PILKI AND *BIRRILIBURU*: COMMERCIAL NATIVE TITLE RIGHTS AFTER *AKIBA*

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I Introduction

The failure of Australian native title jurisprudence to develop any scope for the recognition of commercial native title rights has been much lamented.[1] This article first briefly summarises that failure, and then turns to describe the Akiba litigation that culminated in the High Court's 2013 decision of *Akiba v Commonwealth* ('*Akiba HC*'),[2] and explains how that decision presents an opportunity at last to develop the jurisprudence in a direction more amenable to the recognition of commercial native title rights. I briefly note that the opportunity has not been seized in some recent native title judgments, probably because they were mostly argued prior to *Akiba HC*, before proceeding to discuss the 2014 Federal Court cases of *Willis on behalf of the Pilki People v Western Australia* ('*Pilki*'),[3] and *BP (deceased) on behalf of the Birriliburu People v Western Australia* ('*Birriliburu*'),[4] the former of which has now been upheld by the Full Court of the Federal Court.[5] These decisions represent the first fruit of the tortuously slow development of the jurisprudence in this area. This article attempts to glean some lessons from those cases that can be applied to future claims for commercial native title rights, before finally looking to the practical ramifications of this development in the law.

II A Sorry History: Unsuccessful Commercial Native Title Rights Claims

In earlier native title determination applications, a right to use the resources of the sea or the land for commercial purposes, or a right to 'trade' resources, was commonly sought by native title claimants as a distinct right.[6] Such applications were almost universally unsuccessful.[7]

Many applications were unsuccessful because it was found that there was not sufficient evidence to establish the existence of the commercial right in question.[8] A particular stumbling-block in this regard was the obiter dicta comment of the Full Court of the Federal Court in *Commonwealth v Yarmirr* that commercial native title rights were incapable of recognition unless paired with a right to exclusive possession.[9]

But even without a requirement of exclusive possession, it was generally very difficult to marshal enough evidence to point to the pre-sovereignty and continuing right of the applicants to trade in resources, or to access resources for commercial purposes. One reason in particular for this was that the manner of exercise of commercial native title rights, such as the right to fish for commercial purposes, naturally tended to change drastically post-sovereignty, often to such an extent that the courts might consider the alleged right no longer to be one founded in traditional law and custom, and thus incapable of recognition under the *Native Title Act 1993* (Cth) ('the Act').

Other applications, in particular, applications for commercial rights over the sea, were unsuccessful even where the difficult evidentiary issues were overcome, because the commercial native title right was found to have been extinguished by legislation concerning regulation of commercial fishing.[10]

The first-instance judgment in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* represented a rare exception to the general failure of claims for commercial native title rights. In that case, Mansfield J found that the applicants had the right to trade traditional resources.[11] Prior to 2010, this appears to have been the only commercial native title right ever to have been found to

exist in a contested claim. However, it was short-lived. The decision was successfully appealed to the Full Court. The Court unanimously held there was insufficient evidence to support a right to trade.[12]

Given their persistent failure to be recognised, it soon became the practice in most determinations, whether by consent or contested, for commercial native title rights to be 'carved out', as it were, from both the application and determination. There are countless examples of this occurring. To take one, in *Far West Coast Native Title Claim v South Australia (No 7)*, the consent determination specified: 'The native title rights and interests are for personal, domestic and communal use'.[13] Similarly, in *Foster on behalf of the Gunggari People #3 v Queensland*, the consent determination expressed the native title rights recognised as including:

> non-exclusive rights to:
>
> (c) hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;
> (d) take and use Natural Resources from the land and waters of the area for personal, domestic and non-commercial communal purposes;
> (e) take and use the Water of the area for personal, domestic and non-commercial communal purposes;. …[14]

There is one exception to this trend. In *Lovett on behalf of the Gunditjmara People v Victoria (No 5)*, a consent determination was made by North J which included a right to take resources from the sea, without any mention of that right being limited to particular purposes.[15] It appears, therefore, that the Gunditjmara People have a native title right to take resources from the sea for a commercial purpose.[16] Consent determinations, however, inevitably result from trade-offs and compromises, rather than a strict adjudication upon the application of law to the relevant facts. One wonders, had the State been minded to challenge the absence of any 'carving out' of commercial purposes from the right to take resources, whether this determination would have ultimately been made.

The overwhelming lack of success on the part of applicants in claiming commercial native title rights is not unique to Australian law. Attempts to claim such rights have been a sticking-point for applicants in cases concerning indigenous title to land in Canada,[17] and, to a lesser extent, New Zealand.[18] In Australia, the repeated failure of such rights to be recognised has inevitably led to a status quo in which native title rights came to be seen as effectively wholly non-commercial.

III *Akiba*: its Consequences for Commercial Native Title and its Aftermath

A *Akiba* and its Consequences

In 2010, Justice Finn's decision in *Akiba v Queensland (No 3)* ('*Akiba FC*') struck a blow against the commercial native title rights orthodoxy. His Honour found that the traditional owners of the Torres Strait Islands had a right to 'access and take resources of the sea *for any purpose*', including for commercial purposes.[19] It was only the second time, after Mansfield J's overruled judgment in *Alyawarr*, that a commercial native title right had been recognised in a contested native title determination application.

