



Native Title Defences: Australia

Panel 2A: Indigenous Peoples

South Coast Aboriginal People Fishing Rights



“Indigenous people dominate criminal convictions for NSW fisheries offences. In the 10 years to 2017 (the latest available data), 25 of the 32 people jailed for these offences identified as Indigenous (or 78 per cent). As Indigenous people make up 3.4 per cent of the state’s population, this makes them 23 times over- represented. Of the 60 people convicted with bonds whose Indigenous status was recorded in the data, half identified as Indigenous, making them 15 times over-represented.”

Paul Cleary (2021)

Customary Right

- The right to fish is a right possessed and exercised by First Nations for many thousands of years.
- It is a right contingent on being a member of the relevant society and following the normative rules of that society.
- Under First Nations law there is a property right in the marine resources.



Applicable UN Conventions

- UN Declaration on the Rights of Indigenous Peoples, Articles 8(2), 12, 24 -28
- International Covenant on Civil and Political Rights, Articles 1(2), 9(1), 17
- Convention on Biological Diversity, Article 8(c), Akwe Kon principles, Nagoya protocol

Section 211 Native Title Act 1993(Cth)

- (2) 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](#).

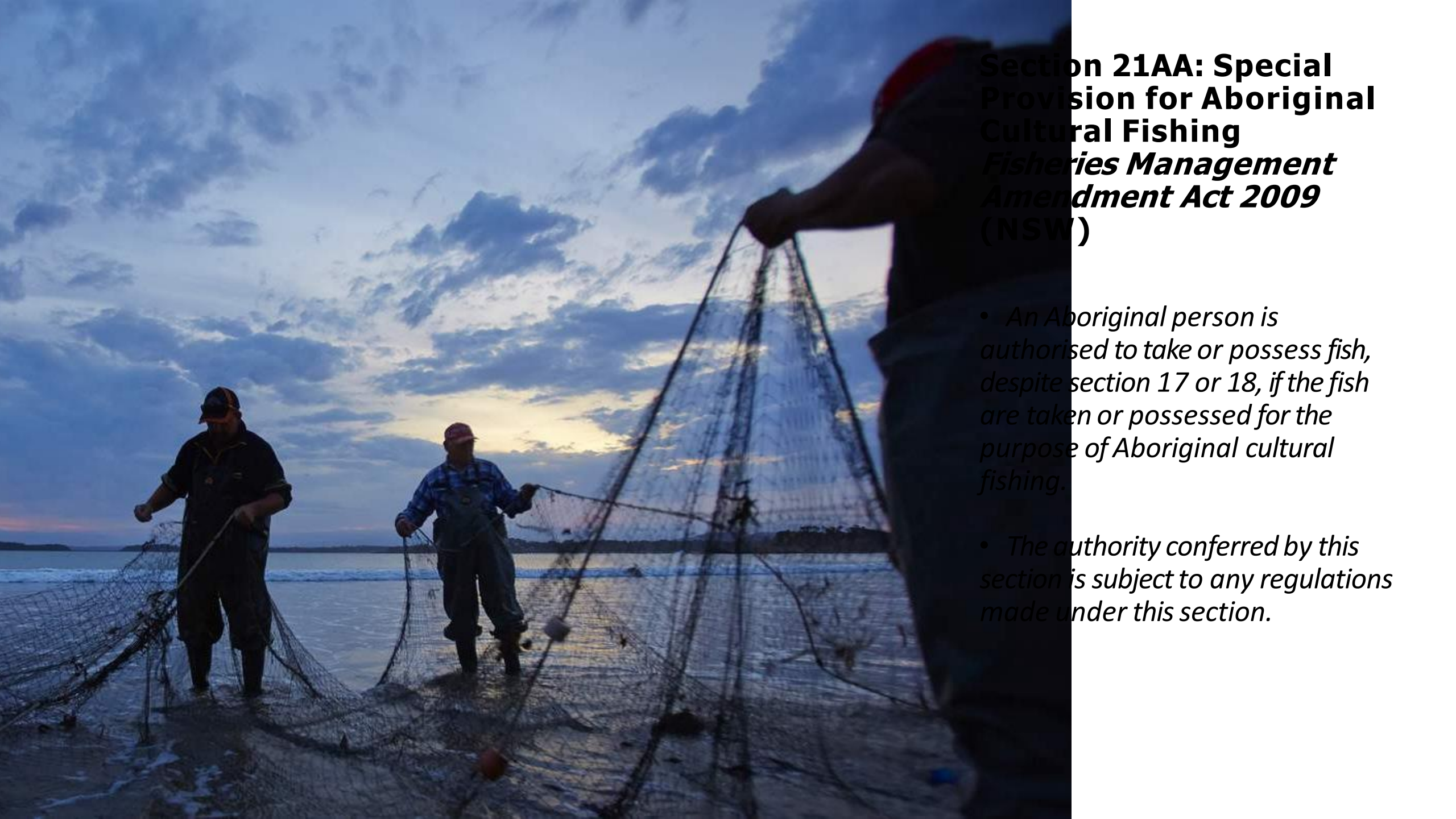
Subsection (1) states the applicable circumstances for 211(2), and (3) the classes of activity, including fishing and hunting.

