

KARPANY & ANOR v DIETMAN (A18/2012)

Court appealed from: Full Court, Supreme Court of South Australia
[2012] SASCFC 53

Date of judgment: 11 May 2012

Date special leave referred: 7 September 2012

The applicants, father and son, were charged with being in joint possession or control of 24 undersized Greenlip abalone, contrary to s 72(2)(c) of the *Fisheries Management Act 2007* (SA) (“the FM Act”). When the matter came before the Magistrate, it was accepted by the applicants that, if s 72(2)(c) was operative, the commission of the offences was proved. However, the applicants asserted that they were entitled to take the undersized abalone. The prosecution accepted that both applicants were members of an Aboriginal group (“the Narrunga People”) whose customary native title rights included fishing in the waters where the abalone were taken. The applicants submitted that the Minister’s power to exempt a person from specified provisions of the FM Act had the result that the South Australian regime regarding the taking of abalone was one of prohibition subject to obtaining a licence or permit within the meaning of s 211 of the *Native Title Act 1993* (Cth) (“the NT Act”). Consequently s 72(2)(c) was inoperative because of the terms of s 211 of the NT Act. The Magistrate accepted the applicants’ argument and dismissed the charges.

The respondent’s appeal to the Full Court of the Supreme Court (Gray, Kelly and Blue JJ) was upheld. There were two grounds of appeal: first, the applicants were not exercising native title rights because they had been extinguished in 1971 by s 29(2) of the *Fisheries Act 1971* (SA) (“the 1971 Act”); and, secondly, that the Magistrate erred in holding that s 72(2)(c) of the FM Act relevantly prohibited persons from fishing “*other than in accordance with a licence, permit or other instrument granted or issued to them under the law*” within the meaning of s 211(1)(b) of the NT Act.

On the first ground of appeal, the majority of the Court (Gray and Kelly JJ, Blue J dissenting on this ground) found that the applicants’ native title rights had been extinguished. The majority held that native title will be extinguished where the native title right or interest is inconsistent with a right conferred by statute: this calls for a comparison of the legal nature and incidents of the native title right and interest with that of the statutory right. In this case the relevant native title right was the applicants’ right to access and take fish. The substantive effect of the 1971 Act 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 replaced by a statutory right available to all persons in the State, namely the right to fish and take fish not for sale, subject to limitations contained in the Act, including limitations as to size. Blue J was of the view that the s 29(2) of the 1971 Act was merely regulatory and not a statutory prohibition inconsistent with native title, so that the native title rights were not extinguished.

On the second ground, the Court noted that s 115 of the FM Act gives to the Minister a general power to exempt a person or class of persons from specified provisions of the Act, including s 72(2)(c). However, the Court found there were marked contrasts

between a fishing licence, fishing permit or boat registration under Part 6 and an exemption under s 115. Whereas licences, permits and boat registrations regulated commercial fishing activities, s 72(2)(c) prohibited certain activities, subject only to the power of the Minister to grant an exemption under s 115. The mere existence of that reserve power does not convert a prohibition regime into a mere licensing regime. Thus the Court unanimously held that the Magistrate was in error in concluding that s 211 of the NT Act applied to s 72(2)(c) of the FM Act to make the State law inoperative.

On 7 September 2012 the application for special leave was referred to an expanded bench to be argued as on appeal. A Notice of Constitutional Matter has been served and the Attorney-General for South Australia and the Commonwealth will be intervening. The South Australia Native Title Services Limited is also seeking leave to intervene in support of the applicants.

This matter had previously been listed for hearing before an expanded bench in February 2013, however that hearing date had been vacated. Subsequently, because argument in this matter would be affected by the outcome of this Court's decision in *Akiba v Commonwealth of Australia & Ors*, this matter was not relisted until after judgment in the *Akiba* matter was delivered.

The questions of law said to justify a grant of special leave are:

- Whether the native title rights and interests to fish of the Narrunga People, including the applicants, had been extinguished by virtue of s 29 of the *Fisheries Act 1971 (SA)*;
- Whether s 72(2)(c) of the *Fisheries Management Act 2007 (SA)* is not operative by virtue of s 211 of the *Native Title Act 1993 (Cth)*.