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Balancing competing rights in the criminal justice system: biodiversity protection and indigenous hunting and fishing rights in Australia and elsewhere

This paper would not have been possible without the research assistance of Tom Holcombe, researcher at the Land and Environment Court of New South Wales.

Introduction

Australia with its extensive marine resources and unique biodiversity has laws regulating fisheries and endangered flora and fauna which aim to protect fish stocks, biodiversity and habitat. These laws are generally made by each state and territory government reflecting the division of power under Australia's federal system of government. For example, measures often included in fisheries statutes specify minimum fish size take and prohibit use of certain equipment such as particular types of nets.

Indigenous cultural and social expression, and subsistence, relies in many communities on continued hunting and fishing. Statutory exemptions from some offences for traditional hunting practices are provided. Such legal regimes need to reflect the balancing of potentially conflicting public policies. The intersection between these potentially competing policies arises in the criminal law context where the pursuit of traditional hunting and fishing practices may breach fisheries and fauna protection laws resulting in prosecution by the responsible state or territory government department or agency of individual Aboriginal defendants. Cases where proof of traditional practice provides a defence to criminal charges will be considered. The approach of courts to the onus of proof which applies in the criminal law context essentially determines if these laws fairly balance competing rights and interests.

Criminal prosecutions in New Zealand and Canada will also be considered. Different historical and legal contexts has resulted in earlier and greater recognition of indigenous traditional practices in those countries than in Australia.

This paper focusses on Australian state and territory statutes related to fishing and hunting. The collection of native plants is also regulated in all jurisdictions in Australia which could also impact on traditional Aboriginal gathering practices but is beyond the scope of this paper.

Recognition of native title in Australia for Aboriginal and Torres Strait Islander people

Mabo v Queensland (No 2) (1992) 175 CLR 1

The majority of the High Court in the landmark decision of *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 declared that the pre-existing rights of members of the Meriam people survived the annexation by Great Britain of the Murray Islands in the Torres Strait, which islands the Meriam people occupied. The majority recognised “a form of native title which, in cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their law and customs to their traditional lands...”: at 15. The acquisition of sovereignty did not require that all land vested beneficially in the Crown, but rather the Crown acquired a radical (or ultimate) title “burdened” by native title: at 48.

Following *Mabo (No 2)*, the *Native Title Act 1993* (Cth) was passed by the Australian government pursuant to s 51(xxvi) of the *Australian Constitution*, which gives the Commonwealth power to enact legislation with respect to “the people of any race for whom it is deemed necessary to make special laws”.¹ Native title and native title rights and interests are defined broadly in s 223 of the *Native Title Act*. The definition includes in part:

Common law rights and interests

- (1) The expression ***native title*** or ***native title rights and interests*** means 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

¹ *The State of Western Australia v The Commonwealth [Native Title Act Case]* [1995] HCA 47; (1995) 183 CLR 373 at 462 and 478.

- (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.

Under s 211 native title-holders can continue to engage in traditional activities, defined as hunting, fishing, gathering, cultural or spiritual activity (or other prescribed activities) which are in exercise or enjoyment of their native title rights and interests or for the purpose of satisfying their personal, domestic or non-commercial communal needs despite a law of the Commonwealth, a state or a territory which would otherwise prohibit those activities.

State and territory based natural resource protection laws

A number of academic papers and reports prepared for indigenous bodies such as the NSW Aboriginal Land Council have considered the interaction of laws regulating resources and the exercise of traditional Aboriginal activities such as hunting and fishing. In 1986 the Australian Law Reform Commission prepared a report on this topic titled "The Recognition of Aboriginal Customary Laws".²

Under Australia's federal legal system most natural resource protection laws are at the state and territory government level. Each state and the Northern Territory has its own laws concerning fisheries utilisation and protection and fauna protection. All state and territory legislation creates criminal offences for breaches of the legislation many of which are strict liability offences. First instance decisions will often be local state and territory courts with appeals to state and territory superior criminal appeal courts. Final appeal from a state or territory court of appeal lies to the High Court of Australia if leave is granted. The defence of native title as provided under s 211 of the *Native Title Act* operates in all jurisdictions whether explicitly recognised or not.

The acknowledgment of traditional Aboriginal cultural practices in statutes varies from one jurisdiction to another. Indigenous fishing rights have been recognised as arising separately from native title rights³ in some Australian states and territories. A brief overview of key legislation follows.

² (1986) Report 31.

³ Alexander White, "Indigenous fishing in Queensland: a review" (2013), 11 Native Title News 7 at 8.

New South Wales

The *Fisheries Management Act 1994* (NSW) exempts Aboriginal fishers from paying a recreational fishing fee. Special permits for Aboriginal cultural fishing purposes are provided for (s 37). A number of offences are specified relating to size, quantity and taking of particular species of fish.

The *Fisheries Management Amendment Act 2009* (NSW) added a definition of Aboriginal cultural fishing which states:

Aboriginal cultural fishing means fishing activities and practices carried out by Aboriginal persons for the purpose of satisfying their personal, domestic or communal needs, or for educational, ceremonial or other traditional purposes, and which do not have a commercial purpose.

One important section (s 21AA) was passed by both Houses of Parliament in 2009. It has never been assented to and gazetted and so is not yet in force.

Under s 21AA an Aboriginal person is authorised to take or possess fish, despite s 17 (bag limits-taking of fish) and s 18 (bag limits-possession of fish) subject to the making of regulations. The regulations may prescribe the manner of taking fish by Aboriginal persons for the purpose of cultural fishing and specify restrictions on the quantity of fish of a specified species or class. Such regulations cannot be made unless an advisory council of the Aboriginal sector of the fishing industry has been established under the Act and been consulted on the proposed regulations. When introducing the Fisheries Management Bill 2009 (NSW) the Minister for Primary Industries stated that the bill means that for the first time Aboriginal people's customary association with fisheries resources is formally recognised in the Act.

The Aboriginal Fishing Advisory Council was established under the Fisheries Management (General) Regulation 2010 (NSW).

The *Threatened Species Conservation Act 1995* (NSW) provides for licences to permit picking of threatened species. No specific reference is made to Aboriginal cultural purposes. A note at the end of s 91 refers to a licence being available to authorise Aboriginal people to harm animals or plants for cultural purposes.

