HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

OWEN JOHN KARPANY & ANOR APPLICANTS

AND

PETER JOHN DIETMAN RESPONDENT

Karpany v Dietman
[2013] HCA 47
6 November 2013
A18/2012

ORDER

1. *Special leave to appeal granted.*

2. *Appeal allowed with costs.*

3. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 11 May 2012 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of South Australia

Representation

I C Robertson SC with S G Berg for the applicants (instructed by Berg Lawyers)

M G Evans QC with A P Rodriquez and D F O'Leary for the respondent (instructed by Crown Solicitor (SA))

Interveners

M G Evans QC with A P Rodriquez and D F O'Leary for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

V B Hughston SC with J A Waters for South Australian Native Title Services Limited, intervening (instructed by South Australian Native Title Services Limited)

CATCHWORDS

Karpany v Dietman

Native title – Native title right to take fish – *Fisheries Act* 1971 (SA) prohibited taking fish without licence or except as provided by the Act – *Fisheries Act* permitted taking fish by certain means without licence for non-commercial purposes – Whether statute inconsistent with continued existence of native title right to take fish – Whether native title right extinguished by pre-1975 State fisheries legislation.

Native title – Native title right to take fish – Native title holders charged with possessing undersize abalone contrary to s 72(2)(c) of *Fisheries Management Act* 2007 (SA) – Section 115 of *Fisheries Management Act* provided for ministerial exemption – Whether ministerial exemption "licence, permit or other instrument" for the purposes of s 211 of *Native Title Act* 1993 (Cth).

Words and phrases – "extinguishment", "inconsistent with the continued existence of a native title right", "licence, permit or other instrument", "native title rights and interests".

Fisheries Act 1917 (SA), ss 39, 48.
Fisheries Act 1971 (SA), ss 28, 29, 42, 47.
Fisheries Management Act 2007 (SA), ss 3, 5, 72, 115.
Native Title Act 1993 (Cth), ss 11, 211, 223.

FRENCH CJ, HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ.

Introduction

1 The applicants, who are Aboriginal and are members of the Narrunga People, successfully defended a summary prosecution under the *Fisheries Management Act* 2007 (SA) ("the FMA 2007") for having in their possession a quantity of undersize abalone. The charge was heard in the Magistrates Court at Kadina. There was no dispute that they had in their possession undersize abalone. Nor was there any dispute that the abalone were taken in accordance with the traditional laws and customs of the Narrunga People. On that basis the applicants successfully invoked s 211 of the *Native Title Act* 1993 (Cth) ("the NTA").

2 Section 211 of the NTA provides that a law which "prohibits or restricts persons" from fishing or gathering "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 conditions where native title exists[1]. As was noted in *Yanner v Eaton*[2]:

> "By doing so, the section necessarily assumes that a conditional prohibition of the kind described does not affect the existence of the native title rights and interests in relation to which the activity is pursued."

The terms of s 211 are considered more closely later in these reasons.

3 The underlying assumption of the subsistence of native title rights and interests conceded in the Magistrates Court was held by the Full Court of the Supreme Court of South Australia to be wrong[3]. The Court held by majority that the relevant native title rights, which, absent extinguishment, would have embraced the taking of the undersize abalone, had been extinguished by the

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1 NTA, s 211(1)(b) and (2).

2 (1999) 201 CLR 351 at 373 [39] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; [1999] HCA 53.

3 *Dietman v Karpany* (2012) 112 SASR 514.

Fisheries Act 1971 (SA) ("the FA 1971"). The applicants sought special leave to appeal to this Court and their application was referred to an enlarged bench[4].

4 Special leave should be granted. The appeal must be allowed. In summary, this is for the following reasons.

5 First, the FA 1971 did not extinguish the applicants' native title right to take fish. The FA 1971 prohibited[5] a person taking fish except as provided by the Act or unless the person held a licence. But the FA 1971 permitted[6] a person without holding a licence to take fish by certain means and "otherwise than for the purpose of sale". Further, the FA 1971 gave[7] the Minister power to grant any person a special permit to take fish during such period and in such waters and subject to such terms and conditions as were specified in the permit. For the reasons given in *Akiba v The Commonwealth*[8], and the cases there cited[9], the FA 1971 regulated, but was not inconsistent with, the continued enjoyment of native title rights.

