



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

Marine Fisheries and Aquaculture
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Sir/Madam,

Productivity Commission Draft Report - Marine Fisheries and Aquaculture

The NSW Aboriginal Land Council (**NSWALC**) appreciates the opportunity to provide a submission to the Productivity Commission's Draft Report on Marine Fisheries and Aquaculture (**Draft Report**).

NSWALC is committed to promoting Aboriginal people's fishing and cultural rights in fisheries management and sea country. While the Draft Report includes some proposals for providing for and recognising 'Indigenous customary fishing' unfortunately these do not appear holistic or sufficient and may undermine Aboriginal people's existing rights and interest in fishing. Further clarification and consultation is required with Aboriginal peoples and peak Aboriginal organisations before the recommendations in the report should be considered for adoption, particularly in a NSW context.

Land Rights in NSW

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 23,000 members, is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**), NSWALC is an independent, self-funded non-government organisation that has an elected governing council and the objective of fostering the aspirations and improving the lives of the Aboriginal peoples of NSW.

NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) in NSW. As elected bodies, Aboriginal land councils represent the not only the interests of their members, but of the wider Aboriginal community.

Aboriginal peoples in NSW, particularly LALCs, are key stakeholders in relation to land, sea and water management and are holders of specific Traditional Ecological Knowledge and Traditional Fishing Knowledge accumulated over millennia.

Under section 106 (7) of the ALRA, NSWALC has the following functions in relation to Aboriginal culture and heritage:

- a) *To take action to protect the culture and heritage of Aboriginal persons in NSW, subject to any other law,*
- b) *To promote awareness in the community of the culture and heritage of Aboriginal persons in NSW.*

NSWALC is committed to promoting the cultural rights of Aboriginal peoples in NSW. Cultural fishing practices are an integral part of Aboriginal cultural, spiritual, mental and physical wellbeing. There is strong international support for the protection of Aboriginal people's rights to a customary harvest of biological resources as well as traditional knowledge associated with these resources (Article 8(j) of the United Nations Convention on Biological Diversity).

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Since time immemorial the seas surrounding this land and its rivers, billabongs and groundwaters have provided Aboriginal peoples with cultural, spiritual, physical and economic nourishment. Dispossession and degradation of these cultural water assets have had significant negative impacts on both Aboriginal people and their cultural landscapes.

Overarching comments

We note the terms of reference for the inquiry direct the Commission to investigate:

“The extent to which fisheries management regimes support greater participation of Indigenous Australians, provide incentives to Indigenous communities to manage their fisheries, and incorporate their traditional management practices in the fishing industry.”

While we recognise that the broader intent for this inquiry relates to streamlining and reducing red tape, we do not consider that the manner in which the issues relating to Aboriginal fishing have been dealt with appropriately or sufficiently.

While we appreciate that there are complexities and that the Productivity Commission has been asked to take a particular focus, the proposals outlined and draft recommendations do not address many of the concerns Aboriginal peoples have in respect to fisheries management. The Draft Report has oversimplified many issues or only addressed these in a cursory way. The proposals do not appear sufficient to make improvements in the best interests of Aboriginal peoples. Many of the proposals do not explain how they are intended to address the issues raised in the terms of reference and risk undermining improvements that have been made to date.

A number of the proposals that are particularly concerning include:

- Proposals to impose cost recovery systems on Aboriginal peoples,
- Proposals to amend definitions of Indigenous customary fishing without fully examining the potential implications of this,
- Proposals to place the onus on Aboriginal peoples to prove “entitlements” to undertake customary fishing, and
- Proposals to regulate customary fishing.

The commentary and recommendations proposed by the Commission in respect to defining customary fishing are problematic for a number of reasons. Consistency between jurisdictions appears to be the key motivating factor by the Productivity Commission. However, this does not recognise the different and unique circumstances of Aboriginal and Torres Strait Islander peoples across Australia. Furthermore, this appears to be at the expense of the rights and interests of Aboriginal communities. For Aboriginal peoples in NSW, all Aboriginal peoples have rights to practice cultural fishing. The proposals put forward by the Commission appear to undermine this.

