







Customary Law

Tasmanian Aboriginal people have engaged in hunting, fishing and gathering food from land and place for countless generations. This ongoing practice lies at the heart of a continuing cultural knowledge that is passed on from elders and parents to their children creating a continuing connection to Country from the past to the present.




CROSS CURRICULUM PRIORITIES

-  Aboriginal and Torres Strait Islander Histories and Cultures
-  Sustainability

CONTENT AREAS

-  History
-  Geography
-  Food and Technology
-  Civics and Citizenship

GENERAL CAPABILITIES

-  Intercultural Understanding
-  Critical and Creative Thinking
-  Ethical Understanding

KEY CONCEPT

Customary Law: Customary law in Australia relates to the systems and practices amongst Aboriginal Australians which have developed over time from accepted moral norms in Aboriginal societies, and which connect people with the land and each other, through a system of relationship.

Wikipedia

SUPPORTING CONCEPTS

- › Recognition of Aboriginal Customary Laws
- › Rights of Aboriginal people to gather food
- › Changes in legislation
- › Inconsistency of legislation
- › Constitutional recognition and reform

GUIDING QUESTION

Does current Australian legislation ensure that Aboriginal customary laws are recognised, maintained, supported and protected?

This printed material is **to be used with Foods – a Living Cultures multimedia curriculum resource** that can be found at www.theorb.tas.gov.au

The Living Cultures Foods resource and this supplementary printed material have been designed to foster culturally responsive practice when learning about Tasmanian Aboriginal Histories and Cultures.

Introduction

As early as 1848, the question had been raised of ‘such free access to land, trees and water as will enable [the Aborigines] to procure the animals, birds and fish, etc., on which they subsist’, and of the possibility of securing such access by inserting conditions in Crown leases. [1582]

Between 1867 and 1900, legislation recognising Aboriginal rights to forage was enacted in Western Australia, Queensland, Victoria and South Australia. [1583] One example, the Fisheries Act Amendment Act 1893 (SA) s 8, enabled the Governor to declare the whole or any part of any river, lagoon, estuary of the sea, a reserve within which only Aboriginal natives of South Australia would be allowed to fish. [1584]

This was the first legislative recognition of a fishing right as an independent right, that is, one not couched merely in terms of exemption from prosecution. The intervening years have seen many amendments to the early legislation, with the rights of Aboriginal people to gather food very often being reduced considerably (if not abrogated altogether) in the process.

Australian Law Reform Commission Report 31. Para. 907, 1986

Pre-colonial economic abundance and diversity

Tasmanian Aboriginal people accessed and enjoyed abundant food resources to feed themselves and their families throughout Tasmania and particularly in the coastal environs in pre-colonial history as is evidenced through the archaeological work of Sue Kee and the observations of George Augustus Robinson.

An extensive archaeological survey of the northeast by Sue Kee in 1987 confirmed Robinson’s 1830/31 observations of a rich and bountiful economy. Kee noted that ‘Abundant marine, estuarine, lagoon, swamp and terrestrial food resources are provided in the coastal environs of the northeast’, The large quantities of seafood the women harvested included favourites such as crayfish,

‘muttonfish’, large whelks, ‘*waireeners*’ mussels and oysters. These were an important source of iodine that contributed to the clan’s health and wellbeing, and the women had their favourite collecting rocks on the coast just as the men had their favoured hunting grounds inland.

Cameron 2011:41



Abalone and waireener fished by Tasmanian Aboriginal Women | Images: Emma Lee

DISCUSSION QUESTIONS

- › How is the connection between Tasmanian Aboriginal people's historic food gathering practices related to special rights of Aboriginal people to continue to hunt fish and gather food in present times?
- › Is current legislation adequate to protect such rights?

Hunting, Fishing and Gathering Rights

Inconsistency of legislation erodes and diminishes Aboriginal people's access to land and water and their independent rights to hunt, fish and gather. Australian legislation on Aboriginal hunting, fishing and gathering rights varies across States and Territories, as is evident in the following extract from the Australian Law Reform Commission Report.