6 Second, s 211(2) of the NTA applied. The exercise or enjoyment of native title rights and interests in relation to the relevant waters included carrying on the activity of fishing for or gathering abalone[10]. A law of a State, the FMA 2007, prohibited or restricted persons from fishing for or gathering abalone "other than in accordance with a licence, permit or other instrument"[11] and the

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4 [2012] HCATrans 210.

5 FA 1971, s 29(1).

6 FA 1971, s 29(2).

7 FA 1971, s 42(1).

8 (2013) 87 ALJR 916; 300 ALR 1; [2013] HCA 33.

9 Including, in particular, *Yanner v Eaton* (1999) 201 CLR 351 and *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28.

10 NTA, s 211(1)(a), (3)(a) and (3)(c).

11 NTA, s 211(1)(b).

FMA 2007 was not said to be a law of a kind described in s 211(1)(ba) or (c). Accordingly, the FMA 2007 did not prohibit or restrict the applicants, as native title holders, from gathering or fishing for abalone in the waters concerned[12] where they did so for the purpose of satisfying their personal, domestic or non-commercial communal needs[13] and in exercise or enjoyment of their native title rights and interests[14].

Factual and procedural background

7 The applicants, father and son, were jointly charged that, on 12 December 2009, near Cape Elizabeth in the waters of South Australia, they had joint possession or control of an aquatic resource of a prescribed class, namely undersize Greenlip abalone (Haliotis laevigata), fish of a priority species. The offence with which they were charged was a summary offence created by s 72(2)(c) of the FMA 2007, read with reg 8(1)(a) of the Fisheries Management (General) Regulations 2007 (SA). It was alleged in particulars of the charge that the applicants were in joint possession or control of 24 Greenlip abalone that were less than 13 cm and thus undersize.

8 By agreement between prosecution and defence, the evidence relied upon by the prosecution was tendered in the form of a booklet of documents and a DVD recording. The documents included statements by a number of fisheries officers and several photographs.

9 It was not in dispute that the applicants, when interviewed by fisheries officers, admitted to having taken 32 abalone, 24 of which were undersize. It was their intention to divide the catch equally and to eat them at a banquet with about 15 family members. They told the officers that their Aboriginal background and entitlements allowed them to take the abalone. They said the abalone looked as though they were big enough, but they did not measure them. They did not have a measurement device and saw no reason to have one.

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12 NTA, s 211(2).

13 NTA, s 211(2)(a).

14 NTA, s 211(2)(b).

10 Counsel for the applicants informed the Magistrates Court that the prosecution materials established the elements of the offence charged. He told the Court, however, that each of the applicants would be relying upon s 211 of the NTA. He said that the applicants would give evidence and call witnesses to establish that their fishing activity was done in a traditional manner and was consistent with the requirements of the NTA. The purpose of the catch was to feed their family. Further, the defence would establish a connection with the Point Pearce area in which the applicants had taken the abalone and would establish familial lineage on the first applicant's mother's side demonstrating a continuous unbroken traditional fishing practice. Counsel for the prosecution indicated that the prosecution would not put the applicants to proof of those matters of fact.

11 The Magistrates Court held that s 211 did apply. That was on the basis that ministerial exemptions from the application of the FMA 2007 to any particular person or group of persons, which could be granted under s 115, fell within the category of "licence, permit or other instrument" within the meaning of s 211. The learned magistrate's reasons concluded:

> "Accordingly in the present case I would conclude that the so-called 'Native Title' defence is available to both defendants with respect to the present charge.
>
> The Prosecution indicates that they do not wish to put the defendants to proof as to the matters previously referred to.
>
> It follows from that concession that I would find them not guilty of the charge. I do so."

