Law Council
OF AUSTRALIA

Marine Fisheries and Aquaculture – Draft Report

Productivity Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Introduction

1. The following submission has been prepared by the Australian Environmental and Planning Law Group (**AEPLG**) from the Law Council's Legal Practice Section. The AEPLG's primary objectives are: to be a national focus group for environmental and planning law; to represent members of the profession working in the areas of environmental and planning law; to advise the Law Council on issues of environmental and planning law; and to lobby Federal and State Government to implement "best practice" in environmental and planning law.

Marine Parks

2. The AEPLG supports the Productivity Commission's view that the statutory and administrative process for establishment of Marine Parks in all jurisdictions should include a requirement for prior community consultation, following the model applied by the Commonwealth in the *Great Barrier Reef Marine Park Act 1975* (Cth).

Determining limits in fisheries

3. The AEPLG supports the Productivity Commission's view that all jurisdictions should continue to adopt harvest strategies as the primary tool for managing fishing stocks. Such strategies should prescribe, by regulation, specific methods for determining the target level of fish extraction, following the Commonwealth model, as a means of providing certainty to the regulatory process.

Valuing access to fishing sectors

4. The AEPLG agrees with the Productivity Commission that the key guiding principle of fisheries regulation should be to allocate fishing resources to the highest value uses across multiple competing parties and that the value of fish resources is economic, social and cultural. Included within those values is the value to succeeding generations of maintaining fish resources and the ecological communities of which they form part.

5. The process for balancing those values, in order to be fair and reasonable, must be one which is the subject of clear regulation, so that affected parties and the public are able to be informed of, and able to participate in, the setting of entitlements to access to fish stocks. Legislative provisions determining the permitted levels of fish extraction should state clear objectives, and criteria for balancing competing interests. The decision-making process should be independent of vested interests, should provide a fair procedure for the expression of economic, social and cultural interests and should provide a procedure for the review of decisions, which takes into account the full range of the public interest in fisheries.

6. The legislation, in order to be effective in pursuing its objectives must include a process for decisions being informed by the optimum scientific, economic, social and cultural data concerning fish, the environments in which they exist and the benefits to special interest groups and the public of both exploiting and preserving fish and the environments in which they exist.

7. The legislation should provide for the creation of -

    - scientific data and a scientific advisory body;
    - economic data and an economic advisory body;
    - social data, including data regarding recreational access to fish, and a social advisory body; and
    - indigenous cultural data and an indigenous cultural advisory body

    to inform the decisions to be made about access to fish stocks. Advisory bodies, to perform effectively, will be required to take into account regional and locational differences and will need to comprise several regionally-based bodies, particularly in relation to indigenous cultural data and advice. The data required to properly inform decision-making is best collected at a national or nationally co-ordinated level, as the Commission suggests (for the obvious reason that fish and its environs are not limited within state and territory borders). If the process is to be effective, that data must be updated regularly. The Commission's suggestion of at least every five years is supported by the AEPLG.

Reducing regulatory costs and imposts

8. The AEPLG agrees with the Productivity Commission that there should be a process for regular review of fisheries laws, regulations, policies and strategies, to determine whether the specific controls and management arrangements applying to fisheries are appropriate for particular fisheries, or whether there is scope for streamlining and simplification.

Licensing recreational fishing

9. The AEPLG's position on licensing recreational fishing, noting that licensing currently occurs in some jurisdictions in Australia, is that there is broad public interest in uniformity of regulation throughout the nation. That provides an argument in favour of regulation in all states and territories, ideally following a uniform model. A uniform model would also address the issue of cross-jurisdictional fishing and movement of fish.

Enforcement & Indigenous participation in fisheries management

10. The AEPLG recognises that the diversity and expanse of recreational fishing activity makes enforcement difficult and the risk of being caught low. However, it points out that there is no empirical evidence that strong penalties are an effective way of achieving compliance, where the resources to impose them are lacking. The AEPLG's experience in relation to law enforcement generally is that the chance of being caught has more impact as a deterrent than the quantity of the penalty. That suggests the need for some resources to be devoted to enforcement. However, the importance of education as to the value of the resource to the broader community and future generations is likely to be more important in protecting fish and their environment; operating as a preventative, rather than penalising, measure.