The *Aboriginal Land Rights Act 1983* (NSW) provides for agreements to permit hunting, fishing and gathering between local land councils, and the owner or occupier of any land.

Recent developments

As recently as March 2015 the Illawarra Aboriginal Corporation on the south coast of NSW was reported in the media as calling on the NSW government to ensure the

laws passed in 2009 come into force (meaning s 21AA) and for greater awareness amongst fisheries officers of the cultural basis of traditional fishing by Aboriginal people.⁴ An ABC news report referred to over 200 prosecutions of Aboriginal people for fisheries offences.⁵ I will refer to one such matter below.

In July 2015 a representative of the Department of Primary Industry (the Department) was reported⁶ as stating the Department formally recognised that individual Aboriginal people have the right to fish under native title and had not prosecuted an Aboriginal person for taking more than the allowable catch in the past year. An extra step had been adopted by Fisheries NSW officers in the process of considering whether to charge for the offence of exceeding the bag limit in now asking for details of the circumstances of fishing. Those who can prove they were fishing according to traditional Aboriginal law and custom have so far not been prosecuted according to the news report. The report referred to a major case in which the Department withdrew charges against two Aboriginal men in Batemans Bay local court in 2014 following the identification of a defence based on fishing being part of the defendants' native title rights to fish.

While s 21AA has yet to be passed, at officer level greater cultural sensitivity is possibly prevailing. The July 2015 media report also quoted however a cultural fishing advocate as saying that cultural fishers were still having their catches seized.

Queensland

The *Fisheries Act 1994* (Qld) includes a defence for Aboriginal and Torres Strait Islanders for fishing related offences in s 114. I will discuss this section in more detail later in relation to *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351.

The *Nature Conservation Act 1992* (Qld) in s 93 recognises Aboriginal and Torres Strait Islanders' rights to take, use or keep protected wildlife but this is subject to a conservation plan that expressly applies to the taking, using or keeping of protected wildlife. The section also provides that it is an offence for an Aboriginal person or Torres Strait Islander to take, use or keep protected wildlife in contravention of provisions of a conservation plan punishable by up to 3000 penalty units or up to two years imprisonment. Section 93 is not yet in force.

⁴ Mark Colvin, "Aboriginal people call on NSW to protect cultural fishing rights", Australian Broadcasting Corporation (online); March 19, 2015 < <http://www.abc.net.au/pm/content/2015/s4201002.htm>>.

⁵ Ibid.

⁶ Carmen McIntosh, "Department of Primary Industries adds new step in Aboriginal cultural fishing enforcement", Merimbula News (online), 17 July 2015 < <http://www.merimbulanewsweekly.com.au/story/3217641/indigenous-fishing-prosecutions-snap-frozen/>>.

South Australia

The *Fisheries Management Act 2007* (SA) includes Div 2 titled “Aboriginal Traditional Fishing”. Under s 60 an Aboriginal traditional fishing management plan for specified Aboriginal traditional fishing activities in specified areas of water can be made.

The *National Parks and Wildlife Act 1972* (SA) authorises hunting by Aboriginal persons outside reserves and wilderness protection areas which would otherwise be illegal under the Act.

Tasmania

The *Living Marine Resources Management Act 1995* (Tas) creates in s 60 an offence of fishing without a licence in state waters. Subsection (2)(c) exempts an Aboriginal person who is engaged in an Aboriginal activity from the requirement to hold a fishing licence.

“Aboriginal activity” is defined as (a) the non-commercial use of the sea and its resources by Aborigines; and (b) the taking of prescribed fish by Aboriginal people for the manufacture, by Aborigines, of artefacts for sale; and (c) manufacturing of the kind referred to in (b).

The *Nature Conservation Act 2002* (Tas) provides for Aboriginal cultural activity of hunting, fishing and gathering for personal use based on the Aboriginal custom of Tasmania as passed down to that Aboriginal person.

Victoria

The *Fisheries Act 1995* (Vic) specifies in s 49 that a permit can be issued to take and possess fish for a specified indigenous cultural ceremony or event. The Act provides for permits to authorise a holder to possess fish for education, research, scientific purposes, to sell, and for a specified indigenous cultural ceremony or event. A regulation made in 2009 creates a category of traditional owner recognition permit which authorises the members of a traditional owner group to carry out taking of fish species specified in the permit and the use and possession of any recreational fishing equipment approved and specified in the permit. Section 69C requires that there be an agreed means by which an authorised officer is able to verify that a member is a member of the traditional owner group the holder of the permit.

The *Traditional Owner Settlement Act 2010* (Vic) provides for an order to be made authorising the members of a traditional owner group which has entered into a natural resource agreement to hunt, take or destroy wildlife for traditional purposes which activities would otherwise be in breach of the *Wildlife Act 1975* (Vic).

Western Australia

The *Fish Resources Management Act 1994* (WA) in s 6 exempts Aboriginal people from having to hold a recreational fishing licence when taking fish in accordance with continuing Aboriginal tradition if fish are taken for the purposes of the person and/or family and not for commercial purposes. Customary fishing is defined to mean fishing by an Aboriginal person that is in accordance with Aboriginal customary law and tradition of the area being fished and is for the purpose of satisfying personal, domestic, ceremonial, educational or non-commercial communal needs.

The *Wildlife Conservation Act 1950* (WA) provides in s 23 that Aboriginal persons may take flora and fauna for customary purposes. Customary purposes are defined to include preparing or consuming food customarily eaten by Aboriginal persons, preparing or using medicine customarily used by Aboriginal persons or engaging in artistic, ceremonial or other cultural activities.

Northern Territory

The *Territory Parks and Wildlife Conservation Act 1976* (NT) states specifically in s 53 that the Act does not limit the right of Aboriginal people who have traditionally used an area of land or water from continuing to use that area in accordance with Aboriginal tradition for hunting, food gathering (otherwise than for the purpose of sale) and for ceremonial and religious purposes. The operation of the Act is stated explicitly to be subject to the *Native Title Act*. Aboriginal tradition has the same meaning as the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

This brief overview of state and Northern Territory legislation identifies that all jurisdictions have offences which can potentially impact on traditional Aboriginal hunting and fishing practices.

