



Hunting, shooting, fishing: the content of native title rights and the right to take and use resources for commercial purposes

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LAWYERS

All hunting of dugongs, turtles must end: activist

The Australian 11 November 2016



Bob Irwin and Colin Riddell have called for a hunting ban.

South Coast abalone and shark fin seizure worth more than \$57,000

Illawarra Mercury 26 January 2017

A banner for the 7.30 news program. On the left is the "7.30" logo in a blue box. In the center is a portrait of Leigh Sales, the host. On the right, it says "HOSTED BY: Leigh Sales". Below the banner is a navigation menu with links: "Home", "Archives", "About Us", "Contact Us", and "Vodcast". Below the menu is a headline: "Hunting rights hide horror for dugongs, turtles". At the bottom right of the banner area is the date "8 March 2012".

8 March 2012

Cultural fishing a 'front' to cover up commercial poaching: Abalone Council

Narooma News, 9 February 2017

'They call it black market, we call it survival': Far South Coast fishermen denounce abalone arrests

Illawarra Mercury, 11 February 2017



Photograph: Rohan Thompson, *Sydney Morning Herald* 2016

Agenda

1. Rights and protections applying to the exercise of hunting and fishing activities for personal, domestic or non-commercial communal needs
2. Recognising commercial rights to take and use resources (qualified rights)

211 Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holder

(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.

Removal of prohibition etc. on native title holders

(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.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of **class of activity**

(3) Each of the following is a separate ***class of activity***:

- (a) hunting;
- (b) fishing;
- (c) gathering;
- (d) a cultural or spiritual activity;
- (e) any other kind of activity prescribed for the purpose of this paragraph.

Relying on section 211

- *Yanner v Eaton* [1999] HCA 53
- *Karpany v Dietman* [2013] HCA 47
- Walbunja prosecutions

John Brierley, NSW Aboriginal Fishing Rights Group:

“(DPI Fisheries) officers are making out it’s all his. That’s not all (his) abalone. It’s the Walbunja people’s product,” Mr Brierley told the Bay Post/Moruya Examiner.

“On average, (he) would only get three kilograms a week for the whole year. (He) is within individual regulations, so is everybody else within the whole system.

“It was all within the legal quota. They call it black market, we call it survival because we take it and we sell it and we’re not doing drugs with it. These people are poor people.”

Source: “‘They call it black market, we call it survival’: Far South Coast fishermen denounce abalone arrests” *Illawarra Mercury*, 11 February 2017
<http://www.illawarramercury.com.au/story/4461326/they-call-it-black-market-we-call-it-survival-south-coast-fishermen-denounce-abalone-arrests/>

Andrew Nye, NSW Aboriginal Fishing Rights Group:

“(He) is entitled to do that. That is our resource. It has never been sold, never given up. There should be nothing stopping him from using his culture to collect abalone and go and make some money off it to buy a car or a house,” Mr Nye said.

“As an original owner of this country and a cultural fisherman, we should be entitled to go out there on any day and get whatever. We should not be dictated to by the DPI. They don’t pay our wages, we’ve got to make money. Our culture is commercial.”

Source: “They call it black market, we call it survival’: Far South Coast fishermen denounce abalone arrests” *Illawarra Mercury*, 11 February 2017
<http://www.illawarramercury.com.au/story/4461326/they-call-it-black-market-we-call-it-survival-south-coast-fishermen-denounce-abalone-arrests/>

John Smythe, NSW Director, Abalone Council of Australia:

“If someone has 500 abalone in the boot of a car, how do you know it’s going to be for their cultural food purposes and not sold on the black market?”

Source: “Cultural Fishing” *Sydney Morning Herald* 2016

<http://www.smh.com.au/interactive/2016/cultural-fishing-fight/>

Warren Entsch, Federal Member for Leichardt

“Of course [people will] “say it’s not for commercial purposes as they know it’s illegal. They’re selling the meat for \$50 and \$60 a kilo [vacuumed packed] and sold [in] pubs and motels in Cairns and Innisfail”

Source: “No evidence of illegal turtle, dugong hunting in far north Queensland, unreleased report finds” *Australian Broadcasting Corporation* 24 March 2017

<http://www.abc.net.au/news/2017-03-24/dugong-turtle-hunting-indigenous-hunting-report/8377852>

Hunting and fishing for commercial purposes

- *Akiba v Commonwealth* [2013] HCA 33
- *Willis on behalf of the Pilki People v State of Western Australia* [2014] FCA 714; appealed to the Full Court *State of Western Australia v Willis on behalf of the Pilki People* [2015] FCAFC 186
- *BP (Deceased) on behalf of the Birriliburu People v Western Australian* [2014] FCA 715
- *Rrumburriya Boorooloola Claim Group v Northern Territory of Australia* [2016] FCA 776.

“My conclusion responds to the extinguishment contentions as put by the State and the Commonwealth. It is that the legislative regimes of the State since 1877, and of the Commonwealth since 1952, concerning fisheries did not, and do not, severally or together evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes. **To the extent that those legislative regimes regulate the manner in which, and the conditions subject to which, commercial fishing can be conducted in a fishery in the native title holders’ marine estate, or prohibits qualifiedly or absolutely particular activities in relation to commercial fishing in the fishery in that estate: cf s 211 of the NT Act; the native title holders must, in enjoying their native title rights, observe the law of the land. This is their obligations as Australian citizens. But complying with those regimes provides them with the opportunity — qualified it may be — to exercise their native title rights”**

Akiba (on behalf of the Torres Strait Islanders of the Regional Seas Claim v State of Queensland (No 2); sub nom Akiba v Queensland (No 3) (FCR) [2010] FCA 643 at [861]

Looking forward

- Extend operation of section 211? – politically unlikely
- Developments at a State level
- Negotiations as part of consent determinations
- Guidance from other jurisdictions