that Mr Yasso can claim to be Aboriginal.”

[132] Second, Mr Yasso gave evidence, which the magistrate accepted, that he was a member of the Darumbal and that he had been setting and dragging nets all his life in the practice of his aboriginal culture. The latter proposition was not challenged in cross-examination and there was no suggestion that the Darumbal were not aborigines. The magistrate's finding that Mr Yasso was an aborigine was based in part on his finding that Mr Yasso “assimilates [*sic*] himself as an aborigine”. Whether that finding was correctly transcribed may be doubted. It seems clear enough that it was intended to mean that Mr Yasso identified as an aborigine. The prosecutor challenged Mr Yasso's credibility in his address but the magistrate's findings were made despite that challenge. In the absence of fresh evidence to reopen the topic (which his Honour refused to allow), the magistrate's finding was not susceptible of challenge.

[133] In any event I see no reason to disagree with the conclusion reached by McPherson JA that Mr Yasso's aboriginality was sufficiently established for the purposes of s 14(1). The relevant cases and statutory provision are referred to by the President.

Aboriginal tradition

[134] An element of s 14 is that the taking of fish be “under Aboriginal tradition”. I would reserve the interpretation of “under” in that expression for consideration in a case in which it is strictly necessary to decide the point. As McPherson JA points out the expression may mean “by virtue of”; but it may also mean “in accordance with”, and other meanings are possible. It is unnecessary to resolve the possibilities in this application. It is also unnecessary to discuss a related topic which has arisen in other contexts: the mental element if any connoted by those words. There was no suggestion that Mr Yasso’s state of knowledge of tradition or his intention took him outside the scope of s 14.

[135] As noted earlier, the prosecutor accepted the existence of a tradition of fishing among the Darumbal people. Features of that tradition which were proved by or could be inferred from uncontradicted evidence were that only Darumbal people could fish at Dadsons Beach; that nets could be used for fishing; and that nets might be up to about 50 m long. There was some evidence relating to the manner of manipulation of nets (dragging and casting) but no suggestion that a particular method formed an essential ingredient of the tradition. Similarly there was no suggestion that a particular method of construction (multistrand or monofilament), material of construction (natural fibre or synthetic material) or mesh dimension constituted such an ingredient. Finally, there was no suggestion that the purpose of

the fisher (sustenance, trade or amusement) had anything to do with the tradition. However interesting it might have been to have examined such questions had they been put in issue, the occasion for their examination did not arise because they were not in issue.

[136] Counsel for the respondent (who appeared for the complainant in the District Court but not in the Magistrates Court) submitted that the formulation of the issue by the prosecutor, and consequently by the magistrate, was misconceived. He submitted that the prosecutor's statement, "This whole case impinges [*sic*] around what's a traditional method of taking fish" confused "a method of fishing (traditional or not) with a body of traditions, customs, beliefs and observances under which the particular method of fishing occurred or is sanctioned". He submitted, "In order to engage the operation of s 14 of the Act, the prohibited act must occur under that body of traditions etc. It follows that there must be evidence as to the **nature** of that body of traditions etc and of the **content** of the particular traditions, customs, beliefs and observances that together constitute the body of traditions etc."⁸⁷

[137] What must be proved to demonstrate the existence (or disproved to demonstrate the non-existence) of an aboriginal tradition has been the subject of considerable discussion in the cases. However, those cases have involved situations where the very existence of an aboriginal tradition, as well as its characteristics, were in issue. Some were test cases on native title. In a large native title case such questions will often be debated. It is however for the parties in any litigation to define the issues. This case involved a prosecution for a relatively minor breach of the *Fisheries Act*. It arose in a context where local aborigines, with the support of the Department, were trying to protect their traditional fishing ground from those whom they regarded as outsiders.⁸⁸ It occupied less than a day in the Rockhampton Magistrates Court. The magistrate delivered an ex-tempore decision, for which he is to be commended. The parties were under no obligation to turn the case into an expensive preview of proceedings which might be expected to take place on the hearing of the pending native title claim of the Darumbal people. They were entitled to limit the issues as they did to those which mattered for the purposes of the prosecution. They are bound by their conduct of the proceedings. This court should be astute to prevent the loser from belatedly attempting to widen the ambit of the issues, particularly when the attempt is made by fresh counsel on the basis of an error imputed to his predecessor. In my judgment there was no error; there was only a calculated decision as to the way to conduct the case. On its face it appears to have been a sensible decision. The submission should be rejected.