Section 287 FMA Argument

- Section 287 provides:

"This Act does not affect the operation of the Native Title Act 1993 of the Commonwealth or the Native Title (New South Wales) Act 1994 in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect."

- The same formulation has been used in many other pieces of legislation including the *Game and Feral Animal Control Act 2002* (NSW) (s 54)
- The second reading speech to that Act made clear that the purpose of the section was to ensure that there was no effect on the exercise of native title rights.

A photograph of three fishers pulling a large net in the ocean at sunset. The fishers are silhouetted against the bright, low sun, which creates a strong glow on the water and the net. The sky is filled with scattered clouds. The fisher in the foreground is on the right, pulling the net upwards. Two other fishers are further back, also pulling the net. The net is large and made of fine mesh, with several floats visible. The water is dark, and the horizon is visible in the distance.

Section 21AA: Special Provision for Aboriginal Cultural Fishing

Fisheries Management Amendment Act 2009 (NSW)

- *An Aboriginal person is authorised to take or possess fish, despite section 17 or 18, if the fish are taken or possessed for the purpose of Aboriginal cultural fishing.*
- *The authority conferred by this section is subject to any regulations made under this section.*

Community led rights campaign

- Advocacy – in 2009 changed Act (section 21AA not commenced), met with every Minister and Attorney General since
- Reform – three stages of legislative reform, 2009, 2015, 2022
- Education – community meetings, media, factsheets
- Legal representation – appearances from 2014 – ongoing, no precedents as all cases well defended get withdrawn
- Legal training – originally one solicitor and two barristers, now 4 solicitors and 16 barristers, training for Aboriginal Legal Service and Legal Aid Commission
- Class Action – after decade of defence

NSW Parliamentary Inquiry findings

1. That the NSW Government has failed to effect the will of the Parliament by not commencing Schedule 1 of the Fisheries Management Amendment Act 2009 to make special provision for cultural fishing.
2. That the NSW Government's implementation of a local management approach to make provision for cultural fishing has been too slow and lacks the full support of stakeholders.
3. That the regulatory and policy settings applied by the NSW Department of Primary Industries Fisheries mean it is unable to differentiate between trade and barter, as part of cultural fishing practice, and being in possession of fish for the purpose of a commercial activity without a licence.
4. That the compliance activity and prosecutions against Aboriginal people for practising cultural fishing, particularly on the South Coast of NSW, are unacceptable and creating perverse outcomes inconsistent with the NSW Government's commitments to the Closing the Gap Agreement.”

Section 255A Fisheries Management Act

- The South Coast Aboriginal Fishing Rights Group successfully worked with the NSW Parliament in late 2022 to amend the compliance powers provision to ensure that Fishery Compliance Officers must exclude that the fishing being undertaken by Aboriginal people is for cultural purposes, or native title, prior to taking any compliance action.
- This puts a positive burden of proof on Fishery Compliance Officers to show that they considered the issue before approaching Aboriginal people conducting cultural fishing.
- South Coast Aboriginal Fishing Group has a card for native title holders to show Fishery Compliance Officers.

An aerial photograph of a rugged coastline. A large, dark, craggy rock formation dominates the center-right of the frame. White, frothy waves are crashing against the base of the rock and along the shoreline. The water is a deep teal color, and the sky is a pale, hazy blue. The overall scene conveys a sense of wild, natural beauty.

NAROOMA, NSW