The Application of Fishing Legislation.

There are no exemptions for traditional fishing under fisheries legislation in South Australia, Victoria or Tasmania.

Under Commonwealth, Northern Territory, South Australia and Western Australia law, Aboriginal people are able to hunt substantially unrestricted by conservation laws. Certain exemptions apply in New South Wales and allowance is also made for residents of trust lands in Queensland. However in Tasmania and Victoria there is no special provision to take account of Aboriginal interests.

In relation to traditional fishing activities there is in principle a recognition of traditional fishing under the Torres Strait legislation and the Great Barrier Reef Marine Park Authority Zoning Plans. At the State level, the experience varies considerably' Aboriginal people are allowed considerable scope to fish unrestricted by fishing laws and regulations in the Northern Territory and Western Australia, and residents of trust lands also have special rights in Queensland. But there is no special provision made in the other States.[1749] On the other hand there is an increasing understanding and

appreciation of Aboriginal traditional fishing interests.

...the failure to allow access denies the relevance of hunting and foraging for many traditional communities.

Australian Law Reform Commission Report 31.
Para. 969 1986

Although, since the 1986 ALRC report, Tasmania and all other jurisdictions now have legislation that includes the right of fisheries as a cultural activity, the DPIPWE rules according to the Living Marine Resource Management Act 1995 identifies that the rules for Aboriginal people engaging in cultural activities are bound by the same rules for all other recreational fishers apart from the requirement to hold a sea licence, as follows:

The rules for non-commercial fishing apply to both recreational fishers and Aborigines engaged in aboriginal activities. Aborigines engaged in non-commercial fishing activities are exempt from requirements to hold a sea fishing licence but must comply with all other fisheries rules, including bag and possession limits, size restrictions and seasons.

Department of Primary Industries, Parks, Water and the Environment

DISCUSSION QUESTIONS

- › What problems arise when access and permission for Aboriginal people to practice their culture of hunting, fishing and gathering is inconsistent across states, or is absent, as in the cases of South Australia, Victoria and Tasmania?
- › What changes in legislation would need to be made in Tasmania to 'recognise Aboriginal rights to forage'?
- › What might be the consequences of legislative recognition of a fishing right as an independent right for Aboriginal people in Tasmania?

Securing Aboriginal Rights

A Tasmanian Aboriginal researcher is testing the waters to find out whether tourists have an appetite for Indigenous-caught seafood. Dr. Emma Lee's research investigates links between current Aboriginal hunting, fishing and gathering rights, her vision for an Indigenous fishing industry and raises questions about future needs for an Australia-wide recognition that affirms Aboriginal people's rights hunt, fish and gather.



Dr Emma Lee | Image: Jamie Graham

Dr. Emma Lee, Aboriginal and Torres Strait Islander Research Fellow for the Centre for Social Impact at Swinburne University of Technology raises questions in her research as to whether existing Aboriginal hunting, fishing and gathering legislative rights adequately and consistently protect Aboriginal people's access and rights to hunt, fish and gather according to their current and future cultural needs.

She shares her vision that Australia-wide recognition of Indigenous hunting, fishing and gathering rights could lead to the development of Tasmanian Aboriginal fisheries that would provide a sustainable supply of wild-catch food to the general public.

Dr. Lee, in an interview with Rhiannon Shine of ABC news, says "My vision for an Indigenous

fisheries industry in Tasmania is to be able to introduce Indigenous wild catch, but also the cultural story behind that... so that when people are eating they are also having a connection to us as people and to sea country."

In her draft executive summary of the Indigenous-led research project 'Wave to Plate': establishing a market for cultural fisheries in Tasmania, she identifies a broad range of outcomes that can be considered as important social shifts for Tasmanian Aboriginal fisheries in over a generation.

