IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A18 of 2012

BETWEEN:

OWEN JOHN KARPANY
First Applicant

And

DANIEL THOMAS KARPANY
Second Applicant

and

PETER JOHN DIETMAN
Respondent

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(PROPOSED) **INTERVENER'S SUBMISSIONS**

Part I:

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. South Australia Native Title Services Limited (SANTS) performs all of the functions of a representative Aboriginal /Torres Strait Islander body in respect of the State South Australia pursuant to Section 203FE (1)(a) of the *Native Title Act* 1993 ("NTA").

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3. The decision in *Dietman v Karpany* [2012] SASCFC 53 affects all holders of native title and person who may hold native title rights and interests in South Australia which include a right to fish (however expressed) in that the legislation upon which the findings of the Full Court is based was or is of state-wide application.

4. In the circumstances more fully described in the affidavit of Andrew Beckworth affirmed 9 October 2012, SANTS seeks to intervene (in the event that special leave is granted) in support of the applicants for special leave (appellants).

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Part III:

5. Leave to intervene should be granted because:

   (a) In the manner described in the affidavit of Andrew Beckworth affirmed 9 October 2012, the interests of native title holders and persons asserting native title represented by SANTS are affected by the decision of the Full Court in *Dietman v Karpany* and are likely to be affected by the disposition

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of the present application for special leave. If special leave is granted, those interests will be affected by the disposition of any appeal.

(b) The submissions SANTS seeks to make are independent of and differ from the submissions made by the applicant for special leave.

Part IV:

6. This part is an annexure to these submissions.

10 **Part V:**

7. SANTS seeks to address three issues raised by the Appeal (should special leave be granted), namely:

(a) Extinguishment of the native title right to fish, as found by the Full Court.

(b) Extinguishment of the native title right to take green-lip abalone under 13 centimetres in length , as contended for in the Respondent's Draft Notice of Contention, and

(c) Operation of NTA s211.

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8. SANTS Submissions are as follows.

(a) Extinguishment of the native title right to fish by Fisheries Act 1971.

9. The majority in the Full Court found that *Fisheries Act 1971*, s29 extinguished a native title right to access and take fish (Gray J R[35] with whom Kelly J agreed R[38]).

10. No question of extinguishment had been raised before the magistrate and it appears
30 that the Crown conceded at trial that the applicants took undersize green-lip abalone in the exercise of a native title right to fish.[1] That concession, which necessarily entailed a concession that the native title right had not been extinguished, appears to have been reconsidered or reformulated in the Full Court.

11. Gray J arrived at the conclusion concerning extinguishment by reasoning involving two steps. First, his Honour observed that the *Fisheries Act 1971* omitted any exclusion in favour of Aboriginal people, contrary to the position that had been taken in earlier legislation (*Fisheries Act 1878*, s14, *Fisheries Act 1904*, s22 and *Fisheries Act 1917*, s48: R[23]). From this his Honour stated: *"It may be reasonably inferred*
40 *that a decision had been taken to bring to an end the exclusion of Aboriginal people from the purview of the new regime enacted in 1971."* (R[25]).

12. Secondly, his Honour purported to apply an "*inconsistency of incidence test*" which was said to call for "*a comparison of the legal nature and incidence of the native title right and the statutory right.*" (R[33]). His Honour identified the relevant native title right as that which had been accepted at trial and on appeal: "*a right to access and*

1 Respondent's Summary of Argument at [2], M at [13],[14] and [26] but cf Respondent's Summary of Argument at [7] and R [7].

take fish"(R [34]). The right was described without qualification as to species, size, purpose, quantity or method of capture and without the context of evidence, the importance of which is noted in the Applicants' Submissions at [14] to [16].[2] After determining that statutory provisions had replaced pre-existing native title rights Gray J identified the non-native title right, the creation of which was found to have brought about extinguishment, as the "*right to fish and take fish not for sale, subject to limitations contained in the Act, including limitations as to size*" (R[35]).