11. The AEPLG advocates adoption of an approach comparable to that being used under the *Great Barrier Reef Marine Park Act 1975* (Cth) of Traditional Use of Marine

Resources Agreements and Indigenous Land Use Agreements for the management of traditional taking of dugong and turtle within the Great Barrier Reef Marine Park, and provides a paper discussing the same in detail at **Attachment A**.

Indigenous customary fishing

12. The High Court of Australia in *Akiba v Commonwealth* (2013) HCA 33 (***Akiba***) concluded that native title may include the right to trade in fish, where that is consistent with traditional laws and customs. It upheld (per French CJ and Crennan J, at [1]) a native right framed as "the right to access resources and to take for any purpose resources in the native title areas" and noted that:

> *The native title right so framed could be exercised in a variety of ways, including by taking fish for commercial or trading purposes. Like each of the native title rights and interests set out in the Determination, it was not exclusive. That is to say, it did not confer rights on the native title holders to the exclusion of others, nor any right to control the conduct of others. It was a right to be exercised in accordance with the traditional laws and customs of the native title holders, the laws of the State of Queensland and the Commonwealth of Australia and the common law.*

13. The High Court (at [27]) noted the distinction between the existence and exercise of a right appears in s 211 of the *Native Title Act 1993* (Cth) (**NTA**). Section 211 relevantly provides as follows:

> *Requirements for removal of prohibition etc on native title holders*
>
> *(1) Subsection (2) applies if:*
>
> *(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and*
>
> *(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and*
>
> *…*
>
> *Removal of prohibition etc on native title holders*
>
> *(2) If this subsection applies, 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.*
>
> *Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.*

Definition of class of activity

(3) Each of the following is a separate ***class of activity****:*

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph.

14. The High Court noted (at [28]):

> *The distinction between native title rights and their exercise is made explicit in s 211 and was noted by the plurality in Yanner v Eaton (1999) 201 CLR 351 at 373 [39]. Their Honours said that:*
>
> *"the section necessarily assumes that a conditional prohibition of the kind described in s 211(1)(b)] does not affect the existence of the native title rights and interests in relation to which the activity is pursued."*

15. The High Court in *Akiba* did not conclude anything other than that if a native title holder is engaged in an act of fishing pursuant to a native title right, it remains open for the Parliament to regulate that activity where it includes commercial fishing, so as to require a native title holder to comply with the requirement which applies to all other citizens in relation to obtaining a commercial fishing licence.

16. Customary fishing rights recognised at common law and under the NTA are not transferable, except in accordance with traditional law and custom (*Mabo v Queensland (No 2)* (1992) 175 CLR 1, 51 (Brennan J)). It follows that they are not transferrable beyond the traditional society who acknowledge those traditional laws and adhere to those traditional customs. Customary fishing rights which may be recognised beyond those which comprise an incident of native title are incapable of being recognised by the common law as transferable to any greater extent than as an incident of native title. It follows that it is reasonable for any statutory recognition of customary rights to be similarly limited.

17. If any state or territory, by statute or administrative act, was to do anything which infringed native title rights, then the same would be invalid; because of an inconsistency with the NTA, and proceedings would be likely to be taken to obtain a declaration to that effect, pursuant to s 109 of the *Constitution* (Cth).

18. The criteria for a claim to traditional fishing rights should be uniform throughout Australia. In the view of the AEPLG, the criteria for a person to make such a claim should be those which apply generally throughout the Commonwealth for identity as an Aboriginal person, i.e., that the person is of Aboriginal descent, identifies as Aboriginal and is recognised by the Aboriginal community as such. It is a reasonable requirement that, if challenged, the claimant to the rights is able to provide evidence of a right which has been held by the person's predecessors.