1 Introduction

This essay investigates the tension between animal welfare and animal conservation with reference to the legislative and policy frameworks governing the hunting of turtle and dugong by indigenous people in Australia. Specifically, it explores the regulatory regimes relating to indigenous rights, traditional hunting, marine animal conservation and animal welfare in the context of dugong and turtle ‘harvesting’ in an area extending 24,000 km along the northern Australian coastline. Deficiencies in these regimes are examined, together with suggestions for legal reform.
2 The Context of Indigenous Hunting Rights

2.1 The International Context

Australia is signatory to the UN Declaration on the Rights of Indigenous Peoples which recognises that indigenous peoples have the right to traditional cultural expressions, and that States must afford legal recognition to such practices. In addition, the Indigenous and Tribal Peoples Convention includes provisions relating to the protection of cultural traditions and the 1992 Convention on Biological Diversity dictates that contracting parties shall ‘preserve and maintain…practices of indigenous communities embodying traditional lifestyles relevant to conservation and sustainable use of biological diversity’. These international commitments reinscribe a human rights paradigm in which animal welfare issues are largely absent.

2.2 The Australian Context

Australia ranks high amongst nations with recent extinctions and has a proportionately large number of endangered species. The Australian Bureau of Statistics reported that between 1995 and 2005 the number of terrestrial bird and mammal species listed as extinct, endangered or vulnerable rose by 41% from 120 to 169. Moreover, traditional hunting by indigenous people in Australia targets over 50 native wildlife species, including the dugong, the last of its kind remaining in the family Dugongidae, and six

1 UN Declaration on the Rights of Indigenous Peoples (2007). Articles 11, 26, 31

2 ILO convention Indigenous and Tribal Peoples Convention No. 169 (1989) Articles, 5, 7, 8

3 Convention on Biological Diversity (1992) Article 8(j)
http://www.cbd.int/convention/text/

species of marine turtles.\(^5\)

As a consequence of the landmark *Mabo* decision, the High Court of Australia acknowledged the existence of native title rights including rights to hunting, at common law.\(^6\) While the *Native Title Act 1993* specifies that this right is limited to hunting for personal, domestic or non-commercial communal needs, it preserves traditional rights to hunt marine turtle and dugong in circumstances where such activities would otherwise be restricted by Commonwealth, State or Territory animal welfare and/or marine conservation legislation.\(^7\) Traditional fishing of dugong and turtle is also permitted under the *Torres Strait Treaty* between Australia and Papua New Guinea \(^8\) and in Australia by the Commonwealth *Torres Strait Fisheries Act 1984*. ‘Traditional fishing’ is defined in both the Treaty and the Act as ‘the taking, by traditional inhabitants for their own or their dependents’ consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle.’\(^9\)

3 The Legislative Framework

The relevant legislative and policy regimes of Indigenous management of traditionally hunted marine turtle and dugong encompass the areas of native title rights, cultural heritage protection, fisheries and biodiversity conservation. Indigenous cultural practices relating to the traditional harvest of marine animals is enshrined in law via native title rights and international agreements and conservation legislation.

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6 *Mabo and Others v Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1

7 Section 211 *Native Title Act 1993* (Cth)


9 ss 3, 8(a) *Torres Strait Fisheries Act 1984* (C’th)
The current conservation status of the Dugong, *Dugong dugon*, under international, Australian and State/Territory Government legislation and conventions is as follows:

### 3.1 International
- The dugong is listed on Appendix I of the *Convention on International Trade in Endangered Species of Fauna and Flora*
- The dugong is listed as ‘vulnerable’ on the *International Union for Conservation of Nature and Natural Resources* Red List of Threatened Species
- The dugong is listed on Appendix II of the *Convention on the Conservation of Migratory Species of Wild Animals*

### 3.2 National

The current legal and policy framework for marine turtles and dugong in Australia incorporates several federal Acts including the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, *Antarctic Marine Living Resources Conservation Act 1981*, *Antarctic Treaty (Environment Protection) Act 1980*. The dugong is listed as a ‘marine and migratory species’ under the *Environment Protection and Biodiversity Conservation Act 1999*. Dugong, together with six species of turtles, are listed under the Act as protected migratory marine species and is an offence to kill such species without a permit. Despite this, traditional hunting is permitted under the Torres Strait Treaty, the Commonwealth *Torres Strait Fisheries Act* and the *Native Title Act* where the operation of s 211 recognises the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity and exempts the traditional harvest of dugong and turtle.

