

**IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY**

**NO A18 OF 2012**

On appeal from  
the Supreme Court of South Australia

**BETWEEN:**

**OWEN JOHN KARPANY**

First Applicant

**DANIEL THOMAS KARPANY**

Second Applicant

**AND:**

**PETER JOHN DIETMAN**

Respondent

**SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH  
OF AUSTRALIA AS INTERVENER**



Filed on behalf of the Attorney-General of the Commonwealth  
of Australia as Intervener by:

Australian Government Solicitor  
Level 42, MLC Centre  
19 Martin Place  
Sydney NSW 2000  
DX444 Sydney

Date of this document: 30 October 2012

Contact: Gordon Kennedy

File ref: 12069924

Telephone: 02 9581 7459

Facsimile: 02 9581 7734

E-mail: [gordon.kennedy@ags.gov.au](mailto:gordon.kennedy@ags.gov.au)

**PART I FORM OF SUBMISSIONS**

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1. This submission is certified as being in a form suitable for publication on the internet.

**PART II BASIS OF INTERVENTION**

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2. The Attorney-General of the Commonwealth of Australia (Commonwealth Attorney-General) intervenes in this application for special leave to appeal (and, should leave be granted, the appeal) pursuant to s 78A of the *Judiciary Act 1903* (Cth) in response to the Applicants' notice pursuant to s 78B of that Act.
- 10 3. To the extent it may be necessary, the Commonwealth Attorney-General also seeks leave to intervene on the basis that the special leave application and, should leave be granted, the appeal:
  - 3.1. raises matters of public importance and general application, namely: whether the commercial incident of native title fishing rights is severable from the general native title right to fish; in what circumstances the native title right to fish will be extinguished in whole or in part; and the construction and operation of s 211 of the *Native Title Act 1993* (Cth) (NTA): affidavit of Sally Ann Davis affirmed 30 October 2012 (Davis) at [7]-[9];
  - 20 3.2. requires consideration of the same central issue that is the subject of the appeal in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Commonwealth of Australia and Ors (Akiba)* (B58/2012), to which the Commonwealth is a party: Davis at [10]-[15];
  - 3.3. raises issues of law that are likely to be relevant to many native title determination applications in South Australia and elsewhere in Australia, to which the Commonwealth is a party: Davis at [16]-[24].
4. The Commonwealth Attorney-General intervenes:
  - 30 4.1. to support the Applicants on the issue of whether their native title right to fish for non-commercial purposes has been extinguished by virtue of s 29 of the *Fisheries Act 1971* (SA) (1971 Act);
  - 4.2. to support the Respondent on the issue of whether s 72(2)(c) of the *Fisheries Management Act 2007* (SA) (FM Act) is rendered inoperative by virtue of s 211 of the *Native Title Act 1993* (Cth) (NTA).

5. The Commonwealth Attorney-General contends that:

5.1. s 29 of the 1971 Act did not extinguish all native title rights to fish, but rather, extinguished only native title rights to take fish for commercial purposes;

5.2. an exemption under s 115(1)(a) of the FM Act, if granted, would not be a "licence, permit or other instrument granted or issued" for the purposes of s 211(1) of the NTA and accordingly s 211 does not render s 72(2)(c) of the FM Act inoperative;

10 5.3. the issues raised by the application are sufficiently important, and sufficiently related to the appeal in *Akiba*, to justify a grant of leave to appeal for the Applicants. If the submissions herein are accepted, the result will be that the appeal will ultimately be dismissed;

20 5.4. the Respondent, by its proposed Notice of Contention, raises another basis on which the appeal might ultimately be dismissed. The Applicants apparently will oppose the raising of that issue in this Court. As it is not yet clear whether the Court will consider it appropriate or necessary to consider that other basis, no submissions are put in relation to it at this stage. To the extent that basis does become relevant, any separate s 109 issues to which it gives rise could be addressed at that time.

#### **PART III LEAVE TO INTERVENE**

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6. To the extent it may be necessary, leave to intervene should be granted because the Commonwealth Attorney-General:

6.1. has a special interest in the application and, should leave be granted, the appeal, due to the matters set out in paragraphs 3.1 to 3.3;

6.2. will make submissions that are different to those of the Applicants and Respondent, being submissions to which the Court should have regard in its consideration of the issues.

#### **PART IV LEGISLATIVE PROVISIONS**

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30 7. Applicable provisions, additional to those included with the Applicants' and the Proposed Interveners' Submissions are annexed to these Submissions.

