IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A18 of 2012

BETWEEN:

OWEN JOHN KARPANY
First Appellant

DANIEL THOMAS KARPANY
Second Appellant

and

PETER JOHN DIETMAN
Respondent

APPELLANTS' REPLY

Part I: Application to Intervene to the 3rd Intervener.

1. The applicants do not oppose the application of the Commonwealth Attorney General (**AG**) to intervene in these proceedings to the extent identified in the Attorney General's Submissions (**AGS**) and on the basis that the AG abides its own costs of and incidental to the proceedings.

Part II: Argument - No extinguishment

2. The applicants substantially agree with conclusions stated in paragraphs 42 and 43 AGS. These conclusions stand on their own terms without the need to consider if there is or was a native title right to fish for a commercial purposes. It is enough that this Court finds that the entire right to fish was not extinguished, and accordingly, that the approach of the majority of the Full Court was in error.

3. If the distinction between commercial and non-commercial purposes in the context of the exercise of native title rights was to be considered the focus would be upon the use of the fish taken by Aboriginal persons. These are questions associated with the barter or trade of fish and are not in issue in this matter. This matter is limited to considerations of the taking of fish *per se* rather than the broader notion of physical subsistence, which in a native title context may extend to, for example, pay-back, gift giving, barter, inter-community trade, or providing sustenance for those unable to obtain their own (for example, the young or the elderly). These matters may all be relevant considerations prior to

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the activity of the sale of fish to non-Aboriginal consumers or distributors: see *ALRC Report No 31, Vol. 2, page 181.*

Argument - Section 211 *NTA* is applicable

4. Section 211 *NTA* is of wide import and application. It is intended to have application to all manner of different laws existing in jurisdictions across Australia which have the effect of limiting or reducing the exercise by an Aboriginal person of their native title rights. In its effect s 211 *NTA* recognises (by its own regulatory force) that Aboriginal persons who undertake a prescribed class of activity, for example fishing, shall not be burdened with the usual impositions of a regulatory scheme. Section 211 *NTA*, in conjunction with s109 The Constitution, makes inoperative such laws that have such effect.

5. The language of s 211 *NTA* is necessarily broad. It provides relief from the obligations of a regulatory scheme if the regulatory scheme requires *"a licence, permit or other instrument granted or issued to them"*. The effect of s 211 *NTA* is that if an activity is prohibited to all person, including Aboriginal persons, but for the requirement to obtain *a licence, permit or other instrument* being *granted or issued to them*, an Aboriginal person can participate in the prescribed activities, including fishing, without more.

6. Looked at in this way, one might ask:

> *Can a non-Aboriginal person take abalone by obtaining a licence, permit or other instrument?*

If the answer to this question is *"yes"*, then s 211 *NTA* applies. If the answer is *"no"*, then it does not apply.

7. A negative answer would necessarily follow if there could be no relief from the provision of the relevant State Law. The State Law would be an absolute prohibition.

8. It is acknowledged by all members of the Full Court that s 115 *FMA* exemptions can be issued to allow persons to take undersized abalone. As set out in the applicants' primary Submissions, an exemption pursuant to s 115 *FMA* occurs by notice in the South Australian Government Gazette. It is an instrument by virtue of s 4 of the *Acts Interpretation Act 1915* (SA).

PART III: Specific Comments about the AG's Submission

9. AGS [48] – [53] asserts in substance that the words *"other instrument"* are to be read down because of their proximity to the words *"licence"* and *"permit"* in s 211(1)(b) *NTA*. It begins from the correct premise of determining whether an exemption can properly be characterised as a licence, permit or instrument

(AGS[48]), but then proceeds only to consider if an exemption might be a *"licence"* or *"permit"* (AGS[50] - [51]). It submits that the latter words connote *an "authority to do the activity"*. One assumes that the AG accepts that the words, *"other instrument"*, too connote an *"authority to do the activity"*. In both case the AG would argue that this is to be distinguished from an exemption. However, with respect, it is not obvious why an exemption does not, in the context of a prohibition, otherwise authorise the prohibited activity. The example provided in AGS [57] omits the last part of the tale; the reason the 76 year old is at liberty to operate the machine is because the statutory prohibition has been removed by the exemption. The statutory prohibition does not dissolve of its own accord, but in accordance with the relevant exemption.

10. Further, at AGS [52] the AG contends that an exemption refers to the exclusion of an activity from the scope of the prohibition. It argues that s 115 *FMA* can exempt a person from any provision of the Act, not just Part 7. Ergo, it could dispense with the need for a licence or permit at all. Although this might be possible (albeit does not sit comfortably with the decision of this Court in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs*[1] referred to in footnote 57 of the Respondent's Submissions) this says nothing about the characterisation of an exemption as an *"instrument"* and there would seem to be no vice in the result. The strange result referred to in AGS [52], lines 21 - 23 would appear to be entirely consistent with the intended operation of s 211 *NTA*.[2]

11. Further, at AGS [53] the AG argues that the *"mere possibility"* that the Minister might exempt some person under s 115 *FMA* does not mean that the State Law, even combined with s 115 *FMA*, *"allows others to engage in* [the prohibited] *activities"*. These latter words come from the *Parliamentary Debates*, not s 211 *NTA*. In any event, the degree of possibility is not a relevant consideration. If persons can be exempted from the operation of the State Law (which they plainly can) it cannot matter that they are infrequently exempted or, to use the language of the *Debates*, if they are infrequently allowed to engage in the prohibited activity.

12. At AGS [54] – [58] the AG contends that the authority to carry on the prohibited activity must derive from the licence, permit or instrument. Accepting that the practical effect of a licence, permit or exemption might be the same, it argues that there is difference because the effect is differently achieved. This attributes to the words *"in accordance with"* a meaning different from their plain and ordinary meaning. The *Macquarie Dictionary* defines *" in accord"* to mean *"in harmony or agreement"*. It defines *"accordance"* as:

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1 (1995) 183 CLR 552, 559-560.

2 See the passage from the Commonwealth, *Parliamentary Debates*, Senate, 20 December 1993, 5440 reproduced the reasons of Gray J at [54]: SLAB[33].

"noun ***1.*** *agreement; conformity.* ***2.*** *the act of according.* –phrase ***3. in accordance with****, in line with"*

There is no common sense reason why fishing for abalone is any less in accordance with an exemption granted pursuant to s 115 than it would be if it were done under licence or permit.

13. Further, at AGS [58] the argument is advanced that an exemption is not *"issued or granted to them"*. Again, the applicants disagree. The natural and ordinary meaning of these words apply as comfortably to a licence, a permit or an exemption.

Part VI: Table of authorities, legislation and other materials

Australian Law Report Commission, *Aboriginal Customary Laws: Recognition* Report No 31 (1986) 65.

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Dated 6 November 2012.

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