The first part of the project was to provide an overview for Aboriginal Tasmanian communities to consider the policy and regulation background identifying barriers and opportunities.

DISCUSSION QUESTION

- › How might Aboriginal people thrive and retain their connection to Country and culture through legislative recognition and change?

Call for quotas for Aboriginal Tasmanians

Elder Rodney Dillon speaks about the cultural tradition of fishing and what it meant for Aboriginal people in the following article.



Rodney Dillon wants the Tasmanian Government to hand over its share of the overall abalone quota.

Image: Dcnstrct

In an interview with Rhiannon Shine of ABC News, Rodney said “This is an important part of who we are today and who we have always been,” He went on to say that

“Without your culture you are just an empty vessel.”

Rodney maintains that the Tasmanian Government should re-allocate the abalone quota, which currently goes out to public tender, to be managed by Tasmania’s Aboriginal people.

“We have got to make sure we are within the sustainable catch for the country. The way we can do that is by getting those licences. That can put us inside the total allowable catch”.

Rodney’s solution to developing a sustainable Aboriginal managed fishery is that “We need to get the State Government to hand back those 40 abalone units so that we can create our own tourism industry... I think that would be a great step for reconciliation and also a great step for the Aboriginal community to be able to run those licences.”

DISCUSSION QUESTION

- › How might the work of Emma Lee and Rodney Dillon improve public awareness of Aboriginal customary laws?

Denying us destroys our culture

Rodney Dillon tells of his concern of serious consequences if Aboriginal people can no longer legally exercise their right to fish and live on and with Country.

To take land, culture and language away is the quickest way to destroy a race of people.

Rodney Dillon, in *Keeping Culture: Aboriginal Tasmania*, 2006: 80

DISCUSSION QUESTION

- › What connections may there be between Aboriginal customary laws and the survival of a 'race of people' as Rodney describes?

Native title and fishing rights

Current legislation is determined by separate states and territories, as can be seen in the extract below, leading to inconsistent legal protection of Aboriginal people's rights to practice their culture.

Each state and territory has its own fisheries laws, and each native title determination is different. This means we don't know for sure what native title holders can and can't do legally in many places, as their rights haven't been tested in court. But we do know

that native title can protect the ability of Aboriginal and Torres Strait Islander peoples to fish on their country in line with their laws and customs.

The Right to Fish: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2018

DISCUSSION QUESTION

- › How does native title protect Aboriginal people from erosion of their culture?

American Indian and Alaska Native Hunting and Fishing Rights

Indigenous hunting and fishing rights exist in countries other than Australia. The following article outlines the importance of American Indian and Alaska native hunting and fishing rights as an effective health promotion and describes standards that are in place to protect such rights.

The Centres for Disease Control and Prevention (CDC) is committed to endorsing traditional foods as an effective approach for health promotion and diabetes prevention in American Indians and Alaska Natives (AI/AN) communities. Hunting and fishing rights are significant in a public health context because

many tribal communities rely on these traditional foods for subsistence.

The Fair Apportionment Standard

- › States must regulate resources in a way that is fairly apportioned between AI/ANs and non- AI/ANs.

- › Tribes are entitled to “fair share” of fish, which is a harvest of up to 50 percent of fish as a maximum allocation—the number of fish required to provide a moderate living for AI/ANs.

The Appropriate Standards Requirement

- › States must prove that their conservation measures are reasonable and necessary before limiting tribal rights to hunt and fish.
- › Any application of state regulations to AI/ANs must be necessary in the interest of conservation; state regulations cannot discriminate against AI/ANs.

The burden of proof is on the state to prove that its regulations meet these appropriate standards elements in order to be necessary for conservation.

American Indian and Alaska Native Hunting and Fishing Rights

Indian people have lived in the Columbia River Basin for thousands of years. Salmon was their staple of life and the foundation of their culture and economy. It was also an important part of their religion. According to conservative estimates, prior to European settlement, the Columbia River’s annual salmon returns ranged from 11-16 million fish.