12 The respondent, who was the informant in the Magistrates Court, instituted an appeal in the Supreme Court of South Australia. The first substantive ground of appeal was that the magistrate had erred in his characterisation of exemptions granted under s 115. The second substantive ground was that any native title right to take undersize abalone enjoyed in the past by the Aboriginal group to which the applicants belonged had been extinguished under earlier State law and for that reason s 211 of the NTA could not apply. That point had not been taken in the Magistrates Court.

13 On 6 October 2011, Kelly J of the Supreme Court of South Australia referred the appeal to the Full Court of the Supreme Court pursuant to s 42(2)(b)

of the *Magistrates Court Act* 1991 (SA). The appeal was heard on 14 October 2011. On 11 May 2012, the Full Court allowed the appeal and remitted the matter to the Magistrates Court for resentencing and, in particular, for consideration as to whether the magistrate should exercise his discretion to proceed without recording convictions[15].

14 Gray J, with whom Kelly J agreed, held that the native title right of Aboriginal persons to fish in the area had been extinguished by operation of the FA 1971 and was replaced by a statutory right available to all persons in the State of South Australia. Blue J disagreed. However, his Honour held that the provision for exemptions under s 115 of the FMA 2007 did not constitute a provision for the granting of a licence, permit or other instrument within the meaning of s 211 of the NTA. No other form of licence or permit being available to authorise the taking of undersize abalone under the FMA 2007, s 211 could not be invoked by the applicants.

15 The applicants applied for special leave to appeal to this Court and on 7 September 2012 that application was referred (French CJ and Kiefel J) to an enlarged bench.

The grounds of the application

16 The referred application for special leave was limited to two grounds, which raised the following questions:

- First, whether the FA 1971 extinguished the native title rights of the Narrunga People to take fish from the relevant waters which, absent such extinguishment, would have embraced the conduct the subject of the charge ("the extinguishment question").

- Second, whether, if the answer to the first question is in the negative, s 211 applied to render the prohibition in s 72(2)(c) of the FMA 2007 inapplicable to the applicants in respect of the conduct the subject of the charge ("the s 211 question").

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15 (2012) 112 SASR 514.

The applicants' native title rights

17 It is necessary to identify the native title rights and interests which the applicants asserted and which were conceded at first instance, in the Full Court and in this Court subject to the question of extinguishment. The concession by the prosecutor in the Magistrates Court incorporated, by reference, what the defence counsel said he was going to prove as reported in the magistrate's reasons for judgment. In the Full Court, Gray J said[16]:

> "For the purposes of the trial, the prosecution accepted that both defendants were members of an Aboriginal group whose customary native title rights included fishing in the waters where the abalone were taken."

And further[17]:

> "The complainant and appellant, Peter John Dietman, accepted at trial and on appeal that the abalone were taken for a bona fide non-commercial, domestic or communal need; that the customary rights of the Aboriginal group to which the defendants belonged included fishing; and that the customary rights of the Aboriginal group, judged apart from the effect of prior State legislation, included the taking of abalone described as 'undersized' under present State law." (footnotes omitted)

The respondent, in his written submissions to this Court, made a concession in similar terms. The conceded native title right of the applicants was therefore a right to take fish from the relevant waters. That right comprehended the taking of abalone, including undersize abalone.

The extinguishment question

18 The first question for determination is whether the applicants' native title right to fish in the relevant waters was extinguished by the FA 1971. It was not suggested that the FA 1971 had any effect upon the factual elements of native title rights and interests set out in pars (a) and (b) of the definition in s 223(1) of the NTA. The question therefore was whether the conceded native title rights,

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16 (2012) 112 SASR 514 at 517 [5].

17 (2012) 112 SASR 514 at 517–518 [7].

subsisting before the enactment of the FA 1971, ceased, by reason of that Act, to be "recognised by the common law of Australia" within the meaning of s 223(1)(c).

