BALANCING COMPETING INTERESTS IN THE CRIMINAL JUSTICE SYSTEM: ABORIGINAL FISHING RIGHTS IN COASTAL NEW SOUTH WALES

NICOLA PAIN[*] AND GEORGIA PICK[**]

Australian state and territory fisheries laws create offences to protect native fish stocks and biodiversity. These laws also, to varying extents, recognise the importance of cultural fishing to Aboriginal people. Aboriginal people who believe they are practising cultural fishing may nevertheless be prosecuted for breaching these laws. This article explores the adequacy of legal protection of cultural fishing under the Fisheries Management Act 1994 (NSW) ('FM Act (NSW)'). The authors examine the limits of the defence of native title for Aboriginal defendants charged with offences under the FM Act (NSW) and legislation in other jurisdictions. They conclude that the FM Act (NSW) should be amended to include a defence of cultural fishing. The exercise of discretion by the Department of Primary Fisheries ('DPI') in charging Aboriginal fishers is also considered.

I INTRODUCTION

Australia with its extensive marine resources and unique biodiversity has laws regulating fishing which aim to protect native fish stocks from harms such as unsustainable fishing. These laws are generally made by each state and territory government and apply to waters within three nautical miles of the territorial sea baseline.[1] Such laws create numerous offences punishable by way of a fine, with imprisonment for more serious offences. Aboriginal cultural and social expression, and subsistence, relies in many communities on continued fishing of native species. This is, of course, well understood in Aboriginal coastal communities in New South Wales ('NSW') and beyond. The importance to Aboriginal people of cultural fishing is recognised in the objects of NSW legislation. The intersection between these potentially competing policies and practices arises in the criminal law context, however, as the pursuit of cultural fishing practices may breach

---

* Judge, Land and Environment Court of New South Wales.

** Researcher, Land and Environment Court of New South Wales. The authors thank Sydney barristers Tony McAvoy SC and John Waters for hard to find information about court cases and Tom Holcombe and Millicent McCreath, former researchers at the Land and Environment Court of NSW, for their editing and research assistance.

1 *Coastal Waters (State Powers) Act 1980* (Cth) ss 3–5; *Coastal Waters (State Title) Act 1980* (Cth) ss 3–5; *Application of Laws (Coastal Sea) Act 1980* (NSW) s 4.

fisheries laws resulting in prosecution of individual Aboriginal defendants, particularly in coastal areas. This article explores whether the appropriate balance between the two, at times competing, policy objectives is met in NSW.

A number of issues arise in doing so. The significance of cultural fishing in Aboriginal communities, with a focus on the south coast of NSW, will be outlined and the inadequate legal protection for cultural fishing in NSW identified. With the recognition of native title in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*')[2] and the passage of the *Native Title Act 1993* (Cth) ('*NT Act* (Cth)') state and territory fisheries laws are overridden to the extent these impinge on native title rights and interests. Practically, demonstration of fishing practices based on native title provides a defence to a prosecution under fisheries legislation. The experience of Aboriginal defendants relying on the defence of native title in NSW and other Australian jurisdictions will be considered in understanding the evidential burden they bear. The exercise of prosecutorial discretion is also relevant. Aboriginal communities in NSW, particularly on the south coast, consider that enforcement of the *Fisheries Management Act 1994* (NSW) ('*FM Act* (NSW)') has unfairly targeted cultural fishers. Attempts to accommodate such concerns have been made.

The authors conclude that cultural fishing should be better protected legally in NSW as it is in other Australian jurisdictions. Additionally, a number of initiatives are under way at a policy level, including in the exercise of prosecutorial discretion to more harmoniously manage the tension between native fish stock protection and cultural fishing.

II IMPORTANCE OF FISHING TO ABORIGINAL PEOPLES

Aboriginal peoples have occupied Australia for at least 50,000 years and have strong connections to their customary land, inland waters and sea estates ('country').[3] Throughout Australia, Aboriginal family groups, households and larger networks visit country to camp, hunt, fish and gather resources, and simultaneously pass on knowledge of country to the next generations.[4] Evidence suggests that connection to country strengthens self-worth, cultural and spiritual connections and positive states of wellbeing.[5]

---

2 (1992) 175 CLR 1 ('*Mabo [No 2]*').

3 Paul Humphries, 'Historical Indigenous Use of Aquatic Resources in Australia's Murray-Darling Basin, and its Implications for River Management' (2007) 8(2) *Ecological Management and Restoration* 106, 106; Kristin Howden, 'Indigenous Traditional Knowledge and Native Title' (2001) 24(1) *University of New South Wales Law Journal* 60, 62, citing Neil Lofgren, 'Common Law Aboriginal Knowledge' (1996) 3(70) *Indigenous Law Bulletin* 4, 6.

4 Rosemary Hill et al, *Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors* (Report, May 2013) 12; Ray Tobler et al, 'Aboriginal Mitogenomes Reveal 50,000 Years of Regionalism in Australia' (2017) 544 *Nature* 180.

5 Luke Smyth, Hayley Egan and Rod Kennett, Fisheries Research and Development Corporation, *Livelihood Values of Indigenous Customary Fishing* (Final Report FRDC Project No 2015/205, November 2018) 7 <https://aiatsis.gov.au/sites/default/files/products/research_report/livelihood_values_of_indigenous_customary_fishing.pdf>, citing Jonathan Kingsley et al, 'Developing an Exploratory Framework Linking

Fishing practices for both coastal and inland Aboriginal communities are integral to community and family life on a daily basis and as part of significant cultural and ceremonial activities.[6] For example, traditional owners of the NSW south coast have strong ties to the water and sea areas of their country, which are significant to their knowledge systems, creation stories and social relations.[7] Archaeological evidence suggests Aboriginal occupation of the south coast at least 21,000 years ago and use of a variety of marine and estuarine species.[8] Cultural fishing has been part of the area's subsistence economy, and fish and other marine life have been traded with communities along the coast.[9] Fishing also enables local Aboriginal communities to engage in traditional and cultural activities that commemorate the region's ancestors.[10]

A 2018 report by the Fisheries Research and Development Corporation ('FRDC') contains the results of the largest research project into the value of fishing to Aboriginal people to date.[11] The FRDC is a statutory body, funded by the Commonwealth government and the fishing and aquaculture sectors. It is responsible for ensuring that research is conducted to help manage the sustainability of fisheries and aquaculture (for the benefit of the commercial, recreational and indigenous sectors and the wider public).[12] The FRDC research project interviewed 169 Aboriginal people from the west coast of South Australia, in the north of the Northern Territory and south coast NSW between October 2015 and July 2017. Qualitative data on the perceived cultural, social, economic and health significance and benefits of customary fishing practices was collected.[13] The key findings of the project across all three case study regions included: fishing is one of the key ways of practising culture, maintaining a connection with country and passing on cultural knowledge; sharing catch is commonplace (often a small number of regular fishers provide for many people); sharing catch strengthens social ties within and between families and communities; fishing is an important recreational activity (it helps people relax and keeps them physically active); and subsistence fishing and the trade and barter of catch increase discretionary incomes by substituting for purchased goods.[14]

Australian Aboriginal Peoples' Connection to Country and Concepts of Wellbeing' (2013) 10(2) *International Journal of Environmental Research and Public Health* 678.

