CITATION:	*Police v Graeme William Sydney Talbot* [2013] NTMC 033
PARTIES:	POLICE v GRAEME WILLIAM SYDNEY TALBOT
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
FILE NO(s):	21142343
DELIVERED ON:	17 December 2013
DELIVERED AT:	Darwin
HEARING DATE:	22 and 23 July 2013, 3 and 4 October 2013, 6 November 2013
JUDGMENT OF:	JMR Neill
CATCHWORDS:	"Aboriginals who have traditionally used the resources of an area…" subsection 53 (1) *Fisheries Act NT*; " native title holders" – section 226 *Native Title Act* 1993 (C'wlth); and "…in exercise or enjoyment of their native title rights and interests…" subsection 211(2)(b) *Native Title Act*.

REPRESENTATION:

Counsel:

Prosecution:	Mr Humphris
Defendant:	Mr O'Brien-Hartcher

Solicitors:

Prosecution:	DPP
Defendant:	NAAJA

Judgment category classification:	A
Judgment ID number:	[2013] NTMC 033
Number of paragraphs:	73

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21142343

BETWEEN:

POLICE
Plaintiff

AND:

GRAEME WILLIAM SYDNEY TALBOT
Defendant

SUMMARY OF DECISION

(Delivered 17 December 2013)

Mr John Neill SM:

1. The accused Graeme Talbot is presently aged 23 years. He was charged with 6 offences on Complaint alleged to have occurred on 8 December 2011 when he was 21 years of age. He defended all counts.

2. The hearing proceeded before me over a number of days. The first day was 23 July 2013 when counts 5 and 6 were withdrawn, with leave. This left counts 1, 2 and 3 which alleged offences contrary to Clauses 27 and 28 of the Barramundi Fishery Management Plan which relate to possessing certain fishing equipment and taking fish. It also left count 4 which alleged the offence of resisting or obstructing a Fisheries Officer in the execution of his duties, contrary to section 31(1)(a) of the *Fisheries Act* ("the Act").

3. At the conclusion of the prosecution case on the second hearing day 24 July 2013 I heard submissions on count 4, the charge of resisting or obstructing a Fisheries Officer. I found Mr Talbot not guilty on that count.

4. The Barramundi Fishery Management Plan was created pursuant to sections 22 and 23 of the *Fisheries Act*. Section 27(1) of the *Fisheries Act* provides that every provision of an operative management plan (such as the Barramundi Fishery Management Plan) shall have the force and effect of a regulation in force under the *Fisheries Act*. I am satisfied, and I find, that the Barramundi Fishery Management Plan is either a provision of the *Fisheries Act* or "an instrument of a judicial or administrative character" made under the *Fisheries Act* within the meaning of section 53(1) of the *Fisheries Act* such that section 53 of the Act applies to that Management Plan. I return to consider section 53 of the Act later in this Decision.

5. Mr O'Brien-Hartcher for Mr Talbot made it plain on 23 July 2013 that counts 1, 2 and 3 were defended on the basis that Mr Talbot is an Aboriginal man who is entitled to take fish from the relevant area as a traditional owner of the land ("the native title defence"), rather than on the basis of any dispute about the facts alleged.

6. I ordered that the prosecution should call all its evidence as to the occurrence of the offences alleged but the accused would bear the evidentiary onus at the close of the prosecution case to establish the matters relied on for the native title defence. The prosecution would then be entitled to call evidence in reply on the native title defence. The standard of proof to be applied to the native title defence is the balance of probabilities.

7. The prosecution case was concluded on the second hearing day, 24 July 2013. The hearing was adjourned for evidence on the native title defence to 3 October 2013. On 3 October 2013 Mr O'Brien- Hartcher for Mr Talbot conceded that the prosecution evidence had made out all the elements of the offences alleged in counts1, 2 and 3 and confirmed that Mr Talbot's defence was limited to the native title defence. I am satisfied that concession was properly made, and I find that all the elements of the offences alleged in

counts 1, 2 and 3 have been established beyond reasonable doubt in the prosecution case.

8. Also on 3 October 2013 I invited and heard submissions that counts 1 and 2 were duplicitous. I ruled that they were and Mr Humphris for the prosecution elected to proceed on the basis of count 2 rather than both counts 1 and 2.