13. His Honour described the question of whether or not the Fisheries Acts (which seems to be a reference to the *Fisheries Act 1971* and the *Fisheries Act 1982*) extinguish native title as a question of statutory interpretation in which the legislature must manifest a clear and plain intention to do so (R[33]). His Honour went on to state that "*native title will be extinguished where the native title right or interest is inconsistent with a right conferred by statute...*" which was said to involve the application of the "*inconsistency of incidence test.*" (R [33])

14. There are at least five errors in this approach.

Effect of repeal of exemptions in favour of Aboriginal people

15. First, insofar as the absence from the 1971 Act of the express exclusion in favour of "*any full-blooded Aboriginal of this State taking fish for his household consumption*" is concerned, as Blue J notes (R [91] "*the mere fact that the 1971 Act no longer contained a wholesale exclusion of its provision to Aboriginal peoples, does not evince an intention to extinguish native title....it* [the 1971 Act] *simply did not speak to native title rights.*

Treatment of rights conferred by Fisheries Act 1971 s29 as a grant of rights.

16. Secondly, the application by Gray J of "*the inconsistency of incidence test*" and the approach of attempting to compare the nature and incidence of the native title right and interest with that of the statutory right (R [33]) was inappropriate.

17. In *Wik v Queensland*[3] Brennan CJ identifies three categories of act capable of extinguishing native title:

(1) laws or acts which, simply extinguish native title;
(2) laws or acts which creates rights in third parties which are inconsistent with a continued right to enjoy native title; and
(3) laws and acts by which the Crown acquires a full beneficial ownership of land previously subject to native title.

Brennan CJ notes the different inquiries that are appropriate in each case[4] and cautions that "*in considering whether native title has been extinguished in or over a*

[2] See also *Mabo v Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 58 (Brennan J); "*Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty ...*"

[3] *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 84-85 (Brennan CJ).

particular parcel of land, it is necessary to identify the particular law or act which is said to effect the extinguishment and to apply the appropriate test to ascertain the effect of that law and whether that effect is inconsistent with the continued right to enjoy native title."[5]

18. The grant of pastoral leases (as considered in *Wik v Queensland*[6]) and freehold interests (as considered in *Fejo v Northern Territory*[7]) are instances of the second category of acts identified by Brennan CJ. It is in relation to this category that the "*inconsistency of incidents*" test is meaningfully capable of application. The legislation (and regulations and notifications) in the present case however cannot be an instance of this category of act as, contrary to Gray J's reasoning, the commencement of the *Fisheries Act 1971* did not, in itself, create any rights in third parties inconsistent with the continued right to enjoy the native title "*right to access and take fish*"; the right which his Honour identified as the relevant native title right (R [34]).

19. The legislation (and regulations and notifications) in the present case can only be the first category of (potentially) extinguishing acts: laws or acts which (might) simply extinguish native title. The appropriate inquiry in this case is as to whether the statute discloses a clear and plain intention on the part of the legislature to extinguish native title rights.[8] Insofar as Gray J has attempted to identify rights created by the *Fisheries Act 1971* and to compare the rights identified with native title rights by application of the inconsistency of incidents test, the approach has been in error.

20. Had his Honour, instead of seeking to undertake a comparison of rights, considered whether the *Fisheries Act 1971* simply extinguished native title, a conclusion that the Act had that effect could only be reached if the Act construed, as a whole,[9] was found to disclose a "*clear and plain intention*" to do so.[10] There is a presumption that a statute is not intended to extinguish native title.[11]

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4 *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 85 (Brennan CJ).

5 *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 86. Brennan CJ then gives the illustration that in *Wik* it would be erroneous after identifying the relevant act as the grant of a pastoral lease to inquire whether the act exhibited a clear and plain intention to extinguish native title.

6 *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1.

7 *Fejo v Northern Territory* [1998] HCA 18; (1998) 195 CLR 96.

8 *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 85 (Brennan CJ) citing *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 at 64 (Brennan J); at 111 (Deane and Gaudron JJ); at 196 (Toohey J).