NSWALC believes that any framework to address Aboriginal fishing rights should be holistic and based on the principles outlined in the United Nations *Declaration on the Rights of Indigenous Peoples*, in addition to:

- **Recognition of self-determination** regarding Aboriginal cultural matters based on local custom,
- A commitment to a ***genuine partnership*** between Aboriginal People and Government¹,
- The development of a framework that facilitates ***working together for the sustainable management of fisheries*** for future generations, and provide for ***self-regulation*** and management, through local decision-making,
- ***Ensuring that Aboriginal People’s rights to practice culture are not criminalised***, but facilitates the maintenance and transmission of traditional knowledge and cultural practices -

It is essential that, in any legislation enacted or policies developed, compliance and penalty processes must be culturally appropriate and operate so as to not contribute to the ongoing high rates of incarceration for Aboriginal People in NSW,

- ***That provides economic pathways*** for Aboriginal Peoples through both commercial fishing and employment opportunities,
- ***Is supported by evidence based research*** conducted in partnership with Aboriginal communities, and
- ***That Aboriginal cultural fishers can fish without additional restrictions.***

Unfortunately the proposals in the draft report do not appear to be supported by the above principles. It is essential that the potential impacts of the proposed reforms are well considered, and not ad hoc or limited. Aboriginal peoples have been advocating strongly for increased rights and interests for many decades, and the proposed reforms do not appear to address the concerns raised.

There are a suite of models that can both support Aboriginal People's social, cultural and economic interests, while delivering certainty to Government. These must be developed in genuine consultation with Aboriginal peoples to ensure that locally based, fit for purpose options are developed, rather than imposing a fragmented or one-size-fits all regime.

NSW context

An understanding of the current landscape in NSW does not appear to be adequately represented in the Draft Report. As you can appreciate, Aboriginal peoples have long been advocating for the recognition of rights and interests in lands and waters, including in relation to fishing, hunting and gathering. Aboriginal people in NSW have, and continue to, undertake sustainable fishing practices using a variety of methods to supplement food sources for themselves, their family and their community. This continuing practice provides Aboriginal people with a means of retaining cultural and traditional customs and is integral to the maintenance of Aboriginal culture and identity.

In NSW, the *Fisheries Management Act 1994 (NSW)* (FMA) was amended in 2009 to recognise the spiritual, social and customary significance of fisheries resources to Aboriginal persons and to protect and promote the continuation of Aboriginal cultural fishing (Section 3(2)(h), FMA). NSWALC supported these amendments, including section 21AA relating to protections against prosecution for Aboriginal cultural fishers, as a first step to achieving positive reforms that would improve rights of Aboriginal fishers in NSW.

The majority of the amendments came into effect on 1 April 2010. Unfortunately, after five years a key amendment, section 21AA, has not yet commenced. This has resulted in the ongoing prosecution of Aboriginal cultural fishers and a lack of certainty regarding the compliance regime. While a policy document has been developed by the NSW Government, this has not been implemented consistently. While the Draft Report notes that Aboriginal cultural fishers are subject to "*less stringent bag limits than recreational fishers*", this is currently not outlined in the legislation. In the six years where the legal protection for Aboriginal cultural fishing has been sitting in limbo, there have been more over 200 prosecutions of Aboriginal peoples. The former NSW Attorney-General Brad Hazzard has stated that he is: "*aware of some cases of misguided prosecution of Aboriginal people for exceeding fishing bag limits*".¹¹

In respect to the draft recommendations, we provide the below specific comments.

Draft Recommendation 5.1: Customary Fishing by Indigenous Australians should be recognised as a sector in its own right in fisheries management regimes. The definition of Indigenous customary fishing should be consistent with native title.