9. Evidence was called by Mr O'Brien-Hartcher for Mr Talbot on the native title defence on 3 October 2013. The prosecution called evidence in reply limited to that issue and all the native title defence evidence was completed that day. I heard some submissions on the native title defence that day and also on 4 October 2013. Further time for submissions was requested and those were finally concluded on 6 November 2013. At the conclusion of submissions I reserved my Decision to 17 December 2013 at 09.30am. On that date I delivered my Decision and said I would provide written reasons. I now do so.

10. The submissions of the parties were focused on the native title defence generally and on subsection 53(1) of the *Fisheries Act* specifically. That subsection provides:

> "Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner".

Accordingly, if Mr Talbot is one of "Aboriginals" within the meaning of this subsection and if he was fishing and/or possessing fish in a traditional manner on traditional land on 8 December 2011 then the restrictions in Clauses 27 and 28 of the Barramundi Fishery Management Plan would not

apply to him and he would have to be found not guilty of the offences in counts 1, 2 and 3.

11. There is no definition in subsection 53(1) or elsewhere in the *Fisheries Act* of "Aboriginals", or of the concept of "traditional use of the resources of an area of land or water" or of the concept of "in a traditional manner". Concepts akin to these are defined in or have been judicially considered under the *Native Title Act 1993* (Commonwealth). The Northern Territory *Fisheries Act* including section 53 was enacted in 1988, 5 years before the Commonwealth *Native Title Act*. Nevertheless, the *Native Title Act* is a "law in force in the Territory" within the meaning of sub section 53(1) of the *Fisheries Act*. His Honour Dr John Lowndes SM (as he then was) touched on this issue in *Trenerry* v *Rivers* [2000] NTMC 19 where he concluded in para [25] that section 53 of the *Fisheries Act* permits a person "… to mount a native title defence based on the provisions of section 211 of the *Native Title Act* 1993 (Commonwealth)". More recently, the High Court of Australia in *Karpany* v *Dietman* [2013] HCA 47 found that the *Native Title Act* relevantly co-exists with and informs the South Australian *Fisheries Act*, the relevant parts of which also pre-date the *Native Title Act*.

12. I am satisfied and I find that the provisions of the *Native Title Act* 1993 (Commonwealth) can and do apply alongside the provisions of section 53 of the Northern Territory *Fisheries Act* 1988, and provide assistance in the interpretation of section 53 of the *NT Fisheries Act*.

13. Section 253 of the *Native Title Act* defines "Aboriginal Peoples" to mean people of the Aboriginal race of Australia.

14. Section 223(1) and (2) of the *Native Title Act* deal with native title rights and interests as follows:

> "Common law rights and interests

(1) The expression native title or native title rights and interests means 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

(b) the Aboriginal peoples or Torres Straits Islanders, by those laws and customs, have a connection with the land or water and

(c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), rights and interests in that subsection

includes hunting, gathering, or fishing, rights and interests."

15. Section 224 of the *Native Title Act* provides that the expression “native title holder” means a person who holds native title.

16. Section 211 of the *Native Title Act* provides:

“Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

(1) Subsection (2) applies if:

(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and

(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and

(ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and

(c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and

(b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity

(3) Each of the following is a separate *class of activity:*

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph."

17. Dr Lowndes in para [25] of *Trenerry* v *Rivers* (above) held:

"The purpose of s 211 of the *Native Title Act* is to permit native title holders to exercise their rights and interests in relation to any fishing

> activities which could be the subject of an exemption, provided they do so in accordance with subsections 2(a) and (b). Section 211 has the effect of permitting fishing or activities incidental thereto by native title holders, contrary to the provisions of the *Fisheries Act* (NT), provided they comply with s 211. The provisions of s 38(2)(c) and 53 of the *Fisheries Act* allow the defendant to mount a native title defence based on the provisions of s 211 of the *Native Title Act*".

I respectfully agree with and adopt this analysis.

The Evidence

18. The area of land or water where Mr Talbot fished and possessed barramundi on 8 December 2011 is popularly known as the Shady Camp Barrage at Shady Camp Billabong ("the area"). It was common ground that the area is within the Mary River Fish Management Zone. Mr Talbot gave evidence that he lived a considerable distance from the area, at Dundee Beach.

19. Evidence was led and not contested that the area including the Shady Camp Billabong is within the traditional lands of the Wulna/Limilngan Aboriginal people, and I so find.

20. Evidence was led and not contested that the Wulna/Limilngan Aboriginal people traditionally used the resources of the area in a traditional manner, including fishing, and that they have continued uninterrupted to do so, and I so find.