6 Scott Hawkins, 'Caught, Hook Line & Sinker' [2004] (3) *Journal of Indigenous Policy* 4, 4–5; Jason Behrendt and Peter Thompson, 'The Recognition and Protection of Aboriginal Interests in NSW Rivers' [2004] (3) *Journal of Indigenous Policy* 37, 49–50.

7 Rod Kennett et al, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Livelihood Values in Indigenous Cultural Fishing: Report of a Meeting with Indigenous Cultural Fishers on the South Coast of NSW* (Report, 2016) 1 <https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/Land-and-water/frdc_nsw_september_report_final.pdf>.

8 Tran Tran et al, 'What's the Catch? Aboriginal Cultural Fishing on the NSW South Coast' (2016) 31(5) *Australian Environment Review* 182, 182.

9 Kennett et al (n 7) 1.

10 Ibid.

11 Smyth, Egan and Kennett (n 5) iii.

12 Fisheries Research and Development Corporation, 'About Us', *FRDC* (Web Page, 2017) <https://www.frdc.com.au/about>.

13 Smyth, Egan and Kennett (n 5) iii.

14 Ibid iv.

Compared to commercial and recreational fishing activities, little data is available on Aboriginal fishing activities in terms of the number of fishers and volume of take. For example, the most recent comprehensive evaluation of Aboriginal fishing activities occurred in 2003 as part of the National Recreational and Indigenous Fishing Survey ('NRIFS').[15] The NRIFS, which evaluated Aboriginal fishing activities in northern Australia (Broome in Western Australia to Cairns in Queensland), found that an estimated 37,000 Aboriginal people living in northern Australia fished at least once between 2000 and 2001.[16] This represented 92% of the surveyed Aboriginal population in the region.[17]

III REGULATION OF ABORIGINAL FISHING IN NSW

In criminal proceedings the onus of proof beyond reasonable doubt lies on the prosecutor (a government agency or department in the cases considered) to establish all the elements of an offence.[18] A defendant bears the onus of proof on the balance of probabilities to establish any defence to a charge.[19] There are three types of criminal offences, those where proof of mens rea (intent) is required by the prosecutor, strict liability (no mens rea element) and absolute liability (no defence) offences. Fisheries offences under Australian state and territory fisheries legislation are generally strict liability. An honest and reasonable mistake of fact, if established, may afford a defence to a strict liability offence.[20]

Turning to NSW fisheries law, the *FM Act* (NSW), which regulates recreational and commercial fishing in NSW, has been enforced in relation to Aboriginal defendants by the laying of criminal charges. To convict a defendant for an offence against the *FM Act* (NSW), a prosecutor must prove beyond reasonable doubt that the defendant committed the offence. This is relatively easy for strict liability offences under the *FM Act* (NSW), for example, catch or size of catch exceeding the regulatory limit.[21] As discussed below, while the objects of the *FM Act* (NSW) recognise cultural fishing for Aboriginal people, an operative provision which would enable a defence on this basis was passed in 2009 but is yet to commence.

In recognition of the importance of cultural fishing practises to Aboriginal people, various state and territory fisheries legislation, including in NSW, have statutory provisions concerning Aboriginal cultural fishing. One of the objects of the *FM Act* (NSW) is to 'recognise the spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect, and promote the

15 Gary W Henry and Jeremy M Lyle, 'The National Recreational and Indigenous Fishing Survey' (Survey FRDC Project No 99/158, Australian Government Department of Agriculture, Fisheries and Forestry, July 2003) <https://eprints.utas.edu.au/2526/1/Henry_Lyle_Nationalsurvey.pdf> ('NRIFS').

16 Ibid 110.

17 Ibid.

18 *R v Olbrich* (1999) 199 CLR 270, 281 (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

19 Ibid.

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

21 *Fisheries Management Act 1994* (NSW) div 2 ('*FM Act*').

continuation of, Aboriginal cultural fishing'.[22] This object came into force relatively recently in April 2010 and is the first time such recognition appears in the *FM Act* (NSW).[23] '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'.[24] Arguably, this object of the *FM Act* (NSW) is reflected in the exemption of Aboriginal people from the requirement to pay a recreational fishing fee.[25]

The *FM Act* (NSW) creates a number of offences relating to size, quantity and taking of particular species of fish.[26] An unsatisfactory aspect of the regime for the recognition of cultural fishing under the *FM Act* (NSW) is that section 21AA of the *Fisheries Management Amendment Act 2009* (NSW) was assented to on 14 December 2009, the same time the objects of the *FM Act* (NSW) were amended, but has not yet come into force. Under section 21AA of the *Fisheries Management Amendment Act 2009 (NSW)*, an Aboriginal person is authorised to take or possess fish for the purpose of Aboriginal cultural fishing despite sections 17 and 18 (which specify offences for taking and possessing more than the maximum quantity of fish prescribed by the regulations) of the *FM Act* (NSW), 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.[27] 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.[28] The Aboriginal Fishing Advisory Council was established under the *Fisheries Management (General) Regulation 2010* (NSW) (which commenced in September 2010) to advise the NSW Minister for Primary Industries on issues affecting Aboriginal fishing.[29] Members of the Aboriginal Fishing Advisory Council include Aboriginal persons appointed to represent different regions of NSW and a representative of NTSCORP Limited (the native title service provider for Aboriginal traditional owners in NSW and the Australian Capital Territory) and the NSW Aboriginal Land Council.[30]

The NSW Department of Primary Industries ('DPI') implemented the 'Aboriginal Cultural Fishing Interim Access' arrangement in October 2014.[31]

---

22 *FM Act 1994* (NSW) s 3(2)(h).

23 See *Fisheries Management Amendment Act 2009* (NSW) sch 1 [27]; New South Wales, *Parliamentary Debates*, Legislative Council, 2 December 2009, 20358 (Tony Kelly, Minister for Primary Industries and Minister for Lands).

24 *FM Act 1994* (NSW) s 4(1) (definition of 'Aboriginal cultural fishing').

25 Ibid s 34C(2)(f).

26 See ibid pt 2 div 2.

27 *Fisheries Management Amendment Act 2009* (NSW) s 21AA(4)(b).

28 Ibid s 21AA(5).

29 'Aboriginal Fishing Advisory Council', *NSW Department of Primary Industries* (Web Page) <https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/afac>.

30 *Fisheries Management (General) Regulation 2019* (NSW) cl 250 ('*FM Regulation*').

31 Fisheries NSW, Department of Primary Industries (NSW), *Aboriginal Cultural Fishing Interim Access* (Public Circulation Document No INT14/90930, 29 October 2014)

Under the arrangement, the amount of fish that can be taken by an Aboriginal person fishing for the purpose of Aboriginal cultural needs where elders, the incapacitated or other community members are unable to or it is otherwise inappropriate for them to fish[32] is double that of the current recreational bag/possession limits, other than for specified species.[33] If Aboriginal people wish to fish for greater numbers of fish an approval under section 37 of the *FM Act* (NSW) must be obtained.

