

Traditional hunting, contemporary torture – time for change

If only the law was an ass – mandating cruelty for gentle giants

(because asses wouldn't wish horror on other creatures)

Each year, hundreds of dugongs¹ and thousands of marine turtles² suffer horrific deaths at human hands, fully sanctioned and supported by the Queensland and Commonwealth governments. Both animals are harpooned and may take between 15 and 20 minutes to die (dugongs, and depending on the method of preparation, days for marine turtles).³ In fact, State legislation *mandates* that only inhumane killing methods for dugongs and marine turtles are legal in Queensland if the person killing them is Indigenous.⁴ Non-Indigenous people are prohibited from killing any protected wildlife without a permit,⁵ and if they must kill a badly injured dugong or turtle, non-Indigenous people must be as humane as possible in the circumstances.⁶ While recognizing institutional cruelty is integral to non-Indigenous uses of animals, particularly but not limited to factory farming, fishing and modern agriculture, none of these activities invokes the wall of silence with respect to inhumane practices as traditional hunting.⁷ One of the very few authors to investigate cruelty in traditional hunting found that officials from most agencies and many Indigenous people interviewed expressed views that the issue was too sensitive and were reticent to be quoted.⁸

Dugongs and marine turtles as iconic species

Dugongs and marine turtles are iconic species found in the warmer waters of northern Australia. They are of immense social, spiritual and in some areas, economic

¹ Revised Final Draft Torres Strait Turtle and Dugong Fisheries Assessment Report, November 2006, p 32. An estimated 600 dugongs are killed for food in the Torres Strait each year. This is a conservative figure.

² *Ibid*, a conservative estimate of 1500 green turtles are killed for food in the Torres Strait each year, although the actual number killed by Indigenous Australians is unknown.

³ Dominique Thiriet, "Tradition and Change – avenues for improving animal welfare in Indigenous hunting," (2004) 11 *James Cook University Law Review* 159.

⁴ *Nature Conservation Regulation 1994 (Qld)* s 33(1)(d)(i). The *Torres Strait Fisheries Act 1984 (Cth)* applies to the waters around the Torres Strait and its regulations similarly allow for hunting by wap.

⁵ *Nature Conservation Act 1994 (Qld)* s 88.

⁶ *Nature Conservation (Dugong) Conservation Plan 1999 (Qld)* s 6.

⁷ Dominique Thiriet, Out of the "too hard basket" – Traditional hunting and animal welfare, (2007) 1 *Environmental and Planning Law Journal* 59 at 61.

⁸ *Ibid*.

significance to coastal Aboriginal and Torres Strait Islander communities.⁹ Dugongs and marine turtles are much loved by non-Indigenous people for their intrinsic value, and are promoted as attractions in the Great Barrier Reef Marine Park.¹⁰ The dugongs' range is as far as Iran and East Africa, but the largest population is found in the Torres Strait. Similarly, the six species of marine turtles are found all through tropical waters, with the world's largest rookery at Raine Island in the Great Barrier Reef.¹¹ Marine turtles are on the ICUN Red List as threatened species¹², and are considered vulnerable (dugongs and all marine turtles species except loggerhead) and endangered (loggerhead turtles) in international environment, national and state laws¹³. This paper is not about conservation or population biology, about which much has been written, but inhumane practises inherent in the hunting of dugongs and turtles.

Traditional hunting of dugongs and turtles

There is no doubt that traditional hunting is a fundamental tenet of Indigenous culture. The former Aboriginal and Torres Strait Islander Commission has stressed that:

Hunting, fishing and gathering are fundamental to our peoples' contemporary and traditional cultures, help define our identity, and are at the root of our relationship to the land. Hunting, fishing and gathering continue to provide a significant part of the diet of many of our people.¹⁴

Traditional hunting is part of the bundle of rights explicitly recognised by Parliament in the *Native Title Act*¹⁵ following the *Mabo*¹⁶ decision. Those people holding formal native title rights¹⁷ have certain rights and interests including explicitly hunting and

⁹ Helene Marsh, Torres Strait Dugong Fishery Assessment Report. Torres Strait Fisheries Assessment Group, AFM, Canberra (1998); Donna Kwan, *Towards a sustainable indigenous fishery for dugongs in Torres Strait: a contribution of empirical data and process* (PhD Thesis, unpublished, James Cook University, Townsville, 2002).

