**IN THE HIGH COURT OF AUSTRALIA No. A18 of 2012**
**ADELAIDE REGISTRY**

**BETWEEN:**

**OWEN JOHN KARPANY**
First Applicant

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**DANIEL THOMAS KARPANY**
Second Applicant

and

**PETER JOHN DIETMAN**
Respondent

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## WRITTEN SUBMISSIONS FOR THE RESPONDENT AND THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

### Part I: Publication on the internet

1. These submissions are in a form suitable for publication on the internet.

### Part II: Statement of issues

2. In South Australia it is an offence under the *Fisheries Management Act* 2007 (SA) (**the 2007 Act**) to have possession or control of undersized greenlip abalone. The Minister, however, is empowered to exempt a person from specified provisions of the 2007 Act including the provision prohibiting a person from being in possession or control of undersized greenlip abalone.

30 3. The Applicants took undersize greenlip abalone in the exercise of what the prosecution conceded at trial was a native title right to fish. Despite holding such right the Applicants were charged with being in possession or control of undersized greenlip abalone. The Applicants conceded the

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prosecution case but contended that they were nevertheless not guilty.[1] Their argument depended upon it being accepted that the Minister's power to exempt a person from specified provisions of the 2007 Act had the consequence that the South Australian regime for regulating the taking of undersized abalone was one of prohibition subject to obtaining a licence, permit, or other instrument within the meaning of s211 of the *Native Title Act 1993* (Cth) (**NTA**). If it was, s211 NTA had the effect of excluding them from having to comply with the State law where the conduct constituted the exercise of a native title right.

4. The Magistrate who presided over the Applicants' trial accepted that the Minister's power to exempt amounted to a power to issue an instrument permitting a person to undertake what was
10 otherwise prohibited. Consequently he concluded that s211 applied and the Applicants were acquitted. The Full Court unanimously determined that the learned Magistrate's characterisation of the Minister's power as falling within s211 was erroneous with the consequence that the acquittals were quashed and a finding that the offence was proved beyond reasonable doubt substituted.

5. A majority of the Full Court (Gray J, with whom Kelly J agreed and Blue J disagreed on this point) also held that native title rights to fish in the waters of South Australia were extinguished by s29 of the *Fisheries Act 1971*(SA) (**the 1971 Act**).

6. In the circumstances, if special leave is granted, the following substantive issues arise for determination:

20 6.1. Did s29 of the **1971 Act** validly extinguish native title rights to take fish in waters to which that Act applied?

6.2. Is the grant of an exemption pursuant to s115(1)(a) of the **2007 Act** a "licence, permit or other instrument" for the purposes of s211 **NTA**?

7. If special leave is granted and the answer to the question posed at [6.1] is, "No", the Respondent contends, in the alternative, that s41 of the *Fisheries Act 1982* (SA) (**1982 Act**) read with regulations 5, 23 and Schedule 1 of the *Fisheries (General) Regulations 1984* (SA) (**1984 Regulations**) affected the native title right to take greenlip abalone less than 13cm in length such that such native title right cannot be exercised.

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1 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [4], [6] (Gray J), [40] (Blue J).

**Part III: Notices under s78B of the Judiciary Act 1903 (Cth)**

8. The Applicants have served notices pursuant to s78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) identifying the issues to which s78B of that Act applies. Accordingly, no further notice under s78B of the Judiciary Act is necessary.

**Part IV: Statement of Facts**

9. Paragraph 6 of the Applicants' Submissions is incorrect. The Applicants were acquitted of the charge of possession or control of 24 undersized Greenlip abalone contrary to s72(2)(c) of the 2007 Act.[2]

10 10. Paragraph 9 of the Applicants' submissions incorrectly indicates that evidence was received by the Stipendiary Magistrate in respect of native title rights. At trial, the Applicants intimated that they would call evidence on the topic.[3] The prosecution elected not to put the Applicants to proof[4] and accepted that the Applicants were members of an Aboriginal group who possessed native title rights to fish in the waters of the State from which the abalone the subject of the charge were taken[5] and, apart from the effect of legislation, the native title rights included the right to take abalone described as undersized under present State law.[6]

**Part V: Statement of applicable constitutional provisions, statutes and regulations**

11. The Respondent accepts as accurate the Applicants' statement of applicable constitutional provisions, statutes and regulations.