Unless or until section 21AA comes into force, if an Aboriginal person wishes to fish for the purpose of 'Aboriginal cultural fishing' in breach of the limits established by the *FM Act* (NSW) and the regulations,[34] they must comply with the 'Aboriginal Cultural Fishing Interim Access' arrangement or gain the approval of the Minister (via the grant of a permit or order) under section 37(1)(d) of the *FM Act* (NSW). An approval may, under section 37(2), 'authorise the taking of fish or marine vegetation by any method or by any specified method, from any waters or any specified waters or in any other specified way, despite any provision of … this Act'. Under section 37(5) an approval in force under section 37 is a defence to a prosecution under the *FM Act* (NSW) if a defendant satisfies the court that the act or omission giving rise to an offence was authorised by that approval. The authors have not found anything on the public record to explain why section 21AA has not come into force. Members of the Aboriginal community have called for it to be implemented.[35]

Other Australian jurisdictions, notably Queensland and the Northern Territory, have provisions in force recognising cultural fishing which can be relied on as a defence to prosecution.

IV IMPACT OF COMMONWEALTH NATIVE TITLE ON STATE AND TERRITORY FISHERIES LAWS

Proof of the exercise of native title provides a further and different defence for charges arising from cultural fishing. The majority of the High Court of Australia in the landmark decision *Mabo [No 2]* 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, islands the Meriam people occupied. The

<https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/632695/legislation-aboriginal-cultural-fishing-interim-access-arrangments.pdf>.

32 The wording suggests a composite test of fishing for cultural needs and where community members are unable to in the circumstances identified in the policy.

33 The *FM Act 1994* (NSW) or the *FM Regulation 2019* (NSW) do not specify how long the interim arrangement is intended to remain. The policy is effective from 3 November 2014 until rescinded – the authors deduce that it is intended to operate until s 21AA comes into force: see New South Wales Aboriginal Land Council, 'Aboriginal Cultural Fishing in NSW' (Fact Sheet, 2015) <https://alc.org.au/wp-content/uploads/2020/01/151007-aboriginal-cultural-fishing-fact-sheet-final1.pdf>; Smyth, Egan and Kennett (n 5); Carmen McIntosh, 'Cultural Fishing Regulation Progresses', *South Coast Register* (online, 17 July 2015) <https://www.southcoastregister.com.au/story/3216350/cultural-fishing-regulation-progresses/>.

34 *FM Regulation 2019* (NSW).

35 See below n 73.

majority recognised 'a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands'.[36]

Following *Mabo [No 2]*, the *NT Act* (Cth) was passed by the Commonwealth government pursuant to section 51(xxvi) of the *Australian Constitution* which gives the Commonwealth the power to enact legislation with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

Section 211(1) of the *NT Act* (Cth) provides section 211(2) applies if the following is satisfied:

> (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
>
> (b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
>
> (ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and
>
> (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Section 211(2) provides:

> the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
>
> (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
>
> (b) in exercise or enjoyment of their native title rights and interests.

Subsection (3) specifies several classes of activity including (b) fishing. If section 211 of the *NT Act* (Cth) applies, it overrides state and territory laws which impinge on native title rights and interests as defined by the Act.

'Native title rights and interests' are defined under section 223(1) of the *NT Act* (Cth) as:

> the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.

A declaration of native title in coastal waters has been made on numerous occasions by the Federal Court of Australia. *Commonwealth v Yarmirr* (2001) 208 CLR 1 was an appeal to the High Court from the first successful determination under the *NT Act* (Cth) and the common law of offshore native title, the Federal Court conferring rights to fish in accordance with traditional laws for native

36 *Mabo [No 2]* (1992) 175 CLR 1, 15.

titleholders in the Croker Island region of the Northern Territory.[37] At issue was whether such rights could exist in Australian common law below the low-water mark. The High Court found native title rights and interests were capable of being recognised by the common law for the sea and seabed beyond the low-water mark.[38] The High Court has considered whether state and territory laws regulating fishing extinguish native title, finding that such a construction should only be applied if no other reasonable construction exists.[39] A similar finding applying the same reasoning was made in *Karpany v Dietman*[40] that South Australian fisheries legislation did not extinguish native title rights to engage in Aboriginal customary fishing.

The recognition of native title as part of the common law of Australia and legislatively through the *NT Act* (Cth) is important in NSW as in all states and territories as it provides a defence that Aboriginal fishers can rely on to avoid criminal liability under the *FM Act* (NSW) if proven. Cases where Aboriginal defendants have sought to establish native title as a defence will be considered in the context of the *FM Act* (NSW) and other state and territory fisheries legislation. These raise issues of evidentiary burden and the length and cost of proceedings, particularly where there is no native title declaration for an area as is presently the case for much of coastal NSW.

A The Evidentiary Burden of Native Title

Native title has been raised as a defence in a number of criminal cases involving fisheries offences over the past several decades in various Australian jurisdictions.

An important case in NSW is *Mason v Tritton*.[41] The defendant was charged with possessing 92 abalone in his car. Under the *Fisheries and Oyster Farms (General) Regulation 1989* (NSW) it was an offence to possess more than 10 abalone. In pleading not guilty, the defendant relied on the defence that he enjoyed a common law native title right to fish in the ocean near Narooma on the NSW south coast. 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 evidence of what the defendant personally intended to do with the abalone. The magistrate in the NSW Local Court dismissed the defence on the basis that there was

---

37 See *Commonwealth v Yarmirr* (1999) 101 FCR 171.

38 It is beyond the scope of this article to outline every declaration of native title which includes recognition of fishing rights, recent examples include *Mooney v Queensland* [2020] FCA 170 and *Peck v Western Australia* [2019] FCA 2090.

39 *Akiba v Commonwealth* (2013) 250 CLR 209. The Federal Court of Australia declared a number of island communities in the Torres Strait held native title over a large part of the Strait under the *Native Title Act 1993* (Cth). On appeal, the Full Federal Court held that Queensland and Commonwealth laws had extinguished any native title right to fish for commercial purposes. The High Court overturned that finding.

40 (2013) 252 CLR 507.

41 (1994) 34 NSWLR 572.

insufficient evidence to establish that the defendant on the day of the offence was exercising a native title right to fish and he was convicted and fined.

The Supreme Court of NSW in *Mason v Tritton*[42] dismissed the appeal against conviction by the defendant, who then appealed to the Court of Appeal which dismissed the appeal. As the *NT Act* (Cth) did not apply, the Court of Appeal considered the common law as identified in *Mabo [No 2]* in determining what the defendant had to prove. The Court held that in order to establish the defence, a defendant must prove the existence of native title, a 'difficult evidentiary task'.[43] According to the Court of Appeal, the exacting nature of the evidential burden established by *Mabo [No 2]* required the defendant to adduce evidence sufficient to demonstrate:[44]

> (1) that traditional laws and customs extending to the 'right to fish' were exercised by an Aboriginal community immediately before the Crown claimed sovereignty over the territory …;
>
> (2) that the appellant is an indigenous person and is a biological descendant of that original Aboriginal community;
>
> (3) that the appellant and the intermediate descendants had, subject to the general propositions outlined above, continued, uninterrupted, to observe the relevant traditional laws and customs; and
>
> (4) that the appellant's activity or conduct in fishing for abalone was an exercise of those traditional laws and customs.

