HIGH COURT OF AUSTRALIA

6 November 2013

OWEN JOHN KARPANY & ANOR v PETER JOHN DIETMAN

[2013] HCA 47

Today the High Court unanimously allowed an appeal from a decision of the Full Court of the Supreme Court of South Australia, which had overturned a decision of the Magistrates Court of South Australia finding the applicants not guilty of possessing undersize abalone.

The applicants are Aboriginal and members of the Narrunga People. They had taken undersize Greenlip abalone in accordance with their traditional laws and customs. They were charged with possessing undersize abalone contrary to s 72(2)(c) of the *Fisheries Management Act* 2007 (SA).

In the Magistrates Court, the respondent conceded that the applicants' native title right to take fish from the relevant waters subsisted. The applicants argued that, by reason of s 211 of the *Native Title Act* 1993 (Cth), the prohibition in s 72(2)(c) of the *Fisheries Management Act* did not apply to their activities in taking abalone. Section 211 of the *Native Title Act* provides that, if a law prohibits a person from carrying on certain activities other than in accordance with a "licence, permit or other instrument" granted under that law, that law does not prohibit a native title holder from carrying on those activities for the purpose of satisfying their personal, domestic or non-commercial communal needs. Section 115 of the *Fisheries Management Act* allowed the Minister to exempt a person from provisions of that Act. The Magistrate found that that an exemption under s 115 amounted to a "licence, permit or other instrument" and therefore that s 72(2)(c) did not prohibit the applicants' conduct.

On appeal to the Full Court, the respondent argued that the applicants' native title right had been extinguished by the *Fisheries Act* 1971 (SA) and that the magistrate had erred by characterising an exemption under s 115 of the *Fisheries Management Act* as a "licence, permit or other instrument". The Full Court, by majority, held that the applicants' native title right had been extinguished and, unanimously, held that in any event s 211 of the *Native Title Act* did not apply. It remitted the matter for re-sentencing.

The applicants applied for special leave to appeal to the High Court and the application was referred to an enlarged bench. The High Court unanimously held that the applicants' native title right had not been extinguished because, for the reasons given in *Akiba v The Commonwealth* (2013) 87 ALJR 916; 300 ALR 1; [2013] HCA 33, the *Fisheries Act* regulated but was not inconsistent with the continued enjoyment of native title rights. It further held that an exemption under s 115 of the *Fisheries Management Act* was a "licence, permit or other instrument". The consequence, provided by s 211 of the *Native Title Act*, was that s 72(2)(c) of the *Fisheries Management Act* did not prohibit the applicants, as native title holders, from gathering or fishing for undersize abalone in the waters concerned, where they did so for the purpose of satisfying their personal, domestic or non-commercial communal needs and in exercise or enjoyment of their native title rights and interests.

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- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*