19 Section 11(1) of the NTA provides that "[n]ative title is not able to be extinguished contrary to this Act." It is prospective in its operation. In *Western Australia v The Commonwealth* (*Native Title Act Case*) the Court held s 11(1) to be valid and that its effect was that "any future State law which purports to extinguish native title contrary to the Act is inoperative by reason of s 109 of the Constitution."[18] It has no application to the question of extinguishment under the FA 1971. Further, as in *Akiba*, it was not said in this case that the enactment of the FA 1971 was a "past act" within the meaning of s 228 of the NTA[19]. The inquiry, as in *Akiba*, is whether or not the FA 1971 was "effective at common law to work extinguishment of native title"[20]. That question is answered by determining whether or not the provisions of the FA 1971 were inconsistent with the continuing recognition by the common law of the Narrunga People's native title right to fish, which the applicants said they were exercising when they took the abalone in respect of which they were charged. That directs attention to the provisions of the FA 1971.

20 The long title of the FA 1971 characterised it as a statute "relating to the management, and conservation of fisheries and the regulation of fishing, and to matters incidental thereto." The Act repealed the *Fisheries Act* 1917 (SA) ("the FA 1917") and eight amending Acts and related provisions in two other Acts[21]. Section 39 of the FA 1917 had provided that:

> "No person shall take or have in his possession or sell any fish or oysters of less than the prescribed weight."

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18 (1995) 183 CLR 373 at 468 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47; see also *Jango v Northern Territory* (2006) 152 FCR 150 at 164 [34] per Sackville J.

19 (2013) 87 ALJR 916 at 931 [58] per Hayne, Kiefel and Bell JJ; 300 ALR 1 at 20.

20 (2013) 87 ALJR 916 at 931 [58] per Hayne, Kiefel and Bell JJ; 300 ALR 1 at 20–21 citing *Western Australia v Ward* (2002) 213 CLR 1 at 62 [5].

21 FA 1971, s 4(1), Schedule.

However, s 48 contained what were described in the marginal note to that section as "special exemptions". Relevantly, the section provided:

> "Nothing in this Act shall apply to—
>
> (a) any full-blooded aboriginal inhabitant of this State taking fish for his household consumption: provided that no explosive or noxious matter is used in the taking of such fish".

Such exemptions were also provided in earlier South Australian fisheries statutes[22]. They were common in the fisheries legislation of other States and Territories[23]. There was no such exemption in the FA 1971.

21 Section 29(1) of the FA 1971 provided:

> "Except as is provided in this Act, a person shall not take fish unless he hold a fishing licence."

The definition of "fish" in the Act covered "fish, mollusc, crustacean and aquatic animal of any species"[24]. The word "take" was also broadly defined:

> "'take' in relation to fish means to fish for, catch, take or obtain fish from any waters by any means whatever, and includes to kill or destroy fish in any waters".

22 The FA 1971 only provided for two classes of fishing licence. They were designated in s 28 as a class A fishing licence and a class B fishing licence, both of which related to commercial fishing operations[25]. Section 29(2) provided:

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22 *Fisheries Act* 1878 (SA), s 14; *Fisheries Amendment Act* 1893 (SA), s 8; *Fisheries Act* 1904 (SA), s 22.

23 Sweeney, "Fishing, Hunting and Gathering Rights of Aboriginal Peoples in Australia", (1993) 16 *University of New South Wales Law Journal* 97 at 99, fn 5.

24 FA 1971, s 5(1).

25 FA 1971, s 30(1).

"A person may without holding a licence, but subject to the other sections of this Act—

(a) take fish otherwise than for the purpose of sale by means of a rod and line, hand line, hand fish spear or declared device;

(b) take crabs otherwise than for the purpose of sale, by a hoop net;

or

(c) take garfish, otherwise than for the purpose of sale, by a dab net."

Read as a whole, the FA 1971 (and s 29 in particular) regulated rather than prohibited fishing in the waters governed by that Act. The prohibition in s 29(1) was subject to the exceptions otherwise provided by the Act and recognised that licences could be granted for commercial fishing. Section 29(2) permitted but regulated fishing "otherwise than for the purpose of sale". Section 29(2) may not have permitted the taking of abalone by hand, but neither s 29 nor the FA 1971 more generally amounted to prohibition of the exercise of a native title right to fish in waters governed by the Act. Because neither s 29 nor the FA 1971 more generally prohibited the exercise of a native title right to fish, the FA 1971 was not inconsistent with the continued existence of, and did not extinguish, then existing native title rights to fish. That the FA 1971 did not wholly prohibit fishing generally (or the taking of abalone in particular) is reinforced by reference to the statutory mechanisms under ss 42 and 47 by which such activities should be permitted.