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, as at the day of the offence, within their scope. The Court of Appeal contrasted the detailed evidence of traditional custom and reliance on it by the defendants in *Walden v Hensler*[45] ('*Walden*') and *Milirrpum v Nabalco Pty Ltd*[46] ('*Milirrpum*').[47] In *Walden* (which was decided before *Mabo [No 2]*), the appellant's conviction of taking and keeping protected fauna was quashed because the High Court found that he was not criminally responsible for the relevant offence because he exercised an 'honest claim of right' pursuant to section 22 of the *Criminal Code 1899* (Qld). The appellant was an elder of an identifiable Aboriginal group who gave evidence of what was in that case called Aboriginal law, by which he abided. In *Milirrpum* (a non-criminal land rights case pre-dating *Mabo [No 2]*), many Aboriginal people gave evidence of what their system of rules was, what their fathers told them and of their observance of the system.

In *Derschaw v Sutton*[48] the defendants were charged with possessing fish contrary to a ministerial notice issued under the *Fisheries Act 1905* (WA) ('*Fisheries Act* (WA)'). They relied on the defence that they were exercising a common law native title right to fish. The magistrate dismissed the charges on this

42 (1993) 70 A Crim R 28.
43 *Mason v Tritton* (1994) 34 NSWLR 572, 590 (Kirby P).
44 Ibid 584 (Kirby P).
45 (1987) 163 CLR 561.
46 (1971) 17 FLR 14.
47 *Mason v Tritton* (1994) 34 NSWLR 572, 604 (Priestley JA).
48 (1996) 17 WAR 419 ('*Derschaw*').

basis. 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 Supreme Court stated that the defendants were biological descendants of Aboriginal communities that had a native title right to fish.[49] However, the evidence did not show the extent of the right, for example, whether it is a right to take sufficient fish for food for the individual, for the family or for the community. 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 in seeking to rely on a defence of native title fishing rights, the onus then shifting to the prosecutor to negate the claim.[50] A majority of the full bench dismissed the appeal finding that the defendants had not satisfied their evidentiary burden.

In *Dillon v Davies*[51] the defendant was charged with breaches of the *Sea Fisheries Regulations 1962* (Tas) in that he took undersized abalone. The defendant relied on the defence of native title under the *NT Act* (Cth). 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 people before white settlement, and that the taking and eating of abalone was a widespread practice was accepted. The magistrate held that, consistent with the principles identified in *Mason v Tritton*, the defendant had to establish that the fishing of abalone was done in the exercise of traditional laws and customs. The asserted custom, that all Tasmanian Aboriginals would take abalone from the sea for the purpose of providing food for themselves and their families, was general and with unknown limits. There was no evidence of who could exercise the right to fish and what restrictions there were, if any, to such a right. The defendant's appeal to a single judge of the Supreme Court of Tasmania was dismissed.[52] Underwood J identified that the *NT Act* (Cth) reflects the common law reflected in *Mabo [No 2], Mason v Tritton* and *Derschaw v Sutton*.

The difficulties of mounting a native title defence are further demonstrated by the recent South Australian case of *Dudley v Department of Primary Industries and Regions South Australia (PIRSA)* ('*Dudley*'),[53] which considered whether the defence was available in the context of charges for offences against the *Fisheries Management Act 2007* (SA) ('*FM Act* (SA)'). Five Aboriginal men (Narungga people) were charged and found guilty in the Magistrates Court of possessing 370 abalone contrary to the *FM Act* (SA).[54] The defendants called three witnesses: one of the defendants, a relative of the defendants and an archaeologist. The first two witnesses gave evidence about their personal experience of fishing abalone in the

49 Ibid 422–3 (Franklyn J).
50 Ibid 431 (Franklyn J, Murray J agreeing at 445).
51 (1998) 145 FLR 111 ('*Dillon*').
52 Ibid 117–18 (Underwood J).
53 (2018) 231 LGERA 13 ('*Dudley*').
54 *Department for Primary Industries & Regions SA v Dudley* [2015] SAMC 57.

area and their knowledge of the role and significance of this activity in their community. The anthropologist gave expert evidence in relation to the tradition and history of fishing by the Narungga people in the area.

The magistrate found that a defence relying on section 211 of the *NT Act* (Cth) was not established as she was not satisfied that the defendants did not take the abalone for commercial purposes.[55] The magistrate found that the defendants were members of the Narungga people, with native title rights that included a right to take abalone in the area where the offence occurred. The key issue was whether the taking of the 370 abalone by the defendants was for 'personal, domestic or non-commercial communal needs' as required by section 211(2)(a) of the *NT Act* (Cth). The magistrate referred to the lies told by the defendants when first asked by the fisheries officers whether they had caught any abalone. She also noted that none of the defendants said anything about feeding their community until after the abalone were located. There was no evidence of any plan or preparation for distributing a large quantity of abalone among members of the community.

The defendants appealed their convictions to the Supreme Court of South Australia.[56] Nicholson J dismissed the appeal on the basis that the anthropological evidence did not establish that the present day customary rights amongst Narungga people included the spontaneous taking by anyone in that community of large quantities of abalone for sharing amongst the community.[57] There was no evidence as to who within the community had the right to take the abalone, whether or the extent to which the right to take abalone was limited by way of quantity or size, or the extent to which it was limited in accordance with particular locations.

Four defendants appealed their convictions to the Full Court of the Supreme Court of South Australia on the ground that the evidence at trial was sufficient to discharge the evidential burden on the defendants of a defence under section 211 of the *NT Act* (Cth). Dismissing the appeal, the Full Court affirmed authorities such as *Mason v Tritton* as demonstrating that in order for a defendant to discharge their evidentiary burden, they must identify evidence capable of establishing that the defendant is a member of a community of people who have traditionally exercised some form of right pursuant to a system of rules recognised by the common law, and that the defendant was exercising such a right on the occasion in question.[58] The Full Court rejected the appellants' submission that the Supreme Court focused to an inappropriate or erroneous extent upon the need for evidence that gave some definition or content to the claimed right to fish.[59] Such evidence is essential to any conclusion that a native title right exists and that it was being exercised on the occasion in question. The Full Court emphasised the 'distinction between evidence that establishes a history of engaging in a particular activity, and evidence that is

55 See summary of the magistrate's reasoning in *Dudley* [2018] SASCFC 23, [47]–[58] (Bampton, Lovell and Doyle JJ).

56 *Dudley v Department of Primary Industries and Regions South Australia (PIRSA)* [2016] SASC 144.

57 Ibid [65]–[71] (Nicholson J).

58 *Dudley* [2018] SASCFC 23, 18 [75] (Bampton, Lovell and Doyle JJ).

59 Ibid 27 [104] (Bampton, Lovell and Doyle JJ), citing *Dudley v Department of Primary Industries Regions South Australia (PIRSA)* [2016] SASC 144.

capable of establishing a native title right to engage in that activity'.[60] Interestingly, although the Full Court accepted that

> account must be taken of … the differences between [Aboriginal] and western culture in respect of the identification and articulation of rights, and hence the difficulties that may exist in identifying and articulating the basic definition and content of the right claimed … they cannot be a basis for overlooking the requirement that these matters be established …[61]

Mason v Tritton (NSW), *Derschaw v Sutton* (Western Australia), *Dillon v Davies* (Tasmania) and the recent decision of *Dudley* (South Australia) demonstrate that Australian courts have required defendants to satisfy the evidentiary burden to establish native title as a defence to fisheries offences by focusing on the particular circumstances giving rise to an offence. Expert evidence demonstrating a general tradition or custom of fishing in a particular region is, for example, insufficient. A defendant must provide evidence demonstrating that the particular fishing event (and the surrounding circumstances including the identity of the fisher and the size and purpose of the catch for example) occurred in the exercise of a system of traditional laws and customs adhered to by the defendant. Defendants have not been required to prove the defence of native title on the balance of probabilities.[62] As flagged in *Mason v Tritton*, discharging the onus of proof of native title which is sufficient to shift the onus to a prosecutor to prove beyond reasonable doubt that the defence of native title is not available has proved a difficult task for Aboriginal defendants.

