'FOR THE REASONS GIVEN IN *AKIBA*...'[1]: *KARPANY V DIETMAN* [2013] HCA 47

by Lauren Butterly

INTRODUCTION

In Volume 8(8) of the *Indigenous Law Bulletin*, we considered the case of *Akiba v Commonwealth* [2013] HCA 33 ('*Akiba*') (also known as the Torres Strait Sea Claim).[2] Already, the findings in relation to native title rights to fishing in that case have been relied on as authority in the High Court. The case of *Karpany v Dietman* [2013] HCA 47 ('*Karpany*') is a very different 'kettle of fish', however, it considered the same issues to do with the potential extinguishment of native title rights by fisheries legislation.

Karpany is a case where native title was used as a 'defence' to prosecution. This is unlike *Akiba,* which was a native title claim to the sea. The applicants in *Karpany* were two Aboriginal men who are members of the Narrunga people. They were charged with the offence, pursuant to the *Fisheries Management Act 2007* (SA), of having 24 undersized Greenslip abalone in their possession near Cape Elizabeth in South Australia ('SA').[3] It was not in dispute that the applicants had 24 undersized abalone and that it was their intention to share them with family members.[4]

As this was a criminal prosecution it went to trial before a Magistrate. At the trial, the prosecution did not put the applicants 'to proof' as to their native title rights.[5] Therefore, it was not in dispute that the applicants had native title rights to take abalone. As a defence, the applicants relied on section 211 of the *Native Title Act 1993* (Cth) ('NTA'). Section 211 provides that a law which prohibits or restricts persons from fishing, other than in accordance with 'a licence, permit or other instrument', does not prohibit or restrict native title holders.[6] However, the native title holders must be 'satisfying their personal, domestic or non-commercial communal needs'.[7] This section was invoked in the well-known case of *Yanner v Eaton* (1999) 201 CLR 351 ('*Yanner*') in relation to the taking of juvenile crocodiles in Queensland.[8]

The Magistrate held that section 211 NTA could be used as a 'defence' to the prosecution.[9] This decision was then appealed by the SA Government to the Full Court of the Supreme Court of South Australia ('SASC'). Two questions were considered on appeal. The first question related to the Magistrate's interpretation of 'licence, permit or other instrument granted' in section 211 NTA. The second question on appeal related to a matter not raised before the Magistrate, being whether native title rights had been extinguished by prior state fisheries legislation. This was essentially the same question as was considered in *Akiba*. We'll consider this latter question first as if native title is extinguished, section 211 NTA does not come into play.

Already, the findings in relation to native title rights to fishing in Akiba have been relied on as authority in the High Court.

'REASONABLY INFERRED'?[10]: DID THE EARLIER SOUTH AUSTRALIAN FISHERIES LEGISLATION EXTINGUISH NATIVE TITLE RIGHTS?

Similarly to *Akiba*, the question considered by the High Court was whether previous fisheries legislation had extinguished native title rights due to inconsistency. Inconsistency arises where legislation is inconsistent with the continued enjoyment of native title rights. In *Karpany,* we are only dealing with SA legislation; whereas *Akiba* dealt with both State and Commonwealth legislation due to the geographic area claimed in the Torres Strait. The first fisheries legislation in SA was the *Fisheries Act 1878* (SA). This legislation included an express exclusion that the legislation did not apply to Indigenous persons taking fish 'for his own use'.[11] As was noted by the High Court, such exclusions were common in other states and territories.[12] Effectively, this type of exclusion continued to operate in SA until 1971.[13] The *Fisheries Act 1971* (SA) ('FA 1971') represented a 'major overhaul' in the legislation.[14] This included the removal of the express exclusion from the legislation.[15]

Justice Gray of the Full Court of the SASC (with whom Justice Kelly agreed) stated that it may be 'reasonably inferred' that such

a decision to remove the exclusion 'had been taken to bring to an end the exclusion of Aboriginal people from…the new regime'.[16] Justice Gray gave no further consideration of why this reasonable inference existed. On the other hand, Justice Blue did not accept that the changes in the FA 1971 'evinced an intention' to extinguish native title rights.[17] In a unanimous judgment, the High Court agreed with this aspect of Justice Blue's decision and held that the FA 1971 did not extinguish native title rights. The High Court held that '[f]or the reasons given in *Akiba*…the FA 1971 regulated, but was not inconsistent with, the continued enjoyment of native title rights'.[18]