- In the Torres Strait, dugong and turtles are declared an Article 22 traditional fishery under the *Torres Strait Treaty 1985*, and traditional harvest is protected by the Treaty. However, the *Torres Strait Fisheries Act 1984* provides ‘Fishery Management Notices’ (FMN) which regulate the taking of turtles and dugong by traditional fishing. For example
FMN 65 provides that ‘traditional fishing’ is allowed via use of a spear thrown by hand and FMN 66 restricts the carriage of turtles on vessels less than 6 metres.

### 3.3 State and Territory

In New South Wales, the dugong is listed as ‘vulnerable’ under the *Threatened Species Conservation Act 1995* (NSW).

In the Northern Territory, the dugong is listed as ‘protected wildlife’ under the *Territory Parks and Wildlife Conservation Act 2001*. However, s 122 of the Act recognises the rights of Aboriginal peoples to traditional hunting in accordance with Aboriginal tradition.

In Queensland the dugong is listed as ‘vulnerable’ under the *Nature Conservation Act 1992* (Qld). However the *Community Services (Aborigines) Act 1984* (Qld) and the *Community Services (Torres Strait) Act 1984* (Qld) authorise traditional residents to take marine products. Under these Acts, hunting is lawful under traditional right by a traditional owner or community member. Additionally, dugongs are protected species under the *Great Barrier Reef Marine Park Zoning Plan 2003*. The Plan, however, does not extinguish native title rights and does not affect the operation of section 211 of the *Native Title Act 1993*.

In Western Australia the Department of Conservation and Land Management has legislative responsibility to conserve wildlife under the *Conservation and Land Management Act 1984* and to protect fauna under the *Wildlife Conservation Act 1950*. The dugong is listed as ‘specially protected’ fauna and the six species of marine turtles as ‘rare or is likely to become extinct’ under the *Wildlife Conservation Act 1950*. However, s 23 of the Act allows indigenous harvest from Crown land for ‘customary purposes’. While regulation 63 of the *Wildlife Conservation Regulations 1970* (WA) suspends section 23 in relation to ‘specially protected fauna’, the taking of dugong and turtles are exempt where an animal has been harvested for an Aboriginal customary purpose.
4 Conservation and Welfare Issues

While the issue of whether the traditional harvest of turtles and dugong is within sustainable levels has been a concern of Australian and international agencies, less attention has been paid to the issue of animal suffering caused by indigenous hunting practices. In addition, limited resources have been directed towards assisting Indigenous communities to protect turtles and dugongs – a fact recognised by the Indigenous Advisory Committee.10

Rather, the priority of Australian jurisdictions is to manage dugong and turtle ‘harvest’ by indigenous hunters, consistent with native title rights.11 As Dominique Thiriet observes however, native title legislation provides no direction regarding the issue of animal welfare and appears to enjoy tacit ‘approval’ by animal welfarists and conservationists alike.12 She acknowledges that while traditional hunting has been considered thoroughly in the context of ecological sustainability and native title rights, the animal welfare dimension of traditional hunting practices has been largely ignored and that the welfare of native wild animals subject to traditional hunting is an issue that ‘has been left mostly untouched by the law and by public discourse.’13 And a noted by Cameo Dalley, historical perspectives


on traditional hunting demonstrate how it relates more to the ‘management of social relations guiding hunting’ rather than to species conservation.14

This is a significant concern in light of evidence which suggests that that legal Indigenous hunting is now the greatest source of dugong mortality in northern Australia.