[138] There was no doubt that the net in Mr Yasso's possession (which was a little over 50 m in length) had recently been used for fishing - the inspectors found the fish. Mr Yasso gave evidence that he was a Darumbal person, and on that point he was strongly challenged. His evidence was not particularly impressive. His grandmother was Darumbal (and therefore his father was half Darumbal) and, putting it at its highest, he himself identified as Darumbal in addition to his identification as a South Sea Islander. Against him was the fact that he had initially described himself when intercepted by the fishing inspectors only as a South Sea Islander (although later in the conversation he described his ancestry as "aboriginal and South Sea Islander"; he had been accepted only as an associate member of the

⁸⁷ Emphasis in the original.

⁸⁸ See next paragraph.

Aboriginal Corporation created to represent the Darumbal people, when he would have been accepted as a full member were he perceived by the Darumbal as one of themselves; and he seemed to have had little contact with the Darumbal people. As Mr Hatfield said, apparently with some vehemence:

“We give people the opportunity to have a say. Now Ric, as an associate member of the organisation, he attended the meeting. He didn't assert any Darumbal heritage that night. He just said, ‘I'm Ricco, I'm becoming an associate member.’ He told us who he was, a South Sea Islander boy, so we accepted him as an associate member. Why didn't he say that [he was Darumbal] when he applied for membership? All of a sudden he's caught fishing, he's in trouble and ‘I'm a traditional owner, you know.’ So, you know, you've really got to get your facts in order, eh?”⁸⁹

Mr Yasso denied going to the meeting and denied that conversation. An adverse finding would not have been surprising. But the magistrate did not find adversely to Mr Yasso. He believed him. Mr Yasso was entitled to the benefit of that finding on the appeal to the District Court. Had counsel for the complainant consented to the reopening of evidence, Mr Yasso might have been further cross-examined and it would have been open to the judge to make his own finding on credibility. A letter which Mr Yasso wrote, which Mr Jones tendered to the District Court, suggested that Mr Yasso belonged to the Wakka Wakka people and made no mention of the Darumbal. There would have been ample material to make a finding against Mr Yasso. But that did not happen. Mr Yasso's application to give further evidence himself and to call another witness was refused. There is no suggestion that the case falls into that unusual category where an appellate court may reverse a finding made at first instance based on an assessment of credibility.⁹⁰ In my judgment his Honour was wrong to go behind the magistrate's decision on this point.

[139] It is therefore strictly unnecessary for me to discuss in detail the meaning of “Aboriginal tradition”. However, during the hearing of the application I detained Mr Preston (who appeared on behalf of the respondent) for some time on the issue of how tradition should be defined in this context. In deference to his submissions I should say something about them. Mr Preston submitted that one could not prove the existence of an aboriginal tradition of fishing in particular waters simply by proving that traditionally aborigines fished in those waters. He referred to the definition of the term “Aboriginal tradition” in the *Acts Interpretation Act 1954*; it

“means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.”⁹¹

He submitted that this definition required the existence of some form of right exercised pursuant to a system of rules which constituted the body of traditions,

⁸⁹ I have rationalised the punctuation and stuttering in the transcript.

⁹⁰ *Fox v Percy* (2003) 214 CLR 118.