¹⁰ Reef HQ has a green turtle as a mascot and promoter of children's reef awareness programs.

¹¹ Colin Limpus, Jeffrey Millar, John Parmenter, Duncan Limpus, The Green Turtle (*Chelonia mydas*), population of Raine Island and the Northern Great Barrier Reef: 1843 – 2001, *Memoirs of the Queensland Museum*, 49(1).

¹² at <<http://www.icun.org/redlist>>.

¹³ *Nature Conservation Regulations 1994* (Qld) Schedule 2 (endangered species) and 3 (vulnerable species), *Environmental Protection and Biodiversity Conservation Act* ss 248(2)(f) (dugongs), 248(g) (marine turtles) and 248(h) (leatherback turtles).

¹⁴ ATSIAC, *Aboriginal and Torres Strait Islander Commission Environmental Policy* (1994) 5.

¹⁵ *Native Title Act 1993* (Cth) s 223(2).

¹⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 186.

¹⁷ *Native Title Act 1993* (Cth) s 224.

fishing, not held by other non-native title holders.¹⁸ The High Court looked at the effect of the native title right to hunt in s 211 of the *Native Title Act* on hunting of protected species under State law in *Yanner v Eaton*.¹⁹ The Court made it clear that unless the Legislature specifically extinguished the native title right to hunt, native title rights would prevail.²⁰ Yanner's use of a firearm rather than a spear to kill an estuarine crocodile was considered 'traditional' in line with legal authority that the purpose of the activity, rather than the technological method of the activity, determines if it is 'traditional'.²¹ Death by a gunshot to the head is far quicker than by harpooning and drowning, but confused thinking by decision-makers have condemned dugongs and marine turtles to slow and horrific deaths in the belief that fewer will be killed by spear than by guns. This makes a mockery of Australian Law Reform Commission's assertions that if hunting is traditional it is *ergo* sustainable,²² because clearly, the more humane method of hunting with rifles (traditional, according to purpose) leads to far too many dugong and turtle deaths, and is therefore 'unsustainable'.²³

Traditional hunting and cruelty – imposed cone of silence

The untouchable subject of the particularly cruel methods of killing dugongs and marine turtles²⁴ prevents serious discourse on the subject.²⁵ Indeed, attempts by the NSW Young Lawyers Animal Rights Committee and others to have cruel practises addressed in the Report of "Sustainable and Legal Indigenous Harvest of Marine

¹⁸ *Native Title Act 1993* (Cth) s 211(3)(a) and (b).

¹⁹ [1999]

²⁰ *Yanner v Eaton*, per Callinan J at [153].

²¹ Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, Vol II (1986). at [977], *Campbell v Arnold* (1982) 56 FLR 382.

²² ALRC, above n 21.

²³ *Ibid*, see also Paul Havemann, Dominique Thiriet, Helene Marsh, Craig Jones, Traditional use of marine resources agreements and dugong hunting in the Great Barrier Reef World Heritage Area (2005) 22(4) *Environmental and Planning Law Journal* 258. In his 2006 book, *Collapse*, Jared Diamond details many traditional societies that existed for thousands of years and eventually collapsed due to unsustainable practices.

²⁴ In the years 2003 – 2004, the North Queensland Conservation Council attempted to have the issue of indigenous hunting per se, and involved cruelty, taken up by other environment groups as national environment organization meetings. At each instance they were clearly told that the issue was untouchable and no organization would address it for fear of alienating indigenous groups and their non-indigenous supporters.

²⁵ Orton D, "Animals and Nature: Cultural Myths, Cultural Realities – by R Preece, Book Review" (1999) 2 *Journal of Wildlife Law and Policy* 381 at 382, cited in Thiriet (2007), above n 8.