The broadly-worded right was an unusual right to be claimed, let alone determined. Generally in past determinations, as has been noted, where a right to access and take resources was claimed, it would be limited to enumerated purposes - and 'commercial purposes' would inevitably be omitted. In the rare case where a right had been claimed without those limits, the right would be rejected. For instance, in *Neowarra v Western Australia,* a broad right similar to that found in *Akiba FC* was sought, but not recognised.[20]

Justice Finn's recognition of a broad right to 'access and take resources of the sea *for any purpose*' was of course no accidental anomaly; it is respectfully suggested that Finn J was far from blind to the departure from orthodoxy his finding represented (as no doubt were the claimants and their lawyers). In a speech given after *Akiba FC* but before *Akiba HC*, Finn J criticised:

> [T]he fragmentation of native title rights and interests. It results, in my view, in the over-definition, and subdivision of, individual rights and interests and in the dilution of a proprietary conception of native title.[21]

This is an oft-heard criticism. The so-called 'bundle of rights' approach to native title, encouraged by the terms of the *Native Title Act 1993* (Cth) ('NT Act') and subsequent High Court jurisprudence such as *Western Australia v Ward*,[22] requires

native title to be reduced from rights truly proprietary in character to little more than a small collection of bare licences. It is difficult not to see the claiming and recognition of this broader right in *Akiba FC* as a strike against the 'bundle of rights' approach.[23]

The finding of this right to access and take resources of the sea for any purpose was based on a plethora of evidence, both lay and expert, of both the existence of traditional laws and customs related to taking resources of the sea for trade, and of actual such trading of such resources, both in ancient and modern times.[24] One suspects that the strength and volume of evidence in this regard would be difficult to replicate in many other places in Australia. One witness, Walter Nona, gave the following pithy summary of the matter, quoted by Finn J:

> We always used things from the sea for trade or exchange for things we didn't have. … [W]hen money came we sold things from the sea for money to get things we needed. Selling things for money is new because money is new; but we always exchanged and traded things for what we needed. In that way, selling things for money is no different.[25]

The right to 'access and take resources of the sea for any purpose' found to exist by Finn J was a non-exclusive right. Justice Finn declined to follow the obiter dicta comments in *Yarmirr* and in some other cases (mentioned above) to the effect that commercial native title rights must be exclusive rights. His Honour found:

> With the greatest of respect to others who may, or may appear to, have expressed a … view [that rights to take and use the resources of an area for trading or commercial purposes cannot be sustained in the absence of a right to occupy the area to the exclusion of all others]: cf *Commonwealth v Yarmirr* (2000) 101 FCR 171 at [250]-[251]; *Daniel v Western Australia* [2003] FCA 666 at [320]; I cannot accept this if it purports to state a rule of universal application. … [A]t least in relation to the sea … it is by no means apparent, absent a legislative regime to the contrary, why marine resources may not be exploited by those who care to do so for trading and commercial purposes, though they lack entirely any exclusive right to possession of the area. ...
>
> [It] is difficult to understand … why a right to take marine resources for trading or commercial purposes is said to presuppose a right to exclusive possession.[26]

Having found that this broad right existed subject to extinguishment issues, Finn J proceeded to determine the question of extinguishment. His Honour held that:

> The native title right I have found is a right to access and take marine resources as such—a right not circumscribed by the use to be made of the resource taken. This said, where the activity engaged in when exercising that right has itself a discrete and understood purpose, I accept that that activity may properly be able to be treated as a distinct incident of the right for extinguishment purposes. As have some number of the judges of this Court (eg *Yarmirr FC* at [255]; *Neowarra*, at [779]; *Gumana TJ*, at [247(b)]) I accept for present purposes that a right to take resources for trading or commercial purposes—whether exclusive or non-exclusive—is a discrete and severable characteristic of a general right to take resources. To this extent I reject the Applicant's submission that it is impermissible so to 'subdivide' this right.[27]

So, although a broad right had been found to be established, Finn J felt bound to treat that right's use for commercial purposes as a 'distinct incident' for the purpose of determining whether it had been extinguished.[28] After an analysis of Queensland commercial fishing regulations, His Honour concluded that the right had not been extinguished.[29] Like Mansfield J's decision in *Alyawarr*, Finn J's decision was soon overruled by a 2:1 majority in the Full Federal Court ('*Akiba FCAFC*').[30] The majority of the Full Federal Court (for currently relevant purposes) merely reached a different conclusion as to whether the Queensland commercial fishing regulations had extinguished the native title rights. The majority found that the claimants' right to access and take resources of the sea for commercial purposes was inconsistent with, and therefore extinguished by, Queensland legislation regulating commercial fishing.[31] The majority did not question the existence of the broad right recognised by Finn J, nor did they question Finn J's approach of dealing with this broad right's use for a commercial purpose as a 'distinct incident' for the purpose of considering extinguishment.

In 2013, the High Court unanimously overturned the Full Court's decision, and restored Finn J's original decision. The High Court disagreed with the Full Court's reasoning in regard to the Queensland commercial fishing regulations' inconsistency with and extinguishment of native title rights to fish. Much of the judgment focussed on this issue, and so consequently has much subsequent commentary.

But the Court went further. The Court held that, in any event, both the Full Court and Finn J had addressed the issue of extinguishment on the wrong footing. Justices Hayne, Kiefel and Bell held:

> The relevant native title right that was found to exist was a right to access and to take resources from the identified waters for any purpose. It was wrong to single out taking those resources for sale or trade as an 'incident' of the right that had been identified. The purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.
>
> Focusing upon the activity described as 'taking fish and other aquatic life for sale or trade', rather than focusing upon the relevant native title right, was apt to, and in this case did, lead to error. That shift of focus, from right to activity, led to error in this case by inferentially reframing the question determinative of extinguishment as being whether the statutory prohibition against fishing for a particular purpose without a licence was inconsistent with the continued existence of a native title right to fish for that purpose. But the relevant native title right that was found in this case was a right to take resources for any purpose. No distinct or separate native title right to take fish for sale or trade was found. The prohibition of taking fish for sale or trade without a licence regulated the exercise of the native title right by prohibiting its exercise for some, but not all, purposes without a licence. It did not extinguish the right to any extent.[32]

Chief Justice French and Crennan J agreed, rejecting the notion that it was proper to characterise 'the exercise, for a particular purpose, of a general native title right as the exercise of a lesser right defined by reference to that purpose'.[33]

Moreover, French CJ and Crennan J acknowledged that the right to access and take resources for any purpose was a 'non-exclusive' right.[34] Presumably, this can be taken as an indication the High Court sees no contradiction in a commercial native title right being non-exclusive.