9 *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 363[10]

10 *Mabo [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 64, (Brennan J); at 111, (Deane and Gaudron JJ); at 195-6, (Toohey J). *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 84, 85 (Brennan CJ) 123-124 (Toohey J), 155 (Gaudron J), 168, 193 (Gummow J). *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; (1995) 183 CLR 373 at 423 (Mason CJ, Brennan, Dean, Toohey, Gaudron and McHugh JJ)

11 *Western Australia v Commonwealth (Native Title Act Case)* [1995] HCA 47; (1994) 183 CLR 373 at 422 (Mason CJ, Brennan, Dean, Toohey, Gaudron and McHugh JJ); *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 247, (Kirby J).

21. Blue J noted (at R [91]) the informant in the present case did not expressly contend that the 1971 Act manifested an intention to extinguish native title. The informant was correct to resist advancing such an argument but the alternative argument that was pursued was misconceived.

22. As was noted in *Yanner v Eaton;*[12] *"Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal people concerned with the land"* ... *"saying to Aboriginal people 'You may not hunt or fish without a permit' does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing".*[13]

23. In not submitting that the relevant statute manifested an intention to extinguish native title the position taken by the informant in the present case mirrored that taken by the informant in *Yanner v Eaton*, in relation to which the joint majority noted: "*Not only did the respondent not contend that such a law severed that connection, s 211 of the* Native Title Act *assumes that it does not. Section 211 provides that a law which 'prohibits or restricts persons' from hunting or fishing 'other than in accordance with a licence permit or other instrument granted or issued to them under the law', does not prohibit or restrict the pursuit of that activity in certain circumstances where native title exists. By doing so, the section necessarily assumes that a conditional prohibition of the kind described does not affect the existence of native title rights and interests in relation to which the activity is pursue."* [14]

24. The reasoning of Gray J in relation to the creation of rights incompatible with the continued existence of a native title right "*to access and take fish*", depends upon acceptance of the analysis under which a new statutory right "*to fish and take fish not for sale, subject to limitations contained in the Act, including limitations as to size*" came into existence (R [35]) on commencement of the *Fisheries Act 1971* in place of pre-existing rights. Logically, if a statutory right did displace a native title right "*to access and take fish"* it must also have displaced all public rights to fish. The informant asserts that public rights were also abrogated.[15]

25. His Honour's conclusions concerning the application of the 1971 Act to all persons does not, without more, support the further conclusion that new rights were created or, more particularly that a statutory right available to all persons in the State, had replaced the native title rights (as well as public rights to fish). *Fisheries Act 1971*, s29 does not contain any express reference to the creation of any rights and there is no basis upon which such an effect should be inferred. The statute is more aptly characterised as an instrument which regulated existing rights.

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[12] *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351.

[13] *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ). See also *Commonwealth v Yarmirr* [2001] HCA ; (2001) 208 CLR 1 at 127 [284] (Kirby J).

[14] *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 373 [39] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

[15] Respondent's Summary of Argument at [20].

26. The long title of the 1971 Act is "*An Act to repeal the Fisheries Act, 1917-1969, and to enact other provisions relating to the management and conservation of fisheries and the regulation of fishing and matters incidental thereto.*" The statute contains no statement of other objects or purpose and no express statement of intention to abrogate rights. The management and conservation of fisheries and the regulation of fishing are objectives entirely compatible with the continuation of native title rights to fish and public rights to fish. Whilst native title may not have been a matter that the legislature could have been expected to explicitly deal with in 1971, public rights to fish were. In spite of this there is an absence of any express reference to the
10 abrogation of rights.

27. As in *Yanner v Eaton* the apparent generality of the prohibition must be understood not only in light of its reference to the holder of a licence but also the further exemptions.[16] The licencing requirement created by s29(1) is subject to the exceptions in relation to the taking of fish for purposes other than sale contained in s29(2), including the taking of fish "*by means of a rod and line, hand line, hand fish spear or declared device.*" It does not appear to have been the case that the forms of fishing described in s29(2) were, before commencement of the 1971 Act, impermissible. These exceptions suggest that the legislature did not intend to
20 disturb, let alone permanently extinguish, the continuing enjoyment of at least some rights which were not founded on the holding of a licence or permit. The exceptions provided for by s29(2) are confirmation of the continuation of existing rights, to the extent that the exercise of those rights was within the terms of the exception.