Turtles and Dugongs in Australia – A National Approach” were ignored,²⁶ and all references to animal welfare considerations in a paper commissioned by the Torres Strait Regional Authority regarding legal scope for self-managed dugong and turtle hunting were expunged.²⁷ The draft paper attracted criticism for the use of the word ‘slaughter’ as ‘emotive and antagonistic’²⁸, despite that word being legislatively prescribed for the act of killing animals for food in the *Animal Care and Protection Act 2001* (Qld),²⁹ and queried if the practices, discussed below, are inhumane.³⁰ Another comment was that the concept of ‘cruelty’ was a Western construct and had no place in a discussion about traditional hunting.³¹

Under the Torres Strait Fisheries Regulations Gazette Notice, dugongs and marine turtles in the vast region of the Torres Strait Dugong and Turtle Fisheries may only be speared with a ‘wap’.³² Throughout the rest of Queensland, State legislation also allows hunting threatened species only by spear.³³

Dugongs are typically speared with a barbed harpoon in the back as they surface for air. A long rope is attached to the harpoon, and the dugong is ‘played’ on the line until it tires. This can take 15 minutes for a pregnant female, and several hours for an adult male. Once ‘subdued’, it is then drowned or suffocated by plugging its nostrils with fibres or keelhailed until it dies.³⁴ Witnesses to traditional hunting of dugongs have attested to the cruelty. Long-time fisherman and no stranger to animal suffering, Rex Millet, was in a fishing boat with Torres Strait Islanders when a dugong was speared. Millet recalls the hunters dipped the spear prod in tobacco to make the wound deeper, and was dismayed and ashamed at the level of pain inflicted, and the disregard to the

²⁶ NSW Young Lawyers Animal Rights Committee, A submission on the Marine and Coastal Committee Taskforce on Dugong and Marine Turtle Populations on the Draft Report titled ‘Sustainable and Legal Indigenous Harvest of Marine Turtles and Dugongs in Australia – A National Approach’, NSW Young Lawyers, 2005.

²⁷ Tentatively titled ‘Desk top review of the current legislation and policy conducive to Torres Strait Islander sustainable community management of dugong and turtle hunting’. Unpublished paper. As primary author, I am furious that the diplomatic references to humane and inhumane killing were removed.

²⁸ Comment to draft paper by Australian Fisheries Management Authority Marcus Finn

²⁹ Schedule Dictionary.

³⁰ Marcus Finn, above n 28.

³¹ Comment to issue of inhumane practices by Lachlan Sutherland, Co-ordinator of Torres Strait Regional Authority Dugong and Turtle Management Program.

³² Fisheries Management Notice No. 65, *Torres Strait Dugong Fishery – Prohibitions on the Taking of Dugongs (Area, Gear and Method Restrictions)*, Fisheries Management.

³³ *Nature Conservation Regulation 1994* (Qld) s 33 (1)(d)(i).

³⁴ Dominique Thiriet, above n 3.

dugong's pain by the Islanders, saying "I am not proud to say I was a part of it."³⁵ An indigenous volunteer ranger reported that pregnant dugongs were speared and cut open while alive and their fetuses thrown back into the water so their cries would attract the other members of the herd.³⁶ The RSPCA took two men of Indigenous descent to court after distressed witnesses saw the men spear a dugong, cut into it and eat some of the animal while still alive. The case was struck out for lack of evidence because the RSPCA had not been able to prove that the men acted cruelly. The men claiming they killed the dugong in the traditional way, itself protected from Queensland's animal protection laws.³⁷

Marine turtles similarly suffer, being harpooned or lassoed from a boat. They are kept alive until it is time to be eaten, most commonly by leaving them upturned in the shade, sometimes for weeks. Some people immobilize the turtles by cutting off their flippers. Mark Baker gave a chilling account of the lingering death of a 'traditionally hunted' green turtle. The turtle was unturned and its flippers were gouged from their sockets and tossed into the sea. The hunter then casually cut off its breastplate to expose her internal organs and eggs. 10 to 15 minutes later, after scooping out the eggs of the dying turtle, he snapped her neck and finally ended her misery.³⁸ This method is not an isolated example, but common in many communities.³⁹ Clearly, the killing of marine turtles and dugongs has a very high potential to be inhumane.

Queensland Animal Protection failure

It is because of the gravely inhumane methods of traditional hunting that Aboriginal and Torres Strait Islanders exercising 'Aboriginal tradition' or 'Island custom' are explicitly exempted from the *Animal Care and Protection Act 2001* (Qld).⁴⁰ The Act otherwise purports to 'protect animals from unjustifiable, unnecessary or unreasonable pain,⁴¹ and certain practices would fall foul of these provisions if not for the exemption, including dugong and turtle hunting with spears.

³⁵ Personal communication, 3 July 2007.

³⁶ Baker M, "Slaughter of the Innocents", *The Age*, 7 February 1998.