B Length and Cost of Proceedings

The potential for a lengthy hearing on contested matters of fact in the context of criminal cases where Aboriginal defendants seek to rely on native title as a defence is demonstrated by *Department of Primary Industries (New South Wales Fisheries) v Rigby* ('*Rigby*').[63] Eleven Aboriginal defendants were charged with fishing offences for possessing undersized abalone and excessive quantities of abalone over and above the daily bag limit (in one case 1,366 compared to a daily limit of 10). The offences occurred at several places along the south coast of NSW on six separate dates between 1999 and 2002. Evidence of community elders and expert anthropologists was called by the defendants to establish native title. The prosecutor engaged its own anthropologist to assess the defendants' experts' evidence and give evidence in reply. The hearing took 20 days over several months and was followed by written submissions and further oral submissions over eight days. The magistrate found the offences proved in a 130 page judgment.[64] In

---

60 Ibid 28 [108] (Bampton, Lovell and Doyle JJ).

61 Ibid 28 [109] (Bampton, Lovell and Doyle JJ).

62 Richard Bartlett, *Native Title in Australia* (LexisNexis, 4th ed, 2020) [32.4], states that based on *Derschaw* and *Dillon*, evidence of native title must raise a reasonable doubt, ie less than on the balance of probabilities.

63 (Local Court of New South Wales at Narooma, Magistrate Lyon, December 2005).

64 Laurelle Pacey, 'Religion No Defence: South Coast Men Convicted on Abalone Charges', *The Koori Mail* (Toowong, 14 December 2005) 7 <http://aiatsis.gov.au/sites/default/files/docs/digitised_collections/the_koori_mail/366.pdf>.

Mason v Department of Primary Industries (NSW Fisheries)[65] the District Court dismissed 11 appeals from the Local Court convictions. *Rigby* demonstrates that hearing anthropological evidence from both the defendant(s) and prosecutor can result in lengthy proceedings and high legal costs which could deter Aboriginal defendants from relying on the defence.

V ABORIGINAL PEOPLES' CONCERNS ABOUT EXCESSIVE REGULATION AND ENFORCEMENT

According to Aboriginal groups and representatives, the statutory scheme in NSW is not fit for purpose given the significant regulatory action taken against Aboriginal people pursuant to the *FM Act* (NSW). According to a 2015 online story, between 2009 and 2015 there were over 250 prosecutions of Aboriginal people in NSW for fisheries offences and over 500 regulatory actions (including fines, warnings and confiscation of gear) were taken against Aboriginal people.[66] The source of these statistics is unknown and due to the dearth of data in relation to Aboriginal fishing in NSW the authors could not verify them. Ms Kathryn Ridge, a solicitor who defended Aboriginal people on the NSW south coast charged with illegal fishing, stated in March 2015 that the statutory scheme constituted a 'criminalisation of cultural practices'.[67] Ms Ridge stated that Aboriginal people might not be able to pay for fines issued pursuant to the *FM Act* (NSW) which could result in consequences disproportionate to the offence they were charged with (including gaol time).[68] This can result in wider social impacts including loss of employment which can impact individuals and their families.[69] Attendees at the Aboriginal Fishing Rights Gathering held on the NSW south coast in September 2015 voiced their concern about the number of locals being prosecuted and urged marine park officers to use more discretion when dealing with Aboriginal people.[70] This event was organised by the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') and funded by the FRDC. Reflecting on the NSW statutory scheme, the AIATSIS stated in 2016 that, despite the importance of cultural fishing to local Aboriginal communities, 'the legislation designed to sustain and conserve marine wildlife, and policies that only recognise recreational, commercial and aquacultural fishing activities in NSW, adversely affect Aboriginal groups'.[71] In June 2017 the NSW Aboriginal Fishing Rights Group, which was established by the Yuin people of the NSW south coast in 2014 and shares information about Aboriginal fishing issues and coordinates

---

65 (District Court of New South Wales, Blanch DCJ, 17 December 2007).

66 Jennifer Macey, 'NSW Election 2015: Aboriginal Groups Want Cultural Fishing Rights Made Law', *ABC News* (online, 19 March 2015) <https://www.abc.net.au/news/2015-03-19/aboriginal-groups-want-cultural-fishing-rights-made-law/6331716>. The statistic that over 500 regulatory actions were taken against Aboriginal people between 2009 and 2015 was also cited in Kennett et al (n 7) 9.

67 Macey (n 66).

68 Ibid.

69 Smyth, Egan and Kennett (n 5) 27.

70 Kennett et al (n 7) 7.

71 Ibid 2.

events to further the rights of Aboriginal fishers,[72] called for the commencement of section 21AA of the *FM Act* (NSW).[73]

Similar concerns were reported by the FRDC in 2018. Aboriginal people from various regions across Australia discussed in interviews the barriers to Aboriginal customary fishing. These include fisheries management and environmental protection legislation and regulations not sufficiently accommodating the unique aspects of Aboriginal fishing activities, unfair targeting and harassment of Aboriginal fishers by enforcement officers, a lack of understanding of native title rights, and long-term declines in local fish stocks due to overfishing by commercial fisheries.[74] The importance of sharing take in Aboriginal communities is not accounted for in fisheries management legislation and regulations.[75] Participants from the south coast of NSW stated that the 'bag limits' under the Aboriginal Cultural Fishing Interim Access arrangement are too restrictive as they do not take into account 'the common practice of a small group of regular fishers providing for extended networks of people who for various reasons could not fish for themselves'.[76]

VI RECENT EXPERIENCE IN NSW LOCAL COURTS

A comprehensive review of all criminal cases before NSW courts where Aboriginal fishing practices have arisen is beyond the scope of this article. Part of the difficulty of undertaking a comprehensive review arises because the extent to which individual Aboriginal people are charged is difficult to determine.[77] A number of defendants could plead guilty before local/magistrates courts giving rise to a sentencing hearing rather than a contested hearing. Hearings may not result in a reported judgment. Further, there is a lack of data of the number of matters withdrawn by prosecutors.

Notwithstanding the limitations of this case law analysis, in contrast to the concerns raised above about excessive enforcement of the *FM Act* (NSW), a possible change in approach of the prosecuting department in NSW, the DPI, is identified in the following cases. In *NSW Department of Primary Industries v Ardler* ('*Ardler*')[78] the defendants sought costs following the withdrawal of charges

---

72 Lydia Feng, 'Indigenous Communities Fight for Traditional Fishing Practices to Be Recognised', *SBS News* (online, 23 February 2019) <https://www.sbs.com.au/news/indigenous-communities-fight-for-traditional-fishing-practices-to-be-recognised>.