Very brief overview of criminal law

In criminal proceedings the onus of proof beyond reasonable doubt lies on the prosecutor (usually a state government agency in the cases I consider) to establish all the elements of an offence. A defendant has an onus of proof on the balance of probabilities to establish any defence.

There are three types of criminal offences, those where proof of mens rea is required by the prosecutor, strict liability and absolute liability offences. An honest and reasonable mistake of fact, if established, may render an accused's conduct innocent such that it would afford an excuse to a strict liability offence.⁷ Such a "defence" is not available in absolute liability offences.

⁷ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) at [3.270] 218.

Offences under state and territory fisheries and fauna protection legislation are generally strict liability. The penalties imposed usually include fines and/or prison terms for more serious offences.

The commencement of a prosecution is a discretionary decision by a government regulator and the exercise of that prosecutorial discretion has an important role to play in what matters reach a court system.

Native title and criminal offences in the High Court of Australia

A number of criminal prosecutions of Aboriginal people in the context of fishing and fauna conservation have been before the courts in most Australian states and territories. Four matters have been argued in the High Court of Australia.

***Walden v Hensler* [1987] HCA 54; (1987) 163 CLR 561**

Taking native fauna required a permit which the defendant, an Aboriginal elder, did not have in breach of s 58(1) of the *Fauna Conservation Act 1974* (Qld). The defendant was charged by a fauna officer (Mr Hensler) and convicted in the local court at Mount Isa of taking a bush turkey and having in his possession a live turkey chick. The defendant was found in possession of a partly plucked turkey carcass and a live turkey chick which his son was intending to keep as a pet. The birds were the property of the Crown under s 7 of the Act. The defendant was fined \$100 plus professional and court costs and in default of payments was to be imprisoned for one month.

In 1987 the High Court had yet to determine the existence of native title which it did in 1992 in *Mabo (No 2)*.

Uncontested evidence from the appellant and the fauna officer was set out in the High Court judgment. Before the magistrate the defendant gave evidence relating to his upbringing and lifestyle, particularly in relation to food gathering by traditional means. An anthropologist gave evidence that “in Aboriginal society a member of a clan had the right to take bush resources within and beyond the clan’s own country, and that the practice of taking bush tucker was never forbidden”.⁸ According to Aboriginal law, the defendant or his family may capture a young bird for a pet, but has to be let go once it grows back because it belongs to the bush.⁹ This evidence was accepted by the magistrate who found that the defendant had taken a variety of traditional food sources during his life, including plain turkeys and honestly believed he was doing nothing wrong in doing so.

⁸ *Walden v Hensler* (1987) 163 CLR 561 at 564, 586-598.

⁹ *Ibid* 593-594.

The High Court held that the defendant's conviction and the harsh penalty imposed was a substantial mistake. Section 22 of the *Criminal Code 1899* (Qld) which provided that a person is not criminally responsible for an offence relating to property, or an act done or omitted to be done in respect of property in the exercise of an honest claim of right and without intention to defraud did not exculpate the defendant. The majority essentially held that the sentencing process had miscarried however and quashed the conviction.

The High Court has now considered the interaction between s 211 of the *Native Title Act* and criminal offence provisions in state fisheries management and fauna protection legislation in two cases, *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 and *Karpny v Dietman* [2013] HCA 47; (2013) 252 CLR 507. A key issue which usually arises and did in *Akiba (on behalf of the Torres Strait Regional Seas Claim Group) v Commonwealth and Others* [2013] HCA 33; (2013) 300 ALR 1 is whether particular resource conservation and management legislation has extinguished native title. If native title is extinguished then s 211 of the *Native Title Act* does not apply.

***Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351**

In *Yanner v Eaton*, the defendant was charged with the offence of taking and keeping fauna (two juvenile crocodiles) without a permit under the *Fauna Conservation Act 1974* (Qld). In the local court the magistrate found that as a member of an Aboriginal clan it was traditional custom to hunt juvenile crocodiles for food as they had tribal totemic significance. The practice was based on spiritual belief. The charge was dismissed. The prosecutor appealed. The Queensland Court of Appeal set aside the magistrate's order. The defendant appealed to the High Court where the majority held that the hunting and fishing rights found to exist by the magistrate were within s 223 of the *Native Title Act* and the native title defence provided by s 211 was available.

A summary of the appellant's evidence and evidence of an anthropologist (the same anthropologist that gave evidence in *Walden v Hensler*) was set out at [132] by Callinan J:

Evidence was given in the Magistrates Court without objection, that the appellant took, during a period of five weeks, two young crocodiles from Cliffdale Creek in North Queensland. He and other members of his group or tribe froze and ate part of the catch. The area around Cliffdale Creek was traditionally occupied by the tribe or group of people, the Gungalletta people, of whom the appellant was a member. The precise length of time of this occupation was uncertain. The appellant claimed that the area had been occupied for at least 1,300 years. Dr Trigger, an anthropologist, gave unchallenged evidence that radiocarbon dating conducted in 1983 indicated that shellfish-eating people occupied the area 140 years ago

(plus or minus 60 years) and 1,300 years ago (plus or minus 80 years). The appellant and Dr Trigger gave evidence that the appellant's genealogy could be traced back to 1870. The magistrate concluded that the appellant's tribe or people were identical with those whose presence was revealed by carbon dating. The hunting and taking of crocodiles in the area was a practice which, Mr Yanner stated, his people had been following "forever". He also said that although traditional hunting methods had changed over the years, the way in which he hunted crocodiles was "[p]retty much the same" as the way in which his ancestors had. This claim was made despite the fact that the appellant used a modern boat with an outboard motor and a steel tomahawk to administer the coup de grace to the crocodiles. Dr Trigger also gave evidence that "Gungaletta customs and traditions have simply been maintained from the earliest processes of colonisation through to the present, though they have changed in certain ways".

The High Court held that the defendant's rights and interests were recognised by the common law of Australia up until the passage of the *Fauna Conservation Act 1974* (Qld). These rights were not extinguished by the introduction of that Act. By operation of s 211(2) of the *Native Title Act* and s 109 of the *Australian Constitution* the *Fauna Conservation Act 1974* (Qld) did not prohibit or restrict the appellant as a native title holder from hunting juvenile crocodiles.

***Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33; (2013) 300 ALR 1**

More recently, in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33; (2013) 300 ALR 1 a single judge of the Federal Court found that 13 island communities in the Torres Strait to the north of the Australian mainland held native title over a significant part of the waters of the Strait and made a determination to that effect under the *Native Title Act*. The government appealed to the Full Federal Court which overturned that finding, holding that Queensland and the Commonwealth had extinguished any native title held by each of the communities to take fish and other marine resources for commercial purposes. The effect of the state and Commonwealth laws was to forbid taking of fish for commercial purposes without a licence. The Full Federal Court decision was overturned in the High Court. The majority of the High Court did not consider that the legislation did extinguish native title, finding that such a construction should only be applied if no other reasonable construction exists. Nothing in the character of a conditional prohibition on taking fish for commercial purposes required that it be construed as extinguishing such a right.

***Karpany v Dietman* [2013] HCA 47; (2013) 252 CLR 507**

In a decision handed down shortly after *Akiba*, *Karpany v Dietman* [2013] HCA 47; (2013) 252 CLR 507 the High Court held that native title rights to hunt, fish and

gather prevailed over state fisheries legislation that criminalised some of those activities. That case considered an offence under the *Fisheries Management Act 2007* (SA) s 72(2)(c) of taking undersize abalone. The defendants did not dispute that they had 24 undersize abalone nor was it disputed that the abalone was taken in accordance with the traditional law and customs of the Narrunga people being for communal non-commercial purposes.

Before the magistrate the counsel for the defendants stated that the defendants would give evidence and call witnesses to establish that their fishing activity was carried out in a traditional manner and was consistent with the requirements of the *Native Title Act*. The evidence would establish the defendants' connection with the area in which they had taken the abalone, as well as the familiar lineage demonstrating a continuing unbroken traditional fishing practice.¹⁰

The magistrate accepted that the defendants were exercising their traditional fishing rights and dismissed the charges. The Full Court of the Supreme Court of South Australia held that the assumption that native title rights and interests had subsisted as conceded in the magistrates court was wrong on the basis that the *Fisheries Act 1971* (SA) had extinguished such rights.

The High Court considered whether native title rights were extinguished by state fisheries legislation passed before 1975 finding that it was not, referring to *Akiba*. The *Fisheries Act 1971* (SA) regulated but was not inconsistent with the continued enjoyment of native title rights. Extinguishment must be emphatic and does not arise by inference. Sections which allowed an exemption from a prohibition on taking undersized fish reinforced a finding that the section did not prohibit Aboriginal customary fishing, applying the reasoning in *Akiba* in doing so.

Native title/traditional customary practices and criminal offences in the States and Northern Territory

A comprehensive review of all cases before the courts of the various jurisdictions in Australia is beyond the scope of this paper. The extent to which individual Aboriginal people are charged in each jurisdiction is also difficult to determine given that it is possible a number of defendants will plead guilty in the local court giving rise to a sentencing hearing rather than a contested defended hearing. In the following cases in the states and the Northern Territory the defendants pleaded not guilty.

¹⁰ *Karpny v Dietman* [2013] HCA 47; (2013) 252 CLR 507 at 515 [10].

New South Wales

Mason v Tritton (1994) 34 NSWLR 572

Under the Fisheries and Oyster Farms (General) Regulation 1989 (NSW) it was an offence to possess more than 10 abalone. The defendant was charged with having 92 abalone in his car boot. In pleading not guilty he relied on a defence that he enjoyed an unextinguished traditional and customary right to fish in the ocean near Narooma on the NSW south coast. This right was asserted to be a native title right recognised by the common law, relying on the recently decided *Mabo (No 2)* in the High Court. The defendant did not give evidence. Two expert witnesses were called by him to give evidence at a general level of the practice of Aboriginal people to fish for abalone along the NSW coast to support their opinion that Aboriginal people traditionally fished for their own subsistence, to provide food for their clan and to obtain fish for the purpose of bartering. There was no direct evidence of what the defendant intended to do with the abalone. The magistrate in the local court dismissed the defence on the basis that there was insufficient evidence to establish that the defendant on the day of the offence was exercising a traditional or customary right to fish and he was convicted and fined.

In *Mason v Tritton* (1993) 70 A Crim R 28 a single judge of the Supreme Court of NSW dismissed the appeal against conviction by the defendant.

The NSW Court of Criminal Appeal held that *Mabo (No 2)* imposed a quite onerous evidentiary burden on a defendant to establish that traditional practice was exercised by the person relying on it. Evidence that what the defendant was doing on the day of the offence was the assertion of or pursuant to a system of rules which he recognised and adhered to was absent. There was a fundamental failure to prove such matters. This case was contrasted with the detailed evidence of traditional custom and reliance on it by the defendants in *Walden v Hensler*¹¹ and *Milirrump v Nabalco Pty Ltd*¹². A defendant must prove on the balance of probabilities the existence of native title per *Mason v Tritton* (1994) 34 NSWLR 572 at 594G. The offence arose from the prohibition in a regulation aimed at controlling fishing in the public interest. The defendant had to establish that he was fishing pursuant to a set of rules recognised by the common law. He failed to provide evidence of the content of those rules and to bring himself within their scope.

Local/District Court of New South Wales

Eleven Aboriginal defendants were charged with offences relating to fishing which occurred at several places along the south coast of NSW on six separate dates

¹¹ (1987) 163 CLR at 561.

¹² (1971) 17 FLR 14.

between 1999 and 2002 and concerned possession of undersized abalone, excessive quantities of abalone over and above the daily bag limit (in one case 1,366 compared to a daily limit of 10).

The defendants sought to rely on the defence that they were exercising native title rights as enabled by s 211 of the *Native Title Act* and that the state fisheries legislation amounted to an impairment of their religion in breach of s 116 of the *Australian Constitution*.

Who bore what onus of proof in relation to a native title defence was disputed. The defendants argued that they bore the evidentiary onus of producing sufficient evidence of native title to create a doubt as to their guilt on the basis that the onus of proof to establish an offence rests on the prosecutor. *Mason v Triton* did not support such an approach. *Dershaw v Sutton*¹³ in Western Australia was argued to support their approach.

