Victorian Government Solicitor's Office

Client Newsletter

Natural Resources and the Native Title Defence – *Dietman v Karpany*

July 2012

Introduction

Dietman v Karpany [2012] SASCFC 53 is the most recent superior court decision regarding the effect of natural resource legislation on aboriginal customary rights.

The decision shows when native title rights to hunt, fish, gather or conduct a cultural or spiritual activity may be extinguished by legislation that regulates those activities, and, if the rights exist, whether they can be relied on successfully as a defence to a prosecution for a breach of state law.

State agencies will need to be aware of the case and its implications when updating authorised officer training manuals.

Magistrates' Court prosecution

Members of the Narrunga People were charged for possession of undersized Greenlip abalone under a South Australian natural resource law. They successfully relied on s 211 of the *Native Title Act 1993* (Cth) (**NTA**) as a defence to a prosecution (the '**Native Title defence**'). If there is a native title right to do an activity (eg fishing), the Native Title defence allows the person with that right to carry out the activity without a licence.

Summary

The Native Title defence

If there is a native title right to do an activity (eg hunting, fishing, gathering or conducting a cultural or spiritual activity), the *Native Title Act 1993* allows a person with that right to carry out the activity without a licence. This can be used as a defence to a prosecution.

There must be a licence or similar instrument

The Native Title defence does not apply if the activity is completely prohibited. For example, it must be at least possible to get a licence or similar instrument to carry out the activity. A ministerial exemption might not be enough if it does not work like a licence.

An Act might replace native title rights

The *Karpany* case shows that where an Act replaces existing rights to carry out an activity such as fishing, this might extinguish native title rights also.

High Court challenge

The defendants in the *Karpany* case have now sought special leave to challenge the decision in the High Court.

However, for the Native title defence to apply it must be at least possible to get a licence or similar instrument to carry out the activity; the defence does not apply if the activity is completely prohibited. The Magistrate found that the offence of possessing the abalone was not completely prohibited due to the possibility of obtaining a Ministerial exemption, and therefore the Native title defence applied.

Appeal decision: the Native Title defence did not apply

However, the prosecutor was successful on appeal. The Full Court of the South Australian Supreme Court unanimously decided that the Ministerial exemption in that case was not an 'instrument' for the purpose of the Native Title defence. Therefore, the restriction regarding the abalone still applied to the defendants. The defendant had relied on the Western Australian case of *Wilkes v Johnsen* (1999) 21 WAR 269. That case concerned a fishing restriction that could be lifted by a ministerial exemption under an Act. In that case, the Full Court of the Western Australian Supreme Court considered that the exemption was similar to a licence and held that it could trigger the Native Title defence. However, although the restriction at issue in the *Karpany* case could be lifted by ministerial exemption, the South Australian court unanimously held that the exemption was not similar enough to a licence or permit. Therefore, the Native Title defence was not available against the *Karpany* prosecution.

Native Title fishing right extinguished

The Full Court went even further. Two of the three justices held that the native title right to fish had in fact been extinguished by the *Fisheries Act 1971*. They held that the Act had completely replaced any existing rights to fish with rights under that Act. Therefore, the Narrunga People's defence failed at a more fundamental level: there was no native title right to take the abalone on which to base the Native Title defence.

Only one of the justices agreed with the defendants on this point. He decided that even if the 1971 Act had replaced existing fishing rights, this did not mean it had replaced native title ones. He concluded that that Act simply did not 'speak to' native title.

Significance of the case

The defendants are now seeking to challenge the South Australian Full Court's decision in the High Court. Whether the decision is left to stand or is overturned, the case will be a significant development in the law on extinguishment of native title rights.

The case also provides guidance as to when statutory exemption powers might or might not trigger a defence under the NTA against a prosecution.

Government agencies involved in native title matters will need to consider this case in the context of administering natural resource legislation, negotiating indigenous land use agreements, and resolving native title applications.

Disclaimer

Further information

For further information about your agency's legislation and regulations and how it interacts with the *Native Title Act* and aboriginal customary rights please contact:

Sue Nolen, Assistant Victorian Government Solicitor, Commercial, Property and Technology on 9947 1404 or sue.nolen@vgso.vic.gov.au

Mary Scalzo, Managing Principal Solicitor, Commercial, Property and Technology on 9947 1419 or mary.scalzo@vgso.vic.gov.au

James Stephens, Senior Solicitor, Commercial, Property and Technology on 9947 1422 or james.stephens@vgso.vic.gov.au

Zoe Jones, Solicitor, Commercial, Property and Technology on 9947 1415 or zoe.jones@vgso.vic.gov.au