73 Stan Gorton, 'NSW Aboriginal Fishing Rights Group Starts Petition', *Narooma News* (online, 28 June 2017) <https://www.naroomanewsonline.com.au/story/4757111/nsw-aboriginal-fishing-rights-group-starts-petition/>.

74 Smyth, Egan and Kennett (n 5) v.

75 Ibid 27, 38, 44.

76 Ibid 56.

77 For example, the NSW Department of Primary Industries 'Fisheries Compliance Enforcement' data does not indicate which offences and significant court results involved Aboriginal peoples: 'Fisheries Compliance Enforcement 2017–2018', *NSW Department of Primary Industries* (Web Page, 2018) <https://www.dpi.nsw.gov.au/fishing/compliance/fisheries-compliance-enforcement/fisheries-compliance-enforcement-2017-18>.

78 (Local Court of New South Wales at Nowra, Magistrate G Fleming, 1 April 2015).

against them for possessing an unspecified number of live abalone in July 2008. At the time of collecting the abalone, fisheries officers told the defendants of the need for permits for the activity they were engaged in. The fisheries officers requested an interview with the defendants, which the defendants chose not to participate in. In June 2010 the defendants were served with court attendance notices. No explanation was given for the delay in commencing prosecutions. The charges were subsequently withdrawn.

The magistrate found the prosecutor should have made further inquiries of the defendants' Aboriginal community, community elders and land council, as well as raising specific matters with the defendants directly or through the Aboriginal Legal Service. The prosecutor should have been aware that if the defendants could prove that their practice of abalone collection constituted an exercise of native title rights, this was a relevant matter capable of suggesting that the defendants might not be guilty. Failure to investigate properly resulted in an award of costs to the defendants of $200,000.

In May 2013, five men were charged with taking and possessing 50 abalone. The allowable limit per person was two although the figure of 50 was consistent with a generally accepted state policy (predecessor to 2014 interim access policy) permitting Aboriginal people to take and possess a maximum of 10 abalone per day.[79] Mr Carberry and Mr Stewart, two of the five men charged, defended the case in the Batemans Bay Local Court on the basis that they had a native title right to take 10 abalone each.[80] On the first day of the defence case in early May 2014, an anthropologist gave evidence about the presence of Aboriginal people on the south coast and an Aboriginal elder gave evidence of Aboriginal occupation and fishing practices from her childhood to the present day. The following day the prosecutor withdrew all charges against Mr Carberry and Mr Stewart.[81] According to a local newspaper report in July 2015, the DPI announced that it 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.[82] An 'extra step' was to be adopted by DPI officers in the process of considering whether to charge for an offence of exceeding the bag limit in asking for details of the circumstances of fishing. Those who could prove they were fishing according to traditional Aboriginal law and custom were not prosecuted between the implementation of the 'extra step' and July 2015. For example, the prosecution of an Aboriginal man in Narooma for taking 28 abalone (over the 10

79 Carmen McIntosh, 'A Cultural Catch', *Bay Post–Moruya Examiner* (online, 9 May 2014) <http://www.batemansbaypost.com.au/story/2269339/a-cultural-catch/>.

80 Carmen McIntosh, 'Charges Withdrawn in Court', *Bay Post – Moruya Examiner* (online, 9 May 2014) <http://www.batemansbaypost.com.au/story/2269342/charges-withdrawn-in-court/>.

81 Ibid.

82 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/>.

abalone per catch limit) in 2015 was discontinued shortly before the hearing.[83] Although there had been no further prosecutions throughout this time period, a Narooma cultural fishing advocate stated that cultural fishers were still having their catches seized.[84] A DPI officer may seize any fish if they have reason to believe that the fish have been taken, sold or in the possession of a person contrary to the *FM Act* (NSW) or the regulations.[85]

The above suggests that prosecutors in NSW are in some cases making inquiries before prosecuting Aboriginal people for fishing offences (in *Ardler*, with the encouragement of the court) or withdrawing charges if the defendant provides evidence of native title. This trend towards exercising discretion before prosecuting Aboriginal fishers is supported by the 'extra step' now taken by DPI officers to inquire into the circumstances of fishing before prosecuting people found with catch in excess of allowable bag limits. Although this shift in the DPI's approach to prosecution is positive, it should be reflected in the DPI's formal 'Fisheries Compliance Enforcement Policy and Procedure'[86] to ensure that this continues.

VII POSSIBLE LEGISLATIVE REFORM IN NSW

In addition to amending the DPI's prosecution policy, consideration should be given to amending the *FM Act* (NSW) to protect Aboriginal cultural fishing. As demonstrated above, it is practically difficult for defendants to successfully rely on native title as a defence under the *NT Act* (Cth). Section 37 of the *FM Act* (NSW) (which allows Aboriginal people to apply for permits to fish in contravention of the Act for non-commercial purposes) is an insufficient statutory protection for at least three reasons. Firstly, it requires the Minister to decide, when an application for a permit is made, whether the nature and quantity of catch proposed to be fished is permissible, without consideration of typical fishing practices of the local Aboriginal population. Secondly, the application process seems unnecessarily bureaucratic and impractical as applications must be made at least six weeks before the proposed fishing activity to accommodate processing

83 Bridget Brennan and Isabella Higgins, 'How Diving for Abalone Could Have Landed This Great-Grandfather in Prison', *ABC News* (online, 12 July 2018) <https://www.abc.net.au/news/2018-07-12/fishing-rights-abalone-could-have-put-great-grandfather-in-jail/9958280>.

84 Ibid. For example, 3,300 abalone were seized by the NSW Department of Primary Industries in January 2017 from a joint haul of abalone from the Walbunja people on the far south coast of NSW: Kate Lockley, '"They Call It Black Market, We Call It Survival": Far South Coast Fisherman Denounce Abalone Arrests', *Narooma News* (online, 9 February 2017) <https://www.naroomanewsonline.com.au/story/4456501/they-call-it-black-market-we-call-it-survival-far-south-coast-fishermen-denounce-abalone-arrests/?cs=1489>.

85 *FM Act 1994* (NSW) s 267.

86 Department of Primary Industries (NSW), 'Fisheries Compliance Enforcement Policy and Procedure' (Policy Document, 29 July 2011) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0018/401814/Fisheries-compliance-prosecution-policy-and-procedure.pdf>.

time.[87] Thirdly, fishing for subsistence (as opposed to a specific ceremonial event) is not covered by section 37 permits.[88] The FRDC found that section 37 permits appear to be rarely used.[89] This may be due to the lengthy processing time for applications, providing the required information may be considered too onerous, and Aboriginal people may find it disrespectful to have to apply for a permit to practice their culture.[90] In addition, the 2014 'Aboriginal Cultural Fishing Interim Access' arrangement may provide sufficient flexibility for Aboriginal communities if they are prepared to operate within it.