Thus, the decision of the High Court in *Akiba HC* endorsed the unconventionally broad right found to exist in *Akiba FC*.[35] It was not impermissibly broad, and its non-exclusive nature was immaterial. Moreover, *Akiba HC* demonstrated one of the advantages of expressing a claim group's native title rights in the broader terms used—in terms of extinguishment, a broad native title right to access and take resources for any purpose, once established to have existed under traditional law and custom, would be less likely to be extinguished than a native title right to access and take resources for a commercial purpose. Two rights must be wholly inconsistent in order for the native title right to be extinguished.[36] The broader the right, the less likely that a particular executive or legislative action will be wholly inconsistent with that right.

B The Aftermath: Subsequent Determinations

The advantages in terms of extinguishment of claiming a broad native title right to access and take resources for any purpose were made clear by *Akiba HC*. But its advantages in terms of proof appeared even more promising, if not so clear. As has been discussed, proof had been the most significant stumbling block for claims for commercial native title rights. But if a claimant could now claim a broad right to access and take resources for any purpose, rather than a right specifically for a commercial purpose, then it would seem to follow that it becomes unnecessary, or at least less important, to call evidence of that right existing or being exercised specifically in relation to commercial purposes. This would make proof an easier obstacle to clear, because it would be more likely that a claimant witness would be able to give evidence to the effect that there is a traditional right to use the land or sea for any purpose, than that there is a traditional right to use the land or sea to make money, or for trading purposes. Lay witnesses in native title cases have often struggled to express their entitlements under traditional laws and customs in the form of a 'shopping list' of rights, as required by the courts. Brennan J had observed as long ago as 1982 that 'Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights'.[37] The broader right to 'access and take resources for any purpose' would seem to accord more readily with an Aboriginal understanding of their own traditional laws and customs. So, at least, it appeared. But the full effect of *Akiba HC* remained to be considered.

Before *Akiba HC* was decided, but after *Akiba FCAFC*, there had already appeared one decision which should be briefly noted. In *Graham on behalf of the Ngadju People v Western Australia*, a broad right, somewhat similar to the one claimed in *Akiba FC*, was partially successfully claimed. Justice Marshall determined that the claimants had a right 'to hunt and fish (excluding commercial fishing), to gather

and use the natural resources of the area, such as food and medicinal plants and trees, timber and ochre and to have access to and use of potable water'.[38] The broad terms of this right were not objected to by any respondent, except the Western Australian Fishing Industry Council, who insisted that commercial fishing be expressly excluded. The applicant consented, and the words '(excluding commercial fishing)' were inserted. Prima facie, then, this right may arguably implicitly permit commercial hunting and gathering of resources. However, this right should be read with another right granted in the same determination, the right 'to share or exchange subsistence and other traditional resources obtained on or from the land and waters'. The limiting of this right to 'subsistence and other traditional resources' appears to implicitly prohibit the sharing and exchange (or trade) of resources for commercial purposes (which would not be 'subsistence'). So it is doubtful that *Ngadju* represents any further step forward for commercial native title rights.

Following *Akiba HC*, opportunities arose to consider its effects in three cases.[39] However, each case had been argued prior (or mostly prior) to the delivery of judgment in *Akiba HC*. Consequently, in all three cases, express commercial native title rights were claimed, rather than the broad right claimed in *Akiba*. In all three cases, the claimed commercial right was not recognised.[40] Meanwhile, all of the many consent determinations made by the Federal Court continued to 'carve out' commercial rights from recognition, as they had in the past.[41]

IV *Pilki* and *Birriliburu*

A The Decision

An opportunity to explore fully the consequences of *Akiba* arose in the 2014 Federal Court decisions of Justice North in *Pilki* and *Birriliburu*. The decisions arose from two cases heard together by North J. One concerned the Birriliburu people's claim to rights over land in northwest Western Australia, along the famous Canning Stock Route, and the other concerned the Pilki people's claim to rights over land in southeastern Western Australia.

They were heard together because they both concerned the same legal question. In both cases, the native title claim group had claimed a right to access and take resources from the relevant land for any purpose, including a commercial purpose—that is, a right identically worded to the one found to exist in *Akiba*. In both cases, the Western Australian Government objected to the existence of that right insofar as it included the right to access and take resources for a commercial purpose.[42] The questions for North J to determine, therefore, were whether the claimed native title right was established and was capable of recognition. Justice North decided in favour of recognition of the right in both cases. *Pilki* was subsequently appealed by the State to the Full Court. Justices Dowsett, Jagot and Barker unanimously dismissed the appeal in separate judgments ('*Pilki FCAFC*'). The Western Australian government's argument against the recognition of the right (argued both at first instance and on appeal) was one of principle, which seemed to ignore the clear effect of *Akiba HC*. It argued that a right to access and take resources 'for any purpose' was 'lacking in precision' and on that basis should not be recognised. Justice North expressly applied *Akiba HC* in swiftly rejecting that argument:

> [O]nce it is accepted, as it should be in this case, that the evidence establishes a right to access and take resources for any purpose, there is no lack of precision in expressing the right as such. So much is demonstrated by Akiba. … The argument by which the High Court allowed the appeal in [Akiba HC] depended on an acceptance by the High Court of the broadly stated right to take and use resources for any purpose.[43]

That reasoning was approved on appeal. Justice Barker in particular dealt with this matter at length, and concluded there was no theoretical bar to a claim for what Barker J called 'a use right ... in "purpose-less" terms'—that is, a right not limited to a particular purpose.[44]

The State's next argument (again, both at first instance and on appeal) related broadly to proof. The State pointed to the paucity of evidence about actual use of any commercial right, and argued that evidence of such actual use was necessary to establish the broadly-worded right. Justice North rejected this argument in a passage appearing in both judgments:

> [I]t is not necessary as a matter of logic to prove that activity in conformity with traditional laws and customs has taken place in order to establish that a right exists. In many cases, proof of activities undertaken pursuant to laws or customs will assist in proving the existence of the right. But evidence of the activity is not necessary. Thus, if the applicants had not shown that they traditionally accessed and took resources for commercial purposes, they could still show

> that they had the right to do so if there were traditional laws or customs which gave them such a right. In the same way, the holders of freehold title do not need to show that they have leased out their properties to prove that they have the right to do so.[45] If there is evidence of witnesses accepted by the Court that there are traditional laws and customs which give a right to access and take for any purpose the resources of the country, then the right is established even if there is no evidence of trading activity. …[46]

Justice North cited an influential passage from *Yorta Yorta v Victoria* in support of that proposition.[47] His Honour concluded: 'Thus, without evidence of actual trading activity, if the evidence of traditional laws or customs which give a right to access and take for any purpose the resources of the country is accepted by the Court, then the right would be established.'[48]

Having dismissed the above arguments, North J went on to hold that the claimed right did exist, by relying on both the expert evidence and lay witness evidence as to the existence of the right, even though both the expert and lay evidence only contained extremely limited references to or inferences about any actual trading activity actually occurring within the claim area.

All of North J's relevant findings were upheld on appeal in *Pilki FCAFC*. Thus, *Pilki* and *Birriliburu* demonstrate how *Akiba* has made the successful claiming of commercial native title rights much easier than it previously was. All the above points raised by the State would likely have been much more problematic for the applicants were they raised prior to *Akiba*. Moreover, and importantly, this is the first contested determination (apart from the overruled *Alyawarr*) to recognise commercial native title rights over land. This article now turns to examine more closely how the broad right was proven in *Pilki* and *Birriliburu*, and the lessons these judgments provide for applicants hoping to prove a similar right in future.

B Lessons to be Learned

Of course, the task of establishing a right to access and take resources for any purpose may not be as straightforward in many native title determination applications as it appears to have been in *Pilki* and *Birriliburu*. It is worth considering how the applicants went about proving the existence of this right in these cases in order to identify what hurdles future claimants will likely have to clear in order to have commercial rights recognised.

It is possible to draw four lessons from a consideration of *Pilki* and *Birriliburu*: first, it is established that evidence of trading activity is not necessary to prove a right to engage in such activities; second, the depth of a witness's general cultural knowledge is likely to affect the weight afforded to their evidence as to the content of the relevant traditional laws and customs, which evidence may well be particularly critical in a claim for the sort of right claimed in *Akiba*; third, evidence of the existence of a traditional law prohibiting wastefulness, commonly found in Aboriginal societies, does not mean there is no right to take resources for 'any purpose'; and fourth, the content of the expert evidence is likely to be critical in establishing the right to take and access resources for any purpose including a commercial purpose. I now address each of these matters.

Perhaps the most important lesson contained in these judgments concerned the necessity, or lack thereof, of evidence of trading activity. Evidence of actual use of the right to take resources for commercial purposes was scant, a fact highlighted by the State at first instance and on appeal.[49] In *Pilki*, there was evidence of the sale of paintings of the country made by elders, necklaces made from seeds obtained from the claim area, and other artefacts, including baskets and spears. There was also evidence of shooting and selling rabbits.[50] In *Birriliburu*, the evidence was a little more extensive. There was evidence of the sale of emu chicks, mulga seeds, kangaroo skins, spears, and wooden articles made from trees in the claim area.[51]

But the question of the sufficiency or otherwise of that evidence was ultimately rendered nugatory, because, as already noted, His Honour found, following *Akiba HC*, that evidence of commercial activity was strictly unnecessary to prove a right to access and take for any purpose.[52]

That reasoning was affirmed on appeal (albeit with reservations from Barker J, apparently not shared by the other appeal judges).[53] Justice North concluded in both judgments that:

> In this case the evidence of the existence of such a right from [the lay witnesses], although brief, was compelling. Even without evidence of trading activity, the right is established by this testimony.[54]

Justice North went on in obiter dicta comments to reject in any event the State's submission that the evidence of the claimants' trading activity 'did not amount to substantial commercial activity sufficient to substantiate a right to take resources for commercial purposes'.[55]

Of course, if a prospective applicant wishes to proceed with a claim for commercial native title rights in the absence of any, or much, evidence of actual trading activity, that applicant will need to ensure the evidence of the existence of that right (despite the lack of its exercise) is compelling.

This leads us to the second lesson arising from these judgments. The favourable decision in both cases was aided by the strength of the cultural knowledge of the lay witnesses. Justice North noted in *Birriliburu* that the witnesses 'were knowledgeable people about the laws and customs of the Birriliburu People.'[56] His Honour said that not just their words, but the 'way in which [the witnesses] responded to questions displayed a deep, ingrained, genuine and natural understanding of the laws and customs of their people.'[57]

Likewise, North J held that the Pilki witnesses demonstrated 'detailed knowledge of the stories which are embedded in the physical area of their country' and it was clear there was a 'complete integration between the stories from which the traditional laws and customs emanated and their everyday life.'[58] In weighing up both cases' evidence, North J made especial mention of the fact that '[t]here was … express evidence about the laws and customs from knowledgeable people.'[59]

Both cases concerned groups within what is commonly called the 'Western Desert cultural bloc' (albeit groups at opposite extremities of that bloc). While it is perilous to generalise about a constellation of communities, cultures and linguistic varieties as diverse and far-reaching as that which constitutes the Western Desert cultural bloc, it is relatively uncontroversial to observe that many groups forming part of the bloc are among the Aboriginal cultures which have had the least contact with European settlement, and where, as a consequence, so-called 'classical' culture is relatively strong and unchanged.