RELEVANT PROVISIONS IN THE FA 1971

Broadly, what we had in the FA 1971 was a legislative scheme that can generally be described as having a provision that prohibits a person from engaging in commercial fishing unless that person holds a licence.[19] The definition of fish in the FA 1971 included molluscs such as abalone.[20] Further to that, there was a provision that allowed for non-commercial fishing without a licence in certain circumstances.[21] The High Court noted that the two applicants in this case *may* have fallen outside these certain circumstances due to their method of collection (taking by hand).[22] There was also a prohibition on taking undersized fish (as declared by proclamation), including abalone.[23] Yet, an exemption could be granted to this particular prohibition.[24] Further, the legislation contained a more general provision allowing for the Minister to grant a 'special permit' to fish.[25] What was not contained in the FA 1971 was a prohibition on the exercise of native title rights to fish.

Now that these rights have been clarified, Aboriginal and Torres Strait Islander communities can be on the 'front foot' in discussions with state and territory governments.

The High Court held that the FA 1971 did not prohibit the exercise of a native title right to fish and was not inconsistent with the continued existence of such a right. Therefore, the native title right was not extinguished.[26] Further, the High Court observed that sections like those that allowed the grant of an exemption, to the prohibition on taking undersized fish, 'reinforced' that the FA 1971 did not wholly prohibit fishing.[27] In relation to the availability of the 'special permit', the High Court held that there was nothing in the FA 1971:

> '…which would preclude the grant of such permits to members of Aboriginal communities to enable them to exercise traditional fishing rights…'[28]

In light of this, the High Court concluded that the FA 1971 actually contained a provision through which Indigenous people could continue to exercise their native title rights to take undersize abalone for non-commercial purposes.[29]

BROADER APPROACH TO EXTINGUISHMENT QUESTION

Effectively, the question in relation to extinguishment was resolved by the decision of *Akiba*—the legislation regulated, but was not inconsistent with native title rights. In response to Justice Gray's statement about reasonable inference, the High Court emphatically stated that such questions of extinguishment are not to be answered by inferences.[30] This is clearly correct, and the language of reasonable inference in relation to extinguishment of native title rights is squarely at odds with other cases (and the underlying nature of native title rights). Clearly after the decision of *Akiba*, the High Court could not let this aspect of the decision of the Full Court of the SASC stand.

Yet, in some ways it is surprising that this ground of appeal went all the way to the High Court given its similarities to the case of *Yanner*. The High Court noted that Justice Gray did go on to apply the test of inconsistency that the High Court also applied.[31] However, Justice Gray came to a different result, determining that there was an absolute prohibition and distinguishing the case from *Yanner*.[32] This demonstrates the differences of opinion and interpretation in relation to how 'regulation may shade into prohibition'.[33] As will be further considered in the conclusion, it seems the High Court has moved away from 'shades' of grey in this area. For regulation to be prohibitory, it must quite specifically prohibit the exercise of the native title right.

Similarly, it is surprising that what was described by the Magistrate as a 'limited issue' raised in the second ground of appeal, went all the way to the High Court.[34]

'LIMITED ISSUE': IS THE EXEMPTION IN THE SOUTH AUSTRALIAN LEGISLATION A 'LICENCE, PERMIT OR OTHER INSTRUMENT' PURSUANT TO SECTION 211 OF THE *NATIVE TITLE ACT*?

Once it is determined that the native title rights have not been extinguished, the next question is whether section 211 NTA applies and, in this case, whether section 211 could be used as a 'defence' to the prosecution. As explained above, for section 211 NTA to apply, the SA legislation must restrict a person from carrying out the activity other than in accordance with a 'licence, permit or other instrument'. As the alleged offence occurred in 2009, the relevant

legislation is the fisheries legislation that applied at that time, the *Fisheries Management Act 2007* (SA) ('FMA').

