

# **Cultural Rights in Conservation: Regulating the Indigenous Taking of Endangered and Threatened Species**

**Professor Gary D Meyers**

**With Research Assistance from: Penelope Owen, David Osz,  
Elise Murray, and Tara Ganley**

# Outline

- “Green”/“Black” Co-operation/Co-management and Controversy
- The Conflict: Dugong and Turtles
- Australian Native Title
- United States and Canadian Jurisprudence
- Conclusions/Recommendations

# The Conflict



# Co-operation/ Co-management

- Uluru
- Kakadu National Park



# Liquefied Natural Gas Precinct Controversy

- Environmentalists have made protests against the development of the precinct since the location (at James Price Point, North of Broome), was determined.
- The protests have been for the stated purpose of protecting 'threatened species, dinosaur footprints and Aboriginal heritage'.
- A majority of native title claimants (the Goolarbooloo / Jabirr Jabirr group) allowed for the industry to proceed by voting in favour of the precinct which gave a negotiation process and monetary compensation package.
- Criticisms were levied at the Goolarbooloo/Jabirr Jabirr group, angering former Kimberley Land Council CEO Wayne Bergmann who claimed that *'They value our culture only if we always say no to development. This attitude is an abandonment of their support for Aboriginal self-determination. This is wrong and insulting'*.

(Note: Project abandoned by Woodside Petroleum.)

# 'Wild Rivers' Controversy

- Legislation, now the subject of repeal, brought in to limit development in the 'wild river areas'.
- Question raised in debate: 'what's more important, Indigenous self-determination or preserving a unique unspoiled environment?'
- Environmental groups wanting to limit development to small-scale, government approved activity, such as ecotourism.
- Indigenous communities fear lack of future development. Call for there to be 'opportunities for people to get off welfare and make a living from their land' ...
- Claims of lack of consolation with Indigenous groups

# Dugong and Turtles



# Black Market Trade

“It is so common - the sale of turtle and dugong meat - and that has escalated the killing, probably doubled, tripled, the killing”

Mr Cropp, an environmental campaigner, says Aboriginal and Torres Strait Islanders are hunting in green zones and it should not be allowed.

Claims have been made that the Great Barrier Reef Marine Park Authority is too lenient on Indigenous people when it comes to traditional hunting rights.



- “Footage by former IT entrepreneur and now eco-warrior Rupert Imhoff showed a turtle fastened by a rope for up to three days waiting to die, while dugongs were being dragged by boats....”
- The Queensland Liberal National Party Government pledged to remove animal cruelty exemptions that existed and honoured that promise by introducing legislation to protect dugongs and turtles by the same cruelty laws that protect other animals.
- Beyond, reducing cruelty, the issue remains as to whether dugongs and turtles should be hunted when they are endangered.



# Australia: Native Title

In *Eddie Mabo and Ors v State of Queensland*, the Australian High Court decision acknowledging the reception into Australian law of common law doctrine of native title, Justice Brennan, author of the principal majority decision, writes:

*Native title has its origins in and is given its content by the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.*

# Early Cases

Native title may encompass usufructory rights (hunting/fishing) off lands held exclusively by native title holders where those lands are not held exclusively by other owners: *The Wik Peoples v State of Queensland* (1996) 187 CLR 1.

Rights to hunt and fish may extend off-shore (sea rights): *Commonwealth v Ymirr* (2001) 208 CLR 1.

State management of wildlife does not equal state ownership and state regulation does not extinguish recognised native title hunting and fishing rights: *Yanner v Eaton* (1999) 201 CLR 351.

# Native Title Definition

Section 223(1) of the Native Title Act (as amended by the *Native Title Amendment Act*) defines 'native title' and 'native title rights and interests' as:

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.

# Post-2000 High Court Cases

- In their joint judgment in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, Chief Justice Gleeson and Justices Gummow and Hayne note in regard to Justice Olney's decision at trial that:
- The legal principles which the primary judge considered were to be applied to the facts found were principles which he correctly identified as being found in the Native Title Act's definition of native title. It is true to say that his Honour said that this definition of native title was "consistent with" language in the reasons in *Mabo [No 2]* and that is was, in his Honours view, necessary to understand the context in which the statutory definition was developed by reference to what was said in that case. It may be that undue emphasis was given in the reasons to what was said in *Mabo [2]*, at the expense of recognising the principal, indeed determinative, place that should be given to the *Native Title Act*.

# WA v Ward

- In *Western Australia v Ward* 191 ALR 1 the High Court disavows a common law approach to defining Native title rights in favour of a statutory approach:

The fact of occupation does, without more, identify the nature of the rights and interests which, under traditional law and custom, those predecessors held... [and] says nothing of what traditional or custom provided... [I]t is an insufficient basis for concluding that there was... communal title in respect of the claim area... or a right of occupation to it.

# Recent Cases: The Future?

Note, in the Akiba case (*Akiba on behalf of the Torres Strait Regional Sea Claims Group v Commonwealth* [2013] 250 CLR 208), High Court did not ask whether commercial/trading rights in fish was part of the Native title holders traditional customs. Instead, the assumption appears to be if native title includes fishing rights in marine areas where others are fishing commercially, then the Native Title must also include those rights.