21. Evidence was led and not contested that Mr Talbot regards himself and is regarded by others as an Aboriginal person, and I find he is a person of the Aboriginal race of Australia for the purposes of the *Native Title Act*.

22. Mr Humphris for the prosecution conceded that nothing turned on the means employed by Mr Talbot to catch fish in the area on 8 December 2011, namely by using a fishing rod and line and lure. He made this concession properly on the basis of case law common to the parties to the effect that traditional customs are not frozen as at the date of first European contact

and may and do change and evolve, so that a person can fish in a traditional manner even though they use modern equipment to do so.

23. Mr Talbot gave evidence of his understanding that the essence of fishing in a traditional manner is to take only what is needed to feed oneself and one's family. This was not contested. Indeed, the prosecution in its turn called evidence from an acknowledged Wulna/Limilngan man and traditional owner of the area Mr Graham Kenyon, to the same effect. Mr Talbot gave uncontested evidence that this is what he was doing on 8 December 2011, and I so find.

24. I find that Mr Talbot in fishing as he did and in taking barramundi on 8 December 2011 was engaging in a "class of activity" within the meaning of section 211(3) namely fishing, and that this was for the purpose of satisfying his personal and domestic needs within the meaning of section 211(2)(a), of the *Native Title Act*. I find that this was a use of the resources of the area in a traditional manner within the meaning of subsection 53(1) of the *Fisheries Act* (NT).

25. However it is not sufficient to be an Aboriginal person who uses the resources of an area of land or water in a traditional manner. It is also necessary to do so "in exercise or enjoyment of their native title rights and interests" in accordance with section 211(2)(b) of the *Native Title Act*, and similarly for the purpose of section 53(1) of the *Fisheries Act* it is necessary to be one of the "Aboriginals who have traditionally used the resources" of the area.

26. In other words, Mr Talbot must also establish his relevant connection with the Wulna/Limilngan people.

27. I heard live evidence from Mr Graeme Talbot and from his paternal grandmother Ms Gwen Talbot (who is since deceased). I heard live evidence from traditional Wulna/Limilngan owner Mr Graham Kenyon. I heard live

evidence from anthropologist Mr Gareth Lewis. In addition, I received documents tendered by consent without the authors of those documents being required to be made available for cross-examination.

28. Mr Graeme Talbot gave evidence that he had fished at Shady Camp Billabong "all my life". He said he was taught to fish there by one Felix Holmes who also taught him to catch only enough fish for his and his family's needs. Mr Talbot said he believed he did not need permission from any person or class of persons to fish there and that he could fish there in any season at any time provided he did so to provide a feed for himself and his family.

29. Mr Talbot gave evidence of his belief that he is of the Limilngan people. He understood that his Limilngan heritage is derived through his father and his father's mother Gwen Talbot. He said that he had been told by Felix Holmes that he, Graeme Talbot, was Limilngan. Mr Talbot was not clear as to his precise relationship to Felix Holmes. He believed that Mr Holmes was a blood relative of some kind and he described Mr Holmes as his "grandfather" although he realised that this was not a strictly accurate description of the relationship, at least not in Western terms.

30. Mr Talbot gave evidence he knows some words of the Limilngan language but "I can't talk full speech"- transcript page 23.2.

31. Mr Talbot's grandmother Gwen Talbot gave more detailed evidence of the relationship with Mr Felix Holmes and of the family's Limilngan connection. Her evidence is made up of her affidavit sworn 3 September 2013 and received as Exhibit D4 in these proceedings, as well as her live evidence in chief and in cross examination.

32. Gwen Talbot gave evidence she was the mother of Mr Graeme Talbot's father Mr William Talbot and she was therefore Mr Graeme Talbot's paternal grandmother.

33. She gave evidence that her ancestry on her mother's side was Aboriginal. She identified her mother as Eileen Baban, her mother's mother as Caroline Baban, and Caroline Baban's mother as "Liwarar" or "Luralai", also known as "Lulu", a full blood Aboriginal woman of the Limilngan people. Accordingly, on Gwen Talbot's uncontested evidence her great-grandmother was a full blood Aboriginal woman of the Limilngan people, and I so find.

34. She gave evidence that both her grandmother Caroline Baban and her mother Eileen Baban were placed in the Kahlin Compound, as members of the stolen generation. She believed that only Aboriginal or part Aboriginal people were put in the Kahlin Compound. Annexure "A" to Ms Gwen Talbot's affidavit which is Exhibit D4 suggests that Ms Talbot's grandmother described therein an "Catalin Babum" was half Aboriginal and half "Cingalese", her father being named as Anasuma Davey.