As mentioned, the Pilki hail from southeast WA, around the very remote settlement of Tjuntjuntjarra, while the Birriliburu come from northwest WA, near the Canning Stock Route. One Pilki witness, Lennard Walker, was able to recount the first time he saw a non-Aboriginal person.[60] Lena Long, a Birriliburu witness, gave evidence of a very traditional childhood which North J described being spent 'wandering in the bush.'[61] A number of Birriliburu witnesses were born in the bush.[62]

There are many native title claim groups who have felt the effects of colonisation and white settlement much harder and for much longer than these groups, and who, consequently, may not have witnesses with the degree of cultural knowledge of the witnesses in these cases.

Justice North's numerous comments about his favourable impression of the witnesses' knowledge, quoted above, make it clear that the witnesses' traditional backgrounds lent an added authority to that part of their evidence which directly related to the question in issue—namely, the rights of the Pilki and Birriliburu, and whether they included commercial rights. The evidence on this point was brief but convincing: in *Birriliburu*, His Honour summed up the relevant lay witness evidence as being 'that all the resources of their country belong to the Birriliburu People to use as they determine.'[63]

In *Pilki*, North J noted the lay evidence 'concerning the right to access and take the resources of the country was somewhat limited.' However, His Honour went on to say, 'Although their evidence was not elaborate, it did establish that, under the traditional laws and customs, the country belonged to the Pilki People and they were entitled as of right to access and take the resources for any purpose they saw fit. …'[64] Some witnesses merely gave evidence that the Pilki people can take resources for any purpose they see fit,[65] while others explicitly singled out a commercial purpose as a valid purpose for taking resources.[66] It seems likely, given His Honour's numerous comments about the witnesses' deep cultural knowledge, that the limited lay evidence may have been less persuasive in the absence of that knowledge. On appeal, the Court broadly accepted North J's treatment of the lay evidence, and Barker J expressly held that the 'remote traditional desert background' of the Pilki witnesses is 'something that should be borne in mind when assessing the significance of their relevant oral evidence.'[67]

Where the Court is asked to accept the bare evidence of lay witnesses as to the content of the traditional laws and customs of the group in question without evidence as to activities undertaken in accordance with that alleged

content, the authority of the witnesses to speak about such matters, and their credibility in relation to such matters, becomes of critical importance. So far as an applicant solicitor is concerned, it follows that the selection and proofing of appropriate witnesses is here especially important. However, unfortunately, it may be that in some claims, highly authoritative and credible witnesses on these matters are simply lacking, and there will be little that can be done.

It should also be mentioned that the weight of the lay evidence was strengthened by the fact the State made some significant admissions concerning the relevant groups' being united by observance of laws and customs, the normative force of those laws and customs, and the fact that a normative system had existed since sovereignty.[68] This will, again, not always be the case.

Turning to the third lesson to be taken from these judgments, one difficulty in claiming a right to access and take resources for any purpose that may occur to practitioners is that there is a traditional law common to very many Aboriginal societies prohibiting the wasteful use of resources.[69] That is, one should not kill animals for sport, for example, and leave them to rot, but rather, only kill as many animals as are needed for legitimate purposes. Might this restriction on the right to access and take resources mean that it is not a right exercisable 'for any purpose'? It is easy to imagine that, when a lay witness gives evidence that the traditional laws and customs of his or her society provide for a right to take and access resources for any purpose, opposing counsel might ask 'what about for the purpose of fun or sport?' and the witness may well respond in the negative.

Indeed, this issue arose in *Akiba FC, Pilki* and *Birriliburu.* But Finn J found that such restrictions were merely 'customary … constraints on the manner of taking things … [not] constraints on what could be taken.'[70] Justice North relied upon this reasoning in *Pilki* and *Birriliburu*.[71] This reasoning seems open to question—surely this law *is* a constraint on the *purposes* for which traditional owners can access and take resources? For instance, one cannot, under the traditional laws and customs of a society with a rule against waste, 'access' a kangaroo for the purpose of sport. In any event, for present purposes, it is sufficient to say there are now three Federal Court authorities that support the proposition that a rule against waste does not prevent a Court from finding a right to access and take resources for any purpose.

The fourth and final lesson concerns expert evidence. His Honour observed in *Pilki* that any doubt about the existence of a right to access and take resources for any purpose arising from the 'brevity' of the lay evidence on that point was 'more than remedied' by the expert evidence.'[72]

In *Pilki*, the anthropologist, Dr Scott Cane, produced a report on the commercial rights of the Pilki people under traditional laws and customs, with substantial reference to historical Aboriginal trade in the wider Western Desert area, and indeed across the Australian continent generally.[73] Much of this report was relevant to the wider Western Desert area, and so was also tendered in the Birriliburu case. It was supplemented by a report specific to the Birriliburu people, produced by anthropologist, Dr Lee Sackett.[74]

Dr Cane's report was described by North J as being 'of a rare standard of excellence.'[75] It is clear Dr Cane's report succeeded in achieving the notoriously difficult task of bridging the divide between the language of law and that of anthropology. Interestingly, Dr Cane mostly ignored the questions provided to him by the lawyers, and instead provided a long 'contextual discussion' of the issues raised by the questions, before providing short answers to the questions at the end. This bold move was approvingly described by North J as 'a refreshing display of independence'. Justice North found the 'contextual discussion' to be 'detailed and very helpful', and said that it provided 'a well-rounded picture of the Pilki society.'[76] Justice Jagot on appeal went further:

> [W]ithout Dr Cane's evidence about the *Tjukurrpa*,[77] it is difficult, if not impossible, to understand the meaning of the testimony of the lay witnesses in that regard. … [I]t is Dr Cane who explained the significance of the *Tjukurrpa,* in particular in terms of the continuing authority or dominion it gave the Pilki People over their land.[78]

Justice Barker similarly considered Dr Cane's evidence to be of critical importance in establishing the existence of a 'traditional right to use resources'.[79]