**Ground 1: Extinguishment of the native title right to fish by the 1971 Act**

8. The particular finding challenged by the Applicants is the finding of the majority of the Full Court of the Supreme Court of South Australia that the enactment of the 1971 Act had extinguished native title rights and interests to fish.<sup>1</sup>
9. The issue arose in the context of a prosecution for possessing undersized greenlip abalone contrary to s 72(2)(c) of the FM Act. The defendants (here the Applicants), being members of the Narrunga People, asserted that they were entitled to take the undersized abalone in the exercise of their native title right to fish, relying on s 211 of the NTA as a defence to the charge.
10. No question of extinguishment was argued before the Magistrate, but on appeal, it was argued by the complainant (here the Respondent) that s 29 of the 1971 Act took away all rights to fish and replaced them with a new right to take fish other than for the purposes of sale.<sup>2</sup>
11. The majority of the Full Court concluded that s 29 of the 1971 Act "validly extinguished native title". That conclusion is explained in *Karpany* at [35]:

The effect of the 1971 Act was to bring all persons under the regime of the Act and to prohibit the taking of undersized fish and in particular Greenlip abalone. The object of the legislation was to impose the same obligations on all persons. 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.

12. The source of the statutory right referred to by Gray J is s 29 of the 1971 Act which relevantly provided:

- (1) Except as is provided in this Act, a person shall not take fish unless he hold (sic) a fishing licence.
- (2) 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 purposes of sale, by a dab net.

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<sup>1</sup> *Dietman v Karpany* (2012) 112 SASR 514 (*Karpany*): [15], [36] (Gray J) [Special Leave Application Book (SLAB)/23, 29], [38] (Kelly J) [SLAB/30].

<sup>2</sup> *Karpany* at [27] [SLAB/27].

(emphasis added)

13. The error of the majority of the Full Court was to interpret s 29 as providing a statutory right “to fish and take fish not for sale” which extinguished the right to fish entirely,<sup>3</sup> in circumstances where a person taking fish otherwise than for sale (as specified) was **not** required to hold a licence.
14. There is authority for the proposition that licences granted under fisheries legislation are “a new species of statutory entitlement, the nature and extent of which depends entirely on the terms of the legislation”.<sup>4</sup>
- 10 15. In *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (*Harper*) at 334-335, Brennan J described the licensing scheme which the *Fisheries Act* 1959 (Tas) and the *Sea Fisheries Regulations* 1962 (Tas) established in relation to abalone fisheries as having the consequence that “those who may lawfully take abalone do so ... in the exercise of the statutory right of a licensee”, with the previously existing common law right having been abrogated. Mason CJ, Deane and Gaudron JJ (at 325) described the right of a licensee under the Tasmanian legislation as “an entitlement of a new kind created as part of a [statutory] system...”.
- 20 16. In *Harper* it was the imposition of a general prohibition on the exploitation of the abalone resource, followed by a regime of statutory licences for the taking of limited quantities of abalone, which the High Court held had abrogated the previously existing (public) right.
17. The same reasoning would be applicable in the present case to conclude that the 1971 Act, which generally prohibits the taking of fish for sale and imposes a licensing regime for commercial fishing, has the result that any right to fish for commercial purposes is a statutory entitlement which is inconsistent with, and extinguished, any native title right to take fish for commercial purposes.
- 30 18. This is because a licensing regime which prohibits unlicensed fishing for commercial purposes manifests a clear and plain intention to extinguish all common law rights to take fish for commercial purposes, including the native title rights.<sup>5</sup>
19. The principles for the extinguishment of native title which underpin such a conclusion are not controversial: viz

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<sup>3</sup> *Karpany* at [35] [SLAB/29].

<sup>4</sup> See *Bienke v Minister for Primary Industries & Energy* (1996) 63 FCR 567 at 585, relying on *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325. See also *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 168-9. And see *Commonwealth v Akiba* (2012) 289 ALR 400 (*Akiba FFC*) at [70], [73], [87]; noting the grant of special leave to appeal on this issue.

<sup>5</sup> See also *Akiba FFC* at [64], [66].

19.1. For extinguishment of native title to be brought about by an exercise of sovereign power through legislation, the legislation in question must manifest a clear and plain intention to extinguish native title: *Western Australia v Ward* (2002) 213 CLR 1 (*Ward HC*) at [78].

19.2. The test is an objective one and does not involve an enquiry into the state of mind of the legislators: *Ward HC* at [78]; see also *Wik Peoples v Queensland* (1996) 187 CLR 1 (*Wik HC*) at 85 per Brennan CJ.