35. Gwen Talbot said she first met an old Aboriginal man named Felix Holmes in about 1989 (exhibit D4, paragraph 10) when she was already a woman in her late 30s. He told her he was and she believed him to be a full blood Aboriginal man of the Limilngan people and a traditional owner of Limilngan lands and water. Gwen Talbot said Felix Holmes told her that her great grandmother "Lulu" was his "big sister".

36. In traditional Western relationships that would make Felix Holmes the great grand uncle of Gwen Talbot. It would make him the great great great grand uncle of Graeme Talbot.

37. I am satisfied on the balance of probabilities that Graeme Talbot has established that he is a biological descendant of the Limilngan people who occupied and traditionally used the area, and I so find. I am also satisfied on the evidence that Mr Talbot genuinely believes he is of the Limilngan people.

38. However the mere fact of being a biological descendant of traditional owners does not of itself establish any current native title. It is also necessary to show that the intermediate descendants of the native title holders continued uninterrupted to observe the relevant traditional laws and customs - see generally *Mabo* (No 2) 1992 175 CLR 1 and *Mason* v *Tritton* (1994) 34 NSWLR 572 at 583-4 per Kirby P, and per Priestley JA at 598.

39. Ms Gwen Talbot gave evidence of her acceptance as a Limilngan person by other specified Limilngan persons and families. This appears from Annexure "B" to her affidavit - exhibit D4 - which is notes of a meeting on 26/10/1993 of Baban family members, including Gwen Talbot, and Limilngan/Wulna traditional owners. The notes of the meeting end with a summary written by Northern Land Council employee Robert Fuller that "… Baban family can use Limilngan Country [as mother's country people] but although they are accepted as "traditional owners" they have to see and talk to Victor Mob (traditional owner Victor Cooper's family) and Tony Mob (traditional owner Tony Kenyon's family) first over anything requiring the decisions of "traditional owners"."

40. Robert Fuller's summary records his understanding that the Baban family were accepted as traditional owners in a qualified sense, having less entitlement than other traditional owners such that they needed to get the prior agreement of other traditional owner families over anything requiring the decisions of traditional owners. Mr Fuller was not required for cross examination and he did not give any live evidence in this case. Accordingly, the categories of matters requiring the decision of "full" traditional owners were not identified.

41. Ms Gwen Baban's evidence clearly established her deep and abiding interest in her Aboriginal heritage generally and her Limilngan heritage specifically. Her evidence identified the significant and ongoing efforts she made to research that heritage and to be accepted as a Limilngan woman.

42. However she gave no evidence of any steps she took to live on Wulna/Limilngan land, to use the resources of that land or to observe the traditional laws and customs of the Wulna/Limilngan people, other than fishing at Shady Camp from the early 1980s when she would already have been in her early 30s -see transcript p.28.6.

43. She gave evidence that her grandmother Caroline Baban and her mother Eileen Baban were taken to live in Darwin at the Kahlin Compound. She did not give any evidence of the location from where her mother and grandmother were taken, although it may have been Koolpinyah Station-see Annexure "A" referred to in paragraph 33 above. She did not give any evidence as to when this happened. She did not give any evidence as to what her grandmother and mother did with their lives –that is, where and how they lived- after they (presumably) eventually left the Kahlin Compound.

44. She said that her mother and grandmother spoke the Limilngan language. She said she herself knew only some words of that language - see EX D4 paragraph 6.

45. Ms Gwen Talbot identified her son as Mr William "Billy" Talbot, the father of Graeme Talbot. Billy Talbot was not called to give evidence. I heard no evidence that he was deceased or ill or otherwise unable to attend to give evidence. The only evidence concerning Billy Talbot other than his identification as the father of Graeme Talbot was in the evidence of traditional owner Mr Graham Kenyon. Mr Kenyon said he had worked with Billy Talbot as a park ranger in 1993 (transcript 3/10/13 p 42.5) and that he did not recognise Billy Talbot as being of Limilngan country (transcript 3/10/13 p 42.9). There was no evidence whether Billy Talbot spoke the Limilngan language at all.

46. This is the entire extent of the evidence before me of the physical or cultural connection with Wulna/Limilngan lands or the traditional laws and

customs of the Wulna/Limilngan people on the parts of Caroline Baban, Eileen Baban, Gwen Talbot and Billy Talbot who I find are the relevant intermediate descendants between the identified Limilngan woman "Lulu" and Graeme Talbot.