⁹¹ *Acts Interpretation Act 1954*, s 36.

observances, customs and beliefs. In support of that submission he referred to a passage in the judgment of Gleeson CJ in *Mason v Tritton*⁹²:

“Fishing is an activity which is so natural to people who occupy, or visit, coastal regions, that some care needs to be exercised in passing from an observation that people have engaged in that activity to an assertion that they are members of a class who have exercised some form of right pursuant to a system of rules recognised by the common law.”

Consequently it was not sufficient to prove that an activity was carried out in accordance with tradition. It was necessary to show that the activity was carried out in accordance with a body of rules which sanction the tradition.

[140] I am unable to accept that submission. In my judgment it incorrectly assumes that what had to be proved by the plaintiff in *Mason v Tritton* is what must be proved in order to establish an aboriginal tradition within the meaning of the *Acts Interpretation Act 1954*. *Mason v Tritton* was a case in which the plaintiff asserted and relied upon the existence of a right of the type recognised by the High Court in *Mabo v State of Queensland [No 2]*.⁹³ Priestley JA, with whom Gleeson CJ agreed, summarised the High Court's statement of the law concerning the survival of native rights and interests. The first two paragraphs of his summary are pertinent to the present discussion:

“1. Because, if the native interest did not exist at the time when the common law became the law of the colony, the radical title, the legal estate and the beneficial estate in the relevant land all vested together and undivided at that time in the Crown, any claimed native interest can not now be recognised by the common law unless it was in existence immediately before the common law became the law of the colony

2. The native interest must be a recognisable part of the system of rules observed by an identifiable group of people connected with a particular locality ...”⁹⁴

The matter being discussed in *Mason v Tritton* was, what must be proved at common law to establish a right or interest which survived the advent of the common law in Australia. (Later authority suggests that it was the imposition of British sovereignty rather than the advent of the common law which was the critical event, but that is immaterial for present purposes.⁹⁵) Tradition was but one element in the establishment of the right or interest. (The same applies to the decision of the Supreme Court of Western Australia in *Derschaw v Sutton*.⁹⁶) That is very different from what must be established to satisfy the elements of s 36 of the *Acts Interpretation Act 1954*. The tradition referred to in that section need not find its expression in or be sanctioned by rules; need not be traced back to any particular year (whether 1788 or 1828); and, most importantly, need not give rise to a right or interest or any kindred concept, or even be recognised by the common law. Were it

⁹² (1994) 34 NSWLR 572 at p 574.

⁹³ (1992) 175 CLR 1.

⁹⁴ (1994) 34 NSWLR 572 at p 598.

⁹⁵ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422.

⁹⁶ (1997) 17 WAR 419.

otherwise, the definition in s 36 would resemble that in s 223 of the *Native Title Act* 1993. I reject Mr Preston's submission.

[141] Nothing is to be gained by attempting here an *a priori* enumeration of what must be proved to establish the tradition defined in s 36. Indeed, any such attempt must carry a high risk of error. The matter is best worked out in the context of actual cases.

[142] That brings me to the last issue which arose under s 14, the question of whether the tradition had been modified to exclude the use of gill nets. I am prepared to assume that at least in theory, a custom or belief regarding the method of modification of an aboriginal tradition might exist within that tradition (although it seems unlikely) which might be proved, or that the law might recognise a modification from demonstrated changes to a tradition over a long period of time. I am also prepared to assume that such a change might be made notwithstanding an adverse impact upon individuals. What the prosecution sought to prove in this case was that the Darumbal people had modified their tradition by banning the use of gill nets.