Before the local court magistrate evidence of the defendants, community elders and expert anthropologists was called by the defendants. As these were criminal matters there was no requirement (as there would be in a civil matter) placed on the defendants to provide evidence in chief before it was relied on in court. This resulted in the prosecution seeking and being granted an adjournment to consider the evidence and to obtain guidance from its own experts before responding. The prosecutor engaged its own anthropologist to assess the defendants' experts' evidence and to give evidence in reply.

The hearing took 20 days over several months and was followed by written submissions and further oral submissions over 8 days. Such cases are very taxing on the local court system where proceedings of such length and complexity are very unusual. The magistrate found the offences proved in a 130 page judgment.

In *Appeals by Scott Rigby, Troy John Nye, Kevin Mason, Andrew Nye, Brian William Nye, Keith Ronald Nye and Jeremy Caple of New South Wales Fisheries v Mason* (Unreported, (Narooma local court) Judge Lyon, December 2005) *Mason v Department of Primary Industries (NSW Fisheries)* (Unreported, District Court of New South Wales, Blanch CJ 17 December 2007), Blanch CJ dismissed eleven appeals from the local court convictions.

¹³ (1996) 17 WAR 419.

Western Australia

Dershaw v Sutton (1996) 17 WAR 419

The defendants were charged with possessing fish contrary to a ministerial notice issued under the *Fisheries Act 1905 (WA)*. They relied on the defence that they were exercising a common law native right to fish.

The magistrate dismissed complaints issued against the defendants that they were jointly in possession of fish taken in contravention of the requirements of a notice of the relevant state Minister published in the Government Gazette. Considering the provisions of the *Fisheries Act 1905 (WA)* and evidence as to traditional fishing methods, the magistrate was satisfied that the defendants were acting in pursuit of a native title right to fish. It was not in dispute before the magistrate that all of the elements of the offence were made out and the appellants conceded that they did possess the fish in contravention of the notice. Evidence as to the Aboriginality and historical background of each of the appellants was not challenged.

A judge of the Supreme Court of Western Australia upheld an appeal by the prosecutor finding that the defendants failed to discharge their evidentiary burden as to the nature and extent of the claimed right to fish. The defendants appealed to the Full Bench of the Supreme Court of Western Australia. The Full Bench held that the defendants had an evidentiary burden of seeking to rely on a defence of native title fishing rights, the onus then shifting to the Crown to negative the claim.¹⁴ A majority of the Full Bench (Franklyn J, with Murray J concurring) dismissed the appeal finding that the defendants had not satisfied their evidentiary burden.

Tasmania

Dillon v Davies (1998) 145 FLR 111

The defendant was charged with breaches of the Sea Fisheries Regulations 1962 (Tas) in that he took undersized abalone. The defendant argued before the magistrate that this act was not unlawful by reason of his native title rights and interests under the *Native Title Act*, or alternatively because of a common law customary right.

The magistrate heard evidence from an historian, an expert in the genealogy of Tasmanian Aboriginal families and an archaeologist called by the defendant. The magistrate found as fact that the defendant was of Aboriginal descent and his family could be traced back to a certain Aboriginal tribe. The evidence of the historian and archaeologist that abalone was a significant part of the diet of Tasmanian Aboriginal

¹⁴ per Franklyn J at 445, Murray J at 445.

people before white settlement, and that the taking and eating of abalone as a widespread practice was accepted. The magistrate held that, consistent with the principles identified by Kirby P in *Mason v Tritton* at 584, the defendant had to establish that fishing of abalone must have been done in the exercise of traditional laws and customs, no evidence of which was before the court. There was no evidence on the content of the claimed tradition or custom, such as who may exercise the right to fish, what restrictions there are, if any, to such a right, inter alia.

Underwood J of the Supreme Court of Tasmania concurred with the magistrate's decision and dismissed the defendant's appeal.

Aboriginal fishing rights explicitly recognised (separate to native title rights)

Queensland

Queensland provides a statutory defence to a breach of the *Fisheries Act 1994* (Qld) in s 14, which states:

Defence for Aborigines and Torres Strait Islanders for particular offences

- (1) It is a defence in a proceeding against a person for an offence against this Act relating to the taking, using or keeping of fisheries resources, or the using of fish habitats, for the person to prove-
 - (a) the person is an Aborigine, who at the time of the offence was acting under Aboriginal tradition, or the person is a Torres Strait Islander, who at the time of the offence was acting under Island custom; and
 - (b) the taking, using or keeping of the fisheries resources, or the using of the fish habitats, was for the purpose of satisfying a personal, domestic or non-commercial communal need of the Aborigine or Torres Strait Islander; and
 - (c) depending on whichever of the following applies-
 - (i) for an offence relating to the taking or using of fisheries resources, or the using of fish habitats-the taking or using of the fisheries resources, or using of the fish habitats, was carried out using prescribed fishing apparatus in waters other than prescribed waters;
 - (ii) for an offence relating to the keeping of fisheries resources-

- (A) the fisheries resources kept were taken using prescribed fishing apparatus in waters other than prescribed waters; and
 - (B) at the time of the offence, the fisheries resources were not in prescribed waters.
- (2) However, subsection (1) is subject to a provision of a regulation that expressly applies to acts done under Aboriginal tradition or Island custom.
- (3) In this section-

prescribed fishing apparatus means-

- (a) fishing apparatus that is recreational fishing apparatus under a regulation under this Act; or
- (b) fishing apparatus that is used under Aboriginal tradition or Island custom, and prescribed specifically under a regulation for the purpose of this section.

prescribed waters means waters-

- (a) that are regulated waters under a regulation under this Act; and
- (b) that are prescribed specifically under a regulation for the purpose of this section; and
- (c) where the taking of any fish, or the possession of any fish taken, by any person is prohibited.

Stevenson v Yasso [2006] 163 A Crim R

In *Stevenson v Yasso* [2006] 163 A Crim R 1 Mr Yasso was charged under the *Fisheries Act 1994* (Qld) with having unlawfully in his possession a commercial fishing apparatus in contravention of a fishing regulation being a 50 metre monofilament net (gill net) for which he did not have an authority. Mr Yasso relied on s 14 as a defence. Before the magistrate the prosecutor relied on evidence from a fisheries officer and the chairman of an Aboriginal body, who gave evidence concerning when permission to fish may be granted and that Aboriginal body's agreement with the marine park authority to stop using gill nets. Mr Yasso gave evidence, tendered maps showing areas the subject of native title claims and called two witnesses of Aboriginal descent who gave evidence about traditional fishing practice. The magistrate found that Mr Yasso identified himself as an Aboriginal person and was acting in the traditional way of an Aboriginal person in taking fish by means of a net which was in his possession for the purpose of taking fish under

Aboriginal tradition. The magistrate found that Mr Yasso was excused under s 14 so that he was not unlawfully in possession of the gill net.