23 Counsel for the respondent submitted that it was a consequence of s 29 that nobody other than a commercial fisher with a licence could take abalone under the FA 1971. Section 29 was also to be read with the prohibition in s 47(2) on taking undersize fish as declared by proclamation pursuant to s 47(1). By a proclamation made under the FA 1971 on 30 November 1971, all species of abalone less than 10.2 cm were undersize[26]. That proclamation continued in force until the FA 1971 was repealed in 1984[27].

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26 *South Australian Government Gazette*, No 54, 30 November 1971 at 2262–2263.

27 *Fisheries Act* 1982 (SA); *South Australian Government Gazette*, No 29, 14 June 1984 at 1564.

24 There was, however, provision in s 47(4) for an exemption from the prohibition on taking undersize fish. The Governor, by proclamation, could declare that it would "be lawful for any person or any person of a specified class of persons to take undersize fish in accordance with such limitations or conditions as are set out in the proclamation". In addition to the possibility of an exempting proclamation under s 47(4), s 42(1) conferred upon the Minister, notwithstanding any other provision of that Act, a power to "grant to any person a special permit to take fish during such period and in such waters and subject to such terms and conditions as are specified in the permit". Any such permit would render lawful any act done in accordance with its terms and conditions[28].

25 Counsel for the respondent submitted that the use of the word "special" in relation to a permit granted under s 42 imported some kind of constraint on the discretion conferred on the Minister by that section. He also accepted, however, that it was open to construe the term "special" as a designation of permits granted under s 42 in order to distinguish them from the licences otherwise specifically provided for in the Act. The better view perhaps is that permits under s 42 were properly so designated because they could be tailored to authorise otherwise prohibited fishing activity under particular conditions relating to place and time, the kind of taking of fish to be permitted, the species to which the authorisation was to apply, and size and catch limits.

26 There was nothing in the text or context of s 42 to constrain the Minister's discretion in relation to the grant of a special permit, or the conditions to be attached to it, other than the general requirement, implicit in any statutory power, that the power be exercised consistently with the scope, purpose and subject matter of the Act. There was nothing in the Act which would preclude the grant of such permits to members of Aboriginal communities to enable them to exercise traditional fishing rights, subject to such conditions as might be imposed in connection with such a grant.

27 The FA 1971 not only did not generally prohibit non-commercial fishing in the relevant waters, it contained a mechanism by which Aboriginal people could continue to exercise their native title right to fish by taking abalone, including undersize abalone, for communal purposes in accordance with their traditional practices.

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28 FA 1971, s 42(3).

The Full Court's reasoning on extinguishment

28 In the Full Court, Gray J referred to the South Australian fisheries legislation which predated the FA 1971 and concluded that under those regimes "the Aboriginal customary right to fish for personal purposes was largely unaffected."[29] Citing the absence of any general exemption in the FA 1971 with respect to the Aboriginal customary right to fish, his Honour said[30]:

> "It may be reasonably inferred 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."

29 The question whether a statute extinguishes a native title right or interest is, of course, not to be answered by inferences about "decisions" taken by the executive responsible for the introduction of the legislation into parliament or otherwise somehow attributed to the parliament. The question whether a statute enacted prior to the NTA and outside the application of its "past act" provisions extinguishes native title is answered by asking whether the legislation is inconsistent with the subsistence of that native title right. His Honour correctly went on to pose that question. He characterised the FA 1971 as imposing a general prohibition on the taking of undersize fish and, in particular, Greenlip abalone. His Honour said[31]:

> "This was not a case like *Yanner v Eaton* where there was a prohibition subject to an exemption. The substantive effect of the legislation was to place all persons, including Aboriginal persons, under the regime of the statute and to treat all persons as subject to the rights and obligations set out in the statute. As a consequence, the native title right to fish was extinguished and was replaced by a statutory right available to all persons in the State. That right is to fish and take fish not for sale, subject to limitations contained in the Act, including limitations as to size." (footnote omitted)

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29 (2012) 112 SASR 514 at 522 [24].