28. The Governor's power, to create further exemptions in favour of "*any person or a specified class of person*" in relation to taking undersize fish, as conferred by s47(4) of the 1971 Act, whether exercised or not, provided a further indication that the intent of the legislation was to regulate, not to extinguish rights.

30 29. His Honour did not expressly accept the informant's submission that the 1971 Act "*took responsibility for the provision of fishing rights by purporting to be the sole authority for the right to take fish*" (R [27]), but his Honour's findings (at R[35]) as to the effect of the 1971 Act substantially reflect the informant's characterisation of the effect of the legislation. There is no reason to so characterise the consequences of the commencement of the *Fisheries Act 1971*. The Act itself does not disclose the assumption of such a responsibility and the exemptions provided for by s29(2) suggest that many forms of fishing were not intended to be subject to the licencing regime provided for in the Act. The fact that the only classes of license provided for in the 1971 Act were licences available to persons intending to "*carry on the*
40 *business of fishing for profit*",[17] strongly suggests that recreational fishing and fishing to meet personal domestic or communal needs were not within the purview of s29.

30. The fact that *some* conduct which might have occurred in the exercise of the particular native title right (or public right) might have been made conditional upon

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[16] *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 364[13] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

[17] *Fisheries Act 1971*, s5 (definition of fishing licence) and ss 28 and 30.

obtaining a licence or permit, otherwise regulated or even prohibited does not exclude the continuation of the right.[18] "*Indeed regulating the way in which a right may be exercised presupposes that the right exists.*"[19] In the present case the native title right under consideration is the right to fish; not the right to take abalone or to take abalone of a particular size. Even if fishing for some species, in some places or for specimens of a particular size was restricted or prohibited it is plain that many forms of fishing were equally permissible before and after the commencement of the *Fisheries Act 1971*. The rights of the public and native title holders to fish for purposes other than sale, by the methods and for the species referred to in s29(2)
10 were left unaffected by the commencement of the *Fisheries Act 1971.* The continuity of the substantive right was not affected by constraints or prohibitions upon some of the ways it might have been exercised.

31. In these circumstances there is no reason to construe the *Fisheries Act 1971* as having abrogated rights – public rights to fish as well as the native title right – only to have replaced them with statutory rights which in some respects were indistinguishable from the abrogated rights. The intention that such a construction is intended is not "*clearly manifested by unambiguous language*"[20] and is contrary to the well-established presumption against interference with rights.[21]

20 *No inconsistency of incidents of right*

32. Thirdly, even if a new species of statutory right as described by Gray J: "*to fish and take fish not for sale, subject to limitations contained in the Act, including limitations as to size*" (R [35]), was created, the existence and enjoyment of such a right did not immediately create rights in the State's entire fisheries resources (or even the State's entire abalone resource). The potential existed for the concurrent enjoyment of a native title right to "*to access and take fish*" and the entitlement afforded by the statute to holders of licences permits or exemptions. There is no reason to conclude that the two rights were incompatible or inconsistent. By analogy to the acts under consideration in *Wik,* the analysis which Gray J undertakes is akin to treating the
30 commencement of legislation which enabled the granting of pastoral leases in Queensland (as opposed to the subsequent and less pervasive grants of leases) as immediately affecting native title throughout the State.

Consideration of "incidence" of native title not "incidents"

33. Fourthly, in referring to "*incidence*" in the context of the "*inconsistency of incidence test*" (at [33]) his Honour cites *Western Australia v Ward* (2002) 213 CLR 1 at [78]-[85] where, at [79] reference is made to the expression "*inconsistency of incidents test*" which was used, in the view of the majority in the High Court correctly, by Beaumont and von Doussa JJ in the judgment then under appeal.[22]

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18 *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ.).

19 *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 373 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ.).