Members of the south coast Aboriginal community at the Aboriginal Fishing Rights Gathering held in 2015 recommended that section 21AA of the *FM Act (NSW)* commence immediately and that the fishing sector be regulated if issues arise following its commencement.[91] One benefit to implementing section 21AA is that a defendant seeking to rely on the statutory defence need not prove native title which, as discussed above, is both challenging and can be costly to prove. This would, however, depend on whether the effective catch limits imposed by section 21AA and relevant regulations are less extensive than the current NSW Interim Access Arrangement. A further benefit of section 21AA is that it enables regulations to be made to limit Aboriginal fishing in particular ways, presumably to protect fish stocks and otherwise promote sustainability objectives. The Aboriginal Fishing Advisory Council must be consulted on such regulations. Ideally, this requirement will ensure that any regulations made to restrict or otherwise regulate Aboriginal fishing will not conflict with the interests of Aboriginal peoples represented by the Aboriginal Fishing Advisory Council.

Examples of recognition of cultural fishing as a defence to prosecution in other Australian jurisdictions exist. Section 53 of the *Fisheries Act 1998* (NT) ('*Fisheries Act* (NT)') is expressed in similar terms to section 21AA. It provides that the Act does not 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' (excluding commercial activities). In contrast to the NSW Interim Access Arrangement, section 53 does not impose specific catch limits for fishing by Aboriginal peoples 'in a traditional manner'. *Talbot v Malogorski*[92] involved an appeal to the Supreme Court of the Northern Territory against findings of guilt made by a magistrate in respect of charges under the *Fisheries Act* (NT). The appellant argued that the magistrate applied the wrong test to determine whether he was entitled to raise a defence under section 53(1) of the *Fisheries Act* (NT). The magistrate relied entirely on native title principles and not on the particular wording of section 53(1), a threshold which was more difficult to meet. Blokland J considering the application of section 53, held that a native

87 Department of Primary Industries (NSW), 'Application for an Authority to Take Fish for Aboriginal Cultural Fishing Purposes' (Application Form) <https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0006/631788/form-24-application-for-an-authority-to-take-fish-for-aboriginal-cultural-fishing-purposes.pdf>.

88 Smyth, Egan and Kennett (n 5) 56.

89 Ibid.

90 Ibid.

91 Kennett et al (n 7) 13.

92 (2014) 290 FLR 216.

title right was not determinative of whether section 53 applied and allowed the appeal. A defendant had to prove elements of section 53 on the balance of probabilities. 'Traditional' was construed as having its ordinary meaning rather than what is associated with native title ('the establishment of "laws acknowledged and customs observed"').[93] 'Traditional' for native title purposes 'differs from its ordinary meaning because in a native title context "tradition" necessarily extends back to pre-sovereignty'.[94] That is, continued uninterrupted observance of traditional laws and customs since European settlement in 1788 must be demonstrated. Blokland J identified that the word 'traditional' in this context 'does not necessarily signify rigid adherence to past practices' but rather signifies what 'has been handed down from generation to generation, often by word of mouth'.[95]

Talbot v Malogorski demonstrates that, depending on its wording, a statutory defence for Aboriginal cultural fishing can be preferable to the native title defence under the *NT Act* (Cth) since the evidentiary burden of proof is less onerous. Compared to south coast NSW and west coast South Australian participants, no concerns were raised by Northern Territory participants in the 2018 FRDC research project about fisheries enforcement and management.[96] This suggests that the implementation of a similar provision in the *FM Act* (NSW) would allay Aboriginal peoples' concerns about excessive regulation and enforcement of Aboriginal fishing in NSW.

Section 14 of the *Fisheries Act 1994* (Qld) (*'Fisheries Act* (Qld)') also provides a statutory defence for Aboriginal people for fisheries offences. This is available if the person proves that they are an Aborigine who at the time of the offence was acting under Aboriginal tradition and the taking, using or keeping of fisheries resources was for the purpose of satisfying a personal, domestic or non-commercial communal need of the person. Section 14 of the *Fisheries Act* (Qld) was considered in *Stevenson v Yasso*.[97] Mr Yasso was charged under the *Fisheries Act* (Qld) with unlawfully possessing a commercial fishing apparatus in contravention of a fishing regulation being a 50 metre monofilament net (gill net). Mr Yasso relied on section 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 practices. 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 section 14.

---

93 Ibid 229–30 [58]–[59] (Blokland J).
94 Ibid 230 [59] (Blokland J).
95 Ibid, citing *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 463 [112] (Gaudron and Kirby JJ).
96 Smyth, Egan and Kennett (n 5) 55–6.
97 (2006) 163 A Crim R 1.

The prosecutor successfully appealed to the District Court on the basis that, among other things, there was no evidence that Mr Yasso fished under Aboriginal tradition. Mr Yasso appealed to the Court of Appeal of Queensland on the basis that, according to the evidence of Aboriginal elders, the use of the monofilament net was consistent with the traditional use of nets. The Court allowed the appeal (McMurdo P and Fryberg J, with McPherson JA dissenting), stating that 'Aboriginal tradition' in section 14 is defined by section 36 of 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'. This definition implies a handing down of traditions and customs from generation to generation in accordance with the understanding of Aboriginal teachings and practice.[98] It 'need not find its expression in or be sanctioned by rules; need not be traced back to any particular year'.[99] It does not require proof of native title.[100] The defendant must prove on the balance of probabilities that they are an Aborigine acting under Aboriginal tradition.[101] *Stevenson v Yasso*, like *Talbot v Malogorski*, demonstrates that statutory defences for Aboriginal cultural fishing reduce the evidentiary hurdle that Aboriginals would otherwise face in relying on native title as a defence to fisheries offences. This is particularly evident from *Stevenson v Yasso* where Mr Yasso successfully established the statutory defence although legally unrepresented.

The recognition of cultural fishing is likely to benefit wider sections of Aboriginal communities than native title holders. There is potential for tension between the two, encapsulated in section 37(9) of the *FM Act* (NSW) which states that no approval for Aboriginal cultural fishing will be made if inconsistent with native title rights and interests under an approved determination under the *NT Act* (Cth). The authors note two recent developments concerning native title claims in NSW over coastal waters. In *Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney-General (NSW)*,[102] the Federal Court approved a native title claim for areas of land and sea (approximately 242 square kilometres) around Byron Bay in northern NSW in April 2019 almost two decades since it was first lodged with the Court. This decision marks the second time that native title sea rights have been recognised in NSW.[103] Further, a native title claim brought on behalf of the Yuin people known as the 'South Coast People' was lodged with the National Native Title Register in January 2018 which will be determined by the Federal Court.[104] The claim covers an area of approximately 14,000 square kilometres of the south coast of NSW and extends three nautical miles into the

98 Ibid 16–17 [47] (McMurdo P), 44–5 [143]–[144] (Fryberg J).

99 Ibid 43 [140] (Fryberg J).

100 Ibid 16–17 [47] (McMurdo P), 48 [152] (Fryberg J).

101 Ibid 29–30 [94]–[97] (McPherson JA, Fryberg J agreeing at 46–7 [148]–[149]).

102 [2019] FCA 527.

103 Hannah Ross, Elloise Farrow-Smith and Bronwyn Herbert, 'Byron Bay's Bundjalung People Celebrate Long-Awaited Land and Sea Native Title Determination', *ABC News* (online, 4 May 2019) <https://www.abc.net.au/news/2019-04-30/byron-bay-native-title-land-rights/11057896>.

104 NNTT No NC2017/003 accepted for registration and entered on Register of Native Title Claims 31 January 2018.

ocean.[105] A declaration of native title over such a large area of NSW coastal waters is likely to improve the ability of Aboriginal fishers to prove a defence based on the exercise of native title rights. The Aboriginal defendants in the cases reviewed above such as those in *Mason v Tritton* did not have the benefit of a native title declaration.