The Queensland Court of Appeal held that proof of matters in s 14 can be met by affirming that a person is of Aboriginal descent, identifies as an Aboriginal person and is recognised by the Aboriginal community as being an Aboriginal person. A court may need to consider what is “aboriginal tradition”, defined in the *Acts Interpretation Act 1954* (Qld) as:

The body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.

Proof of native title as found in s 211 of the *Native Title Act* was not required.

The Court referred to *Mason v Tritton* (NSW) and *Dershaw v Sutton* (WA) noting that in neither case did the relevant legislation contain an equivalent to s 14. The Court of Criminal Appeal judges came to differing conclusions on how the onus of proof should operate.

President McMurdo (in the minority) did not agree with the other appeal court members that the burden of proof fell on Mr Yasso to prove on the balance of probabilities that he was an Aboriginal acting under Aboriginal tradition. The *Fisheries Act 1974 (Qld)* does not state that the onus of proof in relation to s 14 falls on the person relying on it. Her Honour did not consider that s 14 was an exemption or exception disclosing a legislative intention to impose upon a defendant the onus of bringing the defendant within it on the balance of probabilities. Her Honour referred to *R v Sparrow* [1990] 1 SCR 1025; (1990) 70 DLR (4th) 385 (Canadian Supreme Court) in finding that traditional fishing practice evolved to include contemporary means, here a monofilament gill net. Her Honour concluded the use of such nets was part of Aboriginal tradition.

McPherson JA considered the evidence of whether use of the 50 metre gill net could be found to be Aboriginal tradition was limited. The evidence fell well short of proving a system of rules per *Mason v Tritton* at 598 which included drag net fishing with 50 metre nets dating from 1828. There was insufficient evidence to establish use of a commercial fishing net such as that used by the defendant as part of Aboriginal customary fishing. His Honour considered the onus of proof in relation to how s 14 operates as an exception in favour of a particular class of people in catching fish and the burden of proof falls on the party seeking to rely on it per *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520.

Fryberg JA considered that tradition for the purposes of s 14 need not be defined, did not require defined rules, did not need to be traced to a particular year or be

recognised by the common law. If Mr Yasso had to prove the matters in s 14 he had to show he was acting under Aboriginal tradition which included the use of gill nets. He bore the onus of establishing s 14 on the balance of probabilities. He had satisfied that onus.

White suggests that in the Queensland statutory context the proof threshold for establishing Aboriginal tradition should be required in relation to, firstly, whether the activity of fishing was particular to that Aboriginal community or group traditionally.¹⁵ Secondly, whether the geographical area used for fishing was where the particular Aboriginal group traditionally fished. Proof of satisfying a personal, domestic or non-commercial communal need also arises.

Section 14 was amended after *Stevenson v Yasso* to exclude use of nets akin to commercial fishing net which can capture juvenile fish in large quantities. The need to balance sustainable fishing with traditional fishing was identified as the reason for the amendment of the section.

The *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld) also contains defences in limited circumstances.

Northern Territory

The *Fisheries Act 1976* (NT) states in s 53(1) that:

53 Aboriginals

- (1) Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.

Talbot v Malogorski [2014] NTSC 54

In *Talbot v Malogorski*¹⁶ the defendant was charged with two offences under the *Fisheries Act 1976* (NT). Firstly for possessing a rod and line with a lure in a closed area which was contrary to the Barramundi Fishing Management Plan. Secondly for taking two barramundi in a closed (no fishing) area. The defendant gave evidence before the magistrate that he had fished at that particular place all his life and he was taught to catch enough fish only for him and his family's needs by an Aboriginal elder

¹⁵ Alexander White, "Indigenous fishing in Queensland: a review" (2013) 11 *Native Title News* 7 at 8.

¹⁶ [2014] NTSC 54.

from that area. The defendant's wife also gave evidence of her Aboriginal connection to the area and contact with the elder as a person she believed to be a traditional owner of lands and water of the Limilngan clan. The defendant also called anthropological evidence of traditional Aboriginal practices. The magistrate was satisfied that the appellant was a biological descendant of the Limilngan people who occupied and traditionally used the area. He also concluded that the evidence did not establish that the defendant and the persons through whom he traced descent continued uninterrupted to observe traditional laws and customs of those people. The magistrate found that native title rights were not established for the place where the fishing took place, which was required in order for the defendant to rely on s 53(1). The defendant was convicted. The magistrate did hold that the defendant was fishing for his personal and domestic needs within the meaning of the *Native Title Act* and this was a use of the resources of the area in a traditional manner within the meaning of s 53(1) but found the offence proved.

The defendant appealed to the Supreme Court of the Northern Territory. The Court considered the application of s 53(1) and held that a native title right was not determinative of whether s 53(1) applied. Section 53 provides permission to Aboriginal persons to fish in a traditional manner in accordance with s 53(1) subject to its limitations. Such rights are not defined solely by native title rights. The proof of the matters in the section are what is essential to a defence being established. A defendant who seeks to rely on s 53(1) is required to satisfy the Court on the balance of probabilities that he or she comes within its terms. It is not incumbent on the prosecutor to negative any element of the defence or exception beyond reasonable doubt. The defendant's conviction was overturned.

Other jurisdictions

The legal systems in Canada and New Zealand have recognised traditional native hunting and fishing practices to a greater extent and far earlier than in Australia.

Canada

In Canada the power to make laws is divided between the Parliament of Canada and the provinces and territories. The rights and freedoms in the *Canada Act 1982* (UK) c 11, sch B pt 1 (*Constitution Act 1982*) takes priority over all other legislation. The highest court in Canada is the Supreme Court of Canada, to which appeals from provincial or territorial courts, the federal court of appeal and in some matters directly from trial courts may be made.