³⁷ *Police v Brown and Little* (Unreported, Bundaberg Magistrates Court, No Bun-Mag-00003511 and 00003512, also 'Dugong cruelty charges struck out' ABC Queensland 10 February 2005, <http://www.abc.net.au/queensland/news/200502/s1300260.htm>.

³⁸ Mark Baker, above n 36.

³⁹ See Dominique Thiriet, above n 3.

⁴⁰ *Animal Care and Protection Act 2001* (Qld) s 8.

⁴¹ *Animal Care and Protection Act 2001* (Qld) s 3(c).

The untouchability of Indigenous hunting means practical measures to minimise animal suffering are ignored or neglected. Reliance on ‘traditional methods’ (spearing) as a means of limiting killing of dugongs and turtles is a furphy as these animals are typically chased by men in aluminium dinghies with outboard motors, neither of which are ‘traditional,’ and which lead to many extra dugong and turtle deaths than days gone by when hunters had to wait quietly in dug-out canoes or platforms and skilfully try to spear a surfacing animal.⁴² Further, it is well recognised that ‘tradition’ is fluid and customs of Indigenous people may undergo change subsequent to sovereignty,⁴³ and that the means of enjoyment of native title rights change over time, such as hunting crocodiles with guns and outboard motors.⁴⁴ Amendments to the *Native Title Act* following the *Wik* decision⁴⁵ provide a means for Government to prohibit traditional hunting for a restricted set of activities specified as: research, environmental protection, public health or public safety.⁴⁶ While providing little scope for prohibitions on animal welfare grounds, the fact that a native title right exists does not exempt Native Title holders from prohibition of certain activities where prohibitions are absolute and apply to all persons.⁴⁷ If Parliament so chose, it could regulate the traditional hunting of animals to prohibit inhumane killing methods. There is nothing new or radical in this approach – the Northern Territory’s *Animal Welfare Act 1999* (NT) specifically excludes using cultural, religious or traditional practices as defences to cruelty,⁴⁸ and Western Australia prohibits the hunting of dugongs and turtles outright.⁴⁹ In Western Australia, customary hunting is no defence to acts carried out in an inhumane manner,⁵⁰ although there is no case law on the issue. The Western Australian Law Reform Commission has recently recommended that Aboriginal people be educated to avoid cruelty to animals taken under Aboriginal customary harvesting exemptions.⁵¹

⁴² Bill Arthur, *Tradition and Legislation: analysis of Torres Strait Treaty and Fisheries Act Terms*, Centre for Aboriginal Economic Policy Research, Australian National University, June 2004.

⁴³ *Mabo (No 2)* at 70, 110 and 192.

⁴⁴ *Yanner v Eaton*.

⁴⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁴⁶ *Native Title Act 1993* (Cth) s 211(2)(ba).

⁴⁷ *Western Australia v Ward* (2002) 191 ALR at 265.

⁴⁸ *Animal Welfare Act 1999* (NT), s 79(2).

⁴⁹ *Wildlife Conservation Act 1950* (WA) s 23.

⁵⁰ *Animal Welfare Act 2002* (WA) s 22.

⁵¹ Law Reform Commission of Western Australia – *Aboriginal Customary Laws Final Report*, p 311.

Time for change – recognising cruelty, recognizing that tackling cruelty has no racist dimensions.

It is established in law that tradition changes with circumstances. Dugongs and turtles suffer unnecessary, unjustified and unreasonable deaths because Non-Indigenous Australia is too fearful of accusations of racism, or consumed with guilt over white injustice to Aboriginal Australians,⁵² to tackle the issue of cruelty as they do cruelty to dogs in Korea, and cruelty to whales by whaling nations, particularly Japanese whalers in the Southern Ocean.⁵³ There are no definitions of ‘inhumane killing’ but many definitions of ‘humane killing.’ What is not humane is therefore ‘inhumane’. The Queensland animal protection legislation exempts traditional custom because the killing methods would otherwise fall foul of the Act. The veterinary bible, Bailliere’s Comprehensive Veterinary Dictionary does not define ‘humane’ or ‘inhumane’ but gives examples of easy or painless death under the entry for ‘euthanasia’. Massive doses of barbiturates is the most humane method of killing animals, but unsuitable for animals used for food. In that case, the most humane method of killing is given as a shooting in the head with a bullet or captive bolt pistol.