The report sets out a convincing and, indeed, fascinating history of Aboriginal trade throughout Australia, including evidence linking that history to both the Pilki and Birriliburu claim areas.[80] It is a history that does not accord with the conception of the at-sovereignty Aboriginal person in the popular mind as localised and unsophisticated in matters of commerce and trade. Dr Cane continues from this general

history of Aboriginal trade to trace evidence of Pilki trade through the post-sovereignty period to the present.[81] Dr Sackett's report performed a similar function in relation to the Birriliburu.[82]

Both anthropologists were only able to point to a handful of instances of recent trading activity amongst the claimants, mainly relating to selling paintings and other artefacts to tourists.[83] As noted, the claimants themselves also only gave limited evidence about actual commercial activity undertaken in recent times.[84]

The Court's appreciation for and reliance on the expert reports demonstrates two things. First, in an application for commercial native title rights, it is particularly necessary to tender high-quality and comprehensive expert evidence in order to ensure the judge is fully apprised and convinced of the fact trade and commerce amongst Aboriginal people was a commonplace at sovereignty. Hewitt has noted the reluctance of courts to recognise the existence in pre-sovereignty societies of a right to exploit resources commercially.[85] This reluctance can be overcome by convincing anthropological evidence to the contrary. The content of Dr Cane's report gives cause for optimism in this respect, because it was not applicable exclusively to the Pilki or Birriliburu. The report's contents clearly demonstrate there is compelling and detailed evidence pointing to the historical fact that native title rights to access and take resources for any purpose, including trade, have formed part of the traditional laws and customs of many Aboriginal peoples all across the continent (and beyond).

Secondly, and more broadly, lawyers ought to be more willing to trust expert anthropologists to give a full account of what they consider to be relevant to the issue at hand, and to do so on their own terms and in their own words (within reason), rather than attempt to confine such experts to affirming or denying propositions framed within the often-artificial and limiting language of the native title jurisprudence.

V Practical implications

The greater ease with which it is submitted commercial native title rights can now be claimed does not only have relevance for the diminishing (but still substantial) number of undecided native title determination applications. Section 13 of the Act permits pre-existing approved native title determinations to be varied if 'events have taken place since the determination was made that have caused the determination no longer to be correct', or if the interests of justice otherwise require such a variation.

There is no case law as to how the Court will interpret section 13. However, in some concluded native title determinations, it might be arguable that the changes that have been effected by *Akiba* mean it is in the interests of justice to vary the native title determination so as to include reference to commercial native title rights.[86] In this regard, it should be mentioned that the Australian Law Reform Commission has recently proposed, in the light of *Akiba*, and with reference to *Pilki* and *Birriliburu*, that a new section 223(2) should be substituted into the Act, which ought to read:

> Without limiting subsection (1), native title rights and interests in that subsection:
>
> (a) may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes; and
> (b) may include, but are not limited to, hunting, gathering, fishing and trading rights and interests.[87]

The intent, and no doubt the effect, of this amendment would merely be to confirm the effect of *Akiba*.[88] However, the proposed amendment's passage into law might make an argument to vary an existing determination under section 13 more persuasive, as a legislative change to the definition of native title rights and interests might make it easier to argue that the interests of justice call for a variation of native title determinations made under the present legislation. Of course, this reform may well not ever make it to the floor of Parliament, and even if it did, its passage would likely be far from uncontroversial, notwithstanding the fact it appears merely to confirm the existing jurisprudence.

Finally, there is a much broader practical matter to consider. It is easy in matters of native title to concern oneself with the detail and the technicalities and ignore the purpose and rationale of native title: justice for the indigenous peoples of Australia.

It is to be hoped that the justice that native title can achieve is not just the acknowledgement and partial amelioration of past injustices (though that aspect of native title should not always be belittled, as it often is), but the remoulding of our law in such a way as to grant indigenous people the power and resources to pursue lives that are as healthy

and prosperous as the other modern-day inhabitants of this country. It is often lamented that native title has only delivered the former justice, not the latter (or neither). The attraction of commercial native title rights for claimants, lawyers and scholars has been their promise of delivering that latter aspect of justice for the indigenous peoples of Australia. Yet the recognition of commercial native title rights that has now occurred in *Akiba, Birriliburu* and *Pilki* only delivers such justice to a limited extent.

In *Akiba*, the commercial fishing legislation may not extinguish commercial native title rights, but it does regulate them. So, in reality, the determination of rights in favour of the Torres Strait Islanders gives them no more commercial rights over the relevant waters than they had previously, or than those that any other Australian citizen already possessed. That is, they only have the right to fish those waters commercially upon being granted a licence and in accordance with the relevant regulations. That is a right they already had, and indeed that everyone already has.[89]

In *Pilki* and *Birriliburu*, however, the commercial rights determined to exist—to access and take for any purpose including commercial purposes the resources on the land—are not rights that the claimants previously had recognised by Australian law, nor are they rights that non-claimants have. Here, then, at least, there has been a substantive gain by the claimants. It is likely that there are other indigenous groups in Australia who are able to use *Akiba*, *Pilki*, and *Birriliburu* similarly to claim commercial rights they did not otherwise possess under Australian law.

There is, of course, a further subsequent question, though: are these commercial rights actually likely to prove useful? That is a matter that of course I cannot comment on, but it might be noted that there is evidence to suggest there is increasing demand for the types of goods likely to be found on claimants' land: native foods,[90] and kangaroos.[91] It may well be that business opportunities arise as a consequence of the recognition of commercial native title rights. So there is cause for some cautious optimism that this development in the law might translate to real economic benefits for native title applicants.

VI Conclusion

Before *Akiba*, the history of the recognition of commercial native title rights under Australian law had been an entirely miserable one. Barely any commercial native title rights had ever been recognised in Australia by any means, and no claim for commercial native title rights had ever successfully withstood the opposition of a respondent.

