Indigenous Hunting and Fishing in Queensland: A Legislative Overview

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Introduction

In recent years there has been a great deal of discussion in Queensland about the issue of indigenous hunting rights. This debate seems to have centred on whether Aborigines and Torres Strait Islanders should have the right to hunt.[1] Leaving aside this contentious issue, there appears to be great confusion on the part of environmental managers, Aborigines and Torres Strait Islanders and the general public alike, as to precisely what are the legal rights of indigenous persons to hunt and fish in Queensland. This confusion has been exacerbated by the general confusion surrounding the effect of the decision in *Mabo* v *State of Queensland (No 2)*[2] and the passing of the Commonwealth *Native Title Act* 1993.

This paper endeavours to examine, as clearly as possible, the labyrinth of laws relating to indigenous hunting and fishing in Queensland.[3] In doing this, the laws relating to terrestrial and marine areas will be dealt with separately. Although such a division is contrary to the Aboriginal approach to country being an integrated land and sea environment,[4] it is necessitated owing to the governmental approach reflected in both legislation and the division of governmental departments.

I. Terrestrial areas

(i) Native Title Act 1993 (Cth)

As a result of the decision in *Mabo*[5] and the enactment of the Commonwealth *Native Title Act* 1993, the legal rights of certain Aborigines and Torres Strait Islanders in Queensland have altered. Section 8 of the *Native Title Act* 1993 (Cth) provides that the Act 'is not intended to affect the operation of any law of a State or Territory that is capable of operating concurrently with this Act'. Despite this general provision, s 211 then deals specifically with indigenous hunting, fishing and gathering.[6] The effect of that section seems to be that Aborigines and Torres Strait Islanders who have native title rights or interests may hunt in accordance with those rights and interests regardless of any law, unless that law specifically regulates that activity by conferring rights or benefits only on Aborigines and Torres Strait Islanders. It is submitted that a permit system available equally to indigenous and non-indigenous persons may not be seen as conferring rights or interests only on or for those indigenous persons. If that is the case, a person with native title rights could ignore the permit system and hunt or fish in accordance with his or her native title rights. Interestingly, a person with native title rights to hunt and fish protected wildlife in

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1 J Van Tiggelen, 'To hunt or not to hunt?', *Townsville Bulletin*, 13 November 1993, 23.

2 (1992) 175 CLR 1.

3 This paper will not be examining the manner in which traditional hunting may occur.

4 D Smyth, 'Understanding Country: The Importance of Land and Sea in Aboriginal and Torres Strait Islander Societies', Council for Aboriginal Reconciliation (Key Issue Paper No 1), (Canberra: AGPS, 1994), 21.

5 *Mabo* v *State of Queensland (No 2)* (1992) 175 CLR 1.

6 *Native Title Act* 1993 (Cth).

Queensland protected areas would not have ownership of that wildlife.[7]

The legal right conferred by s 211 is only available to those with native title rights and interests.[8] Under the *Native Title Act* 1993, native title rights and interests are only those recognised by the common law of Australia.[9] In this way the decision of the High Court in *Mabo*[10] is incorporated into the Commonwealth *Native Title Act* 1993.[11] Aborigines and Torres Strait Islanders who are not possessed of native title rights will have to abide by any legislation regulating hunting and fishing activities.

An issue certain to arise is whether the Commonwealth *Native Title Act* 1993 allows an Aborigine with native title rights to exercise those rights anywhere in Australia. The Act does not expressly limit the exercise of those rights to a specific area. Instead, it provides that the exercise of hunting rights must be in accordance with the native title rights and interests relevant to that particular Aborigine or Torres Strait Islander.[12] It will be the content of those native title rights which will determine where activities such as hunting may occur. Support for this proposition comes from the decision of the High Court itself.[13] Brennan J stated that: 'Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[14] Deane and Gaudron JJ commented that: '[T]he contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom'.[15]

The High Court in New Zealand has already been faced with this very issue in a case where a Maori, whose tribe had no proprietary right to land on a foreshore, collected shellfish from that foreshore in seeming contravention of the law.[16] The *Fisheries Act* 1983 (NZ) provided that Maori fishing rights could not be affected by anything in that Act.[17] The defendant argued that he had a Maori fishing right to collect shellfish for his family's consumption with the consent of the local Maori leader.[18] Williamson J held that the defendant was exercising a Maori fishing right and in this regard he commented that the fishing right existed despite the fact that the defendant had no proprietary interest in the land.[19] The customary rights themselves will determine where Aborigines and Torres Strait Islanders may exercise their hunting and fishing rights.