20 **Part VI: Argument**

<u>The concession in the Magistrates Court</u>

12. Despite the concession made at trial, in the Full Court the Respondent sought to argue extinguishment. The argument raised there, as in this Court, turned on the effect of the relevant provisions of the 1971 and 1982 Acts. It concerned questions of law not raised at first instance.

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2 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [2] and [11](Gray J).
3 Reasons of Mr Sprod SM at [13].
4 Reasons of Mr Sprod SM at [26].
5 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [5] and [7] (Gray J).
6 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [7] (Gray J).

13. The appeal to the Full Court was one in the nature of a rehearing; *Magistrates Court Act 1991* (SA), s42. It was within the discretion of the Full Court to determine the question of law not raised before the learned Magistrate.[7]

14. The Respondent first provided notice of its intention to raise the issue of extinguishment in its Amended Notice of Appeal filed on 20 September 2011. The appeal was heard on 14 October 2011. No objection was taken to ground 2 in the Amended Notice of Appeal. Further, in the course of argument the Applicants conceded that it was open to the Respondent to argue extinguishment.[8]

15. It is now too late to complain that the Full Court should not have entertained ground 2, and, in any
10 event, the Applicants have not specifically done so.

Ground 1: Extinguishment

**i. Extinguishment of native title - principles**

16. At common law, native title can be extinguished by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title.[9] As Brennan CJ stated in *Wik Peoples v Queensland*:[10]

> Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it. Such laws or acts may be of three kinds: (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are inconsistent with the continued
> 20 right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title. A law or executive act which, though it creates no rights inconsistent with native title, is said to have the purpose of extinguishing native title, does not have that effect "unless there be a clear and plain intention to do so". (footnotes omitted)

17. A "clear and plain intention" can be demonstrated expressly or by necessary implication,[11] discerned objectively.[12] That is, as was made plain in *Western Australia v Ward*, "intention" is to

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7 *Coultone v Holcomb* (1986) 162 CLR 1; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418.

8 Transcript 44-5.

9 *Western Australia v The Commonwealth & Ors* (1995) 183 CLR 373 at 439 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Yanner v Eaton* (1999) 201 CLR 351 at [36], 372 (Gleeson CJ, Gaudron, Kirby and Hayne JJ)

10 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85 (Brennan CJ, with whom Dawson and McHugh JJ agreed); see also *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 213 (Brennan, Toohey and Gaudron JJ, 223 (Deane J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15 (Mason CJ and McHugh J), 64 (Brennan J), 111 (Deane and Gaudron JJ), 136, 138 (Dawson J), 195-6 (Toohey J); *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 423 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

be discerned from the words of the relevant law or the nature of the executive act and the power supporting that act. Relevantly, Gleeson CJ, Gaudron, Gummow and Hayne JJ stated:

> The cases often refer to the need for those who contend that native title has been extinguished to demonstrate a "clear and plain intention" to do so. That expression, however, must not be misunderstood. The subjective thought processes of those whose act is alleged to have extinguished native title are irrelevant. Nor is it relevant to consider whether, at the time of the act alleged to extinguish native title, the existence of, or the fact of exercise of, native title rights and interests were present to the minds of those whose act is alleged to have extinguished native title. It follows that
10 referring to an "*expression* of intention" is apt to mislead in these respects[13] (footnotes omitted)

Thus, where a statute is under consideration, objective intent is determined applying the normal principles of statutory construction.[14]

18. It is accepted that a clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or creates a regime of control that is consistent with the continued enjoyment of native title.[15] By contrast, the statutory prohibition of an activity that may be pursued in the exercise of a native title right will extinguish that right.[16] Where regulation stops and prohibition starts may be difficult to discern.[17]

19. Where native title is said to have been extinguished by the valid granting of rights to parties other than the native title holders, a court is required to identify and compare the legal nature and
20 incidents of the rights that have been granted and the native title rights being asserted (the

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[11] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 126 (Toohey J); 168-169, 185-6 (Gummow J); 247-249 (Kirby J).