A welcome development is the DPI's proposal in about August 2018 of Aboriginal cultural fishing trial 'Local Management Plans' ('LMPs') in the Tweed, Moama and Port Macquarie regions.[106] These will establish a separate management framework to provide Aboriginal communities with access to local fisheries resources for cultural fishing purposes. The LMPs will outline, among other things, fish species of particular significance and agreed limits in following discussions and negotiations between the DPI and the Aboriginal Fishing Advisory Council, members of local Aboriginal communities and Aboriginal organisations.[107] They will be implemented and given legal effect under ministerial orders pursuant to section 37(3)(b) of the *FM Act* (NSW) ensuring that they provide clear protection from prosecution for an offence against the Act.[108] Similar plans could be made under section 21AA to ensure that parameters of cultural fishing are established at a regional level with Aboriginal communities, as recommended by Hawkins.[109] Ultimately, any proposed changes to the *FM Act* (NSW) to better recognise Aboriginal fishing values should be developed in consultation with affected communities.[110] Participants in the 2018 FRDC research project into Aboriginal fishing values felt that there has been little genuine consultation with south coast Aboriginal people on fisheries management matters.[111]

VIII CONCLUSION

The title of this article refers to balancing of competing interests in the criminal justice system in NSW, meaning the preservation of fish stocks from unsustainable use and allowing Aboriginal people to continue long-standing cultural traditions. Views are likely to differ on whether the balance is right, given the exercise of prosecutorial discretion by DPI in charging perceived offenders and the hurdles in proving a native title defence from a legal and practical perspective for defendants.

105 Stan Gorton, 'Historic South Coast Native Title Claim Heads to Federal Court', *South Coast Register* (online, 16 February 2018) <https://www.southcoastregister.com.au/story/5233548/historic-south-coast-native-title-claim-heads-to-federal-court/>.

106 Department of Primary Industries (NSW), 'Engagement Protocol: Development of Aboriginal Cultural Fishing Trial Local Management Plans (LMPs)' (Policy Document) <https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/820336/engagement-protocol-development-of-aboriginal-cultural-fishing-trial-lmp.pdf>.

107 Ibid.

108 Ibid.

109 Hawkins (n 6) 33.

110 Smyth, Egan and Kennett (n 5) v.

111 Ibid 29.

Aboriginal groups have expressed concerns about excessive regulation and enforcement of fisheries offences under the *FM Act* (NSW) in the context of Aboriginal cultural fishing. Under the current *FM Act* (NSW), Aboriginal people charged with statutory offences when exercising cultural fishing practices who plead not guilty must establish a defence if they are to be acquitted. Native title rights, if established by a defendant, are recognised as a defence in section 211 of the *NT Act* (Cth).

The ability of an Aboriginal person to defend a charge by proving on the balance of probabilities that he or she is Aboriginal and exercising native title rights has varied in the cases reviewed above. Generally much more than a statement from the person charged will be required and, as concluded above, expert evidence demonstrating a general tradition or custom of fishing in a particular region will be insufficient. The cases show that specific and detailed evidence from community members and elders and anthropological evidence may well be needed to establish the exercise of native title rights in the particular circumstances giving rise to an offence in order to discharge that onus of proof. Defendants seeking to establish native title as a defence to charges face a reasonably onerous evidentiary burden, as seen in *Mason v Tritton* (NSW), *Dershaw v Sutton* (Western Australia), *Dillon v Davies* (Tasmania) and the recent decision of *Dudley* (South Australia) (in all of which statutory or common law native title was not established). Legal representation is likely to assist in the presentation of a defendant's case which satisfies the necessary onus of proof. The capacity of Aboriginal defendants to obtain legal representation and the necessary evidence may well be limited due to their social and financial circumstances. Given that extensive expert evidence is typically adduced in proceedings where native title is raised, proceedings can be lengthy and costly (as seen in *Rigby*) and deter Aboriginal defendants from raising the defence.

Greater cultural sensitivity amongst enforcement officers of the importance of traditional Aboriginal fishing can lead to a more nuanced approach to prosecutions for offences under fisheries laws. In NSW, criticism in some Aboriginal coastal communities of the practice of charging Aboriginal defendants with fishing offences received media attention in 2015. Two prosecutions of Aboriginal defendants in the Local Court of NSW were dropped in 2014 and 2015 when the defendants sought to prove a defence based on native title rights. In the Carberry prosecution, the defendants called an anthropologist who gave evidence in the Local Court before the charges were dropped by the DPI in May 2014. In *Ardler*, the defendants successfully obtained an order for costs in their favour after the DPI dropped charges related to fishing in 2015. The dropping of charges was a markedly different outcome to *Rigby* in 2005 where the defendants were all convicted. No direct comparison of these cases can be made as their facts are different and why charges were dropped is not known to the authors. An important difference between the cases is that the number of abalone the subject of the charges was far larger in *Rigby* than in the Carberry case. Nevertheless, there appears to be a change in attitude of those prosecuting in the DPI to more readily recognise defences based on native title rights where they are shown to exist. This

process would be strengthened by amending the DPI's compliance enforcement policy.

The NSW government has not yet implemented section 21AA of the *FM Act* (NSW) which recognises Aboriginal cultural fishing. More certainty for Aboriginal defendants would be achieved if section 21AA came into effect together with the necessary regulations to do so. Similar statutory provisions that recognise Aboriginal cultural fishing have been enacted in the Northern Territory and Queensland. The cases of *Talbot v Malogorski* and *Stevenson v Yasso* which considered these provisions suggest that it would be easier for Aboriginal defendants to rely on section 21AA (in contrast to native title) as a defence to charges brought against them under the *FM Act* (NSW). By enabling the making of regulations to limit Aboriginal fishing in consultation with the Aboriginal Fishing Advisory Council, section 21AA is one mechanism balancing the competing policy objectives of promoting sustainability and Aboriginal cultural and social expression. The nature of such "balance" in practice remains to be seen.

Interestingly, the NSW government committed $1.5 million to the Aboriginal Fishing Trust Fund from 2017 to 2020. The Fund 'provides grants and loans for the enhancement, maintenance and protection of Aboriginal cultural fishing as well as for Aboriginal communities to develop businesses associated with fisheries resources throughout NSW'.[112] Although these projects would seem to be beneficial, that Aboriginal people could still be prosecuted for what they consider their traditional cultural practices remains a live issue in NSW.

Finally, two recent developments concerning native title claims in NSW in relation to coastal waters are important to note. *Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney-General (NSW)*, a native title claim for areas of land and sea around Byron Bay in northern NSW, was approved in April 2019. Further, a substantial native title claim brought on behalf of the Yuin people known as the 'South Coast People' was lodged with the National Native Title Register in January 2018. Future developments in relation to the issues discussed in this article may well be impacted by the formal declaration of native title rights over large areas of NSW coastal waters. Aboriginal defendants who consider they are engaging in cultural fishing would have the benefit of a declaration of native title to assist them in establishing their defence.

---

112 'Aboriginal Fishing Trust Fund', *NSW Department of Primary Industries* (Web Page) <https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/AFTF>.