20 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577.

21 Pearce and Geddes, Statutory Construction in Australia 7th Ed. At 5.2 (pp.168-170), and 5.27 (pp. 188-189).

22 The passage from the opinion of Beaumont and von Doussa JJ in *Western Australia v Ward* [2000] FCA 91; (2000) 99 FCR 316 at [81] was directed to the rejection of the alternative Canadian, "*adverse*

34. There are, in cases dealing with native title, many other references to the "*incidents*" of both native title rights and non-native title rights.[23] This usage is directed to the identification of the content of native title. These references emphasize the importance of considering the content of particular rights in the particular case.

35. In the present case Gray J appears to have examined the "*incidence*" of rights (native title rights and rights under statute) rather than their "*incidents*". His Honour's references to the 1971 Act bringing "*all persons under the regime of the Act*" and placing "*all persons, including Aboriginal persons, under the regime of the statute*" and to all persons being "*subject to the rights and obligations set out in the statute*" (R [35]) suggests that his Honour was concerned more with the "*incidence*" (who enjoyed the rights) rather than the "*incidents*" of the rights. It is submitted that it is clear that his Honour should have considered "*incidents*".[24]

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Finding of extinguishment precedes comparison of rights.

36. Fifthly, whether considering the "incidence" or the "incidents" of native title rights, in applying the test his Honour had described to identify the non-native title right for the purpose of comparison, his Honour followed a process of reasoning which did not involve the process of comparison his Honour had identified. Instead, in making the findings (at R[35]) as to the effect of the 1971 Act, his Honour preemptively determined that the native title right had been extinguished. Inseparable from this conclusion was the finding that a statutory right had been created. By these steps, the results of the test his Honour set out to apply, the "*inconsistency of incidence test*" had been determined. After concluding that the statute had displaced the native title right his Honour identified the non-native title right. His Honour did not expressly compare the two rights, but rather appears to have relied upon the conclusion he had reached in relation to extinguishment as indicating inconsistency of incidence which in turn was taken to support extinguishment. There is circularity in the reasoning process which can be explained in part at least as a result of the application of the wrong test. His Honour did not identify the manifestations of a

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dominion" test and in the context of discussing the effect of grants of interests in land on native title. *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1, Kirby J at 221, but see *Western Australia v Ward* (2002) 213 CLR 1 at [589] where his Honour agrees with the joint majority judgment at [79] and referring also to *Wik*, states "*the inconsistency of incidents test should be applied*". See also *Fejo v Northern Territory* [1998] HCA 18 (1998) 195 CLR 96 at 126 and 143 [86].

23 *Mabo [No 2]* (1992) 175 CLR 1 at 58; *Wik v Queensland* (1996) 187 CLR 1 at 66 where Question 1B(d) was *"did the grant of the pastoral lease necessarily extinguish all incidents of Aboriginal title or possessory title of the Wik peoples..."* See also *Wik* at 169, 170, 171, 175, 185, 197, 198, 201, 204, 213, 218, 220, 224, 228, 229, 235-6, 242, 243, 244 and *Fejo v Northern Territory* [1998] HCA 18 (1998) 195 CLR 96 at 126 and 143 [86]..

24 It is noted however that in *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 221 Kirby J referred to the "*inconsistency of incidence test*" at 221, but read with references to the "*incidents*" of rights at 213, 218, 220, 224, 228, 229, 235-6, 242, 243 and 244, it is clear that Kirby J was considering "*incidents*". see *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at [589] where Kirby J agrees with the joint majority judgment at [79] and referring also to *Wik*, states "*the inconsistency of incidents test should be applied*". It is also noted that in the reasons of Blue J (R [76]) Gummow J is quoted (incorrectly) as referring to "*incidence*" of rights when the passages cited refer to "*incidents*" of rights.

clear and plain intention to extinguish native title and did not make findings that the intention to abrogate rights was "*clearly manifested by unambiguous language*"[25].

(b) Extinguishment of the native title right to take green-lip abalone less than 13 cm in length.

