

# Section 211 – honest claim of right as defence to fisheries prosecution

## *Mueller v Vigilante* [2007] WASC 259

McKechnie J, 1 November 2007

### Issue

This appeal to the Supreme Court of Western Australia raised the issue of whether a person was criminally liable for an offence if they honestly claimed a right to property enjoyed by another i.e. an honest claim of right under s. 22 of the *Criminal Code* (WA) (the Code). The defendant's understanding of the effect of s. 211 of the *Native Title Act 1993* (Cwlth) (NTA) was relevant to this question.

### Background

The respondent, Thomas Vigilante, is an officer with the Kimberley Land Council who is not of Aboriginal descent. In July 2006, while in Derby, he decided to go fishing in his boat, accompanied by his brother and two Aboriginal boys aged 12 and 13. They were fishing for crabs. Both Mr Vigilante and the boys had pots and bait.

A number of crabs were caught and stored in the single esky. Mr Vigilante was the 'driver' of the boat. When they returned to the Derby boat ramp, fisheries inspectors found nine undersized brown crabs in the esky. Under the *Fish Resources Management Act 1994* (WA) (FRMA), undersized brown crabs are 'totally protected fish' and, pursuant to s. 45 of the FRMA, a person must not have in their possession any totally protected fish.

### Proceedings at first instance

Mr Vigilante, who was the only witness, gave evidence before the magistrate that:

- he had worked in Kalumburu for four years and had undertaken a number of trips with traditional owner groups where people were fishing and hunting according to custom;
- the boys' father had lived in Derby most of his life, practised his lore and culture and would not fish in areas that were not his country;
- he intended to take only legally sized crabs but when undersized crabs appeared in the pots, the eldest boy asked if they could keep them;
- he believed that the boys were within their rights to keep the crabs under their lore and customary rights;
- his understanding was that Aboriginal people's hunting and fishing practices, including sustainability matters, were determined by reference to the *Native Title Act 1993* (Cwlth) (the NTA), whereas things like size limits and bag limits were not a traditional factor but were things imposed by legislation and so were inconsistent with the NTA.

At first instance, the magistrate (among other things) found that the Mr Vigilante was in possession of totally protected fish (a finding against which no cross-appeal was brought). However, as the possibility that he was acting under an honest claim of right could not be excluded, the case was dismissed. The prosecution appealed against the dismissal.

## **Grounds of appeal**

The magistrate's conclusion of law was challenged but the findings of fact were not. Two issues arose for consideration:

- whether a claim for possession of the crabs, as part of traditional rights, was a claim of right in respect of property;
- if it was, whether Mr Vigilante could take the benefit of that claim—at [7] to [8].

## **Who was in control of the boat and in possession of the crabs?**

Section 4 of the FRMA defines 'possession' as including:

[H]aving under control in any place, whether for the use or benefit of the person in relation to whom the term is used or another person, and whether or not another person has the actual possession or custody of the thing in question.

His Honour Justice McKechnie concluded that Mr Vigilante was in control of the boat and in possession of the mud crabs because:

- he was in charge and gave permission for the undersized crabs to be retained;
- even if the crabs were for the use or benefit of the boys, he was in control of the vessel;
- he did most of the 'driving', he threw or caused to be thrown back the 'really small' crabs and was asked by the boys whether they could retain the undersized crabs—at [9] to [10].

## **Honest claim of right**

Section 22 of the Code provides:

Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence.

But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

## **Was a claim for possession of the crabs part of a traditional right?**

His Honour found that:

- prima facie, all persons were in possession of totally prohibited fish;
- the conduct elements of an offence under s. 46 of the FRMA had been made out;
- however, the boys could mount a claim of right to possess the fish on the basis that they were satisfying their personal, domestic, or non-commercial communal needs in the exercise or enjoyment of their native title rights and interests i.e. the right or interest claimed was the native title right 'preserved' by s. 211 of the NTA—at [13].

It was noted that:

An Aboriginal person does not have an unfettered immunity from the FRMA s 46. There must be some evidence that they were satisfying personal, domestic, or non-commercial needs and; further, that they were doing so in exercise or enjoyment of native title rights or interests. It is necessary, on this analysis, for the Aboriginal person claiming the right to, in fact, assert the right. The right is not created by statute - the Native Title Act s 211...removes Commonwealth and state prohibitions in the exercise of the right in circumstances specified in s 211. Because these circumstances are specified, an Aboriginal person

seeking to establish that state law, such as FRMA, is inapplicable to them, must bring themselves within s 211(2)—at [14], noting this was consistent with *Wilkes v Johnson* 21 WAR 269 at [105].

On the facts, McKechnie J found that the boys could mount a claim of traditional rights with respect to fishing that came within s. 211 of the NTA—at [15].

### **Was the right to possess crabs a right in respect of property?**

The court noted that:

- although it ‘remains an authority’ on s. 22 of the Code, having regard to the NTA, any principle that may be extracted from *Walden v Hensler* (1987) 163 CLR 561 to the effect that a traditional right may not be a right under s. 22 ‘can now be doubted’;
- section 22 should be given its literal and broad effect, may be raised in relation to offences not contained in the Code and also applies to a claim of right arising under a statute as well as at common law;
- the claim of right asserted was at least a claim under statute, although it was better understood as a traditional right to property created through the activity of fishing, and a right to fish must necessarily cover a right to property produced by the activity of fishing;
- the concept of possession generally, and the definition in s. 4 of the FRMA specifically, was the control or custody of a thing and a ‘thing’ in law was anything that could be the subject of a property right—at [17] to [19].

After reviewing the case law on s. 22 of the Code, his Honour held that possession of the crabs by an Aboriginal person in this case constituted a claim of right in respect of property—at [26].

### **Could the respondent take the benefit of that claim?**

His Honour was of the view that:

- as ‘a matter of general principle, and without regard to authority’, s. 22 of the Code was wide enough to encompass a person acting on behalf of another person in respect of property or authorised by another person to act on their behalf in respect of property pursuant to a claim of right;
- it was not difficult to imagine situations where a person, in pursuing a claim of right, sought the assistance of others;
- there was no reason why the principal might escape criminal responsibility for pursuing an honest claim of right but the person aiding the principal would be criminally liable;
- the few decided cases on claims advanced by an aider to a person exercising a claim of right tended to support the general principle that an aider might come under the umbrella of an honest claim of right—at [27] to [28].

After reviewing the case law, his Honour held that:

- section 22 of the Code could apply in circumstances where the claimant was acting pursuant to a claim of right held by another person;
- in this case, although there was no occasion for them to formally exercise it, the boys, by reason of their status as Aborigines, had a claim of right to the undersized crabs that were in the possession of the respondent and they were entitled to possession;
- the respondent's possession of the undersized crabs was no more than an incident of the possession of the persons who had a claim of right to possess—at [43].

**Decision**

The court concluded that:

- a claim by an Aboriginal person in the circumstances arising in this case was a claim of right with respect to any property within the meaning of s. 22 of the Code;
- such a claim was able to be advanced by the respondent in this case by reason of the nature of possession of the undersized crabs, notwithstanding that he was not the primary beneficiary of a claim of right;
- the appeal should be dismissed — at [45] to [46].