The first part of this recommendation that 'Customary Fishing' by Indigenous Australians should be recognised as a sector in its own right in fisheries management regimes' requires further clarification. While proposals to recognise and provide rights for Aboriginal peoples are supported the intent of this recommendation, and how it will directly benefit Aboriginal peoples is not clear.

In relation to the second part of the recommendation concerning the definition of Indigenous customary fishing, NSWALC asserts that this will need to be further considered and the subject of further consultation in a NSW context. It is important to note that NSWALC has advocated for rights for all Aboriginal cultural fishers, not just cultural fishers who have native title rights and interests.

Draft Recommendation 5.2: The Indigenous customary fishing sector should be afforded a priority share of resources in fisheries where catch or effort is limited. This allocation should be sufficient to cover cultural use by the local Indigenous community in accordance with proven traditional laws and customs.

The proposal to prioritise Aboriginal fishing is fisheries resource allocation generally aligns with NSWALC's advocacy on this issue as well as previous recommendations made by the Australian Law Reform Commission noted above. NSWALC notes that the Draft Report provides additional context as to why this recommendation is made:

'Consistent with the principles agreed in 2004 for the management of Indigenous fishing, governments should set aside shares in overall allocations sufficient for local Indigenous communities to maintain their traditional customs. Based on those principles, which state a desire to protect customary fishing, governments should set aside shares sufficient for local Indigenous communities to maintain their traditional customs. This would, in practice, accord priority to customary fishing take.'

Importantly the Productivity Report's Draft Report also recognises that the impact of Aboriginal cultural fishing on catch stocks is 'relatively small'. Specifically, the Productivity Report's Draft report notes:

'Customary catch is understood to be relatively small and the absence of an explicit allowance for customary 'take' in fisheries where there are controls over aggregate catch (or effort) is unlikely to compromise sustainability objectives. However, this may not be the case where fishing pressure on the resource is more intense (for example, abalone). In such cases, formal resource allocations to the customary sector may be required.'

NSWALC's submits that Aboriginal people have an inherent right to fish in accordance with traditional systems of law and custom. Aboriginal peoples have undertaken this activity for thousands of years and have managed the fisheries resource in a sustainable way throughout.

a. Customary fishing rights should not be tradeable or transferrable, recognising the unique characteristics of the associated cultural benefits and that these benefits are exclusive to the community concerned.

This recommendation does not appear to take account of the diversity and complexity of Aboriginal communities both in a contemporary or historic context. Further consideration is needed.

b. Customary allocations and any controls over customary fishing activities should be developed in consultation with Indigenous communities.

NSWALC is of the view that Aboriginal communities should play a vital role in managing cultural fishing and that this management is based on the self-regulation of fishing activity through the application of aspects of traditional law and custom.

Aboriginal people have an inherent right to fish in accordance with traditional systems of law and custom. Aboriginal peoples have undertaken this activity for thousands of years and have managed the fisheries resource in a sustainable way throughout.

Aboriginal peoples in NSW currently undertake self-regulation of fishing activity. This occurs through aspects of traditional law and custom which impose a range of restrictions on community members including measures such as, ensuring there is no waste in relation to a catch, undertaking seasonal fishing activity and having regard to the gender of the species caught, spawning cycles and fish size. Self-regulation, which has been occurring for thousands of years, is a key tool in managing fisheries resources.

Any proposed control or regulation of Aboriginal cultural fishing by Government must be subject to further consultation and engagement with Aboriginal peoples. NSWALC does not support regulation of Aboriginal cultural fishing by Government.

Draft Recommendation 5.3: The definition of customary fishing in fisheries laws should provide for fishing for commercial purposes, but only where consistent with traditional laws and customs.