(ii) Native Title (Queensland) Act 1993

This Act was enacted in order for Queensland to participate in the national scheme proposed by the Federal Government with respect to the recognition and protection of native title.[20] The Queensland legislation does not alter or remove the indigenous hunting and fishing rights conferred by the Commonwealth *Native Title Act* 1993.

7 *Nature Conservation Act* 1992 (Qld), s 61.
8 *Native Title Act* 1993 (Cth), s 211(1)(a). In *Mason* v *Tritton* (1994) 34 NSWLR 572, 579 and 600, it was held that hunting and fishing rights could be native title rights.
9 *Native Title Act* 1993 (Cth), s 223.
10 *Mabo* v *State of Queensland (No 2)* (1992) 175 CLR 1.
11 J Kelly and H Prokuda, 'Native Title Act 1993: What it Means', *Proctor*, vol 14, no 2, March 1994, 10.
12 *Native Title Act* 1993 (Cth), s 211(1)(a).
13 *Mabo* v *State of Queensland (No 2)* (1992) 175 CLR 1.
14 *Id* 58.
15 *Id* 110.
16 *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680.
17 *Id* 682.
18 *Ibid*
19 *Id* 690.
20 Explanatory Notes 1993, 661.

(iii) Nature Conservation Act 1992 (Qld)

The object of the *Nature Conservation Act* 1992 (Qld) is the conservation of nature[21] which is to be achieved by an 'integrated and comprehensive conservation strategy for the whole of Queensland . . .'[22] The *Nature Conservation Act* 1992, which repealed a number of pieces of legislation including the *Fauna Conservation Act* 1974 (Qld) and the *National Parks and Wildlife Act* 1975 (Qld), conferred hunting and fishing rights on indigenous persons.[23] In December 1994, however, the *Nature Conservation Act* 1992 was amended by the *Nature Conservation Amendment Act* 1994 (Qld). A number of these amendments related to indigenous hunting and fishing rights. Accordingly, the *Nature Conservation Act* 1992 as reprinted will now be examined.

a) Indigenous hunting and fishing outside protected areas

Section 93 of the *Nature Conservation Act* 1992 (Qld) is one of the major provisions relating to hunting and fishing by indigenous peoples. To date, this section has not yet been proclaimed into force. It provides that Aborigines and Torres Strait Islanders may 'take, use or keep protected wildlife under Aboriginal tradition or Island custom'.[24] This right is subject to any conservation plan 'that expressly applies to the taking, using or keeping of protected wildlife under Aboriginal tradition or Island custom'.[25] Seemingly, then, unless a conservation plan expressly regulates indigenous hunting or fishing of protected wildlife, Aborigines and Torres Strait Islanders will be able to hunt protected wildlife anywhere in Queensland in accordance with Aboriginal tradition or Islander custom.[26]

With the amendment of the original *Nature Conservation Act* 1992, a new proviso has been added. The hunting rights conferred on indigenous people by s 93(1) do 'not apply to the taking, using or keeping of protected wildlife in a protected area'.[27] A protected area includes virtually all of the protected areas existing in Queensland.[28] As a result, indigenous Australians may hunt and fish protected wildlife provided it is not undertaken in a protected area or in contravention of a conservation plan which regulates these activities.

There are two further limitations upon this 'right'. Aborigines and Torres Strait Islanders may not enter land to hunt or fish without the landholder's permission[29] and the 'right' only allows the hunting or fishing of protected wildlife. Protected wildlife is that wildlife which is presumed extinct, endangered, vulnerable, rare or common.[30] On the other hand, indigenous persons have no special rights to hunt or fish international and prohibited wildlife.[31]

Section 93 of the *Nature Conservation Act* 1992 appears to exclude the operation of other laws. However, the Commonwealth *Native Title Act* 1993 would override the Queensland *Nature Conservation Act* 1992 to the extent of any inconsistency.[32] Section 211 of the Commonwealth *Native Title Act* 1993 expressly provides for hunting and fishing

21 *Nature Conservation Act* 1992 (Qld), s 4.
22 *Id* s 5.
23 *Id* s 158.
24 *Id* s 93(1). 'Take' is defined in s 7 of the Act to involve a wide range of hunting and fishing techniques, including shooting, poisoning, netting, spearing, catching and bringing ashore or aboard a boat.
25 *Id* s 93(2).
26 Note that s 93 of the *Nature Conservation Act* 1992 (Qld) has not yet been proclaimed into force.
27 *Id* s 93(4).
28 *Id* ss 7, 14.
29 *Id* s 98.
30 *Id* s 7. The *Nature Conservation (Wildlife) Regulations* 1994 (Qld) include schedules listing wildlife which has been so prescribed.
31 *Id* s 91.
32 *Commonwealth of Australia Constitution Act* 1900 (Cth), s 109. See also the *Native Title Act* 1993 (Cth), s 8.