In *Griffiths v Northern Territory* (Timber Creek case) [2019] 269 CLR 1, a decision dealing with the question of compensation for the “cultural/spiritual” loss of native title, the High Court effectively holds that exclusive native title is equivalent to freehold title. The case has significant implications for those negotiating mining agreements on native title lands. Moreover, the determination that native title is equivalent to freehold title suggests that in the future the courts may view proposed activities on native title lands through the lens of what is permissible on freehold lands in the various States.

# Regulation (?): Native Title Hunting & Fishing Rights

S211 NTA 1993 (paraphrased)\*

1(a). if native title rights to hunt, fish, gather, etc;

(b). by Cth/St/Territory law are prohibited except via a license/permit/etc;

(b)(a). and the law does not confine the permit to research, environmental protection, public health or safety purposes; and

(c). the law does not confer benefits only for Indigenous people [then]

2. The Cth/St/Territory law does not prohibit exercising such rights for

(a) personal, domestic, non-commercial communal needs; and

(b) in the exercise of their native title rights.

Note: native title holders are subject to laws of general application.

\*Referred to by former Foreign Minister Gareth Evans during debate on the original NTA as: "the stuff the platypus clause."

# The Real Problem Clause

However, pursuant to s 8 of the EPBC Act, s 211 of the NTA is exempt from any restrictions placed on hunting or fishing. If the activity is undertaken in a Commonwealth reserve, s 359A of the *EPBC Act* applies to Indigenous activities. S 359A provides that if regulations are made under division 4 of part 15 of the *EPBC Act*, those regulations do affect traditional use of the area if they:

*a) are made for the purpose of conserving biodiversity in the area; and*

*b) expressly affect the traditional use of the area by indigenous persons.*

- In this situation, the activity can be subject to an authorisation pursuant to regulations 12.06 and 12.08 of the *Environmental Protection and Biodiversity Conservation Regulations 2000 (Cth)*.

# Summary



In sum,

- A) rights must be specifically pled to be included in a determination of native title rights;
- B) rights must be exercised by recognised Native Title holders;
- C) in areas recognised in the Native Title determination; and
- D) When undertaken in lands subject to native title, hunting/fishing for protected species is unable to be regulated .

# The US Jurisprudence: States v Tribes



1. State regulation of un-reservation hunting and fishing rights is prohibited: *New Mexico v Mescalero Apache Tribe* 462 US 324 (1983).

Held: state may not pre-empt tribal regulation of tribal member's hunting and fishing rights.

# The US Jurisprudence: States v Tribes

## 2. State regulation of off-reservation rights

Beginning with *Tulee v Washington* 315 US 681 (1942) and progressing through the three *Puyallup v Washington State Department of Game* cases, the Supreme Court has established that States may regulate off-reservation rights where:

- a) regulation is for a legitimate conservation interest;
- b) regulation is narrowly drawn to meet that interest; and
- c) regulation is not discriminatory on its face or in practice

*Puyallup II*, 414 US 44, 49 (1973): treaty rights do not allow for extinction of species hunted or fished.

# US Jurisprudence: the Federal Rule

A. Federal statutes are supreme. Thus, laws such as the *Migratory Bird Treaty Act*, *Marine Mammal Protection Act* (which both include limited/permitted hunting by some tribes), *The Bald Eagle Protection Act* (which imposes a blanket ban on takings), and the *Endangered Species Act* (which bans all takings with the exception of hunting by Alaskan Natives, where permitted for subsistence purposes) prevail over both on and off-reservation rights.

*US v Dion* 476 US 734 (1986).

# US Jurisprudence: the Federal Rule

B. Where protected species may be hunted or fished via a permit, the issuance of a permit is a discretionary act.

*Adams v Vance* 570 F2d 950 (DC Cir 1978)

C. Is the abridgment of Native Title rights by federal environmental statutes an extinguishment requiring compensation?

No - probably- not but the issue is too complicated for today's presentation.



# Canada

- *Sparrow v The Queen* [1990] 1 SCR 1075.
- Section 75 of the *Constitution Act* 1982 preserves existing treaty and aboriginal rights. The guarantee is not absolute.
- Question for the court was whether the net length requirement imposed by federal legislation was valid.
- Held: conviction set aside; new trial on whether legislation impermissibly interferes with fishing rights

# Canada: general rule

- The most important aspect of the *Sparrow* decision is that it establishes the general rule in Canada for resolving conflicts between Indigenous rights and environmental conservation
- “...the *Sparrow* decision establishes a purposive approach to the resolution of conflicts over rights assured by section 35... In such an approach, environmental protection measures may limit aboriginal and treaty-guaranteed hunting and fishing rights to the extent needed to preserve the resource. Once conservation of the resource is assured, natives have priority in its use.”

# Conclusions/ Recommendations

Repeal s 8 (2) (b) of the EPBCA; and Amend Native Title Act section 211 to:

1. require permit issued by Commonwealth (or State on behalf of the Commonwealth) (with involvement by the land council or native title representative body) for Indigenous taking of species listed under the *Environment Protection and Biodiversity Conservation Act*, or under state legislation,
2. for a particular number of takings, upon a finding that takings will not adversely affect recovery;
3. for subsistence or ceremonial purposes only; and
4. requiring all takings to be conducted in a humane manner.

Thank you for listening...



... and for caring !