37. The Respondent contends, in the alternative to its reliance on *Fisheries Act 1971* s29, that the decision of the Full Court should be affirmed on a ground that the Full Court failed to decide: the question of whether any native title right to take undersize abalone was subsequently extinguished. The Respondent contends that the right to fish green-lip abalone less than 13 centimetres in length was extinguished by regulation 5 and clause 62 of Schedule 1 of the *Fisheries (General) Regulations 1984(SA)* read with regulation 23 of those regulations, which commenced on 28 June 1984.

38. The contention seems to have its factual foundation in the notion that a native title right to fish (or to take abalone) can be dissected into rights to take species, sub-species and specimens of a particular size. As noted in paragraph 30 above the refinement of rights in this way for the purpose of determining questions of extinguishment overlooks the continuity of the broader right. The right under consideration in the present case is the right to fish. The notion that a native title right might exist in relation to "*fishing*", expressed at that level of generality, is recognized in Native Title Act, s 211(3) and s223(2). Inevitably over short and long time-frames, the particular varieties and quantities of fish (and other resources) available will change. Restrictions or prohibitions under valid laws are one possible cause, other factors may be climate conditions, disease, presence of pollutants, depletion of other parts of the food chain and even changes in preference among fishers. Factors of this kind may lead fishers and consumers of fish to substitute alternative fish or indeed other food sources completely over short or long periods. This reality does not have the consequence of progressively carving particular components out of the right to fish. The right to fish was neither lost nor diminished by the unavailability of green-lip abalone under 13 centimetres for a period commencing in1984.

39. *Fisheries Act 1982*, s 20 identified the principal objectives of the Minister and the Director as:
"(a) *ensuring through conservation and management measures that the living resources to which this act applies are not endangered or overexploited: and*
(b) achieving the optimum utilization and equitable distribution of those resources."

40. These objectives are consistent with a regulatory scheme, do not clearly manifest by unambiguous language an intention to abrogate public or native title rights and do not disclose a clear and plain intention to extinguish native title. The objective of achieving an equitable distribution of resources is an unlikely foundation for a law

[25] *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577.

intended to confiscate property or abrogate rights. There is not, in the long title of the Act or elsewhere, any reference to the abrogation of rights.

41. In any event, if *Fisheries Act 1982* was capable of extinguishing a native title right, its effect was subject to the *Racial Discrimination Act 1975* (Cth) s10(1) because the provision, insofar as it might affect native title, affects only the property rights of Aboriginal persons. Although public rights to fish may also be affected (if they were not abrogated by the Fisheries Act 1971 or other legislation), those rights are of a different character to native title rights, so the law cannot be properly characterized as one which does not have discriminatory application on the basis of race.

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42. Once it is accepted that the *Fisheries Act 1982* would have, if valid, affected native title but was, to that extent invalid by operation of the *Racial Discrimination Act 1975* (Cth), it becomes apparent that the enactment of the 1982 Act was a *past act*[26] and not being a past act falling into any other category, it was a *category D past act.*[27] It follows from this that the *non-extinguishment principle* applies.[28]

(c) Operation of NTA s211.

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43. The designation of a notice published in the Gazette *Fisheries Management Act 2007* (SA) s115 or the entitlement enjoyed as a result of publication of such a notice as an "*exemption*" does not determine the character of the entitlement so created and in particular is not determinative of whether it is "*a licence, permit or other instrument granted or issued to them under the* [relevant State law]" within the meaning of NTA s211(1)(b). As in *Wik v Queensland* where consideration was given to the content of "leases", the rights and obligations of a person holding an interest under the legislation are not disposed of by nomenclature[29] but by examination, in its particular statutory context, of the substance of the entitlement.

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44. Considerations of whether the the State law acts as a prohibition or are regulatory are not to the point. NTA s211(1) applies where a State law "*prohibits or restricts*" (cf Blue J R 65]) there is nothing in the *Fisheries Management Act 2007* (SA) s115 to suggest that the power to make exemptions is to be used sparingly or that it should be characterized as a "*reserve power*" (Blue J at R [65]). If it is necessary to characterize the power at all it is more aptly described as a general power (Blue J at R [63]).