10 19.3. Extinguishment of native title by legislation may be implicit: *Wik HC* at 126 per Toohey J, 185-186 per Gummow J, 247, 249 per Kirby J; see also 155, 166 per Gaudron J. In ascertaining whether legislation has the effect of extinguishing native title, one must have regard to the language, character, and purpose which the statute was designed to achieve: *Wik HC* at 247 per Kirby J.

19.4. Native title rights will be extinguished where they are inconsistent with rights conferred by statute. The test to be applied in determining inconsistency is what is described as "the inconsistency of incidents" test: *Ward HC* at [78]-[85]; *Wik HC* at 185; *Fejo v Northern Territory* (1998) 195 CLR 96 at [43].

20 20. Applying those tests in the present case, it is only the right to take fish for commercial purposes which is inconsistent with the statutory licensing regime and which is extinguished by the 1971 Act.<sup>6</sup>

21. The conclusion that the licensing regime in the 1971 Act is directed at commercial fishing is reinforced by having further regard to ss 5, 28 and 30 of the 1971 Act relating to fishing licences.<sup>7</sup>

22. "[F]ishing licence" is defined in s 5 to mean:

...a class A fishing licence or a class B fishing licence referred to in section 28 of this Act

23. Section 28 relevantly reads:

(1) There shall be two classes of Fishing licences –

30 (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 .....

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<sup>6</sup> See also the conclusion in *Akiba FFC* at [87] viz, "The right to take fish for commercial purposes cannot survive the enactment of laws which prohibit the unlicensed taking of fish for commercial purposes."

<sup>7</sup> Section 5 of the *Fisheries Act* 1904 also provided for licences to take fish for sale or barter; s 22 provided that the Act did not apply, *inter alia*, "to any aboriginal native taking fish for his own use".

24. Under s 30 of the 1971 Act, a person shall not be granted a fishing licence of either class “unless he satisfies the Director that he intends to carry on the business of fishing for profit...”.<sup>8</sup>
25. That licences were only available for commercial fishing under the 1971 Act, and that s 29(2)(a) expressly provided for the taking of fish “otherwise than for the purpose of sale” by various means, reinforces the view that it is only the right to take fish for commercial purposes which is inconsistent with the statutory regime.
- 10 26. It follows that the new statutory right which was created by the licensing regime in the 1971 Act was a statutory right to take fish for commercial purposes, there being a statutory prohibition on unlicensed fishing for commercial purposes.
27. Unlicensed fishing for non-commercial purposes was not similarly prohibited.<sup>9</sup>
28. The distinction made in the fisheries legislation between engaging in an activity for commercial or for non-commercial purposes is also commonly made in native title determinations where the right to take resources for trading or commercial purposes is treated as a discrete and severable characteristic of a general right to take resources.<sup>10</sup>
- 20 29. The same distinction is recognised in s 211 of the NTA.<sup>11</sup> In the context of current legislation, s 211 provides for the preservation of certain native title rights (including to fish) exercised, inter alia, for non-commercial purposes.
30. In the present case, the Applicants were carrying out the activity of fishing for non-commercial purposes.<sup>12</sup>
31. For the reasons set out above, the discrete and severable non-commercial characteristic of fishing was not subject to a licensing regime under the 1971 Act, and was not extinguished by that Act. The relevant (non-commercial) native title rights of the Applicants were not extinguished by the 1971 Act.

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<sup>8</sup> See also ss 16 and 20 1971 Act, requiring boats used for the purpose of taking fish for sale to be registered.

<sup>9</sup> See also Proposed Interveners Submissions filed 9 October 2012 at [29].

<sup>10</sup> See *Commonwealth v Yarmirr* (1999) 101 FCR 171 at [255]; *Neowarra v Western Australia* [2003] FCA 1402 at [777]; *Gumana v Northern Territory* (2005) 141 FCR 457 at [247(b)]; *Akiba v Queensland (No 2)* (2010) 270 ALR 564 at [847].

<sup>11</sup> Section 211 NTA only removes the relevant prohibition or restriction where the native title activity is done for the purpose of satisfying “personal, domestic or non-commercial communal needs”: s 211(2)(a).

<sup>12</sup> See Applicants Amended Submissions filed 9 October 2012 at [10].

32. In dissent, Blue J concluded that the 1971 Act did not extinguish a native title right to fish, referring to and relying upon *Yanner v Eaton* (1999) 201 CLR 351 (*Yanner*) to find that:<sup>13</sup>

...the mere fact that the Fisheries Act 1971 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.