[12] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85 (Brennan CJ with whom Dawson and McHugh JJ agreed); *Western Australia v Ward* (2002) 213 CLR 1 at 89, [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[13] *Western Australia v Ward* (2002) 213 CLR 1 at 89, [78]-[79] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[14] *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 224 (Deane J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 (Brennan J), 1109-111 (Deane and Gaudron JJ); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 247 (Kirby J); *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 423 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).The application of those principles is not without some incongruity due to the recognition of native title by the common law in 1992; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 184-6 (Gummow J).

[15] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 (Brennan J with agreement of Mason CJ and McHugh J); *Yanner v Eaton* (1999) 201 CLR 351 at [37]-[38], 372-3 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

[16] *Western Australia v Ward* (2002) 213 CLR 1 at [265], 152 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185-186 (Gummow J).

[17] *Yanner v Eaton* (1999) 201 CLR 351 at [37], 371 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

"inconsistency of incidents" test).[18] Where they are inconsistent, the native title rights are extinguished to the extent of the inconsistency.[19]

**ii. Extinguishment of native title rights to fish by s29 of the *Fisheries Act 1971* (SA)**

20. Section 29 of the 1971 Act provided as follows:

> (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—
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> (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;
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> 10 (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.

21. The legislative history of the precursors to the 2007 Act is summarised accurately at paragraphs [23] - [25] of the Full Court judgment.[20] Relevantly, prior to the enactment of the 1971 Act, South Australian fisheries legislation contained provisions expressly excluding application of the legislation first, to "any aboriginal native taking fish for his own use"[21], and then, to "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".[22] The 1971 Act contained no such exclusions or qualifications with respect to aboriginal rights or interests.

22. Prior to 1971, there was at common law a public right to fish in the sea.[23]

20 23. The enactment of s29 of the 1971 Act had two consequences: first, the 1971 Act abrogated the common law public right to fish; and secondly, it extinguished any common law native title right to fish. Those two consequences were the result of the Act applying to all persons and admitting of no exceptions. The intention to abrogate any subsisting right recognized by the common law was manifest by the introductory words to the section, "[e]xcept as provided by this Act, a person shall not...". By those words, Parliament expressed in plain and clear terms that the 1971 Act was the sole authority for the right to take fish and that any right to take fish could only be derived from

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18 *Western Australia v Ward* (2002) 213 CLR 1 at [78]-[79], 89-90 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Fejo v Northern Territory* (1998) 195 CLR 96 at [43], 126 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 (Gummow J).

19 *Western Australia v Ward* (2002) 213 CLR 1 at [82], 91 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

20 *Dietman v Karpany* [2012] SASCFC 53; (2012) 112 SASR 514 at 522 (Gray J; Kelly J agreeing at 525 [38])

21 *Fisheries Act 1878* (SA) s14; *Fisheries Act 1904* (SA) s22.

22 *Fisheries Act 1917* (SA) s48.

23 *Harper v The Minister for Sea and Fisheries* (1989) 168 CLR 314 at 330 (Brennan J); 325 (Mason CJ, Deane and Gaudron JJ); 336 (Dawson, Toohey and McHugh JJ); *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at [19]-[22], 55-57 (Gleeson CJ, Gummow, Hayne and Crennan JJ); *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 421 (Stephen J), 486-9 (Jacobs J).

the terms of the 1971 Act. Accordingly, from the enactment of the 1971 Act, all existing rights to take fish were removed by s29(1) and a new statutory right to take fish other than for the purposes of sale was created by s29(2).[24]

24. That a statutory provision which makes clear that the source of any right to perform a specified activity is derived solely from the statute might have the effect of extinguishing native title rights was recognised by Callinan J in *Western Australia v Ward*. He said:

> The Rights in Water and Irrigation Act makes it clear, in my opinion, that any rights to take and use water are derived from it alone. Section 6, for instance, prohibited persons from diverting or appropriating water from any water-course, or from any lake, lagoon, swamp or marsh, <u>except as provided for by the Act</u> or in exercise of "the general right of all persons to take water for domestic and ordinary use, and for watering cattle or other stock". This was not, as the majority concluded, a provision that preserved existing rights to take and appropriate water; on the contrary, it conferred on *all* persons, regardless of their rights to be on the land on which the water-course, lake, lagoon, swamp or marsh might be located, <u>a new statutory right</u> to take water for certain purposes. <u>This supports the conclusion that, absent any rights conferred by the statute, no other right to take water existed</u>[25]. (emphasis added, footnotes omitted)

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25. In light of the above, contrary to the Applicants' contention, and the reasons of Blue J,[26] the enactment of s29 of the 1971 Act created new statutory rights. So understood, s29(1) of the 1971 Act is not appropriately characterized as regulating the exercise of existing common law or native title rights. This is so because if s29(1) is construed in the manner identified above, and the relevant native title rights and interests were extinguished by the 1971 Act, it becomes clear that the analysis underlying *Yanner v Eaton*[27] (*Yanner*), which is premised on the existence of native title rights and interests, cannot apply and s211 of the NTA cannot apply. To make good that submission it is necessary to consider the analysis in *Yanner*.

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26. In *Yanner* the defendant was charged under s54(1)(a) of the *Fauna Conservation Act 1974* (Qld) (***Fauna Act***) which provided:

> A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act

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24 *Harper v The Minister for Sea and Fisheries* (1989) 168 CLR 314 at 325 (Mason CJ, Deane and Gaudron JJ), 334-5 (Brennan J); *Minister for Primary Industry v Davey* (1993) 119 ALR 108 at 116 (Black CJ and Gummow J).

25 *Western Australia v Ward* (2002) 213 CLR 1 at 344-345 [821]. Justice Callinan's reasoning on this point (with whom McHugh J agreed at 213 [472] and 240 [559]) was consistent with the joint judgment at 152 [263]. It is to be noted also that both the joint judgment at 152 [265] and the reasons of Callinan J at 346 [826] joined on the extinguishing effect of the by-laws made under Pt III of the *Rights in Water and Irrigation Act 1914* (WA).

26 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [79] (Blue J).

27 (1999) 201 CLR 351.

27. It is accepted that, like the *Fauna Act*, s29(1) of the 1971 Act provided for permission to fish to be granted by way of licence. However, unlike the *Fauna Act*, which vested "no more than the aggregate of the various rights of control by the Executive that the legislation created"[28] in the Crown, the 1971 Act abrogated all common law rights in relation to fishing. The 1971 Act severed the right derived from the traditional laws acknowledged, and the traditional customs observed, by the Narrunga People. Any right was, once the 1971 Act came into operation, derived from the Act. In this regard, s29(1) of the 1971 Act is unequivocal: the source of any right to fish must be sourced in the 1971 Act. That is inconsistent with the continued existence of any public or native title right to fish and evidences a clear intention to replace such rights with statutory rights. Section 54(1) of the *Fauna Act* operates in a distinctly different manner.

28. *Yanner* only applies in those cases to which s211 of the NTA applies, which necessarily requires an existing native title right to be recognized. So much is made clear in *Yanner* where it was observed:[29]

> 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 the native title rights and interests in relation to which the activity is pursued.

29. Section 211 assumes the existence of native title rights and interests as defined in s223(1)(c) of the NTA, by which definition such rights must be "recognised by the common law". Extinguishment necessarily precludes the recognition by the common law of native title rights and interests.