30 (2012) 112 SASR 514 at 522 [25].

31 (2012) 112 SASR 514 at 525 [35].

Kelly J agreed with Gray J[32].

30 Blue J, who disagreed with their Honours, considered that the reasoning of this Court in *Yanner* applied directly to s 29(1) of the FA 1971. His Honour said[33]:

> "The mere fact that the 1971 Act regulated the right to fish by requiring the fisher to hold a licence was not inconsistent with the continued existence of a native title right to fish and did not extinguish that right."

31 The respondent's submissions depended critically upon the proposition that the FA 1971 abrogated all rights to take fish cognisable by the common law and replaced them with new statutory rights. For the reasons already stated, that submission cannot be accepted. Nor can the submission that the source of any right to fish had to be found in the FA 1971.

32 As appears from the words of exception with which s 29(1) opened and from s 29(2), the FA 1971 did not abrogate all rights to take fish for non-commercial purposes. In respect of activities not covered by s 29(2), it provided for licences for commercial fishing operations[34] and for special permits under s 42. Moreover, the prohibition on taking undersize fish, imposed by s 47, was qualified by the provision for exemptions from that prohibition under s 47(4). The FA 1971 provided a mechanism, specifically the special permit, by which it could be administered consistently with the continuing exercise of native title rights. It cannot be said to have been inconsistent with the recognition by the common law of those rights. The FA 1971 did not extinguish the applicants' native title rights to fish. The applicants succeed on the first ground.

The s 211 question

33 The second question for determination is whether s 211 provided a defence to the offence with which the applicants were charged under the FMA 2007.

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32 (2012) 112 SASR 514 at 525 [38].

33 (2012) 112 SASR 514 at 533 [79].

34 FA 1971, ss 28, 30.

The *Native Title Act* and native title rights

34 The significance of the prosecution concession is to be ascertained by reference to s 211 of the NTA, which was invoked by the applicants in their defence to the charge. It is also to be ascertained by reference to s 223 of the NTA, which defines the terms "native title" and "native title rights and interests" for the purposes of the NTA, including s 211. Section 211 provides:

> "(1) Subsection (2) applies if:
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> (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
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> (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
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> (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
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> (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.
>
> (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.

(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."

35 The term "native title holder" in relation to native title is relevantly defined by s 224(b) as "the person or persons who hold the native title." The terms "native title" and "native title rights and interests" are defined in s 223. That section provides, inter alia:

"(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 Strait Islanders, by those laws and customs, have a connection with the land or waters; and

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

(2) Without limiting subsection (1), ***rights and interests*** in that subsection includes hunting, gathering, or fishing, rights and interests."

36 The operation of s 211 was described in the *Native Title Act Case*[35]:

> "If the affected law be a law of a State, its validity is unimpaired, but its operation is suspended in order to allow the enjoyment of the native title rights and interests which, by s 211, are to be enjoyed without the necessity of first obtaining 'a licence, permit or other instrument'. Again, the effect of s 211 is not to control the exercise of State legislative power, but to exclude laws made in exercise of that power (inter alia) from affecting the freedom of native title holders to enjoy the usufructuary rights referred to in s 211."

37 The concession made by the prosecution and accepted in the Full Court and in this Court, subject to the question of extinguishment, left open the further question whether a provision in the FMA 2007 for the granting of ministerial exemptions from the application of provisions of that Act was a provision for a "licence, permit or other instrument" for the purposes of s 211.

Statutory framework — *Fisheries Management Act* 2007

38 The offence with which the applicants were charged was created by s 72(2)(c) of the FMA 2007. Subject to any limitations expressly prescribed in the FMA 2007, that Act applies in relation to all waters that are within the limits of the State of South Australia[36]. Section 5(3) provides:

> "Native title and native title rights and interests are not affected by the operation of this Act except to the extent authorised under the *Native Title Act 1993* of the Commonwealth."

