IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A18 of 2012

BETWEEN:

OWEN JOHN KARPANY
First Appellant

DANIEL THOMAS KARPANY
Second Appellant

and

PETER JOHN DIETMAN
Respondent

APPELLANTS' REPLY

PART 1 – General Comments

1. The respondent's submissions and the submissions of the Attorney General for the State of South Australia[1] (**RS**) perpetuate, with respect, the same confusion that infuses the majority's approach in the Full Court. The confusion is twofold, namely:
   (a) they intertwine the prohibition/regulation distinction with the first and second limbs of the extinguishment of title test as identified by Brennan CJ in *Wik* and as those limbs have been applied since *Wik*;
   (b) they treat native title rights as necessarily extinguished by the abrogation of a public right. This leads to the fallacious conclusion that there is no need to apply the incidents of title test.

No extinguishment

2. This confusion has prompted the respondent to attempt to re-interpret the extinguishment analysis of Gray J. In making this attempt, the respondent:
   (a) concedes that if the 1971 Act merely regulates or creates a regime of control that the native title right to fish is not extinguished (RS[18]);

---

[1] There has been no formal application by the Attorney General of the State of South Australia to intervene. To the extent that permission to intervene is sought, the applicants do not oppose the intervention of the Attorney General, but on the basis that it has no separate claim to costs. Hereafter references to the respondent include references to the Attorney General of South Australia.

Berg Lawyers
89 King William Street, Adelaide 5000
Telephone: (08) 8410 7779
Fax: (08) 8410 4494
Ref: Shaun Berg

(b) incorrectly presumes that the public right to fish incorporates the traditional customary right to fish (RS[27]);

(c) incorrectly assumes that the 1971 Act extinguished the whole public right to fish and created a statutory right (RS[23]);

(d) asserts (RS[33]) that Gray J undertook an analysis of the incidents of the relevant native title right but simultaneously argues that this was not required (RS[32]).

3. The applicants have submitted that there is no express extinguishment of native title rights and so the Full Court was in the realm of the second limb of the *Wik* test. The respondent does not accept this (see R[31] and R[32], lines 14-18). He asserts that Gray J applied the first limb of the *Wik* test (RS [34]). If this is what Gray J did, then he could only have done it via a route not to date travelled by the Courts. To the extent that route is discernible, it would appear to comprises four steps:

(a) to identify a public right (i.e. to fish);

(b) to treat the public right and the native title right as co-incidental or, in the alternative, to treat the native title right as wholly subsumed within the public right (i.e. the right to fish includes the customary right to fish);

(c) if the public right is abrogated in favour of the creation of a statutory right, then it would be inconsistent if indigenous people were able to exercise the native title right to fish;

(d) therefore parliament must have intended to extinguish the native title right.

4. If the above steps were taken by the majority, then they are wrong, with respect. This is because:

(a) Gray J purported to identify a public right without identifying the content of the right;

(b) the public right and the native title right are not co-incidental. This is the obvious conclusion from the recognition of the existence of separate domains of aboriginal customary law operating outside the bounds of Australian law: see *Mabo (No 2)* (1992) 175 CLR 1; *Australian Law Report Commission, Aboriginal Customary Laws: Recognition Report No 31 (1986) 65;* James Crawford, 'Aboriginal Customary Law: A General Regime of Recognition' (Research Paper 8, Australian Legal Report Commission 1986);

(c) in so far as any alteration of the public right was affected (the applicants contend rights were regulated, not abrogated), only the commercial right to fish was effected. The recreational right to fish, for example, was left largely unregulated by the 1971 Act. Any statutory right can only correspond to the regulated right to fish;

(d) no intention of parliament to extinguish the native title right is necessarily implied by s 29 of the 1971 Act and, certainly, it is not implied by the absence of the words relied upon in RS[21] by the respondent. For completeness we observe that Gray J relied on the omission of these words from the 1971 Act as being relevant to the finding that a public

right to fish was abrogated by the 1971 Act (R [23]). However, in the statutory history of Fisheries legislation that he recognised as a relevant consideration[2] his Honour failed to acknowledge that in South Australia settlement occurred in the unique context of the *Letters Patents 1836*.[3]

5. The orthodox approach to the issue is to accept the applicants' contention and then to apply the incidents of title test to determine if native title has been extinguished by virtue of s 29(1) of the 1971 Act and, if extinguished, to what extent. The orthodox approach is the one Gray J identified at R[33]-[34]. It is not the approach he applied. At least the last statement would seem to be accepted by the respondent (see RS[31]).

6. Further, the analysis the respondent attributes to Gray J is that a public right, abrogated by a prohibition, extinguishes native title. However, a public right is not abrogated by a prohibition but by a prohibition coupled with a licensing regime: see *Harper v. Minister of Sea Fisheries*, 168 CLR 314, 330; *Northern Territory v. Arnhem Land Aboriginal Land Trust*, 248 ALR 195, 201 - 204; *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No. 2)* [2010] FCA 643, at [842].[4] If it is the latter, then the prohibition/regulation distinction is not apposite.