rights of native title holders unless there is some law specifically regulating that activity by conferring rights or benefits only on or for the benefit of Aborigines and Torres Strait Islanders. Section 93 appears to be such a law in that it allows for indigenous hunting and fishing. Upon closer examination, though, this special 'right' is only allowed in non-protected areas when not in contravention of a conservation plan and, with respect to private land, only with the consent of the landholder. It is therefore submitted that s 211 of the Comonwealth *Native Title Act* 1993 would prevail over s 93 of the Queensland *Nature Conservation Act* 1992, unless a conservation plan conferred fishing or hunting rights only on or for the benefit of indigenous persons.

b) Indigenous hunting and fishing within protected areas

Section 62 of the *Nature Conservation Act* 1992 (Qld) makes it an offence to intentionally take, use, keep or interfere with natural resources of a protected area. There are a number of exceptions to this general prohibition. For example, a person may hunt or fish if they hold a licence, permit or authority issued under the *Nature Conservation Regulations*.[33]

There is special provision within the *Regulations* made for indigenous persons to obtain permits and licences for hunting and fishing. Regulations 28 and 29 provide that an authority to hunt or fish in a protected area, other than in a national park, may be obtained pursuant to Aboriginal tradition or Islander custom. These authorities are only available to corporations representing an Aboriginal or Torres Strait Islander community.[34] There is a proviso against granting authorities if the wildlife involved is rare or threatened or if the hunting or fishing activity will reduce the wildlife's 'ability to maintain or recover its natural population levels in the area'.[35] Additional factors which must be satisfied are listed in the *Regulations*.[36] Consequently, it is unlikely that numerous authorities will be granted.

Permits to hunt and fish protected wildlife in protected areas for one year may also be granted.[37] They may be granted for various reasons, none specifically relating to indigenous persons. Permits may be granted for purposes including 'for another purpose',[38] yet the *Regulations* do not define what this means. Perhaps a permit might be granted for indigenous hunting or fishing under the ambiguous 'another purpose' heading.

c) Indigenous hunting and fishing pursuant to a conservation plan

Division 4 of the *Nature Conservation Regulations* applies if a conservation plan specifically provides that only the holder of an Aboriginal tradition or Islander custom authority can hunt or fish a certain protected species.[39] This authority is limited to corporations representing an Aboriginal or Torres Strait Islander community concerned with the land to which the authority is to apply.[40] Advice from the applicant corporation must have been considered and the purpose of the hunting or fishing must have some particular significance to the indigenous group involved.[41] It is submitted that an authority of this kind might be granted for the hunting of an animal required for some traditional ceremony or celebration.

33 *Nature Conservation Act* 1992 (Qld), s 62(1).
34 *Nature Conservation Regulations* 1994 (Qld), r 31.
35 *Id* r 33(1).
36 *Id* r 34.
37 *Id* regs 37(c), 31(1)(c)(v).
38 *Id* r 31(1)(c).
39 *Id* r 123.
40 *Id* r 125.
41 *Id* r 126.

(iv) Community Services (Aborigines) Act 1984 (Qld) and the Community Services (Torres Strait) Act 1984 (Qld)

Under both of these Acts, residents of communities residing on trust areas[42] have traditionally had the right to hunt and fish in Queensland so long as it was for consumption by members of the community only.[43] However, both of these Acts were amended by the *Nature Conservation Amendment Act* 1994 (Qld) so that the traditional hunting and fishing right is subject to ss 62 and 93 of the *Nature Conservation Act* 1992 (Qld).[44] Accordingly, all of the provisions examined above with respect to the *Nature Conservation Act* 1992 and *Regulations* would apply also to indigenous communities residing on trust land.