30. Where a law is manifestly <u>not</u> regulatory and is manifestly prohibitory, neither *Yanner*[30] nor s211 of the NTA will apply. This is such a case. Section 29(1) of the 1971 Act manifested a clear and plain intention to abolish all pre-existing common law rights to take fish. Such common law rights are, relevantly, indistinguishable from the native title right here claimed. Consequently, s29(1) is not, as Blue J contended, merely regulatory.[31]

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28 *Yanner v Eaton* (1999) 201 CLR 351 at [30], 370 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

29 (1999) 201 CLR 351 at 373 [39] (Gleeson CJ, Gaudron, Kirby and Hayne JJ). See also, Western Australia v Ward (2002) 213 CLR 1 at [265], 152 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

30 (1999) 201 CLR 351.

31 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [79] (Blue J).

31. The Applicants complain that Gray J should have applied, but did not, the "incidents of title test".[32] Conversely, it is also submitted[33] that Gray J did apply that test and in so doing erred. Both submissions are premised on a misreading of Gray J's reasons, which display no error. As Gray J made abundantly clear, the focus of an inquiry regarding extinguishment of native title is a question of statutory interpretation,[34] determined objectively,[35] wherein extinguishment must be manifest by a clear and plain intention drawn from express words or by necessary implication.[36] That analysis is correct. In short, the test is whether the effect of a statutory provision is inconsistent with the ongoing exercise of native title rights.[37] Gray J's reference to the inconsistency of incidents test was no more than a correct statement of the law if one was 10 considering extinguishment in the light of a conferral of statutory rights. The fact that this was not the case in the present proceeding does not render either that observation, or the actual analysis that Gray J undertook, incorrect.[38]

32. Contrary to the proposition of the Applicants,[39] in the context of a statutory prohibition that does not grant a competing right, assessment of "inconsistency" does not require application of the inconsistency of incidents test. That test is directed to undertaking a comparison between a set of native title rights and a set of rights vested in another party. The present case did not call for the application of that test. In cases such as the present, the appropriate test is sharply focused on the terms of the prohibition. That is, the inquiry focuses on whether the prohibition is inconsistent with the continued exercise of specified native title rights and no more. So understood, where a 20 law is inconsistent with the continued exercise of specified native title rights, the law falls within the first category of extinguishment identified by Brennan CJ in *Wik*;[40] it is a law which extinguishes native title if it evidences a "clear and plain intention" to have such an effect. That

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32 Applicants' submissions [21].

33 SANTS' submissions at [12].

34 *Dietman v Karpany* [2012] SASCFC 53; (2012) 112 SASR 514 at [33].

35 *Dietman v Karpany* [2012] SASCFC 53; (2012) 112 SASR 514 at [33].

36 *Dietman v Karpany* [2012] SASCFC 53; (2012) 112 SASR 514 at [33].

37 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 (Gummow J); *Western Australia v Ward* (2002) 213 CLR 1 at [826] (Callinan J).

38 Justice Blue's observation that the informant did not expressly contend that the 1971 Act manifested an intention to extinguish native title can only be understood either as a reference to the informant in the Magistrates Court or was clearly erroneous in light of Gray J's judgment: see *Dietman v Karpany* (2012) 112 SASR 514 at 535 [91]; [2012] SASCFC 53 at [91]. In the Full Court, it was clear that the Appellant (the Respondent to the present application for special leave) did expressly submit that the 1971 Act extinguished native title rights.

39 Applicants' submissions at [21]-[22].

40 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85.

was the analysis undertaken[41] by Gray J which gave rise to His Honour's conclusion[42] that s29(1) of the 1971 Act is appropriately characterized as a statutory prohibition inconsistent with the continued exercise of native title rights to fish. It had the clear and plain intention of prohibiting the taking of fish except in accordance with the Act.