[143] The principal witness on this aspect of the prosecution case was Mr Hatfield. He described himself as a Darumbal aboriginal person whose ancestors go back many thousands of years. He was chairman of the Darumbal-Noolar Murree Aboriginal Corporation for Land and Culture, which he described as the representative body to act on behalf of the Darumbal people in consultations with state and federal government departments on community issues. He claimed some surprising authority both for himself and for the Corporation:

“... basically, ah, the organisation is a representative body for – for Darumbal people and also the council of elders which has been, ah, set up. Ah, very much as an operational sort of body that actually, ah, participates in, ah, various sort of issues that, ah, Darumbal people need to take part in, whether it’s marine park planning or it’s – whatever planning issues or, ah, fishing. It could be associated with, ah, any sort of indigenous sort of, ah, issues that are happening at the time. So very much, not only in consultation, but also acting – acting on behalf of, ah, Darumbal people, yeah.

Uh-huh. And then are you able to speak on behalf of the – the Darumbal elders? -- I am, yeah. I’m, ah, as – as the chair of the, ah, organisation I – I – I’m sort of appointed to represented the – represent the, ah, the elders of the Darumbal people and the council of elders and also the members and associate members of the – of the organisation.”

He did not explain how the organisation acquired the authority to speak on behalf of the elders of the Darumbal community, but in re-examination he reiterated that he had been elected to represent the Darumbal council of elders. He testified that a few years earlier the Department (presumably the Fisheries Department) had consulted the organisation about gill netting. The organisation was

“concerned about the numbers of dugong and turtle which were being caught up in the net and there was a bit of controversy in the community about gill nets and I suppose it's still on, that debate, but we certainly - because it's such a sensitive issue we'd like the - we've

actually put a ban on gill netting, you know, the community itself 'cause we can see the dangers of it all."

He said that there was consultation with the elders and it was decided to stop the use of those nets. In cross-examination he said that the objection to [gill] net fishing was not his personal view, but a decision made by the organisation after five-inch gill nets had caused a lot of trouble in the community for a period of time. All gill nets were banned regardless of whether they were five inch or two inch nets. The ban did not apply to cast nets. (Presumably these are not made with large mesh sizes.) It was the result of consultation with those of the people who came to the meeting. It applied until such time as the people might meet and discuss the issue again.

[144] That was where his evidence stood until almost the end of his re-examination. There then occurred the following passage:

"MR FARRAH: Okay. Now also too, you were asked about the decision to ban the gill nets. Now, and again, I don't like putting these as statements but you've already given the evidence in my opinion, you said earlier on that the decision to ban the gill nets was actually made by the council of elders? -- That's right, yeah.

Yes. And it was -- but it was through the organisation that it was to communicate? -- That's right, yeah.

Yes. So it wasn't the organisation that banned -- the organisation standing alone, it was the council of elders? -- No, that's right, yeah."

That was blatantly leading. It ought not to have been allowed when Mr Yasso was unrepresented. It did not reflect, indeed was inconsistent with, what had been said earlier. But matters did not end there. At the close of the defence case, the magistrate himself intervened:

"BENCH: The -- I know it's a bit unusual the way these proceedings have been conducted here today but I think probably all I'm trying to do is to sort something out. And I know Mr Hatfield's in Court -- I know Mr Hatfield has given evidence earlier in the piece but he's also had an opportunity of hearing the witnesses, Mr Willie and Mr Mann, about cultural matters and I don't know whether it's appropriate or not as to whether Mr Hatfield thinks that he could give any other evidence but is there anything, Mr Hatfield, that you wanted to say that would change anything you've said before or-----

MR HATFIELD: Um-----

BENCH: I said it was a bit unusual but-----

MR HATFIELD: Well, probably just to -- just to say that-----

BENCH: Do you want to come back to the witness box. I think it's probably -- you've no problem with this -- I know it's unusual, Mr Farrah.

MR FARRAH: Well, I -- Yeah -- given the circumstances, your Worship, and the -- and the witnesses and the evidence-----

BENCH: I think so.

MR FARRAH: -----I don't object to it, no.

BENCH: Just come back to the witness box, Mr Hatfield.”

Having reminded Mr Hatfield of his oath, the magistrate then asked him:

“What I'm concerned about is this cultural method of taking fish and you've heard some of the things that Mr Willie's had to say and your own things and what Mr Yasso's had to say, but do you want to respond to anything there?”