The treatment of animals targeted in traditional hunting highlights a tension between the rights of indigenous peoples to engage in traditional practices and contemporary standards of animal welfare. Thiriet notes that while some traditional hunting practices cause considerable suffering to marine animals such as dugong and turtles, there is no consistent regulation of these practices by animal protection legislation. This, she argues, can be attributed to the relativity of traditional hunting compared to animal cruelty in commercial contexts and to the politically sensitive issue of colonial guilt relating to the genocide of indigenous cultural practices. There is a concern, Thiriet suggests, that the promotion of animal welfare issues may deprive indigenous peoples of their traditions and violate legally enshrined human rights principles. In the United States, for example, the Inuit people have described how their culture is being devastated by the 1972 Marine Mammal Protection Act, a U.S. law which bans seal products and curtails the capacity of the Inuit to use and trade local resources. They argue that the law disrupts the ‘sustainable ecological relationship’ that indigenous people have with the environment. 15


Jan Crase notes that Western law is shaped by cultural and societal expectations very different to those of Indigenous society.\(^\text{16}\) Similarly, Julia Hartdaker notes that improving animal welfare in the Indigenous paradigm of remote communities differs vastly from approaches undertaken in the urban context, due to differing worldviews and a history of failed approaches.\(^\text{17}\) For Indigenous Australians in remote areas of Northern Australia, traditional hunting of marine turtles and dugongs has an important cultural role, and is intricately entwined with a system for maintaining kinship obligations and social structures that dictate the management of commonly held food resources.\(^\text{18}\)

Crase observes that Western practice in dugong management in Australia has been based on the principle, supported by archaeological evidence of dugong hunting in northern Australia for at least 4,000 years, that indigenous cultural practices involve stewardship responsibilities towards marine mammals and turtles that are sustainable in the long-run.\(^\text{19}\) However, as Anne Ross argues, the paradigm of traditional Aborigines as ‘archetypal conservationists’ belies evidence that traditional hunting contributed to the extinction of mega fauna on the Australian mainland.\(^\text{20}\)


The concerns expressed above suggest that while traditional hunting has been considered thoroughly in the context of ecological sustainability and native title rights, animal welfare concerns relating to traditional hunting practices have received less attention. Indeed, Thiriet and Smith argue that inconsistent legislation, inadequate enforcement and a lack of debate on the issue have contributed to the perpetuation of unnecessary cruelty towards hunted marine animals and that:

‘Much of the laissez-faire dugong management in Australia has been based on the deeply-rooted principle that Aboriginal and Torres Strait Islander peoples know best and that their practices are sustainable. It is time however to set aside romanticised beliefs of Indigenous people as good custodians of the land merely by virtue of their race or ancestry.’

While such sentiments may meet with an anthropocentric objection that the rights of indigenous peoples are of greater importance than the interests of animals, perhaps the central issue is whether dugong hunting can be justified on the basis that it is a cultural tradition. However traditional and contemporary Indigenous attitudes towards animals may vary greatly. Whilst some consider non-human animals as ‘intrinsically valuable’, others claim Aboriginal tradition neither prevents cruel treatment or is traditionally unconcerned with the welfare of individual animals. However, as Thiriet notes, the same can be said for non-Indigenous communities where recreational hunting activities often conflict with humane standards, endangered and native animals are provided more

21 Thiriet Dominique and Rebecca Smith, ‘In the name of culture: dugong hunting is simply cruel’, The Conversation, 8 April 2013
https://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463

protection from cruelty than farmed animals, and care for native wildlife depends on the species and the value placed by people.23

5 Traditional hunting in a contemporary context

As discussed above, the laws, policies and programs applicable to Indigenous rights impinge on the capacity of both animal welfare and conservation legislation. More specifically, issues relating to the protection of dugong and turtle in Australia have been informed by a policy of ensuring conservation and to enable sustainable Indigenous harvest rather than with animal welfare concerns.