47. Graeme Talbot gave evidence that he had fished at the Shady Camp Billabong all his life (transcript p 17.5). His "grandfather" Felix Holmes taught him how to fish there. Felix Holmes taught him to catch only what he needed to eat. He regularly fished there, perhaps as often as every second weekend, and he believed he could do so irrespective of the season.

48. Graeme Talbot said Felix Holmes told him he (Talbot) was Limilngan. All his interactions with Felix Holmes occurred when Mr Talbot was a little boy, because Felix Holmes passed away then.

49. Mr Humphris in cross examination specifically asked Mr Talbot about his involvement with Limilngan country other than complying with the rules about taking only enough fish to feed himself and his family. This question was not directly answered – Mr Talbot was side-tracked by a question about a Northern Land Council meeting in 2008 at Goanna Park (transcript p 22.4 to 22.7).

50. Mr Talbot gave evidence he was not initiated as a Limilngan man and had not undergone ceremony in the Limilngan way. He said he used to speak the Limilngan language with Felix Holmes when he was a child but had since forgotten it, except for a few words (transcript 22.8 to 23.2).

51. There is no evidence before me of Graeme Talbot's personal, physical or cultural connections with Wulna/Limilngan lands and traditional laws and customs other than his regularly fishing in the area and having done so over most of his life, and other than his having spoken the Limilngan language to some degree as a child and his present knowledge of a few words of that language. Although Mr Talbot observes the relevant traditional laws and

customs as to fishing, there is no evidence of his observing any other traditional laws and customs of the Wulna/Limilngan people.

52. On the basis of the foregoing evidence, I am not satisfied on the balance of probabilities that Graeme Talbot and the intermediate descendants of native title holders of the Wulna/Limilngan people, namely his great great grandmother Caroline Baban, his great grandmother Eileen Baban, his grandmother Gwen Talbot and his father Billy Talbot, continued uninterrupted to observe the traditional laws and customs of those people.

53. However, an alternative basis arose on the evidence for a connection between the Baban/Talbot family and the Wulna/Limilngan people. This is the adoption basis.

54. Following the meeting between the Baban family and Limilngan traditional owners on 26 October 1993, the Northern Land Council wrote a letter dated 17 November 1993 to the Conservation Commission of the NT –annexure C to Exhibit D4- stating that the Baban family "have been accepted by a meeting of Wulna/Limilngan people held at the Northern Land Council on 13 October 1993 as having connections to Limilngan country through this common ancestor and have been accepted as having the rights of use and occupation of Limilngan country as per Limilngan traditional practices".

55. By letter dated 30 March 1998, the Northern Land Council wrote to Gwen Talbot seeking her instructions as to compensation payable by Telstra for laying optic fibre cable over traditional lands. This stated plainly they were seeking compensation for "you the traditional owners".

56. However this changed when by letter dated 26 October 2009 the Northern Land Council informed lawyers for the Baban family that the family members were not regarded as "members of the native title group which authorised the Indigenous Land, the Agreement" – referring to the Mary River National Park. This letter went on to draw a distinction between

"traditional Aboriginal owners" and other Aboriginals "entitled by Aboriginal tradition to the use or occupation of land concerned …" The final paragraph of this letter sought to delimit the Baban family as "having connections to Limilngan country" but not as being traditional Aboriginal owners". There was a specific retraction by the Northern Land Council set out in this paragraph of the previous acceptance that the Baban family member were "traditional Aboriginal owners of Limilngan country.

57. Ms Gwen Talbot gave evidence that before the death of Felix Holmes, the Baban family members were accepted by other interested families as having a connection with the Limilngan group, but after his death, "the Northern Land Council didn't want to know about the Baban family" (transcript 3/10/13 p 39.3).

58. She also denied that the Baban family's claim arose through their adoption by the late Felix Holmes. This was put to her in cross examination and she firmly stated "I don't know where they got adopted by Felix Holmes because he never adopted us" – transcript 3/10/13 p 38.8. She relied on the blood connection with Felix Holmes - "we're blood through my grandmother" p 39.2.