(v) Endangered Species Protection Act 1992 (Cth)

Another interesting issue which has been raised is the potential effect of the Commonwealth *Native Title Act* 1993 on the protection of endangered species.[45] If the *Endangered Species Protection Act* 1992 (Cth) does not specifically confer hunting and fishing rights and interests only on or for the benefit of indigenous persons, then Aborigines and Torres Strait Islanders with native title rights would still have the legal right to hunt and fish endangered species in accordance with those native title rights. It is an offence to knowingly or recklessly take, trade, keep or move a listed native species which is in or on a Commonwealth area.[46] Listed native species are those specified in Schedule 1 and are endangered or vulnerable species.[47] The taking of listed native species is permitted in certain circumstances, including when a permit allows it or when a recovery or threat abatement plan makes it permissible.[48]

Applications for permits may be made by both indigenous and non-indigenous persons. Although the Act provides for indigenous interests to be considered when issuing permits, it is only one factor amongst a number. As permits for hunting and fishing are not just available to indigenous persons, it might well be successfully argued that the permit system does not confer rights only on or for Aborigines or Torres Strait Islanders. If this argument is accepted, a person with native title rights in accordance with s 211 of the Commonwealth *Native Title Act* 1993 could continue to hunt an endangered species despite having no permit to do so. Similarly, should a recovery plan or threat abatement plan confer hunting or fishing rights on both indigenous and non-indigenous persons, then a person with native title rights could ignore the plan and hunt or fish the endangered species in accordance with that person's native title rights. On the other hand, if a recovery or threat abatement plan confers these rights only on or for the benefit of indigenous persons, then the plan will have to be complied with, even if it denies native title rights.

42 'Trust area' is defined in s 6(1) of both the *Community Services (Aborigines) Act* 1984 (Qld) and the *Community Services (Torres Strait) Act* 1984 (Qld) to include land for which an Aboriginal or Torres Strait Islander corporation has been established.

43 *Community Services (Aborigines) Act* 1984 (Qld), s 77(1) and the *Community Services (Torres Strait) Act* 1984 (Qld), s 76.

44 *Nature Conservation Amendment Act* 1994 (Qld), s 42 and Schedule 2.

45 K Duggan, 'Relationship of Native Title to Environmental and Heritage Protection Laws', in J Fingleton, M Edmunds and P McRandle (eds), *Proof and Management of Native Title*, (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994), 76.

46 *Endangered Species Protection Act* 1992 (Cth), s 87(1): s 5 defines 'Commonwealth area'.

47 *Id* s 4(1).

48 *Id* ss 87(4)(a),(b).

II. Marine areas

(i) Native Title Act 1993 (Cth)

The High Court in *Mabo*[49] was not required to consider whether native title extended to marine areas. It is beyond the scope of this paper to analyse whether a native title claim over a sea area would be successful or not. Certainly, it has been argued that sea claims may be possible.[50] Indeed, the Commonwealth *Native Title Act* 1993 reflects the idea that sea claims may be possible in its definition of native title which includes rights and interests in land and water.[51]

If courts in Australia do determine that native title rights with respect to a marine area exist, s 211 will apply to fishing and hunting there. Indigenous persons possessing native title fishing and hunting rights in marine areas can exercise those rights so long as it is not contrary to some legislation which confers benefits only on indigenous persons.

(ii) Fisheries Act 1994 (Qld)

The Queensland *Fisheries Act* 1994 repealed both the *Fisheries Act* 1976 (Qld) and the *Fishing Industry Organization and Marketing Act* 1982 (Qld).[52] According to the new Act, which applies to land within Queensland's limits and to Queensland waters,[53] Aborigines and Torres Strait Islanders 'may take, use or keep fisheries resources or use fish habitats' under Aboriginal tradition or Island custom.[54] The definition of 'fisheries resources' includes fish.[55] The meaning of 'fish' expressly excludes protected species under the *Nature Conservation Act* 1992 (Qld).[56] Accordingly, the indigenous fishing rights conferred under this legislation are, in certain cases of protected species, subject to the provisions of the *Nature Conservation Act* 1992. Indigenous persons must comply with the provisions of the *Nature Conservation Act* 1992 regulating the fishing of protected wildlife in Queensland.

As with s 93 of the *Nature Conservation Act* 1992, it is unlikely that s 14 of the *Fisheries Act* 1994 (Qld) would exclude the operation of s 211 of the *Native Title Act* 1993 (Cth). The fishing 'rights' granted by the Queensland legislation do not apply to protected species and are subject to any management plan which expressly applies to indigenous fishing.[57] It is submitted that, unless such a management plan conferred fishing rights only on or for the benefit of Aborigines and Torres Strait Islanders, a native title holder could fish in accordance with those native title rights irrespective of such a management plan.[58]

(iii) Marine Park Act 1982 (Qld)

This Act complements the Commonwealth *Great Barrier Reef Marine Park Act* 1975. Like the Commonwealth Act,[59] the *Marine Park Act* 1982 (Qld) provides for zoning plans to be prepared. It makes no special provision for indigenous peoples to have the right to fish or hunt.