The *Akiba* cases represented a belated substantial step forward for the recognition of commercially useful native title rights under Australian law by its acceptance and approval of the practice of claiming a right to access and take resources for any purpose, including a commercial purpose.

The opportunity represented by *Akiba* was recognised and seized upon by the applicants in *Pilki* and *Birriliburu*. These cases confirm the development that *Akiba* appeared to represent, and contain some useful lessons for future applications for commercial native title rights.

Those lessons are that evidence of trading or commercial activity is not necessary to establish commercial native title rights, the depth of the lay witnesses' cultural knowledge is likely to affect the weight of their evidence regarding the existence of a broad right to access resources for any purpose, the common traditional law against waste and similar restrictions will not negative the existence of a right to access resources for any purpose, and the content of expert evidence is likely to be very important, but also in many cases is likely to be favourable to the applicant.

The practical utility of commercial native title rights can unfortunately be prone to overstatement. However, the commercial native title rights recognised in *Pilki* and *Birriliburu* were a meaningful gain to the relevant applicants. It remains to be seen whether those rights will prove useful, but there are at least some grounds for hoping that the rights will play some part in aiding the economic development of the indigenous groups concerned.

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1 See, eg, Anne Hewitt, 'Commercial Exploitation of Native Title Rights' (2011) 32(2) *Adelaide Law Review* 227.

2 (2013) 250 CLR 209.

3 [2014] FCA 714.

4 [2014] FCA 715.

5 *Western Australia v Willis on behalf of the Pilki People* (2015) 329 ALR 562.

6 In this article, the term 'commercial native title rights' is used as a shorthand way of referring to rights of this nature.

7 *Yarmirr v Northern Territory* (1998) 82 FCR 533; *Lardil Peoples v Queensland* [2004] FCA 298; *Sampi v Western Australia* [2005] FCA 777; *Northern Territory v Alyawarr* (2005) 145 FCR 442; *Gumana v Northern Territory (No 2)* [2005] FCA 1425; *Rubibi Community v Western Australia (No 7)* [2006] FCA 459.

8 See, eg, *Lardil Peoples v Queensland* [2004] FCA 298, [188].

9 *Commonwealth v Yarmirr* (1999) 168 ALR 426, 480 (Beaumont and von Doussa JJ).

10 *Yarmirr v Northern Territory* (1998) 82 FCR 533; *Neowarra v Western Australia* [2003] FCA 1402, [779].

11 (2004) 207 ALR 539, 472.

12 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 448 (Wilcox, French and Weinberg JJ).

13 [2013] FCA 1285, order 11.

14 [2014] FCA 1318, order 8.

15 [2011] FCA 932.

16 Anne Hewitt, above n 1, 250.

17 See, eg, *R v Van der Peet* [1996] 2 SCR 507 and *Lax Kw'alaams Indian Band v Canada* [2011] 3 SCR 535 (but see also *Ashousaht Indian Band and Nation v Canada (A-G)* [2013] BCCA 300).

18 See, eg, *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553; *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139; *Te Runanga o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20 (but see also *Tainui Māori Trust Board v Attorney General* [1989] 2 NZLR 513).

19 (2010) 204 FCR 1, 11 (emphasis added).

20 [2003] FCA 1402, [508], [522] (Sundberg J).

21 Justice Paul Finn, '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8(2) *Indigenous Law Bulletin* 5. Following his retirement as a judge, Finn has recently again criticised the 'fragmentation of native title': Paul Finn, 'A Judge's Reflection on Native Title', in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (The Federation Press, 2015) 23-28, 27.

22 (2002) 213 CLR 1.

23 In his recently-published book chapter on *Akiba,* Sean Brennan also takes this view of the case: Sean Brennan, 'The Significance of the Akiba Torres Strait Regional Sea Claim Case' in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (The Federation Press, 2015) 29-43.

24 *Akiba FC* (2010) 204 FCR 1, 523-530.

25 Ibid 527.

26 Ibid 752-753.

27 Ibid 847. It is interesting to note that the language of 'sub-division' used by the Applicant in the submission rejected by Finn J is the same language Finn J expressly criticised in his later speech which I have referred to above.

28 It is somewhat strange that Finn J felt bound to find as he did given his criticisms of the 'bundle of rights' approach to native title, and given the fact that of the three authorities cited in the above passage, all of them are decisions of a single judge of the Federal Court, and only one (*Neowarra*) is not obiter dicta.

29 *Akiba FC* (2010) 204 FCR 1, 13.

30 *Commonwealth v Akiba* [2012] FCAFC 25

31 Ibid [87].

32 *Akiba HC* (2013) 250 CLR 209, 66-67.

33 Ibid 39.

34 Ibid 1, 34.

35 See *Pilki FCAFC*, [150] and [152], where Barker J, in analysing *Akiba HC*, reaches this conclusion.

36 See, eg, *Western Australia v Brown* [2014] HCA 8.

37 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 358 (the case concerned the interpretation of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)). It should be noted that, while the term 'spiritual affair' is generally an accurate description of Aboriginal people's relationship to land, it is problematic in relation to the people of the Torres Strait: see, eg, *Akiba FC* (2010) 204 FCR 1, 172. In any event, the broader point remains that Aboriginal ownership is not a bundle of rights.

38 [2012] FCA 1455.

39 *Banjima People v Western Australia (No 2)* [2013] FCA 868; *Croft on behalf of the Barngarla Native Title Claim Group v South Australia* [2015] FCA 9; *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204.

40 *Banjima* [2013] FCA 868, [799]-[801] (Barker J); *Barngarla* [2015] FCA 9, [731]-[732] (Mansfield J); *Badimia* [2015] FCA 204, [496], [1162] (Barker J).