59. Graham Kenyon gave evidence as an accepted Wulna/Limilngan traditional owner. He didn't recognise Graeme Talbot or his father William Talbot as being of Limilngan country. Graham Kenyon is the son of Tony Kenyon who was present at the meeting on 26 October 1993. Mr Graham Kenyon was firm in his opinion that Graeme Talbot was not of Limilngan country. He identified the meeting at the Northern Land Council offices on 26 October 1993 (see paragraph 39 above) which his father Tony Kenyon had attended as the basis for his belief that Gwen Talbot was "adopted back into the clan". Although, Graham Kenyon was not present at this meeting he said he was told by his father what had happened. It is on this second- hand basis that he held the opinion that rights granted to Gwen Talbot were through her

"adoption" and were not transmitted to her descendants – transcript 3/10/13 p 45.3. to 45.8.

60. The notes of the meeting on 26 October 1993 say nothing specifically about "adoption". However, Victor Cooper is recorded as saying "we will accept (the Baban family) on Limilngan side … but they gotta talk to us first and negotiate with us first". It is conceivable that Victor Cooper at least was considering something akin to adoption.

61. But even if Gwen Baban had been adopted in some way as a member of the Limilngan people, would that create a present entitlement in her grandson Graeme Talbot?

62. Anthropologist Gareth Lewis gave evidence. His expertise was established by his evidence and his CV tendered as Ex P6.

63. He gave evidence of his extensive involvement on behalf of the Northern Land Council with anthropology in the Kakadu region including the region relevant to the Limilngan clan. He gave evidence that the purpose of his involvement was to determine native title interests in the park area for the purpose of executing an indigenous land use agreement. This involved researching then consulting with people determined to be the native title party.

64. He did meet with Gwen Talbot (Ms Baban) and a cousin of hers and he determined there was insufficient evidence to include them as members of the Limilngan group. This conclusion was based in part on interviewing other members of the Limilngan group, as well as surrounding neighbouring groups.

65. Dr Lewis said (transcript 3/10/13 p 60.3) that an assertion was made by Ms Talbot "about the adoption" but Ms Talbot denied in her evidence that any adoption took place. It was not put to her in cross examination that she told Dr Lewis or anyone else she had been adopted by Felix Holmes. Dr Lewis

did not say Ms Talbot made that assertion to him. He did not identify any basis for his knowledge or belief that such an assertion was made by Gwen Talbot (Ms Baban) to anyone.

66. Dr Lewis said purely matrilineal rights of blood arising through Ms Talbot's great-grandmother "were cut off long before" (p 62.5), but he said that in an uncontested adoption matrilineal or patrilineal rights would follow much the same way as in a blood connection (p 61.5). He said matrilineal rights would usually exist for up to two generations – to a child then to a grandchild - p 60.9. This suggests that if there had been a fully accepted adoption of Gwen Talbot then her rights could include her grandson Graeme Talbot. However, Dr Lewis was firmly of the view that any adoption of Gwen Talbot was not "very accepted as a full adoption in the sense that you would again be able to transmit rights" - p 61.7.

67. Dr Lewis' opinion was that Gwen Talbot's Limilngan connection by way of descent "is extremely tenuous given its distance from the patrilineal line and it is not accepted amongst the group"(transcript 67.6).

68. He said in the alternative if there was any adoption it was qualified because:

    (i) it was an adult adoption, and

    (ii) there was not universal acceptance of it.

69. Dr Lewis gave evidence that even with rights of use of the Limilngan country Graeme Talbot would still need to seek permission to hunt and fish unless he was a traditional owner. Because his Limilngan connection was in the matrilineal line he would normally need to seek permission to hunt and fish and use country – transcript p.75.5.

70. In Dr Lewis' expert opinion, because matrilineal descent is usually good for transmitting rights only for up to two generations, Ms Gwen Talbot's Limilngan great grandmother "Lulu" is too far back to have transmitted

native title rights to her great granddaughter Gwen Talbot, let alone to her great great great grandson Graeme Talbot.

71. On the basis of this expert opinion of Dr Lewis and of my preceding finding I conclude and find that Graeme Talbot does not and did not on 8 December 2011 hold native title rights in respect of the area as a member of the Limilngan/Wulna people, or at all. This is so whether his claim is considered on the basis of his biological descent or of any adoption of his grandmother Gwen Talbot.

72. I find that sub section 53(1) in the Fisheries Act has no application to Mr Talbot in the circumstances of this case.

73. On the basis of the concession by Mr Talbot's counsel and my findings in paragraph 7 of this Decision, I find Graeme Talbot guilty on counts 2 and 3 in the Complaint taken on 19 June 2012. Count 1 is withdrawn.

Dated this 17th day of December 2013

_____
John Neill

STIPENDIARY MAGISTRATE