45. NTA s 211 is remedial legislation. It is to be construed having regard to the beneficial purpose of the legislation.[30] The words "*licence permit or other instrument granted or issued*" should be construed accordingly.

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26 NTA, s 228.

27 NTA, s 232.

28 NTA, ss15(1)(d), 238

29 *Wik v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 117 (Toohey J)

30 *Commonwealth v Yarmirr* [2001] HCA 56; (2001) 208 CLR 1 at 75 [124] (McHugh J) at 112 [249] (Kirby J); *Northern Territory v Alyawarr* (2005) 145 FCR 442 at 461 [62]-[63] (Wilcox, French and Weinberg JJ).

46. Where the procedure for making an exemption and the consequences of an exemption under *Fisheries Management ACT 2007* (SA) s115 are not materially different to the procedure and consequences that might be associated with a licence, permit or other instrument there is no reason why the exemption is not properly characterized as falling within the provision.

Part VI:

47. SANTS seeks one half hour for the presentation of its oral argument.

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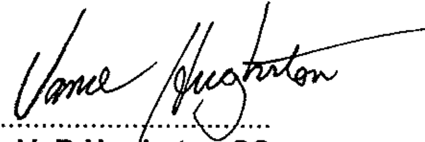
Dated: 9 October 2012



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INTERVENER'S SUBMISSIONS
ANNEXURE – LEGISLATION NOT INCLUDED WITH APPLICANTS' SUBMISSIONS

Native Title Act (Cth)
Section 228 (in force)

228 Past act

Definition

(1) This section defines ***past act***.

Acts before 1 July 1993 or 1 January 1994

(2) Subject to subsection (10), if:

(a) either:

(i) at any time before 1 July 1993 when native title existed in relation to particular land or waters, an act consisting of the making, amendment or repeal of legislation took place; or

(ii) at any time before 1 January 1994 when native title existed in relation to particular land or waters, any other act took place; and

(b) apart from this Act, the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist;

the act is a ***past act*** in relation to the land or waters.

Options exercised on or after 1 January 1994 etc.

(3) Subject to subsection (10), an act that takes place on or after 1 January 1994 is a ***past act*** if:

(a) it would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and

(b) it takes place:

(i) in exercise of a legally enforceable right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994; or

(ii) in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made; and

(c) the act is not the making, amendment or repeal of legislation.

Extensions, renewals etc.

(4) Subject to subsections (6) and (10), an act (the ***later act***) that takes place on or after 1 January 1994 is a ***past act*** if:

(a) the later act would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and

(b) an act (the ***earlier act***) that is a past act because of any subsection of this section (including because of another application of this subsection) took place before the later act; and

(c) the earlier act created interests in a person and the later act creates interests in:

(i) the same person; or

(ii) another person who has acquired the interests of the first person (by assignment, succession or otherwise);

in relation to the whole or part of the land or waters to which the earlier act relates; and

(d) the interests created by the later act take effect before or immediately after the interests created by the earlier act cease to have effect; and

(e) the interests created by the later act permit activities of a similar kind to those permitted by the earlier act.

Examples of similar and dissimilar acts for the purposes of paragraph (4)(e)

(5) The following are examples for the purposes of paragraph (4)(e):

(a) the grant of a lease that permits mining only for a particular mineral followed by the grant of a lease that permits similar mining for another mineral is an example of a case where interests created by an earlier act permit activities that are of a similar kind to those permitted by a later act;

(b) the grant of a lease that permits only grazing followed by the grant of a lease that permits mining is an example of a case where interests created by an earlier act permit activities that are not of a similar kind to those permitted by a later act.

Cases excluded from subsection (4)

(6) Subsection (4) does not apply if:

(a) the earlier act was the creation of a non-proprietary interest in relation to land or waters and the later act is the creation of a proprietary interest in land or waters; or

(b) the earlier act was the creation of a proprietary interest in land or waters and the later act is the creation of a larger proprietary interest in land or waters; or

(c) if the earlier act contains a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders—the later act does not contain the same reservation or condition; or

(d) the earlier act or the later act is the making, amendment or repeal of legislation.