The offence with which the applicants were charged was pursuant to section 72(2)(c) FMA. This section provides that if a person is in possession of an aquatic resource of a prescribed class, they are guilty of an offence. Undersize fish, including abalone, are of this prescribed class.[35] Section 115(1)(a) FMA provides that the Minister can exempt a person from specified provisions of the FMA. At trial, the Magistrate held that this provision fitted within the term 'other instrument' in section 211 NTA.[36]

The SA Government argued in the High Court that this power to exempt was 'exceptional' and was not a 'de facto licensing regime'.[37] In response, the High Court noted that this 'was an unexplained conclusionary statement', but also that this was the 'wrong question' to ask.[38] Rather, the characterisation was about the construction of section 211 NTA, not the provisions of the FMA. The High Court noted that the phrase 'licence, permit or other instrument' is not to be construed narrowly and that such 'laws' may provide for a variety of schemes that may be specified or within the discretion of the grantor:

> 'They are apt to cover any form of statutory permission issued to individuals or classes of groups of people to carry on one or other of the classes of activities…'[39]

Therefore, the High Court agreed with the Magistrate that section 115 FMA fitted within 'other instrument' and the defence of section 211 NTA was available.

The High Court did not comment on the reasons of the Full Court of the SASC in relation to this ground. All three of the judgments held that section 211 NTA did not apply (although Blue J's judgment is the 'lead' judgment in this regard).[40] Justice Blue's judgment focussed on the provisions of the FMA and His Honour's reasons demonstrate the differences in characterisation when focussing on the FMA (rather than section 211 NTA). His Honour stated that there are 'marked contrasts' between the exemption in section 115 FMA and the other provisions of the FMA that may have been characterised as 'a licence, permit or registration'.[41] In contrast to the High Court's statement that the term should not be 'read narrowly', Blue J stated that these contrasts included a distinction between whether a document would issue or whether, as in the case of an exemption, it would operate by notice in the Gazette.[42] Further, Blue J noted that the 'Act does not regard' a licensed activity as 'inherently contrary to the interests of the people of South Australia', whereas, taking undersized fish is 'regarded by the Act as inherently undesirable'.[43] This latter statement is not further explained and, as will be explored in the conclusion, it seems the undersized nature of the abalone played a role in how this case proceeded.

CONCLUSION

Both of the grounds of appeal in this case relied on statutory interpretation. With respect to section 211 NTA specifically, this case held that the term 'licence, permit or other instrument' should not to be construed narrowly. More broadly, the case confirmed the High Court's approach to extinguishment in such cases. In effect, the High Court in both *Akiba* and *Karpany* sifted through the legislation searching for a general prohibition on the exercise of the relevant native title right. If there was not such a general prohibition, then the native title right was merely regulated. In *Karpany,* the language used by the High Court in relation to the extinguishment test was of 'inconsistency'. The judgment did not mention 'clear and plain intention'.[44] Similarly to *Akiba*, the *Karpany* judgment does not exclude the operation of the clear and plain intention test; rather it simply confirms that the correct test is one of inconsistency.[45] This is not at all surprising (in fact, given the decision in *Akiba*, any other result could have been very confusing). It leaves in place the 'murky waters' with respect to the broader test for extinguishment.[46] However, could it be said that there is a hint of 'clear and plain intention' in the sifting through of the legislation in search of a general prohibition? This is an issue that requires further consideration.

As noted above, in some ways it is surprising that these grounds of appeal went all the way to the High Court given the similarities to the case of *Yanner*. Further, this decision generated much more media attention than *Akiba*, including appearing on the front page of *The Australian* newspaper (this was even though *Akiba* was the largest native title claim to the sea in history).[47] It seems the undersized nature of the abalone, the value of the industry more broadly, and the geographic location of where the abalone was taken all played a part in how this case was approached by the SA Government and how it has been received by the public. These are complex issues at the intersection of Indigenous rights and environmental law and policy.

This decision clarifies the rights of native title holders in SA in relation to fishing. Such a clarification will be of particular assistance in negotiations for consent agreements and Indigenous Land Use Agreements in SA. As the decision relates to SA legislation, it does not have a 'direct' impact on other states and territories. However, the broader principles will apply to all fisheries legislation, meaning that unless there is a general prohibition applying to native title rights in the legislation, the result will be the same. Now that these rights have been clarified, Aboriginal and Torres Strait Islander communities can be on the 'front foot' in discussions with state and territory governments. Importantly, governments now have the opportunity to deal with these matters in a more constructive and holistic way.