One obvious and important difference in the recognition of Aboriginal custom between Australia and Canada is the substantially different constitutions of each country. Part II "Rights of the Aboriginal Peoples of Canada" of the *Constitution Act 1982* relevantly states:

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

There is no equivalent provision in the *Australian Constitution*.

***R v Sparrow* (1990) 70 DLR (4th) 385, 411-17**

In the landmark case of *R v Sparrow* (1990) 70 DLR (4th) 385, 411-17, s 35 was considered by the Supreme Court of Canada in the context of provincial fisheries regulation. Mr Sparrow went fishing with a 45 fathoms long net. This was longer than the permitted length of 25 fathoms permitted in the food fishing licence held by the Musqueam Indian Band of British Columbia of which he was a member. He was charged with an offence under s 61(1) of the *Fisheries Act, RSC 1970*. He defended his action on the basis he was exercising an existing Aboriginal right to fish and the net requirements were inconsistent with s 35(1) of the *Constitution Act 1982* and invalid. The evidence revealed that the Musqueam, the Band to which Mr Sparrow belonged, had lived in the relevant area long before the coming of European settlers, and the taking of salmon was and continued to be an integral part of their lives. An anthropologist gave evidence of an aboriginal right to fish by identifying the history of the Musqueam and the role of fishing in that society. That evidence was supported by a Band administrator. The trial judge concluded that Mr Sparrow was fishing in ancient tribal territory where his ancestors had fished “from time immemorial”. That finding was not contested. There was competing evidence concerning fish stock management. Mr Sparrow was convicted at first instance. The trial judge considered himself bound by *Calder v Attorney-General of British Columbia* (1970) 74 WWR 481 (BCCA), which held that a person could not claim an Aboriginal right unless supported by a special treaty, inter alia. Accordingly, he found that s 35(1) of the *Constitution Act 1982* had no application as the alleged right here was not based on any treaty or other document. While the trial judge concluded that Mr Sparrow was fishing in ancient tribal territory where his ancestors had fished “from time immemorial”, it was not necessary to consider evidence in support of an Aboriginal

right. The trial judge convicted Mr Sparrow. His appeal was dismissed by the County Court of Vancouver.

On further appeal the Court of Appeal of British Columbia found that Mr Sparrow was exercising an existing Aboriginal right and ordered a new trial. The Court of Appeal considered that the courts below were not bound by *Calder*. The Court of Appeal considered the nature of the Aboriginal traditional right to fish contended for by Mr Sparrow and found that the trial judge's findings of facts were insufficient to lead to an acquittal. The conviction based on an erroneous view of the law could not stand and the Court of Appeal remarked on unresolved conflicts in the evidence.

An appeal and cross appeal was filed in the Supreme Court of Canada. The Supreme Court held that Aboriginal rights are (existing) constitutional rights. Existing rights mean unextinguished rights as practiced in a contemporary form thus including modern fishing means. Parliament's capacity to extinguish or impair Aboriginal rights is limited to those instances where such regulation is for a purpose such as resource conservation and the regulation is non-discriminatory and minimises the impact on the exercise of Aboriginal rights.¹⁷ The Supreme Court ordered a retrial to allow findings of fact addressing any evidence to be given by Mr Sparrow in discharging his burden of showing that the net length restriction constituted a prima facie infringement of the collective aboriginal right to fish for food.

In *Delgamuukw v British Columbia* [1998] 1 CNLR 14 the Supreme Court held that native title encompasses a spectrum of rights arising from prior occupancy of the land and the relationship between the common law and pre-existing Aboriginal systems of Aboriginal law.

There are many cases in provincial courts concerning native Canadians charged with fishing offences. One example is *R v Langan* [2013] SKQB 256. The Queens bench for Saskatchewan considered an appeal from a conviction for angling without a licence of a Metis person. At the original trial a number of witnesses were called including an expert on Metis history. The accused testified as to his understanding of the traditional rights he was exercising. Several defence witnesses testified to their relationship to the accused, their own genealogies and Metis fishing customs. Based on the expert evidence called by the Crown the trial judge found the accused did not meet the criteria set out in *R v Powley* [2003] 2 SCR 207. *Powley* held the first step in determining whether a proposed Metis right exists is to characterise the right being claimed and secondly the identification of an historical rights-bearing community. This required the trial judge to consider expert opinion about Metis communities in the 1800s, the judge holding that by 1885 the area was under effective European

¹⁷ see GD Meyers, 'Native Title Rights in Natural Resources: a Comparative Perspective of Common Law Jurisprudence' (2002) 19 EPLJ 2450.

control and there was no rights bearing community. It was also necessary to establish continuity between the historic practice and the contemporary right asserted.

The appeal court held the appellant bore the onus of proof on the balance of probabilities of establishing a s 35 constitutional right to fish. The appeal court reviewed the applications of the trial judge of *Powley* factors and found there was no error of law in the application of these. The appeal was dismissed.

New Zealand

New Zealand is a unitary state. Its highest court is the Supreme Court of New Zealand. Appeals lie from the High Court and the Court of Appeal.

The Treaty of Waitangi signed in 1840 by a number of Maori Chiefs and representatives of the British Crown reserved existing rights to the Maori tribes.¹⁸ The approach to native title rights following *Wi Parata v Bishop of Wellington* [1873] 3 NZ Jur 72 which held that Maori title and other property rights required affirmative recognition prevailed until the landmark case *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.¹⁹

Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680

Mr Te Weehi was charged with an offence of having undersized paua. Mr Te Weehi had gained permission from an elder of his clan to gather shellfish for personal and family consumption. Evidence called by the defendant at first instance included a senior lecturer in Maori custom at the University of Canterbury giving evidence of the history of the traditional Maori right of taking shellfish which required the taking to be in the Maori way for food use rather than for sale. While accepting there had been significant changes in the way in which Maori lived and the manner in which fish resources were conserved Maori fishing rights continued to exist and to be significant because of an attitude by the Maori people to areas of fisheries which traditionally belonged to them. Detailed evidence was also called from a respected Maori elder who was regarded as the leader and spokesman for the Ngai Tahu tribe. He gave evidence of the long involvement of that particular tribe with the south island. The Ngai Tahu people had always exercised fishing rights over the south island coastline.

