UP THE CREEK AND OUT AT SEA:
THE RESURFACING OF THE PUBLIC RIGHT TO FISH

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Is the public right to fish significant?

*Mabo v Qld (No 2) (1992) 175 CLR 1* – native title

Exclusive native title rights *denied* in large part because of the public right to fish

*Cth v Yarmirr* (2001) 208 CLR 1 – offshore native title

The public rights of fishing/navigation *extinguish* exclusive offshore native title rights

*WA v Ward* (2002) 213 CLR 1

The public right to fish is an “other interest” to be recognised within native title determinations (s 253 *Native Title Act 1994 (Cth)*)

What is the origin of the public right to fish?

**Magna Carta (1215)**

King can’t grant private fisheries over tidal waters
What is the public right to fish?

Rights for public to fish where and when they like using any ordinary fishing method (unless otherwise regulated)

Free-swimming fish (not sedentary species) can be taken and owned
How far seawards?
Better view: as far as the common law goes

How far landwards?
As far as there is normal tidal influence
May extend further if the Crown owns the riverbed (but only by historical acquiescence; not by Magna Carta)
What about NSW?

**Fisheries Management Act 1994 (NSW) s 38(1)**

— up the creek

“A person may take fish from waters in a river or creek that are not subject to tidal influence despite the fact that the bed of those waters is not Crown land if, for the purpose of taking those fish, the person is in a boat on those waters or is on the bed of the river or creek”
Incidental rights

Persons exercising the right may:

- use as many lines, nets hooks and boats as they please
- dig for bait on the foreshore
- incidentally use the foreshore (e.g., dry nets, land boats)
- traverse the edge of private land above HWM to gain water access at high tide
- temporarily affix nets to the solum underlying the intertidal waters

However:

- must have “due regard” to landowners
Offshore native title

Must yield to the public right to fish

Possible litigation:
• Recreational fishers stray beyond the right eg in how they use land above HWM
• Indigenous fishers actually exclude recreational fishers
Legislative land grants

NEW ISSUE

Gumana litigation 2005
• Blue Mud Bay in Arnhemland
• Legislative title to LWM

KEY QUESTION:

Can holders of land grants to the LWM exclude others?
Three options (there are problems with all of them)

Option 1: can exclude everyone

Option 2: can exclude everyone except those exercise common law public rights such as the public right to fish

Option 3: exclude rights BUT doesn’t apply to the water column

Gumana

Property rights are qualified: they “do not include rights to exclude those exercising public rights to fish”

Need for legislative response?