- [145] In my judgment that intervention was quite improper, particularly when dealing with an unrepresented defendant. First, even assuming the magistrate had power to recall a witness of his own motion, no occasion for curial intervention arose in the circumstances of this case. This was a criminal prosecution. If the occasion for the recall of a prosecution witness had arisen, it was for the prosecutor to make the appropriate application. The intervention created a serious risk that dispassionate members of the public might perceive the bench to be biased in favour of the prosecution. Despite the intervention the prosecutor made no such application. Second, had he done so the magistrate would have been obliged to refuse it. The rules regarding reopening the prosecution case are well settled:

“The prosecution may be permitted to adduce evidence after the close of the defence case in the discretion of the trial judge. The discretion is, however, to be exercised in favour of the prosecution only in exceptional circumstances and the guiding principle is that the prosecution ought not to be permitted to split its case. That is to say, the prosecution must call all the evidence available to it in support of its case during the presentation of that case. If it fails to do so, it ought not to be allowed to remedy the situation by calling evidence in reply except in exceptional circumstances.”⁹⁷

No exceptional circumstances were present in this case. There was no suggestion of a breach of the rule in *Browne v Dunn*.⁹⁸ Third, although the prosecutor was given the opportunity to comment on the course proposed, Mr Yasso was given no such opportunity. He was surely entitled to be heard. Fourth, the phrasing of the magistrate's first question was unfortunate. The magistrate was presiding at a criminal trial, and the desire or otherwise of a witness for the prosecution to respond to what had been said by defence witnesses was quite irrelevant.

- [146] Predictably, the question elicited a lengthy, unfocused response of doubtful assistance in the trial. That naturally led the magistrate's questioning to become more focused:

“But do you have problems with the ideas that nets are used, whether it's a – a cultural method of capturing fish, to use net? Do you accept the concept there? -- Um, well, um, to me it doesn't really matter my opinion. I'm really here to represent the council of elders--
Mmm. Well, that's what – I was going to try and get – the council's opinion of it is? – Yeah.

Through you? -- And we – well my – my idea or my concept is really depended on how the elders feel about it, so, if they say that's the

⁹⁷ *The Queen v Chin* (1985) 157 CLR 671 at p 684.

⁹⁸ (1893) 6 R 67.

decision that's made well that's how – I respect that decision basically.

Mmm. And you say the decision of the elders is at the moment is there's no – no taking of fish by gill net? – Yeah. As – as it stands today, yeah.”

That was just as leading as the earlier questioning by the prosecutor had been.

[147] The possible modification of the tradition was a question which went to the very definition of the tradition relied upon by Mr Yasso. There was some hint in the argument before us that even if Mr Yasso bore the onus of proving the existence of an aboriginal tradition under s 14 of the Act, the prosecution nonetheless bore the onus of proving any modification of that tradition. That suggestion is not in my judgment correct. If Mr Yasso bore the onus of proving the elements of s 14, he was obliged to prove that he acted “under Aboriginal tradition”. In the circumstances of this case, that meant he was required to prove the existence of a tradition which permitted him to use (and hence possess) the net in question on the day of the alleged offence. That in turn meant that, if the possibility of a modification to the tradition excluding its application to that net was fairly raised, he was obliged to disprove it. On the other hand, if the onus was on the prosecution to exclude the applicability of s 14 to Mr Yasso, it might try to do so by showing that one characteristic of the tradition as it stood on the date of the alleged offence was that it did not extend to gill netting. Where did the onus of proof lie?