¹⁸ Gary D Meyers, 'Native Title Rights in Natural Resources: a Comparative Perspective of Common Law Jurisprudence' (2002) 19 *Environmental and Planning Law Journal* 245, 248.

¹⁹ *Ibid* 249.

A single judge of the High Court held that the appellant was exercising a customary Maori fishing right within the meaning of s 88(2) of the *Fisheries Act*.²⁰

The quota management system (QMS) was introduced shortly afterwards creating property rights over fish for the first time and providing for quotas which did not take into account Maori interests. This system has been described as being in direct conflict with the Treaty.²¹

Two injunctions in the High Court prevented the issuing of quotas because of disregard and denial of Maori fishing rights.²² The Waitangi Tribunal reporting on a specific fishing claim concluded that the QMS was at the time of the report in fundamental conflict with the Treaty of Waitangi's principles and terms.²³ Subsequent negotiations resulted in the *Maori Fisheries Act 1989* establishing the Maori Fisheries Commission Part 2 later the *Fisheries Act 1996*.

A number of commentators have considered the extent of recognition of Maori fishing rights in relation to commercial fishing in large part as a result of the Treaty of Waitangi as reinvigorated in the 1980s.²⁴ The establishment of bodies such as the Treaty of Waitangi Fisheries Commission in 1992 reflected these developments. Recognition of commercial fishing rights of Maori people is far more developed than in Australia.

There are many cases of Maori people being charged with fishing offences. One example follows which demonstrates once again the onus on defendants to establish a defence.

***Ministry of Agriculture and Fisheries v Campbell [1989] DCR
254***

Multiple charges were laid under s 57(1) of the Fisheries (Commercial Fishing) Regulations 1986 (NZ) against Mr Campbell and two other defendants who took

²⁰ 1983 (NZ).

²¹ A Jackson Erosion of Maori Fishing Rights in Customary Fisheries Management 21 *Waikato Law Review* 59.

²² *New Zealand Maori Council v Attorney-General* HC Wellington CP553/87, 8 October 1987 (Greig J) and *New Zealand Maori Council v Attorney-General* HC Wellington CP559/87, 610/87, 614/87, 2 November 1987 (Greig J). See also Waitangi Tribunal, 'Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim' (Wai 22, 1988) [1.7.7] and Appendix 5.

²³ Waitangi Tribunal, 'Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim' (Wai 22, 1988) [12.2.3].

²⁴ See Gary D Meyers, 'Native Title Rights in Natural Resources: a Comparative Perspective of Common Law Jurisprudence' (2002) 19 *Environmental and Planning Law Journal* 245, 248-249, Anne-Marie Jackson, 'Erosion of Maori Fishing Rights in Customary Fisheries Management' (2013) 21 *Waikato Law Review* 59, 67-68 and Bjørn Hersoug, 'Maori Fishing Rights – Coping with the Aboriginal Challenge' (2000) 10(2) *Økonomisk Fiskeriforskning* 129, 132-133.

undersize lobsters. Additional charges concerned possession of lobsters the tails of which were less than the regulated length (offence against s 97(1) of the *Fisheries Act 1983* (NZ)) and two charges alleging some lobsters were in such a state the length of their tails could not be properly measured (cl 8(1)(e) of the Regulations).

The District Court found that the defendants were not exercising a traditional right so that no defence to the charges under Fisheries (Commercial Fishing) Regulations 1986 (NZ) was established. The evidence from the prosecutor included members of the local Maori community who gave evidence on behalf of the prosecution that the defendants were not acting in accordance with any traditional Maori right.

Recognition of commercial fishing interests

Increasingly Aboriginal communities in Australia have focussed on the extent to which Aboriginal people can exploit fish resources for commercial purposes, without having to comply with state or territory regulations. Evidence of fish trading by Aboriginal groups in coastal areas particularly in northern Australia is well documented. To what extent should traditional hunting practices enable the incorporation of commercial use/exploitation of a resource is a matter of debate, particularly from a conservation of fish stocks perspective. Academic writers have considered that the reasoning in *Stevenson v Yasso* of Fryberg JA in particular provides a basis for arguing that Aboriginal tradition can include commercial fishing.²⁵

Conclusion

Aboriginal and Torres Strait Islander people charged with statutory offences when they are exercising traditional fishing and hunting practices who plead not guilty must establish a defence if they are to be acquitted. Statutory definitions of Aboriginal person, Aboriginal tradition and similar phrases in legislation are important in shaping the matters which must be established in a prosecution. Native title rights if established by a defendant are recognised as a defence in s 211 of the *Native Title Act*. In addition some statutory schemes also recognise traditional Aboriginal rights in addition to native title rights.

The ability of an Aboriginal person to defend a charge by proving on the balance of probabilities that he or she is an Aboriginal exercising traditional or native title rights will generally require more than a statement from the person charged. The cases show that evidence from community members and elders and anthropological evidence may well be needed to satisfy the definitions in the various statutes and/or native title in order to discharge that onus of proof. While Mr Yasso did manage to

²⁵ See for instance Peter Wulf, "Indigenous commercial fishing rights in Queensland: when is commercial "traditional?" (2006) 23 *Environmental and Planning Journal* 433.

establish a defence in the state of Queensland without representation by lawyers there is a reasonably onerous burden placed on defendants who wish to defend these charges as seen in *Mason v Triton* and *Dershaw v Sutton*. The capacity of Aboriginal defendants to obtain legal representation may well be limited.

Greater cultural sensitivity amongst enforcement officers in relation to the importance of Aboriginal traditional hunting, fishing and gathering can lead to a more balanced approach to prosecutions for offences under fisheries and wildlife protection laws. Criminal law recognises that Aboriginal tradition is evolving. The exercise of traditional rights have generally been accepted as not being fixed over time in the methods that can be employed with the use of equipment that is essentially commercial in nature recognised in some cases.

Whether laws can successfully achieve wildlife protection while enabling Aboriginal hunting and fishing on a commercial scale to enable economic development linked to self-determination for indigenous communities is an emerging area of debate.

While there is greater recognition constitutionally of traditional Aboriginal practices in Canada and New Zealand the operation of the criminal justice system in those countries is similar to Australia. Broadly speaking, the same burden of proof of traditional practice as a defence will apply to Aboriginal defendants wishing to plead not guilty to fishing and hunting offences which burden can be onerous.