Counsel for the respondent contended that this was an interpretive provision but did not develop that submission. It is not necessary for present purposes to consider the substantive operation of s 5(3).

39 Part 6 of the Act deals with regulation of fishing and processing. Division 1 concerns commercial fishing and effectively prohibits a person from

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35 (1995) 183 CLR 373 at 474. See also *Yanner v Eaton* (1999) 201 CLR 351 at 399 [120] per Gummow J.

36 FMA 2007, s 5(1)(a).

engaging in fishing for a commercial purpose unless the person holds a licence or permit in respect of the fishery, or acts as the agent of a licence or permit holder[37]. Boats and devices used in commercial fishing are required to be registered[38]. Licences, permits or registrations may be subject to such conditions as the Minister thinks fit. Licences and permits are not transferable[39].

40 Division 2 of Pt 6 deals with Aboriginal traditional fishing and, in particular, the creation of Aboriginal traditional fishing management plans under indigenous land use agreements in a specified area of waters. Such plans must, inter alia, specify the classes of Aboriginal traditional fishing activities that are authorised by the plan[40]. Aboriginal traditional fishing management plans are required to be gazetted[41]. There was no suggestion that there was in existence any Aboriginal traditional fishing management plan relevant to this appeal.

41 Section 72(2)(c) appears in Pt 7 of the Act, which deals with offences and prohibits persons from engaging in various fishing activities. Section 72(2)(c), under which the applicants were charged, provides:

> "Subject to this section, if a person sells or purchases, or has possession or control of—
>
> ...
>
> (c) an aquatic resource of a prescribed class,
>
> the person is guilty of an offence."

"Undersize fish" are designated as "an aquatic resource of a prescribed class" by reg 8(1)(a) of the Fisheries Management (General) Regulations 2007 (SA). The

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37 FMA 2007, s 52.

38 FMA 2007, s 53.

39 FMA 2007, s 57(1).

40 FMA 2007, s 60(2)(f).

41 FMA 2007, s 60(3).

term "undersize fish" is defined in reg 3(1) to mean "fish that is undersize as determined in accordance with Schedule 2". That Schedule provides that Greenlip abalone is undersize if taken in waters of the State, other than the Western Zone, if less than 13 cm in length[42]. The definition of undersize abalone, including Greenlip abalone, in cl 6 of Sched 2 applies only in relation to abalone taken by an unlicensed person[43].

42 Central to the applicants' argument about the application of s 211 of the NTA was s 115 of the FMA 2007. It appears in Pt 10 of the Act, entitled "Miscellaneous", and in Div 1 of that Part, entitled "General". It relevantly provides:

> "(1) Subject to this section, the Minister may, by notice in the Gazette—
>
> (a) exempt a person or class of persons, subject to such conditions as the Minister thinks fit and specifies in the notice, from specified provisions of this Act; or
>
> (b) vary or revoke an exemption, or a condition of an exemption, under this section or impose a further condition.
>
> ...
>
> (4) The Minister may not exempt a person or class of persons from a provision of a management plan or regulations for a fishery or an aboriginal traditional fishing management plan or regulations relating to aboriginal traditional fishing.
>
> (5) An exemption under this section operates for a period (not exceeding 12 months) specified in the notice of exemption.
>
> (6) A person who contravenes a condition of an exemption is guilty of an offence."

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42 Fisheries Management (General) Regulations 2007, Sched 2, cl 6(2)(b)(i).

43 Fisheries Management (General) Regulations 2007, Sched 2, cl 6(4).

43 The Minister is required to keep a number of registers including a register of "authorities" and a register of "exemptions"[44]. The term "authority" is defined in s 3(1) of the Act as:

> "a licence, permit, registration, authorisation or other authority under this Act".