In addition, judicial consideration of traditional hunting has been considered primarily in terms of the implications for native title rights, conservation or firearm use rather than as an animal welfare issue.24 Common law determinations relating to native title over sea country have identified a non exclusive right by claimants to have free access for non-commercial (‘customary’) hunting and established Aboriginal marine tenure has been recognised in the same way as land tenure.25

In Yanner v Eaton the High Court considered the application of s 211 of the Native Title Act and the taking of species protected under the Fauna Conservation Act 1974 (Qld).26 It found that the operation of s 211(2) and s 109 of the Australian Constitution did not prohibit or restrict a native title holder from hunting crocodile for non-commercial purposes, and clarified that hunting as a practice remained consistent with Aboriginal tradition. The Court commented upon what constitutes ‘traditional' hunting in response to concerns that the use of modern technology facilitates killing at a larger scale. It accepted that an activity is still ‘traditional' as long as the purpose has not changed, regardless of the method used.

23 n 21


In addition, the cases of *R v Sparrow*, *Simon v The Queen*, and *Campbell v Arnold*, make it clear that in the absence of statutory provisions, indigenous people may use modern implements to carry out their traditional practices.\(^{27}\) However, as Lauren Magnotti notes, the concern of the Courts in such cases was with harm to overall species of animals, rather than that caused to individual animals.\(^{28}\)

Suggestions that Indigenous people who rely on traditional rights should only use traditional weapons, as per regulations under the *Torres Strait Fisheries Act* that prohibits the taking of dugongs by any method other than with the use of a 'wap', a spear thrown by hand, may indeed be a direct assault on animal welfare. While traditional hunting may have had minimal impact on marine populations as a whole, due to the 'arduous' nature of the use of dugout canoes and the wap, the suffering caused to individual animals such as dugong were often extreme and prolonged as they were harpooned, dragged until exhausted and drowned. Turtles, once caught, were frequently turned on their backs in the hot sun or have their flippers amputated to prevent escape.

Contemporary technology, such as vessels equipped with outboard motors, provide a more efficient means of harvest. While such technology may result in marine animals being killed in larger numbers, it arguably also provides more humane ways of hunting and slaughter. Humane killing occurs when an animal is either killed instantly or rendered insensible to pain until death supervenes. Where traditional methods such as spearing and drowning are employed to kill dugongs, humane killing is less likely to occur and animal suffering prolonged. As Thiriet argues, traditional hunting practices raise legitimate animal welfare concerns which are not adequately addressed by existing policy and legislation.\(^{29}\)


\(^{28}\) Lauren Magnotti, ‘Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter ’(2006) 80 St. John's L. Rev. 455

\(^{29}\) Dominique Thiriet* Indigenous use of wildlife Out of the ‘too hard basket’- traditional hunting and animal welfare p75
The fact sheet for the Queensland Department of Agriculture, Fisheries and Forestry recommends that marine animals receive a severe blow to the head using a heavy blunt object and while unconscious and less able to feel pain, bled out by cutting the animal’s neck to achieve a quick death. However, the fact sheet acknowledges that:

‘Large animals, such as dugongs, are difficult to make unconscious before they are killed. Most traditional and customary hunters kill dugongs by drowning. This may be the only method reasonably available to a hunter. Where use of a firearm is permitted, shooting dugongs through the brain is the preferred method and will cause less pain.

Animals, such as turtles, do not die quickly when bled out. A turtle can still be responsive and feel pain for a long time after being bled out or having its head cut from its body. For a turtle to die quickly, a hunter needs to know the part of the brain that is most important to destroy is below the eye.’

6 Animal Welfare Initiatives

The federal parliament does not have specific power to enact laws concerning animal welfare, the primary legislative responsibility for animal welfare resting with states and territories. Whilst there are variations between jurisdictions, animal welfare legislation does not exempt acts or omissions done in accordance with Aboriginal tradition or Islander custom from their operation. Under these laws, cruel treatment, including inflicting unnecessary pain or suffering on an animal, may constitute an offence. But because the Acts do not provide an exclusive definition of ‘cruel’ treatment or guidance on what constitutes ‘unjustifiable, unnecessary or unreasonable’ suffering, traditional hunting practices for dugongs and turtles such as drowning, may be justified as the only method reasonably available. While traditional killing should be carried out in a way that ‘causes as little pain as is reasonable’, the harpooning and drowning of dugongs may continue to be considered ‘reasonable’ under existing law.

