

# Section 211 as defence to fisheries prosecution

## *Lewis (Department of Primary Industries – Fisheries) v Wanganeen & Harradine* [2005] SASC 36

Bleby J, 28 January 2005

### Issue

The relevant issue was whether s. 211 of the *Native Title Act 1993 (Cwlth)* (NTA) provided a defence against a charge of being in breach of s. 44 of the *Fisheries Act 1982 (SA)* (*Fisheries Act*).

### Background

This is an appeal against a decision of a magistrate to make a finding of no case to answer on the charges and dismiss them. The magistrate made his decision without hearing submissions from the respondents, although they had foreshadowed a defence relying on s. 211 of the NTA. Justice Bleby interpreted s. 211 to mean:

[I]f the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on hunting, fishing and gathering, and some other law prohibits or restricts persons from carrying on that class of activity other than in accordance with a licence, permit or other instrument granted or issued under the law...in those circumstances the law does not prohibit or restrict native title holders from carrying on the class of activity where they do 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—at [35].

The parties agreed that:

- officers of the Fisheries Department stopped a vehicle which was seen leaving a beach;
- the vehicle was then occupied by the respondents; and
- in the vehicle there were found 250 greenlip abalone, of which 64 were undersize for the purpose of regulation 7(1) of the Regulations under the Fisheries Act—at [12].

The prosecution had tendered evidence that included statements made by one of the respondents which referred to his being engaged in 'hunting and gathering' to 'feed my family'—at [20].

Bleby J considered that the 'evidence before the Magistrate fell far short of establishing rights under s. 211 of the NTA'. His Honour observed that there was no evidence from the defendants as to the following:

- that the respondents were Aboriginal people;
- of the nature of their native title rights and interests as defined in s. 223 of the NTA;
- that such a large quantity of abalone was for the purpose of satisfying their personal, domestic or non-commercial communal needs.

His Honour indicated that the above points were not necessarily exhaustive: '[T]here may well be other evidence that would be necessary to establish the protection afforded by s. 211'. In the absence of proof to the contrary, his Honour held that the magistrate was required to presume that the abalone was in the defendants' possession for sale in accordance with s. 44(2aa) of the Fisheries Act—at [37].

**Decision**

The appeal was allowed on a number of grounds, the order dismissing the charges set aside and the matter remitted to the magistrate to be dealt with according to law—at [52].