10 33. The first difficulty with Blue J's reasoning is that the particular activity engaged in by the Applicants (fishing for non-commercial purposes) did not require them to hold a license, so considerations of whether s 29 of the 1971 Act is regulatory or prohibitory in nature are not relevant in the context of any extinguishment of the relevant native title right to fish for non-commercial purposes.

34. To the extent that Blue J's reasoning should be taken as applying to the commercial aspect of fishing, which was subject to a licensing regime, it should be rejected for the reasons set out above.<sup>14</sup>

35. Further, to the extent *Yanner* was relied upon by Blue J in his conclusion that the 1971 Act did not extinguish **any** native title rights to fish, the reasoning in *Yanner* requires close attention.

20 36. In *Yanner*, the High Court considered whether the *Fauna Conservation Act* 1974 (Qld) (current at the time) extinguished a native title right found to have been exercised in the taking of two estuarine crocodiles. The Act prohibited the taking of fauna (at least in most situations) unless the person was licensed. It also vested property of all fauna in the Crown. The State's contention was that the vesting of all fauna in the Crown was inconsistent with the continued existence of native title rights to take such fauna.

30 37. Close attention to the reasoning in *Yanner*<sup>15</sup> makes clear that the only relevant "regulation" of the native title rights possibly giving rise to extinguishment was the vesting of fauna in the Crown, not an earlier prohibition on the unlicensed taking of fauna.<sup>16</sup> There was no argument put about when a licensing regime could effect an extinguishment.

38. The decision in *Yanner* turned upon the availability and operation of s 211(2) of the NTA upon the prohibition on unlicensed hunting.<sup>17</sup>

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<sup>13</sup> *Karpany* at [79] [SLAB/40].

<sup>14</sup> In the present case, on the Commonwealth Attorney-General's argument, there is no need to go further than to conclude that the Applicants' native title right to fish for non-commercial purposes has not been extinguished by the 1971 Act.

<sup>15</sup> Particularly at [36]-[37].

<sup>16</sup> See also *Akiba FFC* at [79].

<sup>17</sup> See *Yanner* at [121]-[123]. See also Respondent's Submissions filed 23 October 2012 at [28].



39. Further, the discussion in *Yanner* that regulation may shade into prohibition raises the question whether prohibition is, in fact, necessary to extinguish native title. The judgment in *Yanner* refers in footnotes to cases about the ambit of the legislative power to “regulate” an activity or matter,<sup>18</sup> and those cases indicate that some level of prohibition may be considered and authorised by such a power.
40. It is clear that complete prohibition on an activity empowered by a native title right will extinguish that right: see *Ward HC* at [265]. There is some support for the view that a mere licensing scheme does not extinguish native title: that is, an absolute prohibition on some relevant kind of activity is necessary before there is extinguishment.<sup>19</sup>
41. However, where a regime, such as the fisheries legislation under consideration here, prohibits the right to fish for commercial purposes, and then enacts a licensing regime (a prohibition coupled with permissions in the form of statutory rights), it is not a regime which “regulates” rights which are assumed to exist. Rather, it is a regime that comprehensively defines the rights and limits on those rights, as to the relevant kind of activity.
42. It is, however, clear that the Applicants' native title rights in the present case (being non-commercial in nature) do not fall within the scope of the licensing regime, and are not extinguished by the 1971 Act.
43. The finding of the majority of the Full Court that all native title rights to fish (including the Applicants' rights) were extinguished is in error and should be corrected by this Court. The correct finding should be that the Applicants' native title right to fish was not extinguished by the 1971 Act.

## Ground 2: Section 211 of the NTA

44. The issue then for determination is whether s 72(2)(c) of the FM Act is properly characterised as a law that comes within s 211(1)(b) of the NTA. If it is, then there is no dispute that s 109 of the Constitution would render the provision inoperative.
45. The Full Court was correct to conclude that s 72(2)(c) is not such a law because:

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<sup>18</sup> See *Yanner* footnote 58, referring to *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 188-190 per Isaacs J, 211-12 per Higgins J; *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 148-9 per Starke J, 155-6 per Dixon J; *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 93-4 per Rich ACJ, 95 per Starke J; *Municipal Corporation of City of Toronto v Virgo* [1896] AC 88 at 93-4.

<sup>19</sup> *Sampi v Western Australia* [2005] FCA 777 at [1146] per French J holding that there was no extinguishment because the *Pearling Act* 1912 (WA) was “not for absolute prohibition but for licensing regimes”.