41 See, eg, *Dodd on behalf of the Gudjala People Core Country Claim #1 v Queensland (No 3)* [2014] FCA 231; *Sullivan on behalf of the Yulluna People #3 v Queensland* [2014] FCA 659; *Watson on behalf of the Nyikina Mangala People v Western Australia (No 6)* [2014] FCA 545; *Weatherall on behalf of the Kooma People #4 Part A v Queensland* [2014] FCA 662; *Smith on behalf of the Kullilli People v Queensland* [2014] FCA 691.

42 *Pilki* [2014] FCA 714, [6].

43 Ibid [138]; *Birriliburu* [2014] FCA 715, [97].

44 *State of Western Australia v Willis on behalf of the Pilki People* [2015] FCAFC 186, [119]-[155] ('*Pilki FCAFC*').

45 This analogy was criticised by Jagot J on appeal as 'inapt': *Pilki FCAFC* [2015] FCAFC 186, [107]. Proving the existence of a freehold title is a very different matter from proving the existence of a native title right, and it is respectfully suggested that there is indeed no helpful equivalence to be drawn between these two distinct matters. This analogy is not, however, crucial to North J's reasoning.

46 *Pilki* [2014] FCA 714, [118]; *Birriliburu* [2014] FCA 715, [89].

47 (2002) 214 CLR 422, [82] (per Gleeson CJ, Gummow and Hayne JJ).

48 *Pilki* [2014] FCA 714, [119]; *Birriliburu* [2014] FCA 715, [90].

49 *Pilki* [2014] FCA 714, [122]; *Birriliburu* [2014] FCA 715, [78], [92].

50 *Pilki* [2014] FCA 714, [39].

51 *Birriliburu* [2014] FCA 715, [45].

52 *Pilki* [2014] FCA 714, [118]; *Birriliburu* [2014] FCA 715, [89].

53 *Pilki FCAFC* [2015] FCAFC 186, [36] (Dowsett J); [100]-[101] (Jagot J); [168], [170], [189] (Barker J).

54 *Pilki* [2014] FCA 714, [119]; *Birriliburu* [2014] FCA 715, [90].

55 *Pilki* [2014] FCA 714, [122]-[123]; *Birriliburu* [2014] FCA 715, [92]-[93].

56 *Birriliburu* [2014] FCA 715, [28].

57 Ibid.

58 *Pilki* [2014] FCA 714, [47].

59 Ibid [94]; *Birriliburu* [2014] FCA 715, [124].

60 *Pilki* [2014] FCA 714, [23].

61 *Birriliburu* [2014] FCA 715, [24].

62 Ibid [23].

63 Ibid [87].

64 *Pilki* [2014] FCA 714, [116].

65 Ibid [34], [36]-[37]; *Birriliburu,* [2014] FCA 715, [41]-[44].

66 *Pilki* [2014] FCA 714, [35]; *Birriliburu,* [2014] FCA 715, [40].

67 *Pilki FCAFC* [2015] FCAFC 186, [172]-[173].

68 See, eg, ibid [92]-[101], [112]-[113] (Jagot J).

69 For an example (of which there are many others), see, *Lardil Peoples v Queensland* [2004] FCA 298, [180].

70 *Akiba FC* (2010) 204 FCR 1, [524].

71 *Pilki* [2014] FCA 714, [126], *Birriliburu* [2014] FCA 715, [95].

72 *Pilki* [2014] FCA 714, [116].

73 Ibid [57]-[67].

74 *Birriliburu* [2014] FCA 715, [46].

75 *Pilki* [2014] FCA 714, [117].

76 Ibid [51]-[53].

77 This is a word in a Western Desert language that is not directly translatable into English, but the meaning of which is understood to encompass (at least) both creation stories and traditional laws and customs.

78 *Pilki FCAFC* [2015] FCAFC 186, [106].

79 Ibid [212].

80 *Pilki* [2014] FCA 714, [57]-[70]; *Birriliburu* [2014] FCA 715, [56]-[70].

81 *Pilki* [2014] FCA 714, [71]-[92].

82 *Birriliburu* [2014] FCA 715, [39]-[55].

83 *Pilki* [2014] FCA 714, [88]; *Birriliburu* [2014] FCA 715, [51].

84 *Pilki* [2014] FCA 714, [39]; *Birriliburu* [2014] FCA 715 [45].

85 Hewitt, above n 1, 254-256.

86 Although an anonymous peer reviewer of this article makes the point that native title holders should treat the presently-dormant section 13 with caution, it could also be used by States or others to revisit native title determinations on the grounds that the particular native title holders' society has adapted to modern Australia since the determination in ways that mean the group no longer fulfils the onerous requirements of *Ward* and *Yorta Yorta*.

87 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report 126, Recommendation 8-1.

88 Ibid 252 [8.118].

89 Section 211 of the Act provides that, in some circumstances, licensing and regulatory regimes can be ignored if one is exercising native title rights, but this only applies insofar as the rights are being exercised for the purpose of satisfying personal, domestic or non-commercial communal needs.

90 Nicole Hasham, 'Bush Tucker Trend: Indigenous Custodians Call for Protections on Native Foods', *Sydney Morning Herald* (online), 19 December 2015 <http://www.smh.com.au/national/bush-tucker-trend-indigenous-custodians-call-for-protections-on-native-foods-20151218-glrcb2.html>; Angela Saurine, 'How Aussie Chefs Are Making Indigenous Food Cool', *Daily Telegraph* (online), 6 July 2015 <http://www.dailytelegraph.com.au/lifestyle/food/how-aussie-chefs-are-making-indigenous-food-cool/story-fnov1g0j-1227431087579>.

91 Michael McGuire, 'Kangaroo Consumption Has Jumped 400%. Meet the Man Putting Roo on Your Plate', *Adelaide Advertiser* (online), 17 April 2015 <http://www.adelaidenow.com.au/lifestyle/sa-lifestyle/consumption-of-kangaroo-meat-has-jumped-400-meet-the-man-putting-roo-on-your-plate/news-story/33297df72c88244265d2af73de29ee6e>.