[148] In *Chugg v Pacific Dunlop Ltd*,⁹⁹ a case which, like the present, involved a prosecution before a magistrate, Dawson, Toohey and Gaudron JJ said:

“For the purpose of assigning the onus of proof, a distinction is made between a requirement which forms part of the statement of a general rule and a statement of some matter of answer, whether by way of exception, exemption, excuse, qualification, exculpation or otherwise (called an ‘exception’), which serves to take a person outside the operation of a general rule. See *Vines v. Djordjevitch* (1955) 91 CLR 512, at pp 519-520. The distinction does not depend on the rules of formal logic: *Dowling v. Bowie* (1952) 86 CLR 136, at p 147. Rather, the categorization of a provision as part of the statement of a general rule or as a statement of exception reflects its meaning as ascertained by the process of statutory construction. Where some matter is said to be an exception to an offence, the question is whether there is to be discerned a legislative intention ‘to impose upon the accused the ultimate burden of bringing himself within it’: *Director of Public Prosecutions v. United Telecasters Sydney Ltd.* (1990) 64 ALJR 181, at p 183; 91 ALR 1, at p 6. The intention may be discerned from express words or by implication. See *Reg. v Edwards* (1975) QB 27 and *Reg. v. Hunt* (1987) AC 352.”

...

Although the form of language may provide assistance, ultimately the question whether some particular matter is a matter of exception is to be determined ‘upon considerations of substance and not of form’: *Dowling v. Bowie*, at p 140.

⁹⁹ (1990) 170 CLR 249.

...

One indication that a matter may be a matter of exception rather than part of the statement of a general rule is that it sets up some new or different matter from the subject matter of the rule. See *Darling Island Stevedoring and Lighterage Co. Ltd. v. Jacobsen* (1945) 70 CLR 635, per Dixon J. at p 644. Such is ordinarily the case where, in the terms used in *Reg. v. Edwards*, at p 40, there is a prohibition on the doing of an act ‘save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities’. See *Reg. v. Hunt*, at p 375, where Lord Griffiths considered the statement from *Reg. v. Edwards* ‘an excellent guide to construction’. If the new matter is a matter peculiarly within the knowledge of the defendant, then that may provide a strong indication that it is a matter of exception upon which the defendant bears the onus of proof.”¹⁰⁰

I approach the determination of the onus of proof on the basis set out in that passage.

[149] I gain no assistance from the form of the statute. Section 14 is not expressed either as an exception to s 84 or as a requirement the negating of which forms part of the statement of the general rule embodied in s 84. Logically it might be either. In substance, as I have already found, its effect is to exclude the operation of s 84 on conduct involving the exercise of the rights conferred by the section.¹⁰¹ Its subject matter is quite different from that of s 84. Its effect is not limited to excluding the operation of s 84 but extends to exclude the operation of other sections. It is located in a part of the Act remote from s 84. As to ease of proof of its elements, I agree with McPherson JA that it would ordinarily be much easier for a person to prove that he was an aborigine or a Torres Strait Islander within the meaning of the statute than for his opponent to prove that he was not. I also think that ordinarily it would be much easier to prove the existence of a particular aboriginal tradition or island custom than to prove the non-existence of any such tradition or custom. In so saying I take into account the cost of strictly proving the existence of a custom and the paucity of resources likely to be available to a defendant in a prosecution under the Act, but I do not think that factor can determine the outcome.

[150] I think there is some analogy to be drawn between the present case and the case of *Madsen v Western Interstate Pty Ltd.*¹⁰² In that case the Full Court held that a defendant accused of a breach of the state transport laws bore the onus of proving the facts necessary to engage the operation of s 92 of the Constitution if he wished to rely upon that section. Likewise, in *Horne v Tweed River Transport Pty Ltd*, Gibbs J, with whom Hanger and Stable JJ agreed, said:

“If the respondent’s use of the vehicle for the carriage of the goods was in the course of or for the purpose of interstate trade, the respondent would have committed no offence for, because of s 2 of the *State Transport Act* and s 92 of the Constitution, s 49 would not apply. The respondent bore the onus of proving the facts necessary to attract the protection of s 92, either directly or by way of s 2 of the

¹⁰⁰ *Ibid* at p 257.