45.1. the general power under s 115 of the FM Act to exempt a person or class of persons from specified provisions of the Act does not fall within the concept of a “licence, permit or other instrument granted or issued to them” within the meaning of s 211(1)(b) of the NTA;

45.2. an activity that can be done lawfully only because an exemption has lifted the prohibition that would otherwise apply to it, is not done “in accordance with” the exemption.

**Licence, permit etc.**

- 10 46. The operation of s 211(1)(b) of the NTA does not turn on whether s 72(2)(c) of the FM Act is regulatory or prohibitory *per se*.<sup>20</sup> Indeed, the plurality in *Yanner*<sup>21</sup> referred to the kind of law described by s 211 as a “conditional prohibition”.
47. The critical question is whether s 72(2)(c) of the FM Act is a law that prohibits or restricts persons from carrying on a class of activity<sup>22</sup> “other than in accordance with a licence, permit or other instrument granted or issued to them”.<sup>23</sup>
48. The first task is to determine whether an exemption under s 115 of the FM Act can properly be characterised as a “licence, permit or other instrument” for the purposes of the NTA.
- 20 49. Blue J (with whom Gray and Kelly JJ agreed on this issue) held that s 211(1)(b) of the NTA contemplated a licence, permit or other instrument which is granted or issued to a specific person upon satisfaction that the person meets criteria determined by the relevant legislation or by the grantor or issuer of the instrument.<sup>24</sup> That analysis is consistent with the decisions of this Court in *State of Western Australia v The Commonwealth*<sup>25</sup> and *Ward HC*<sup>26</sup>, and with the plain words of the section.
50. His Honour distinguished the licence or permit regime in Part 6 of the FM Act (which provides an authority to do the activity that is otherwise prohibited),

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<sup>20</sup> Cf. Applicants' Amended Submissions at [43(e)] and [44], [46-47]. It is difficult to see how ss 5(3) and 60 of the FM Act assist the Applicants. If the Applicants are arguing that the effect of those provisions is that s 72(2)(c) does not apply to native title holders, or somehow applies differentially, the Applicants would have no need to rely upon s 211 of the NTA for a defence.

<sup>21</sup> *Yanner* at 373 [39].

<sup>22</sup> Section 211(3)(b) NTA defines “fishing” as a class of activity for the purposes of s 211. In *Yanner* at [121], Gummow J considered that the hunting and killing of the estuarine crocodiles was a “class of activity” for the purposes of s 211(2) of the NTA.

<sup>23</sup> See s 211(1)(b) NTA.

<sup>24</sup> *Karpany* at [58] [SLAB/34].

<sup>25</sup> (1995) 183 CLR 373 at 474, reproduced in *Karpany* at [53] [SLAB/32,33].

<sup>26</sup> (*Ward HC*) at [264-265], reproduced in *Karpany* at [57] [SLAB/33,34].

from the exemption regime in Part 10 (which excludes the activity from the scope of the prohibition)<sup>27</sup>, and concluded that an exemption under s 115 cannot be equated with a licence or permit. That result is clearly correct.

51. It is also distinguishable from an exemption under the *Fisheries Resources Management Act 1994 (WA)* (WA Act) considered in *Wilkes v Johnsen* (1999) 21 WAR 269 (*Wilkes*) when regard is had to the following:

51.1. an exemption under s 115 of the FM Act is constituted by a notice in the Gazette, which is not granted or issued to anyone<sup>28</sup>;

10 51.2. the FM Act only provides for applications to be made for an "authority" (being a licence, permit or registration), not for an exemption<sup>29</sup>;

51.3. under the FM Act, a person is only required to carry an authority with them (not an exemption) when carrying out the activity, and a fisheries officer only has power to require a person to produce an authority for inspection (not an exemption)<sup>30</sup>;

51.4. the evidentiary provisions of the FM Act only apply to an authority, not to an exemption.<sup>31</sup>

20 52. Additional support for Blue J's construction comes from s 115 being a general power to exempt a person from any provision of the FM Act, not just the offences in Part 7. It could be used, for example, to exempt a person or class of persons from the necessity to have a licence or permit for a particular activity. It would be a strange result if an exemption that removes the requirement to hold a licence or permit is itself then categorised as "a species of licence or permit": cf. *Wilkes* at [94].

53. Further, the mere possibility that the Minister might exempt some person at some time from the prohibition otherwise contained in s 72(2)(c) of the FM Act does not make that provision, even combined with s 115, a law that "allows others to engage in those activities".<sup>32</sup>

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<sup>27</sup> *Karpany* at [60]-[64] [SLAB/10].