Example of earlier and later acts for the purposes of paragraph (6)(a)

(7) For the purposes of paragraph (6)(a), the issue of a licence followed by the grant of a lease is an example of an earlier act that is the creation of a non-proprietary interest in relation to land and a later act that is the creation of a proprietary interest in land.

Example of earlier and later acts for the purposes of paragraph (6)(b)

(8) For the purposes of paragraph (6)(b), the grant of a lease followed by the grant of a freehold estate is an example of an earlier act that is the creation of a proprietary interest in land and a later act that is the creation of a larger proprietary interest in land.

Other extensions, and developments, of earlier acts

(9) Subject to subsection (10), an act (the ***later act***) that takes place on or after 1 January 1994 is a ***past act*** if:

(a) the later act would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and

(b) an act (the ***earlier act***) that is a past act because of any subsection of this section took place before the later act; and

(c) the earlier act contained or conferred a reservation, condition, permission or authority under which the whole or part of the land or waters to which the earlier act related was to be used at a later time for a particular purpose (for example, a reservation for forestry purposes); and

(d) the later act is done in good faith under or in accordance with the reservation, condition, permission or authority (for example, the issue in good faith of a licence to take timber under a reservation for forestry purposes); and

(e) the later act is not the making, amendment or repeal of legislation.

Excluded acts

(10) An act is not a ***past act*** if it is:

(a) the *Queensland Coast Islands Declaratory Act 1985* of Queensland; or

(b) any other act declared by the regulations to be an excluded act for the purposes of this paragraph.

Fisheries Act 1971 (SA) (repealed)

Long Title:

An Act to repeal the Fisheries Act, 1917-1969, and to enact other provisions relating to the management and conservation of fisheries and the regulation of fishing, and to matters incidental thereto.

Fisheries Act 1971 (SA) (repealed)

Section 5(1) (definition of "fish" and "fishing licence")

(1) In this Act, unless the context otherwise requires-

...

"fish"means-

(a) Fish, mollusc, crustacean and aquatic animal of any species;

and

(b) Spat, spawn, fry and young of any fish, mollusc crustacean or aquatic animal.

"fishing licence"means a class A fishing licence or a class B fishing licence referred to in section 28 of this Act;

...

Fisheries Act 1971 (SA) (repealed)
Section 28

(1) There shall be two classes of Fishing licences -
  (a) a class A fishing licence;
  and
  (b) a class B fishing licence.
(2) A fishing licence shall authorise the taking of fish for sale subject to the other provisions of this Act, by lawful devices of every kind or, if the licence so provides, only the devices specified or described in the licence, and the sale of fish so taken.
(3) A fishing licence of either class may contain conditions as to the total number of devices of any one kind or specifications of devices which may be used pursuant to the licence.

Fisheries Act 1971 (SA) (repealed)
Section 30

(4) A person shall not be granted –
  (a) a class A fishing licence unless he satisfies the Director that he intends to carry on the business of fishing for profit as his principal business;
  or
  (b) a class B fishing licence unless he satisfies the Director that he intends to carry on the business of fishing for profit regularly as a seasonal or part time business;

Fisheries Act 1982 (SA) (repealed)
Long Title:

An Act to provide for the conservation, enhancement and management of fisheries, the regulation of fisheries and the protection of certain fish; to provide for the protectionof aquatic habitat; to provide for the control of exotic fish and disease in fish, and the regulationof fish farming and fish processing; to repeal the Fisheries Act, 1971-1980; to repeal the Fibre and Sponges Act 1909-1973; and for other purposes.

Fisheries Act 1982 (SA) (repealed)
Section 20

In the administration of this Act, the Minister and the Director shall have as their principal objectives:
(a) ensuring through conservation and management measures that the living resources to which this act applies are not endangered or overexploited: and
(b) achieving the optimum utilization and equitable distribution of those resources