44 The respondent sought to characterise s 115 as a "miscellaneous power ... that sits outside the rest of the regulatory licensing scheme provided for in Pt 6." The exemption power, it was said, was "exceptional" and could not be used to effect a de facto licensing regime not envisaged by the Act. That was an unexplained conclusionary statement. In any event, that submission was an answer to the wrong question. The question here is not whether an exemption differs from a licence within Pt 6 of the FMA 2007. Nor is it whether the exemption power is constrained by a requirement that it be exercised only in exceptional circumstances. The question is whether it is a "licence, permit or other instrument" for the purposes of s 211 of the NTA. That characterisation depends upon the construction of s 211, not upon the construction of the FMA 2007.

The application of s 211

45 The determination of whether s 211(2) of the NTA afforded a defence to the charge against the applicants depends upon whether an exemption under s 115 of the FMA 2007 was "a licence, permit or other instrument granted or issued to them" under that law within the meaning of s 211(1)(b). The reduction of this aspect of the application to that narrow question of statutory characterisation arises because none of the other criteria for the application of s 211(2) in the circumstances of this application is in dispute. The exercise or enjoyment of the applicants' native title rights in relation to the relevant waters consists of carrying on fishing or gathering abalone, each of which is a particular "class of activity" within the meaning of s 211(1)(a) and as defined in s 211(3). The condition created by s 211(1)(a) is satisfied. It is not in dispute that the FMA 2007 prohibits or restricts persons from fishing for or gathering undersize abalone. The question in contention is whether it does so "other than in accordance with a licence, permit or other instrument granted or issued" under

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44 FMA 2007, s 116(1).

the FMA 2007. Subject to that question, the condition in s 211(1)(b) is satisfied. It is also not in dispute that the FMA 2007 does not provide that exemptions are only to be granted or issued for research, environmental protection, public health or public safety purposes. Thus, s 211(1)(ba) is satisfied. Finally, it is not in dispute that the FMA 2007 is not a law that confers rights or interests only on or for the benefit of Aboriginal peoples or Torres Strait Islanders. Thus, s 211(1)(c) is satisfied.

46 It was common ground that the conduct of the applicants in taking the undersize abalone the subject of the charge was done for the purpose of satisfying their personal, domestic or non-commercial communal needs within the meaning of s 211(2)(a). It was also common ground that, subject to the question of extinguishment pursuant to the FA 1971, the applicants took the abalone in the exercise or enjoyment of their native title rights and interests within the meaning of s 211(2)(b).

47 The respondent disclaimed any suggestion that the FMA 2007 extinguished native title fishing rights. Any such contention would have raised a question about the interaction between that Act and the NTA. Such a contention would, in any event, have been difficult to maintain in light of the conclusion already reached about the effect of the FA 1971 upon native title rights.

48 In the *Native Title Act Case*[45], this Court considered and rejected a challenge to the validity of s 211(2). The construction of the term "licence, permit or other instrument granted or issued … under the law" in s 211 was not in issue in that case. The term is not to be read narrowly. It has application to a category of laws which prohibit or restrict activities, including fishing and gathering. Such laws may provide a variety of schemes for permitting some people or groups of people to conduct otherwise prohibited or restricted activities subject to terms and conditions which may be specified by law or lie within the discretion of the grantor or issuer of the "licence, permit or other instrument". Those terms accommodate a large range of possible statutory regimes. They are apt to cover any form of statutory permission issued to individuals or classes or groups of people to carry on one or other of the classes of activities described in s 211(3).

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45 (1995) 183 CLR 373.

49 The exemption for which s 115 of the FMA 2007 provides may be granted to individuals or classes of persons for specified activities, on specified conditions and for a specified time. Such exemptions are at least a form of "other instrument" granted or issued under the relevant law of the State and fall within s 211(1) of the NTA. The defence under s 211 was available to the applicants.

Conclusion

50 The applicants should be granted special leave to appeal from the decision of the Full Court of the Supreme Court of South Australia. The appeal should be allowed. The decision of the Full Court should be set aside and in lieu thereof the appeal to the Supreme Court from the Magistrates Court should be dismissed. The respondent should pay the applicants' costs in the Full Court of the Supreme Court of South Australia and in this Court.