33. The Applicants incorrectly contend that Gray J conflates the test for the abolition of a public right with the extinguishment of native title.[43] There is no error in His Honour's approach. His Honour did not reason that where a statutory right replaces a public right then, by inference, the necessary intention of the legislation incorporating the statutory right is to extinguish native title.[44] On the contrary, Gray J did undertake an analysis of the relevant native title right.[45] By necessity that analysis was constrained by the absence of any particularization of the claimed native title right in the Magistrates Court. In those circumstances, there can be no complaint that the Supreme Court failed to scrutinize the claimed native title right with sufficient particularity. If it is necessary for this Court to determine the nature, scope and manner of analysis of native title rights that must be satisfied in cases concerning extinguishment of such rights, this case is an inappropriate vehicle for such a determination. In this case, there is an insufficient factual substratum to determine such issues.

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34. The Applicants submit that the references to Aboriginal persons in the predecessor Acts are references "by dint of *race* not by dint of *rights*" to impugn Gray J's analysis of s29 of the 1971 Act.[46] The Respondent submits that the references to Aboriginal persons in the predecessor Acts had the effect of preserving in, or affording to, those covered by the relevant provisions rights to take fish in the terms of those provisions. His Honour simply, and appropriately, determined that the intention of Parliament was clear: it was to end the exclusion of Aboriginal persons from the scope of the 1971 Act.[47]

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35. Further, contrary to the Applicants' submission, it is not the case that on the reasoning of Gray J any legislation creating a statutory regime in place of an existing public right necessarily extinguishes all relevant native title rights and interests.[48] Such a submission does not necessarily

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41 *Dietman v Karpany* [2012] SASCFC 53; (2012) 112 SASR 514 at [33]-[35].
42 *Dietman v Karpany* [2012] SASCFC 53; (2012) 112 SASR 514 at [36].
43 Applicants' submissions [24].
44 As alleged by the Applicants; Applicants' submissions [27].
45 At [34]
46 Applicants' submissions [27].
47 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [25].
48 Applicants' submissions [37].

follow. The question remains one of legislative intention discerned by the terms of a statute. It will not always be the case that a statute evinces a Parliamentary intention sufficient to establish it as the only authority for specified rights, or conversely, that the relevant rights can only be derived from the statute. Put simply, the terms of a statute will determine the outcome in all cases.

36. Moreover, the Applicants' complaint that Gray J conflated the "incidents of title" test with the prohibitory/regulatory distinction relevant to the application of s211 of the NTA is misconceived.[49] There is no error in His Honour's approach. As part of his analysis of the 1971 Act, Gray J correctly identified the prohibitory/regulatory distinction as relevant to the construction of the Act. It is accepted, as noted by Gray J, that a clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or creates a regime of control that is consistent with the continued enjoyment of native title.[50] Identifying that principle demonstrates both the orthodoxy and validity of Gray J's approach.

37. Finally, s5(3) of the 2007 Act cannot assist in the construction of s29 of the 1971 Act. Moreover, where native title rights have been extinguished they cannot be revived.[51]

Ground 2: Section 211 of the *Native Title Act 1993* (Cth)

38. Sections 211(1) and 211(2) of the NTA relevantly provide:

(1) Subsection (2) applies if:
  - (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
  - (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
  - (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
  - (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.

Section 211(3) includes fishing as a class of activity for the purposes of s211(1).

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49 Applicants' submissions [25].

50 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64 (Brennan J with agreement of Mason CJ and McHugh J).

51 *Fejo v Northern Territory* (1998) 195 CLR 96 at [57]-58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Native Title Act 1993* (Cth) s237A.

39. Section 72(2)(c) of the 2007 Act makes it an offence to be in possession or control of an aquatic resource of a prescribed class. Here, undersized greenlip abalone were prescribed by regulation as aquatic resources.[52] Viewed in isolation, s72(2) is not a provision that can be characterised as permitting an activity provided that permission is first obtained. There is no provision in the 2007 Act to obtain a permit or licence or instrument to possess or control an aquatic resource of a prescribed class. It is for this reason that in their defence the Applicants resorted to s115 of the 2007 Act. Section 115 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.

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40. Justice Blue, with whom Gray and Kelly JJ agreed on this point, summarised the question for determination as follows:[53]

> ...the distinction drawn by s 211(1)(b) of the *Native Title Act* is between:
> (a) a law which permits persons to carry on a class of activity (in this case fishing) but requires them first to obtain a licence (in one form or another); and
> (b) a law which prohibits persons from carrying on a class of activity.