Section 211 is applicable

7. The respondent argues that Blue J correctly distinguishes *Wilkes v Johnson* because the *"exemptions granted* [in *Wilkes*] *were in effect equivalent to licences or permits"* (RS[20]). Blue J inferred that the exemption that might be granted pursuant to s 115 FMA was different to a licence or permit because s 115 did not carry with it the same process as the FMA licensing regime. He inferred that an application, assessment, and policing regime were not supported by s 115. These inferences were essential to Blue J's reasoning in finding that s 115 was different to the exemption in *Wilkes* and that s 72(2)(c) FMA was a prohibition. This is why the applicants submit the further evidence should be received by this Court. If Blue J is incorrect about the processes he inferred were not supported by s 115 (as the applicants submit he is) then s 115 is not distinguishable (on his Honour's reasoning) and he would presumably reach a different conclusion unless the Western Australian legislation can be otherwise distinguished. The respondent offers no justification for their

---

2 In *Ward v. Western Australia* [2002] HCA 28 p82 the majority of the Honourable Court said:
"It is essential to identify and compare the two sets of rights: one deriving from traditional law and custom, the other deriving from the exercise of the new sovereign authority that came with settlement."

3 As Chitty says in A Treatise on the Law of the Prerogative of the Crown (1820), p125, and referred to by the Honourable Court in *Western Australia and the Commonwealth* (183 CLR 373) at 439:
"'the King cannot take away, abridge, or alter any liberties or privileges granted by him or his predecessor, without the consent of the individuals holding them.'"

4 See also: *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25, 62.

Berg Lawyers
89 King William Street, Adelaide 5000
Telephone: (08) 8410 7779
Fax: (08) 8410 4494
Ref: Shaun Berg

dismissal (in RS[45], line 29) of any similarity between the FMA and the Western Australian legislation.

PART II: Special Leave

8. To the extent that the respondent seeks to distance itself from the concession made before the learned Magistrate and repeated in the Full Court that the appellants were exercising their native title rights to take abalone, he should not now be permitted to resile from the concession. For example, the respondent states (RS[10]) that evidence was not received by the Magistrate *"in respect of native title rights"*. The learned Magistrate's Reasons (referred to in AS [9]) set out what was asserted by the applicants and what was conceded by the respondent in not putting the applicants to proof. No further inquiry is necessary to determine the nature and scope of the rights exercised by the applicants as postulated in RS[33], lines 13-17.

PART III: Specific Comments about the Respondent's Submission

9. The respondent's submission:
   - 9.1 RS[9] is correct;
   - 9.2 RS[15] is correct to the extent that it acknowledges that the applicants have not made a complaint about the Full Court's consideration of these issues. Accordingly, RS[12] - [15] are not relevant to an issue in this application or appeal;
   - 9.3 RS[23] says that s 29(1) of the 1971 Act removed *"all existing rights to fish"*. This is incorrect for the reasons set out in paragraph 4, above. RS[23] then asserts that s 29(2) created a new statutory right to take fish other than for sale. It relies on the references cited in footnote 24. Neither *Harper* nor *Davey*[5] were relied upon by the majority in the Full Court. In any event, the legislation in both of these cases was different to s 29 of the 1971 Act. In the former, there was a general prohibition on the taking of abalone coupled with a licensing regime for taking limited abalone (both commercially and recreationally). In the latter there was a general prohibition on prawn trawling coupled with a quota system;
   - 9.4 RS[24] refers to a passage in *Western Australia v Ward* in the reasons of Callinan J at [821]. These reasons were part of the dissenting view in that case. The assertion in footnote 25 on RS page 6 that the quoted passage is consistent with the joint judgment at [263] is misleading, with respect. At [821] Callinan J asserts a theory of abrogation of a public right by the substitution of a statutory right. At [263] the majority acknowledge that the *"vesting of waters in the Crown was inconsistent with any native title right to possession of those waters to the exclusion of all others"*. It is the vesting that was critical to their conclusion, not the creation of a statutory right regulating the use of the waters;

---

5 (1993) 119 ALR 108.

Berg Lawyers
89 King William Street, Adelaide 5000
Telephone: (08) 8410 7779
Fax: (08) 8410 4494
Ref: Shaun Berg

9.5 RS[30] adds the adverb *"manifestly"* but adds nothing to the applicable test or the respondent's argument. The applicants accept that if native title rights have been extinguished, then s 211 *NTA* will not apply. RS [25]- [30] confuses the prohibition/regulation issue by introducing an analysis of *Yanner* into the argument. The applicants accept that *Yanner* is relevant only if the native title right to fish has not been wholly extinguishment by s 29(1) of the 1971 Act.

Part VI: Table of authorities, legislation and other materials

10

James Crawford, 'Aboriginal Customary Law: A General Regime of Recognition' (Research Paper 8, Australian Legal Report Commission 1986)
Australian Law Report Commission, Aboriginal Customary Laws: Recognition Report No 31 (1986) 65

.....
Ian C. Robertson

20 .....
Shaun G. Berg
Counsel for the Appellants

The Appellants' Solicitor is Berg Lawyers

Dated 6 November 2012.

30 .....
Appellants' solicitor

To: The State of South Australia
c/-Mr Martin Hinton QC
Solicitor General for the State of South Australia
45 Pirie Street
ADELAIDE SA 5000

40 And To: The Attorney General of the Commonwealth of Australia
Attention: Mr G. Kennedy, Australian Government Solicitor
Level 42, MLC Centre, 19 Martin Place
SYDNEY NSW 2000

Berg Lawyers
89 King William Street, Adelaide 5000
Telephone: (08) 8410 7779
Fax: (08) 8410 4494
Ref: Shaun Berg