The RSPCA’s humane killing policy is that only methods fulfilling the criteria below and declared humane by recognised expert authorities should be used.⁵⁴

All methods must satisfy the same basic criteria to be considered ‘humane’:

- Death without panic, pain or distress;
- Instant unconsciousness followed by rapid death without regaining consciousness;
- Reliability for both single and large numbers;
- Simplicity and minimal maintenance; and
- Minimal detrimental impact on observers or observer.⁵⁵

The Queensland Department of Primary Industries refers ‘humane killing’ of animals to a document ‘Minimising Disease Risk in Wildlife Management’ by the Department

⁵² Dominique Thiriet, above n 8.

⁵³ Australian dugong researcher Helene Marsh was observer at an IWC meeting and watched the Australian anti-whaling delegation’s collective look of relief when no nations mentioned Australian traditional marine mammal hunting. Personal communication.

⁵⁴ RSPCA Policy and Position Paper, 2006, ‘Humane Killing’. Part 2.1.2.1.

⁵⁵ *Ibid*, Part 2.1.2.2.

of Conservation and Land Management (WA). The *only* humane method of killing a sirenian (dugong or manatee), aside from a lethal injection, is by a brain shot. The only humane method of killing a marine turtle is instant decapitation. Killing a dugong or turtle by wap does not fit the RSPCA guidelines for humane killing and by definition must be inhumane.

Recognising cruelty has no racist dimensions – it is about calling a spade a spade. The *Animal Care and Protection Act* makes exemptions for traditional religious practices that would generally contravene cruelty provisions, such as kosher and halal butchering⁵⁶, but these practices still have minimum standards for humane killing under a Code of Practice.⁵⁷ Expert in animal welfare science, Professor Paul Hemsworth, believes that a cruelty issue arises when an unstunned animal takes more than 15 seconds to die,⁵⁸ which has implications for kosher butcheries. Yet the law condemns dugongs and turtles to a mode of death that invariably takes well in excess of 15 seconds, sometimes taking hours as already noted. To legislatively exempt Indigenous people from cruelty, in fact to *only* permit cruel modes of killing puts Indigenous people on a lesser moral plane from the rest of our multicultural community. Much as child brides, and rape of such children, promised since babyhood was until recently accepted by the wider community and courts as ‘cultural’ rather than a gross violation of a child’s rights⁵⁹ allowing for incredibly cruel hunting practises that would see anyone else rightly prosecuted under the legislation for gross cruelty is a form of treating Indigenous people as lesser, and incapable of a) being humane to animals and b) being incapable of sustainable hunting practices if they have access to humane methods. Much in the manner that the Howard government has legislatively deemed the entire Indigenous community incompetent parents, land and financial managers under the *Aboriginal Land Rights Amendment Act 2007*(Cth) by quarantining half of all welfare payments, forcing parents of all school-age children to pay for school lunches and suspending land rights, so do the cruelty exemptions deem an entire people incapable of attaining

⁵⁶ *Animal Care and Protection Act 2001* (Qld) s 45.

⁵⁷ Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals – Livestock Slaughtering Establishments – SCARM Report 79* (2002) p 8 cited in Thiriet, above n 8.

⁵⁸ Edwards, Lorna, “Halal meat slaughter ‘obeys law’”, *The Age*, 7 August 2007, p 4.

⁵⁹ Toohey P, “Victim Trapped Between Two Worlds: Tribal and White Law Clash over Sex”, *The Australian*, 9 October 2002, pp 1,2.

basic animal welfare standards that hold wide acceptance in a multicultural community.

The way forward is to remove the exemptions that serve only to allow for cruelty and the white expectation that Aboriginal and Torres Strait Islanders are too 'primitive' to manage their cultural affairs any better. If dugongs and marine turtles must be eaten, a Total Allowable Catch system as recently legislated for in amendments to the *Torres Strait Fisheries Act*⁶⁰ could be implemented to prevent over-hunting. With over-hunting stemmed by a TAC, hunters could kill their allocated animals by shooting them in the head, a recognised humane method of killing. Culture and tradition being flexible and fluid as it is, there may come a day when the tides change and the killing of gentle dugongs and turtles is considered as heinous as the killing of whales.

⁶⁰ *Torres Strait Fisheries Act 1984* (Cth) s15A.