41. The Applicants assert that Blue J was wrong to characterise s72(2)(c) of the 2007 Act as a law which prohibits possession or control of undersized abalone in light of s115 of the 2007 Act.[54]

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42. Justice Blue's reasoning is, with respect, sound.

43. Part 6 of the 2007 Act sets out a comprehensive licensing regime in respect of commercial fishing and fish processing. The provisions of that Part are appropriately characterised as permitting persons to carry on commercial fishing and fish processing but requiring them first to obtain the relevant "authority" under that Part (namely a licence, permit or registration[55]). This licensing regime includes the following features:

43.1. Fishing activity of a class that constitutes a fishery for a commercial purpose must not be engaged in without a licence or permit (s52);

43.2. Boats may only be used for engaging in a fishing activity that constitutes a fishery for a commercial purpose if registered for use under a licence or permit and in the charge of its registered master (s53)[56];

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52 *Fisheries Management Regulations 2007* (SA) Regs 3(1) and 8(1)(a).
53 *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [52] (Blue J).
54 Applicants submissions at [43].
55 *Fisheries Management Act 2007* (SA) s51.
56 Or a boat or master in place of those registered with the consent of the Minister.

43.3. An application for an authority must be made in a manner and form approved by the Minister and a fee fixed by regulation paid (s54(1));

43.4. Prior to granting any authority under Part 6, the Minister must be satisfied that the applicant is a fit and proper person to hold it (s54(10));

43.5. An application for a licence or permit will be determined by the Minister subject to, and in accordance with, the regulations (s54(7)(a)) and registrations of boats, masters of boats or devices to be used pursuant to a licence will not be granted unless specified criteria are satisfied (ss54(7)(b), (c) and (d));

43.6. The Minister must refuse to grant an application for a licence, permit or registration in specified circumstances (s54(9)) and may refuse to do so in other specified circumstances (s54(10));

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43.7. Licences or permits may be transferable and pass to the estate of the licence holder on his or her death (s57(6));

43.8. In specified circumstances, the Minister may acquire a licence and the regulations may provide for compensation to be paid (s58);

43.9. Subject to the regulations, licences and permits must be carried at all times whilst fishing pursuant to them is undertaken (s59).

44. Part 7 of the 2007 Act prohibits classes of activities by creating criminal offences including that contained in s72(2)(c) prohibiting the possession or control of an aquatic resource of a prescribed class.

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45. An exemption power is, of its nature, an exceptional power. It may not be used to effect a *de facto* licensing regime when not envisaged by the Act.[57] The granting of an exemption by the Minister pursuant to s115 of the 2007 Act is properly regarded as distinct from the licensing regime established by the Act. An exemption does not alter the character of the prohibition of fishing activities set out in Part 7 of the 2007 Act.[58] The decision of *Wilkes v Johnsen*[59] was properly distinguished by Blue J on the basis that the Act there under consideration[60] treated an exemption power in ways sufficiently similar to licences and permits such that exemptions granted were in effect equivalent to licences or permits. There are no such similarities in the 2007 Act.[61]

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[57] See, for example, *Shop Distributive and Allied Employees Association v. Minister for Industrial Affairs* (1995) 183 CLR 552 at 559-560 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

[58] The respondent adopts and relies on the reasoning of Blue J at *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [64].

[59] (1999) 21 WAR 269.

[60] *Fish Resources Management Act 1995* (WA).

[61] *Dietman v Karpany & Anor* [2012] SASCFC 53; (2012) 112 SASR 514 at [66]-[67] (Blue J).

46. The Applicants contend that Blue J incorrectly assumed that there is no requirement for an application for an exemption and that no document would be issued if an exemption is granted.[62] The Applicants are seeking to adduce before this Court evidence to show that in practice an application form for exemptions is published and used. That evidence is irrelevant to the question of construction and should not be received. How exemptions are granted is not to the point. It is the words of the Act which dictate its proper construction. Similarly, the Applicants contend that in practice the power to grant exemptions is exercised regularly[63] and that a fee is payable.[64] Again, these matters are irrelevant to statutory construction.