<sup>28</sup> *Karpany* at [64.1] [SLAB/35]. Cf. an exemption under s 7 of the WA Act is issued by instrument in writing, apparently given to the person or persons to whom the exemption applies: *Wilkes* at [6].

<sup>29</sup> FM Act s 54. Cf. ss 7(4)(a)-(c) of the WA Act expressly provided for an application to be made for an exemption in a prescribed form accompanied by payment of a prescribed fee: *Wilkes* at [6].

<sup>30</sup> FM Act ss 59, 81(1)(i). Cf. s 189(1)(b) of the WA Act gives a fisheries officer power to require a person to state whether they were authorised or exempt, and under s 190(1)(a) a person can be required to produce any authorisation or exemption which the person states that he or she holds: *Wilkes* at [8].

<sup>31</sup> FM Act s 126(1). Cf. under s 212 of the WA Act, for evidentiary purposes, both exemptions and authorisations were dealt with identically: *Wilkes* at [9], [94].

<sup>32</sup> Cf. Commonwealth, *Parliamentary Debates*, Senate, 20 December 1993, 5440, (Christabel Chamarette), reproduced in *Karpany* at [54] [SLAB/33].

**“in accordance with”**

54. The plain meaning of the words “in accordance with” in s 211(1)(b) is that the authority to carry on the activity must derive from the licence, permit or other instrument issued pursuant to the statute.
55. The grant of a licence or permit to do an activity, and an exemption from a prohibition against the doing of the activity, may both have the same practical effect in the sense that the doing of the activity is lawful. But it is another thing altogether to conclude, in the latter case, that the activity is done “in accordance with” the exemption.
- 10 56. An exemption that simply removes a prohibition against the doing of an activity is not readily characterised as the source of authority to do the activity.
57. By way of analogy, a statute may provide that a person over the age of 75 must have a licence to operate a machine. A 60 year old person can lawfully operate the machine without a licence, but the 60 year old does not derive their authority to do so from the statute. The statute says nothing about them. If a 76 year old person is exempted from the requirement to have a licence, they can also lawfully operate the machine. But the 76 year old does not derive their authority to do so from the statute any more than the 60 year old. Rather, the 76 year old is at liberty to operate the machine under the general law because the statutory prohibition has been removed.
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58. Finally, even if s 211 of the NTA is properly categorised as beneficial legislation, that would not of itself warrant the provision being construed in a way that gives no sensible meaning to the words “in accordance with” and “to them”.<sup>33</sup>

**Section 109 of the Constitution**

59. As to the relationship between s 72(2)(c) of the FM Act and s 211 of the NTA, no s 109 inconsistency arises because s 211(1)(b) does not apply to the scheme of the FM Act created by ss 72(2)(c) and 115. On that basis, the appeal would be dismissed.
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60. If, contrary to the above argument, the exemption pursuant to s 115 of the FM Act falls within the ambit of s 211(1)(b), then s 211 would prevail over and render inoperative the provisions of s 72(2)(c) of the FM Act as a consequence of the operation of s 109 of the Constitution.<sup>34</sup>

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<sup>33</sup> Cf. Proposed Intervener’s Submissions at [45].

<sup>34</sup> Before the Full Court the parties accepted that if s 211 applied it would prevail over and render inoperative the provisions of s 72(2)(c) of the FM Act as a consequence of the operation of s 109 of the Constitution: see *Karpany* at [6] [SLAB/20,21]. See, however, the matter reserved in paragraph 5.4 above.

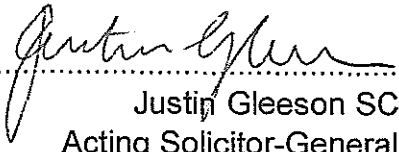
**PART VI TIME ESTIMATE**

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61. The estimate of time for the Commonwealth Attorney-General to present oral argument is one half hour.

Date of filing: 30 October 2012

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Justin Gleeson SC  
Acting Solicitor-General  
Telephone: 02 6141 4146  
Facsimile: 02 6141 4149  
Email: justin.gleeson@ag.gov.au

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.....  
Raelene Webb QC  
Counsel  
Telephone: 08 8901 7704  
Facsimile: 08 8901 7719  
Email: raelene.webb@magayamirr.com

30

.....  
Nitra Kidson  
Counsel  
Telephone: 07 3221 3785  
Facsimile: 07 3221 7781  
Email: nkidson@higginschambers.com.au