¹⁰¹ Paragraph [124].

¹⁰² [1963] Qd R 434.

*State Transport Act (Madsen v Western Interstate Pty Ltd; Horne v Perry; Madsen v Tweed River Transport Pty Ltd and see also Colbert v Tocumwal Trading Pty Ltd; Day v Hunter and Red Land v Dyson).*¹⁰³ The onus of course was to be discharged on the balance of probabilities.”¹⁰⁴

[151] All of these considerations, and particularly the question of ease of proof, lead me to agree with McPherson JA that Mr Yasso bore the onus of proving all the elements of s 14 on the balance of probabilities.

[152] Did he do so? In answering this question I think we should disregard the evidence given by Mr Hatfield in response to the prosecutor’s leading question in re-examination and in response to the magistrate’s questioning when he was recalled after the close of the defence case. I hold that opinion because I think those answers carry very little weight; and because in my judgment to take them into account would deprive the trial of the element of fairness. On this basis the position at the end of the evidence was: there was a tradition of fishing among the Darumbal people; features of that tradition were that only Darumbal people could fish at Dadsons Beach, that nets could be used for fishing, and that nets might be up to about 50 m long; Mr Yasso took fish using such a net; Mr Yasso was entitled to a finding that he was a Darumbal person; the net in Mr Yasso’s possession was a gill net; and the Darumbal-Noolar Murree Aboriginal Corporation for Land and Culture had banned the use of gill nets. That evidence established the existence of a tradition under which Mr Yasso took fish and did not establish that a feature of the tradition was a prohibition on the use of gill nets. In my judgment the proper finding was that Mr Yasso took the fish “under Aboriginal tradition” within the meaning of s 14 of the Act.

[153] It follows that in my judgment the decision of the magistrate was correct.

[154] The case involved some difficult questions of law and it is in the public interest that this court give guidance on the proper interpretation of s 14 of the Act. The decision of the District Court works an injustice on an unrepresented litigant. Those matters are enough to warrant granting leave to appeal.

[155] Before parting with the case, I wish expressly to record two reservations. First, I am by no means persuaded that Mr Yasso was not a “native title holder” under the *Native Title Act* 1993. Both the magistrate and the District Court judge gave no consideration to a defence under s 211 of that Act because they held that there was no evidence that Mr Yasso was a native title holder. Proof of that fact would be necessary for that defence to be made out. “Native title holder” was relevantly defined under that Act as “the person or persons who hold the native title”. “Native title” meant

“the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

¹⁰³ Citations omitted.

¹⁰⁴ (1967) 61 QJPR 114 at p 117. I acknowledge that in the later decision of *Allied Interstate (QLD) Pty Ltd v Barnes*, the High Court expressly left the question open.

- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.”

Rights and interests under that subsection included fishing rights and interests.¹⁰⁵ If it were necessary to decide the point, one would need to consider whether the Darumbal people, and hence Mr Yasso, were native title holders. What is clear is that the submission made to the magistrate, and upon which he apparently acted, that Mr Yasso was not a native title holder because “you only become a holder once the Federal Court has made a determination or an agreement’s been reached ... by consent and the Federal Court has okayed it” was wrong. A decision of the Federal Court on a native title application is declaratory of the existing position. If native title exists, it exists independently of the decision. As to whether a defence might have been available under s 211 of the *Native Title Act* 1993, I say nothing.

[156] Second, were it necessary for me to consider s 22 of the *Criminal Code*, I would find it necessary to take into account the existence of not only s 14 of the Act but also s 211 of the *Native Title Act* 1993. The latter was the provision under which Mr Yasso claimed to be acting at the time he was intercepted - he even produced a laminated copy of the section from his vehicle to support his claim. In view of the complexities involved I prefer to express no opinion when I do not have to do so.

[157] I agree with the orders proposed by the President.

¹⁰⁵ *Native Title Act* 1993, s 223.