Chronology of tribal fishing and fishing rights on the Columbia River. | Columbia River Inter-Tribal Fish Commission.



Spearing Salmon – Wisham 1909. | Image: Edward S Curtis.

DISCUSSION QUESTIONS

- › How do American Indians and Alaskan Native peoples benefit from the right to fish on their traditional lands?
- › What entitlements are given to Native American people according to the guidelines about hunting and fishing rights?
- › How do the standards set for the protection of Indigenous rights in the Columbia basin compare with legislation in Australia that is outlined in the Australian Law Reform Commission, Report 31, listed above?
- › Are American and Alaskan Indian rights better protected than that of Aboriginal Australians?

Keeping Culture

Rodney Dillon explains his deep connection to his culture through his family, past, present and emerging, and reminds us that for him to maintain a pure connection to culture, his family and community must be able to practice it. He has already experienced an erosion of cultural rights in his lifetime and tells of his concern of serious consequences if Aboriginal people can no longer legally exercise their right to fish and live on and with Country.



Rodney Dillon with grandson Tyson on Bruny Island, 2005
Image: from Keeping Culture: Aboriginal Tasmania, 2006: 86

The purest part of our culture is being able to practice it.

My mother is Enid Dillon, my grandfather is Charlie Miller, my great-grandmother is Mary-Jane Miller, my great-great grandmother is Fanny Cochrane Smith, daughter of Tanganuturra, originally of the northeast tribe, from Cape Portland. During the invasion of Tasmania, Tanganuttara was removed to Wybalenna on Flinders Island where she gave birth to Fanny Cochrane. Fanny was then moved to Oyster Cove in the south – a place where many Aboriginal people, separated from their homelands and families, died from disease and a lack of the will to go on in life. Fanny survived and moved across to Nicholls Rivulet where most of the Cochrane-Smith families have resided for the past five generations. My mum still lives in Nicholls Rivulet and she has done so all her life. This area is where we belong now because we've been in the Huon area for six generations.

Rodney Dillon cited in Keeping Culture: Aboriginal Tasmania 2006: 78

DISCUSSION QUESTION

- › Why might Rodney be concerned for his family being able to pursue their cultural practices in the future?

Makarrata

Makarrata is the word used by Aboriginal Australians to capture the intent of those who met at the National Constitutional Convention in 2017 at Uluru.

They were there to discuss future legal and constitutional conditions that could lead to 'Justice and Aboriginal people's rights to self-determination'. Aboriginal people, through this Statement From the Heart invites Australian people to join them for a better future where Aboriginal people can practice their culture and access Country.

Makarrata is a complex Yolngu word describing a process of conflict resolution, peacemaking and justice. Makarrata is much more than just a synonym for treaty.

"Makarrata has so many layers of meaning," says Merrikiyawuy Ganambarr-Stubbs, a Gumatj woman and principal of Arnhem Land's Yirrkala School.

The first one, and the main one, is peace after a dispute.

One of the other layers of meaning is more aligned to the spirit of what many hope a treaty process would look like.

"It can be a negotiation of peace, or a negotiation and an agreement where both parties agree to one thing so that there is no dispute or no other bad feeling," says Ms Ganambarr-Stubbs.

Australian Broadcasting Corporation, 2017

The Uluru Statement From The Heart: 2017

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait

Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful

relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

Uluru Statement from the Heart, 2017

DISCUSSION QUESTIONS

- › What does *The Uluru Statement from the Heart* tell us about what is important for Aboriginal people?
- › How might the invitation to 'walk with us in a movement of the Australian people for a better future' ensure a better future for Rodney Dillon and his family?
- › How might a 'First Nations Voice enshrined in the Constitution' ensure a better future for all Australians?

www.theorb.tas.gov.au/living-cultures/foods/teacher-drawer

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State of Tasmania (Department of Education)
Published: October 2018