Counsel for the Attorney-General of the Commonwealth of Australia as Intervener

**ANNEXURE OF APPLICABLE LEGISLATIVE PROVISIONS**

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**FISHERIES ACT 1904 (SA)**

**Division II - Powers of the Minister**

**Section 5 (as enacted)**

5. The Minister may-

- (a) Appoint persons to issue licences to fishermen.
- (b) Authorise persons to receive the heads of cormorants, turtles, and tortoises.
- 10 (c) Determine the rate of payment to be made for the destruction of cormorants, turtles, and tortoises.
- (d) Direct the manner of disposal of any forfeited device or fish.
- (e) Empower any Inspector to enter any place at all times to search for and take any forfeited device or fish, and to search for and seize any device which, in his opinion, is used, or intended to be used, contrary to the provisions of this Act.
- (f) Issue permits for taking fish from closed water for scientific purposes or for stocking other water.
- 20 (g) Direct the carrying out of experiments in methods of culture, propagation, and catching of fish, and take steps for the discovery of spawning places and trawling grounds.
- (h) Establish any hatchery in or over any water, or in or over any private property, with the consent of the owner or lessee, on such terms and conditions as may be agreed.
- (i) The establishment of a hatchery by the Minister shall have the effect of vesting in the Minister the exclusive right during the continuance thereof to stock such hatchery with fish, and to take therefrom any fish, and to sell or otherwise dispose of fish from such hatchery.

## **Part V - Miscellaneous**

### **Section 22 (as enacted)**

22. Nothing in this Act shall apply to any person using a rod and line, or hand-line, or a landing-net to secure fish taken with a rod and line or hand-line or a hand crab-net, nor to any device used solely for catching eels or congolly, nor to any person using a hand shrimp-net, nor to any aboriginal native taking fish for his own use, nor to any person taking fish solely for bait, nor to any person taking fish in water of which he is the owner, nor to any person authorised by such owner to take fish in such water, nor to any person with the written permission of the Minister catching fish for the *bona fide* purpose of removing them to stock other water, or otherwise in the discretion of the Minister, nor to any device or boat used or fish taken by such last-mentioned person for the purpose aforesaid: Provided that fish caught by any method mentioned in this section (crab-nets excepted) shall not be sold or bartered.

## **FISHERIES ACT 1971 (SA)**

### **Part IV - Regulations - Legal Procedure, Finance and Supplementary Provisions**

#### **Section 5 (as enacted)**

5(1) In this Act, unless the context otherwise requires -

"aquatic reserve" means-

- (a) lands which have been reserved by proclamation under the Crown Lands Act, 1929-1969, for the purposes of an aquatic reserve; and
- (b) waters declared by proclamation pursuant to section 24 of this Act to be-
  - (i) included in an aquatic reserve;
  - or
  - (ii) an aquatic reserve:

"boat" includes ship, vessel and marine craft of any description, whether floating, hovering or submersible:

"Crown lands" means Crown lands as defined in the Crown Lands Act, 1929-1969:

"dab net" means a device for scooping fish from the water by means of netting attached to a hoop fastened to and operated by means of a rigid handle held in the hands:

"declared device" means any device or any device of a class or kind for the time being declared by regulation to be a declared device:

"device" means line, net, trap, spear or other implement or equipment for taking fish:

"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:

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

"fresh fish" means fish which has not been canned, smoked, cooked or preserved by any method other than freezing or chilling:

"hand fish spear" means fish spear propelled by human power without the use of any explosive, spring, elastic material or mechanism:

20 "hand line" means fishing line used without a rod and to which not more than three fishing hooks are attached (for the purpose of this definition not more than five hooks joined by threading the point of one through the eye of another, or by fastening their shanks together shall be deemed to be one hook):

"hatchery" means an area used for the spawning, propagation or culture of fish:

"honorary warden" means a person holding the position of honorary warden pursuant to an appointment under this Act:

"hoop net" means net consisting of one hoop of a diameter not exceeding three feet six inches to which netting is attached in the form of a cone or bag which does not extend more than three feet from the hoop:

"identity card" means an identity card issued to an inspector or honorary warden under section 10 of this Act:

30 "inspector" means an inspector of fisheries appointed pursuant to section 8 of this Act and in office and includes a person who is by virtue of his office an inspector of fisheries for the purposes of this Act:



"mark" means one or more numerals or letters or a combination of one or more numerals with one or more letters:

"oysters" includes the brood, spat and spawn of oysters:

"permit" means permit provided for in this Act:

"processing" in relation to fish means filleting or otherwise cutting or breaking up, freezing, chilling, preserving, treating, canning, packing or otherwise preparing for sale or manufacture and "process" has a corresponding meaning:

10 "purchase" means purchase, agree to purchase, or receive, accept or take delivery under an agreement to purchase:

"register" means to register under this Act and "registration" has a corresponding meaning:

"River Murray" includes every affluent, effluent, anabranch or extension of the River Murray and every lake or lagoon connected with the River Murray:

"rod and line" means a rod to which is attached a fishing line having not more than three fishing hooks attached thereto (for the purpose of this definition not more than five hooks joined by threading the point of one through the eye of another, or by fastening their shanks to each other shall be deemed to be one hook):

20 "sale" means-

- (a) sale, barter or exchange;
- (b) agreement to sell, barter or exchange;
- (c) exposing, storing, possessing, sending, consigning or delivering for or on sale, barter or exchange:

"sell" means-

- (a) sell, barter or exchange;
- (b) agree or offer to sell, barter or exchange;
- (c) receive, expose, store, have in possession, send, consign or deliver for or on sale, barter or exchange:

"spear gun" means a device for spearing fish consisting of a spear and an apparatus for discharging the spear by means of explosives, springs, elastic material or other mechanical means:

"species" includes sub-species and variety:

"specified" means specified, defined, described or indicated in any way in the document in relation to which the expression is used:

"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:

10 "the Director" means the person for the time being holding or acting in the office of Director of Fauna Conservation and Director and Chief Inspector of Fisheries under the Public Service Act, 1967, as amended:

"the repealed Act" means the Fisheries Act, 1917-1969:

"undersize fish" means a fish which in any particular does not comply with a proclamation under this Act setting out the minimum dimensions or weight of fish or any part of fish; and "undersize" has a corresponding meaning.

"waters" includes the sea and every bay, gulf, and inlet of the sea and every river, rivulet, stream, creek, lake or lagoon:

20 (2) Subject to any limitations expressly prescribed in this Act or in any regulation, proclamation or other instrument having effect pursuant to this Act, this Act shall be in force within lands and waters (either inside or beyond the boundaries of the State) to the full extent of the legislative power of the State.

## **Division II - Registration of Boats**

### **Section 16 (as enacted)**

16(1) Subject to subsection (2) of this section a person shall not -

(a) use a boat for the purpose of taking fish for sale or processing;

or

(b) manage or take part in the management of a boat so used, unless the boat is registered under this Act.

30 Penalty: Two hundred dollars and in the case of a continuing offence twenty dollars for each day on which the offence continues.

16 (2) A dinghy which is used as a tender to a larger boat but is not otherwise used for the purpose of taking fish for sale or processing, need not be registered under this section, but shall carry the distinguishing mark of the larger boat as provided in subsection (2) of section 17 of this Act.

**Section 20 (as enacted)**

20 (1) A person shall not-

(a) use a boat for the purpose of taking fish for sale or processing;

or

10 (b) manage or take part in the management of a boat so used, unless the boat has the distinguishing mark allotted to it under this Act painted or marked and displayed thereon in accordance with the regulations.

Penalty: One hundred dollars.

20 (2) A person shall not use an unregistered dinghy as a tender to a registered boat unless the dinghy is legibly marked with the same distinguishing mark as that boat.

Penalty: Fifty dollars.

20 (3) When the registration of a boat has expired and is not renewed, a person shall not after the expiration of one month from the day of expiration own or use the boat unless the distinguishing mark allotted to that boat has been completely removed or obliterated.

Penalty: One hundred dollars.

**Part III Regulation of Fishing**

**Division I - Fishing Licences and Permits**

**Section 28 (as enacted)**

28(1) There shall be two classes of fishing licences

(a) a class A fishing licence;

and

(b) a class B fishing licence.

30 28(2) A fishing licence shall authorize 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 by devices specified or described in the licence, and the sale of fish so taken.

- 28(3) A fishing licence of either class may contain conditions as to the total number of devices, or the number of devices of any one kind or the type of specifications of devices which may be used for fishing pursuant to the licence.

**Section 30 (as enacted)**

30(1) A person shall not be granted-

10

(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

and unless he also satisfies the Director that he has the equipment, experience and resources, sufficient to enable him to carry on the business of fishing efficiently and profitably.

20

30(2) Where a class A licence relates to fishing that is subject to regulations made under section 36 of this Act, it shall be sufficient compliance with paragraph (a) of subsection (1) of this section if the person applying for that licence satisfies the Director that he intends to carry on the business of fishing for profit as his principal business during any period during which, pursuant to those regulations, he may engage in that fishing.