This recommendation should be subject to further consultation with Aboriginal peoples. NSWALC supports increased avenues for economic development and participation of Aboriginal People in the commercial fishing sector which could include a variety of mechanisms:

- A reduced fee structure and more flexible arrangements for allowing family members to use endorsements and undertake Aboriginal Cultural Fishing on commercial boats,
- Dedicated funding for Aboriginal Commercial fishing initiatives and industry including from use of a revenue stream from recreational and commercial fees,
- Funding beyond the current Aboriginal Business Development Program to set up and start a business and to purchase equipment and premises,
- A reduction of commercial license fees and review and restructure of commercial fee arrangements including exemptions from the community contribution levy and annual fees,
- Purchasing businesses and shares to gain access to fully allocated fisheries,
- Review and restructure on how Aboriginal commercial licences can be held and succession planning for those licences,
- Reallocation of resumed, surrendered, retired or dormant commercial licences to the Aboriginal commercial fishing sector,
- Exemption from s49 FMA prohibition, to allow for Aboriginal People who have had previous fisheries-related convictions to apply for and hold commercial fishing licences,
- Priority share of each of the fisheries and taking up shares at review periods,
- Priority on the grant of commercial licences to Aboriginal Applicants,
- Investment in education programs to provide any qualifications required for commercial fishing, and
- Engagement in aquaculture industries and restocking of fisheries.

Recommendation: That further consultation is undertaken with NSWALC, Aboriginal peak organisations and Aboriginal peoples in NSW to regarding the proposals relating to Aboriginal fishing sector. A genuine consultation process is needed to gain a clearer understanding of the issues and the intent of the proposed reforms.

Both the Federal and NSW Government have previously recognised the importance of providing avenues for Aboriginal peoples to practice culture, as well as the importance of consultation with Aboriginal peoples in fisheries management, and providing economic and employment opportunities to Aboriginal peoples.ⁱⁱⁱ

The importance of recognising Aboriginal people's rights and interests in legislation to avoid prosecutions for carrying out cultural practices is long overdue, as are reforms to promote economic development for Aboriginal peoples in respect to fisheries. In 1986 the Australian Law Reform Commission Inquiry into the Recognition of Aboriginal Customary Laws suggested that *'as a general principle Aboriginal traditional hunting and fishing should take priority over nontraditional activities including commercial and recreational activities'*.^{iv} Nearly 30 years later, reforms to finally recognise Aboriginal people's cultural fishing practices are yet to be put into practice.

Should you require further information in regards to any issues that have been raised in this submission, please do not hesitate to contact the NSWALC Policy and Programs Unit

Yours Sincerely,

Kate Aubrey Poiner
Executive Director, Policy and Programs

Date: 21/10/16

ⁱ The principle underpinning fisheries management in New Zealand is partnership between the New Zealand Government, Department of Fisheries, and Maori, and sustainable use for future generations. This is based on a shared understanding of each others' understandings Ministry of Fisheries Te Tautiaki i nga tini a Tangaroa, 'Customary Fishing Information Manual' 2009 <http://www.fish.govt.nz/NR/rdonlyres/4C12BC8D-1CE8-4B14-AEEF-4AEBE4B82562/0/63585_MOF_CustomaryFishingManual.pdf> Introduction page.

ⁱⁱ ABC media article, 19 March 2015, 'NSW Election 2015: Aboriginal groups want cultural fishing rights made law': <http://www.abc.net.au/news/2015-03-19/aboriginal-groups-want-cultural-fishing-rights-made-law/6331716>

ⁱⁱⁱ See the National Principles of Indigenous Fishing <http://www.atns.net.au/agreement.asp?EntityID=3797> and the NSW Indigenous Fishing Strategy and <http://www.dpi.nsw.gov.au/fisheries/aboriginal-fishing/strategy/nsw-ifs/nsw-ifs>

^{iv} Australian Law Reform Commission Inquiry, Recognition of Aboriginal Customary Laws, Paragraph 984, available at: <http://www.alrc.gov.au/publications/36%20Securing%20Hunting%2C%20Fishing%20and%20Gathering%20Rights/statement-principles>