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1 *Karpany v Dietman* [2013] HCA 47 (6 November 2013) [5].
2 Lauren Butterly, 'Unfinished Business in the Straits: *Akiba v Commonwealth of Australia* [2013] HCA 33' (2013) 8(8) *Indigenous Law Bulletin* 3.
3 *Karpany* [2013] HCA 47 [7].
4 Ibid [9].
5 Ibid [11].
6 *Native Title Act 1993* (Cth) s 211(1)(b) and 3(b).
7 *Native Title Act 1993* (Cth) s 211(2)(a).
8 Although s 211 NTA featured in some of the arguments (and therefore reasoning) of *Akiba*, it did not apply to the commercial fishing rights that were being claimed: see, for example, *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 (7 August 2013) [27] – [29]. Further, as explained above, *Akiba* was a native title claim rather than a prosecution. Therefore, *Akiba* did not consider s 211 NTA as a 'defence'.
9 *Karpany* [2013] HCA 47 [11].
10 *Dietman v Karpany* (2012) 262 FLR 292, 301 [25].
11 Ibid, 300 [23].
12 *Karpany* [2013] HCA 47 [20].
13 Ibid and *Dietman* (2012) 262 FLR 292, 300 [23] – [24].
14 *Dietman* (2012) 262 FLR 292, 300 [25].
15 *Karpany* [2013] HCA 47 [20].
16 *Dietman* (2012) 262 FLR 292, 301[25].
17 Ibid, 313 [89] and [91].
18 *Karpany* [2013] HCA 47 [5].
19 *Fisheries Act 1971* (SA) s 29(1).
20 Ibid s 5(1).
21 Ibid s 29(2).
22 *Karpany* [2013] HCA 47 [22].
23 *FA 1971* s 47(2).
24 *FA 1971* s 47(4).
25 *FA 1971* s 42(1).
26 *Karpany* [2013] HCA 47 [22].
27 Ibid.
28 Ibid [26].
29 Ibid [27].
30 Ibid [29].
31 Ibid.
32 *Dietman* (2012) 262 FLR 292, 303 [35].
33 *Akiba* [2013] HCA 33 [64]. Also see *Yanner v Eaton* (1999) 201 CLR 351, 372 [37].
34 *Dietman* (2012) 262 FLR 292, 296 [9].
35 *Fisheries Management (General) Regulations* 2007 (SA) rr 3(1), 8(1)(a) and Sch 2.
36 *Dietman* (2012) 262 FLR 292, 305 [50].
37 *Karpany* [2013] HCA 47 [44].
38 Ibid.
39 Ibid [48].
40 *Dietman* (2012) 262 FLR 292, 297 [14], 303 [38] and 304 – 309 [45] – [67].
41 Ibid, 307 - 308 [64] – [65].
42 Ibid.
43 Ibid.
44 See discussion in Lauren Butterly, above n 2, 4.
45 Ibid.
46 Ibid.
47 Mark Schliebs, 'High Court casts a line on right to fish', *The Australian*, 7 November 2013, 1.

ARTIST NOTE
BRONWYN BANCROFT


Photo by Sharon Hickey

Born in Tenterfield, northern New South Wales, Bronwyn Bancroft is a descendant of the Djanbun clan of the Bundjalung nation.

Utilising many mediums, Bronwyn's artistic practice extends from public artworks to children's book illustrations. She is represented in many collections both in Australia and overseas, including the National Gallery of Australia, Art Gallery of New South Wales, Art Gallery of Western Australian, Australian Museum.

Throughout her career Bronwyn has illustrated over 20 children's books, including the works of Aboriginal authors Sally Morgan, Oodgeroo Nunukul and Annaleise Porter. In 1994, Bronwyn was an Australian candidate for the UNICEF Ezra Keats Award for excellence in book illustrations.

Bronwyn was a founding member of Boomalli Aboriginal Artists Co-operative and over the past 20 years has served as its Chair, Director and Treasurer. Bronwyn currently holds Board positions with Boomalli Aboriginal Artists Cooperative, Visual Arts Copyright Collection Agency (Viscopy), Commonwealth Bank RAP Committee, Copyright Agency (CA) and the Australian Indigenous Mentoring Experience (AIME).

Bronwyn has a Fine Arts degree from Canberra School of Art, a Master of Studio Practice and a Master of Visual Arts from the University of Sydney, and is currently a Doctoral candidate at the University of Western Sydney.