



Walbunja Fishing Rights

Walbunja Case

- Kieran Stewart and Wayne Carberry charged with taking and possessing more fish (abalone) than allowed under the Fisheries Management Act 1994 (NSW).
- Walbunja Elders all decided enough was enough, and the usual practice of pleading guilty because there was no funding for litigated Native Title defences was not acceptable
- Sought Legal Aid assistance to fund a Native Title defence (in part) and the rest was offered on a speculative basis by Barrister, Solicitor and Expert.

Facts

- 52 abalone, three men diving, one lookout and one runner
- Walbunga registration test decision was a finding of each of the facts of native title to a prima facie standard by a specialist tribunal (onus then rests on State to negative);
- Genealogies, and registration on the Register of Aboriginal Owners proved descent and membership of Walbunga
- Affidavit evidence from senior Walbunga men and women to say the men were fishing in accordance with Law and Custom
- Both men had priors for fisheries offences.

S 211 Native Title as a Shield Case

Section 211 of the Native Title Act provides a defence where Aboriginal people can prove on the balance of probabilities:

At sovereignty, there was a society of people bound together by law and custom that supported rights and interests in the lands and waters that included taking and possessing species such as fish and shellfish;

- That the society has maintained continuity of law and custom, including fishing to the present day;
- That the Aboriginal persons are members of that society;
- That the Aboriginal persons were fishing in exercise or enjoyment of the law and custom of that society), and
- That the Aboriginal persons were fishing for personal, communal and non-commercial purposes (Section 211(2)(a) and 211(3) of the NTA, Fact Sheet).

NSW Fisheries Law and s 211

Sections 17 and 18 of the Fisheries Management Act 1994 (NSW) (**Fisheries Management Act**) prohibit the taking and or possessing of fish otherwise than in accordance with the regulations and fall within section 211(1)(b) of the *Native Title Act 1993 (Cth)*.

The Fisheries Management Act is not a law that confers rights or interests only on, or for the benefit of Aboriginal peoples or Torres Strait Islanders. (s 211(1)(c), see *Karpany v Dietman* [2013] HCA 47 at [45]).

The Fisheries Management Act, and ss 17, 18 and 35, or 37 in particular, are not laws which provide only for permits to be granted for research, environmental protection, public health or public safety purposes (Section 211(1)(ba) *Native Title Act 1993 (Cth)* and s 37 *Fisheries Management Act 1994(NSW)*).

President Kirby in *Mason v Tritton* (1994) 34 N.S.W.L.R. 572, at pp. 590-593 found that the predecessors of the Fisheries Management Act NSW (1994) did not extinguish native title rights and interests.

Legislative Context – failure to commence

Section 21 AA of the *Fisheries Management Amendment Act 2009 No 114* was passed by the NSW Parliament in 2009 but is yet to commence and provides:

“21AA Special provision for Aboriginal cultural fishing

(1) An Aboriginal person is authorised to take or possess fish, despite section 17 or 18, if the fish are taken or possessed for the purpose of Aboriginal cultural fishing.

(2) The authority conferred by this section is subject to any regulations made under this section.

Spurious conservation claims by FisheriesNSW

Impact of Aboriginal Cultural Fishing on Fisheries Resources

No review of Aboriginal cultural fishing, or any review of black market fishing or any fishery in NSW has identified Aboriginal Cultural fishing as having a negative impact on a marine resource.

Each has however commented on the continuity of the practice, the health, social and cultural benefits of being able to continue their custom.

Many Aboriginal People hold the view that current Fisheries Management practices do not enhance and maintain fisheries, Aunty Coop, Georgina Parsons recalls *"We would always give something back, all the shells, and guts went back to the ocean so the fish could get a feed, I would leave a fish for the sea eagle, my totem. We all got a feed, not just me."*

Interestingly, the effect of broadscale removal of Aboriginal people from the land on resources such as fisheries did not go unnoticed: *"When the blacks went the fish went': meaning that the habit of preserving the wild was destitute in the early white settler."*

M Gilmore, *Old Days, Old ways: a book of reflections*, Angus and Robertson, Sydney 1934, pp 163-164.

Outcome

Case withdrawn after first day of defence evidence.

- Walbunja people established an Aboriginal Fishing Rights group;
- Advocacy at a National (wrote to Mick Gooda and Professor Val Cooms), State (NTSCorp, NSWALC, Attorney General, DAA and Fisheries) and local level;
- Currently requesting DPP prepare standard prosecution guideline for NSW Fisheries and Police.

But....

Two young Walbunja men have just been charged for taking 18 abalone, 16 and 18 years of age.

Aboriginal Legal Service has sent the standard defence letters we drafted, and are awaiting a response.

Danny Chapman meeting with Geoff McKechnie, Deputy Police Commissioner, Field Operations on 9 June 2016.