49 *Mabo* v *State of Queensland (No 2)* (1992) 175 CLR 1.
50 For example, by Bergin, 'A Rising Tide of Aboriginal Sea Claims: Implications of the Mabo Case in Australia' (1993) 8(3) *International Journal of Marine and Coastal Law* (August) 359.
51 *Native Title Act* 1993 (Cth), s 223.
52 *Fisheries Act* 1994 (Qld), s 243. It provides that the Acts mentioned in Schedule 1 are repealed: Schedule 1 lists both of these Acts.
53 *Id* s 11(1).
54 *Id* s 14(1).
55 *Id* s 4.
56 *Id* s 5(3)(b).
57 *Id* s 14.
58 *Native Title Act* 1993 (Cth), s 211.
59 *Great Barrier Reef Marine Park Act* 1975 (Cth).

(iv) Great Barrier Reef Marine Park Act 1975 (Cth)

The major aims of this Act are to provide for the establishment, control, care and development of the Great Barrier Reef Marine Park. Section 38A provides that only permitted uses in a zone are allowed. In this way fishing and hunting may be restricted or prohibited in certain areas of the Great Barrier Reef Marine Park.

A zoning plan may require a permit to be issued for certain uses within a zone. Regulation 13AC(4) of the *Great Barrier Reef Marine Park Regulations* lists the factors the Great Barrier Reef Marine Park Authority must have regard to when considering an application for such a permission. Further factors must be considered with applications for traditional fishing, hunting or gathering. These factors include, amongst others, the need for conservation of endangered species, the purpose of the activity and where the applicant is resident.[60] As well as individual permit applications from indigenous and non-indigenous persons, the Authority has recently granted at least two community based traditional hunting permits.[61] Such community permits operate by the Council of Elders in a particular Aboriginal community assisting the Authority in determining applications for hunting permits.[62] Whether a person with native title rights can exercise those rights contrary to a zoning plan will depend on whether the zoning plan confers hunting or fishing rights only for the benefit of indigenous persons. Should permits be equally available to both indigenous and non-indigenous persons, persons with native title rights may ignore the zoning plan if an activity is part of the person's native title rights. Indigenous persons with no native title rights must abide by zoning plans.

(v) Endangered Species Protection Act 1992 (Cth)

The Great Barrier Reef Marine Park would be a Commonwealth area under the *Endangered Species Protection Act* 1992 (Cth).[63] Recovery plans or threat abatement plans might be prepared for certain species in the Great Barrier Reef Marine Park. A recovery plan or threat abatement plan would probably regulate or prohibit hunting or fishing of an endangered or vulnerable species. An Aborigine or Torres Strait Islander with native title rights would have the legal right to fish or hunt an endangered species in accordance with those native title rights, unless the plan specifically dealt with indigenous hunting or fishing rights and conferred rights or interests only on or for the benefit of Aborigines or Torres Strait Islanders. Obviously, indigenous persons without native title rights would have to comply with such plans.

Conclusion

The legislation affecting the legal rights of Aborigines and Torres Strait Islanders to hunt and fish in Queensland is extremely complex. Indeed, it is little wonder that environmental managers are uncertain as to whether these rights are being impinged by their decisions. In general terms, Aborigines and Torres Strait Islanders do have certain hunting and fishing rights over and above those possessed by the general public in Queensland. Further, Aborigines and Torres Strait Islanders possessing native title rights in accordance with the decision in *Mabo*[64] may ignore a whole range of environmental legislation, including legislation relating to hunting and fishing. Whether many indigenous groups will be successful in establishing native title rights, however, is another issue.

60 *Great Barrier Reef Marine Park Regulations*, r 13AC(5).

61 C Cook, 'Aboriginal and Torres Strait Islander Traditional Hunting and Native Title' (1994) 4 *Reef Research* (June 6) 7, 8.

62 *Id* 7.

63 See ss 5(1)(c) and (3)(a) of the *Endangered Species Protection Act* 1992 (Cth) and s 4(3) of the *Coastal Waters (State Title) Act* 1980 (Cth).

64 *Mabo* v *State of Queensland (No 2)* (1992) 175 CLR 1.

Without an adequate knowledge on the part of environmental managers of the legal rights of indigenous persons to hunt and fish, it would be difficult for decisions potentially affecting those rights to be made. Understanding these rights has not been simplified by the amended *Nature Conservation Act* 1992 (Qld). It is submitted that with the continuation of the current legislative regime in Queensland, confusion will continue to reign with regard to the legalities of indigenous hunting and fishing activities.