**Part VII: Respondent's argument in respect of the proposed Notice of Contention**

10 47. Even if s29 of the 1971 Act did not extinguish all native title rights to fish, any native title right to fish greenlip abalone less than 13 centimetres in length was "affected" by the gazetting of the *Fisheries (General) Regulations 1984* (SA) (**1984 Regulations**).

48. Section 47(2) of the 1971 Act prohibited the taking of "undersize fish". By proclamation gazetted on 30 November 1971 "undersize" for all types of abalone meant less than 10.2 cm,[65] and the 1971 Act came into force on 1 December 1971.

49. The 1982 Act repealed and superseded the preceding legislation.[66] Section 41 of the 1982 Act provided that "[n]o person shall engage in a fishing activity of a prescribed class". Regulations gazetted on 28 June 1984 made the taking of "undersize fish by any person in the waters of the state" a fishing activity of a prescribed class[67] and provided that greenlip abalone was undersize if
20 it was less than 13 centimetres in length if taken from all waters of the State except the western zone, and 14.5 centimetres in the western zone[68]. The waters around Cape Elizabeth from which the Applicants took greenlip abalone less than 13 centimetres in length are not in the western zone.

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62 Applicants' submissions [43(a)].

63 Applicants' submissions [50].

64 Applicants' submissions [50].

65 South Australia, *South Australian Government Gazette*, 30 November 1971, p2262-3.

66 The 1982 Act came into effect on 1 July 1984 - South Australia, *South Australian Government Gazette*, 14 June 1984, p1564.

67 Regulation 5 and Schedule 1 of the *Fisheries (General) Regulations 1984* (SA) (South Australia, *South Australian Government Gazette*, 28 June 1984, pp1950 and 1964).

68 Regulation 23 of and the *Fisheries (General) Regulations 1984* (SA) (South Australia, *South Australian Government Gazette*, 28 June 1984, p1955).

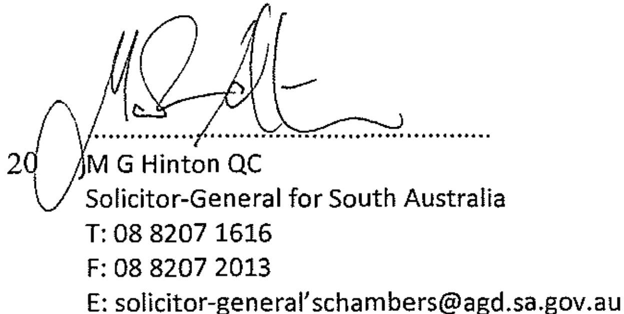
50. The effect of s41 of the 1982 Act and the 1984 regulations was to create a prohibition inconsistent with the exercise of any native title rights to take greenlip abalone of less than 13 centimetres in length.[69] The provisions are of general application and no question of inconsistency with the *Racial Discrimination Act 1975* (Cth) arises.

51. The 1984 Regulations affect any subsisting native title right to take undersize abalone. Accordingly, the effect produced by the 1982 Act read with the 1984 Regulations is a "category D past act" as defined by s232 of the NTA applying s19(1) of the NTA and ss32 and 36 of the *Native Title (South Australia) Act 1994* (SA). Consequently, the "non-extinguishment principle" under s238 of the NTA applies to the act. As a consequence, although native title rights and interests in relation to the relevant waters are not extinguished, they have no effect and cannot be exercised in relation to undersize abalone.

**Part VIII: Time estimate**

52. The Respondent estimates that it will take an hour and a half to present its oral argument.

Dated: 23 October 2012



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[69] Section 59 of the 1982 Act provided the Minister with power to exempt any person or class of persons from specified provisions of the Act. The respondent submits that this does not render s41 regulatory in nature.