In September 2012, in response to legitimate animal welfare concerns, the Queensland government introduced amendments to the Animal Care and Protection Act 2001 to

protect dugong and turtles from unreasonable pain and suffering when hunted and killed in the course of indigenous customary harvesting. The changes removed the previous exemption from animal welfare obligations for Aboriginal people and Torres Strait Islander people, bringing Queensland’s animal welfare legislation in line with other states. Section 8 of the Act now provides that ‘a person does not avoid liability to be prosecuted for an offence under this Act only because the act or omission that constitutes the offence happens in the exercise or enjoyment of native title rights and interests.’

Section 41 A of the amended Act: ‘killing an animal under Aboriginal tradition, Island custom or native title’ sets out prohibited acts or omissions which are prohibited under the Act, including:

- injuring the animal to stop it escaping after it has been caught;
- injuring the animal or prolonging its life to attract another animal;
- taking flesh from the animal for human consumption before the animal is dead;
- doing a thing or omitting to do a thing that causes the animal to die from dehydration or starvation.

Changes were also made to the Nature Conservation Act 1992 (Qld), Aboriginal and Torres Strait Islander Communities (Justice Land and Other Matters) Act 1984 (Qld) and the Aurukun and Mornington Shire Leases Act 1978 to ensure Aboriginal people and Torres Strait Islander people authorised to hunt under these Acts are subject to animal welfare obligations.31

The Queensland Department of Agriculture, Fisheries and Forestry states that ‘the amendments only mean a change for the small number of Aboriginal people and Torres Strait Islander people who have been using unreasonable hunting practices’ and recognises ‘the positive work’ already being done by many Aboriginal groups and Torres Strait Islander groups to protect dugong and turtle populations. It acknowledges that the implementation of changes to hunting methods should be community-driven and that

31 Once the amendment was introduced, there was a 12 month grace period for enforcement of the changes, during which time anyone found using cruel hunting methods, except for significant animal welfare breaches, was given a warning rather than face prosecution.
indigenous communities ‘are encouraged to work with scientists, animal welfare interest groups and other stakeholders to agree on acceptable hunting practices based on science and practicality, while recognising tradition and custom.’32

7 Conclusion: Indigenous Rights and Animal Welfare

The treatment of animals in the course of indigenous traditional hunting practices involves a conflict between enshrined rights to maintain traditional practices and contemporary standards of animal welfare. While dugongs and turtles are afforded some protection in terms of their conservation sustainability status, less legislative concern has been directed towards their intrinsic worth or individual welfare. The current legal and policy frameworks for marine turtles and dugong incorporate a myriad of competing interests that are in tension with international, national, state and territory objectives.

As Thiriet and Smith point out, where illegal harvest or cruel practices occur, enforcement and compliance challenges include the dispersed and remote nature of many Indigenous communities of northern Australia, where law enforcement is difficult to maintain at sea, and identification of an individual’s legal right to hunt may be difficult to determine.33 And as the federal government noted in 2013, dugongs are susceptible to a range of threatening processes and the relative ‘importance of the various causes cannot be quantified’.34 Whilst native title rights should be appropriately recognised, the contexts of indigenous practices are not static and indigenous hunting practices should be in conformity with contemporary standards of animal welfare. Traditional indigenous hunting practices, regardless of their legal status, may be in tension with animal welfare legislation and contemporary social standards of humane animal treatment. It has been

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32 Queensland Department of Agriculture, Fisheries and Forestry, ‘New Laws to Protect Turtle and Dugongs’


33 Sustainable Harvest of Marine Turtles and Dugongs in Australia – A National Partnership Approach 2005 p 6. Thiriet Dominique and Rebecca Smith, ‘In the name of culture: dugong hunting is simply cruel’, The Conversation, 8 April 2013

https://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463

argued in this paper that when a cultural practice is inconsistent with such standards indigenous rights may require reassessment to ensure that animal welfare is incorporated as a legitimate and necessary element of traditional hunting practices and that comprehensive definitions of ‘cruelty’ and ‘unjustifiable, unnecessary or unreasonable’ treatment, needs to be unambiguously articulated and enforced to give substance to existing animal welfare legislation.

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