



LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 4

Commencement of the Fisheries Management Amendment Act 2009

Report 55

November 2022

4



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Portfolio Committee No. 4

Commencement of the Fisheries Management Amendment Act 2009

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Commencement of the Fisheries Management Amendment Act 2009

"November 2022".

Chair: Hon. Mark Banasiak, MLC



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Terms of reference

1. That Portfolio Committee No. 4 – Customer Service and Natural Resources inquire into and report on the failure to proclaim the commencement of [Schedule 1 of the Fisheries Management Amendment Act 2009](#) concerning Aboriginal cultural fishing, and in particular:
 - (a) the historical reasons for not commencing Schedule 1 for 11 years,
 - (b) the present challenges to commencing Schedule 1,
 - (c) the impact of the non-commencement of Schedule 1 on Aboriginal peoples and the practice of Aboriginal cultural fishing,
 - (d) steps previously taken and proposed to be taken by the government to commence Schedule 1,
 - (e) compliance measures undertaken by Fisheries NSW as it pertains to the non-compliance of Schedule 1, and
 - (f) any other related matter.

The terms of reference were self-referred by the committee on 25 November 2021.¹

¹ *Minutes*, NSW Legislative Council, 22 February 2022, pp 2963-2964.

Committee details

Committee members

| | | |
|-------------------------------|------------------------------------|---------------------|
| Hon Mark Banasiak MLC | Shooters Fishers and Farmers Party | <i>Chair</i> |
| Hon Emma Hurst MLC | Animal Justice Party | <i>Deputy Chair</i> |
| Hon Scott Barrett MLC | The Nationals | |
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* The Hon Scott Barrett MLC replaced the Hon Wes Fang MLC as a substantive member of the committee from 1 March 2022. The Hon Wes Fang MLC replaced the Hon Sam Farraway MLC as a substantive member of the committee from 25 January 2022 to 1 March 2022.

** Mr David Shoebridge MLC was a participating member from 25 November 2021 to 11 April 2022.

Committee Secretariat

Ms Sarah Newlands, Principal Council Officer

Ms Ros O'Brien, Administration Officer

Ms Tina Higgins, Director

Chair's foreword

In 2009 the Fisheries Management Act was amended by the NSW Government to acknowledge Aboriginal people's unique cultural connection to sea and inland waters and to protect and promote Aboriginal cultural fishing. A special provision, section 21AA, was also introduced which was intended to protect Aboriginal people from compliance actions for fishing offences if they were undertaking cultural fishing.

Thirteen years later, section 21AA has still not been commenced, and extraordinarily, the will of the Parliament has failed to take effect.

This inquiry was established to investigate why section 21AA was not commenced, and the impact of this non-commencement on Aboriginal cultural fishers. The committee heard from many different stakeholders over the course of the inquiry. While there were different views on how cultural fishing should be regulated, all stakeholders were united in wanting to preserve and protect the rich and varied fisheries of New South Wales.

Many stakeholders also indicated their support for cultural fishing, and for the commencement of section 21AA. Some felt that this should occur without regulation. Other stakeholders, including the NSW Government, maintained that some form of supporting regulation is essential, to ensure the sustainability of fishing resources.

The committee accepts that the NSW Government was unable to reach agreement with stakeholders concerning a supporting regulation when this law was first passed, and so changed its focus to local management plans, on the premise that a localised arrangement would be more appropriate for reflecting each community's needs. Despite this the committee finds it hard to accept that in the space of 13 years all that has been achieved to protect and promote Aboriginal cultural fishing is one long and complex local management plan for the Hastings Aboriginal community, which took 5 years to develop, and only applies to a small area of the NSW North Coast. In the committee's view, the process has been too slow, and lacked the support of all stakeholders.

And as a result, here we are 13 years later, with still not much to show for the Parliament's intention to make special provision for Aboriginal cultural fishing. As this report recommends, section 21AA needs to be commenced immediately, and the NSW Government must take immediate steps to develop a supporting regulation with stakeholders, which could be new or could capture the arrangements at a local level. While some may not agree with this view, the committee believes it is the best way forward given all of the circumstances and views across the fishing sector.

During this inquiry the committee was extremely concerned to hear of the level of damage inflicted by compliance actions on Aboriginal people whose lives and culture are expressed and defined by their cultural fishing practices. We repeatedly heard stories of Aboriginal people being harassed, prosecuted, and fined for practising cultural fishing. Some Aboriginal fishers have been subject to terrible consequences, including jail terms and fines in the thousands of dollars. Additionally, a number have reported reduced mental health and wellbeing due to being prevented from practising their culture. This was particularly apparent in evidence provided by fishers on the South Coast of NSW.

The committee learnt that the impact of compliance actions goes beyond individuals and is felt deeply across the whole Aboriginal community. Sadly, the committee also learned that this is diminishing the transmission of culture from one generation to the next. These outcomes are clearly inconsistent with the NSW Government's commitments to the Closing the Gap Agreement and must be addressed. Until section 21AA is commenced, the committee has called for this type of compliance action to be ceased.

Additionally, in the committee's view, the Department of Primary Industries Fisheries needs to address what can only be categorised as a cultural issue within its organisation. Our report highlights this, and also makes some important recommendations which should assist in lifting the cultural capability of the organisation.

I want to sincerely thank all of the stakeholders who participated in this inquiry, especially those on the South Coast of NSW who hosted the committee on a visit to Mystery Bay and spoke so openly at the meeting we had in Narooma. I also express my thanks to my committee colleagues, and to the secretariat who helped to support the work of this inquiry.

I commend this report to the House.



The Hon Mark Banasiak MLC
Committee Chair

Findings

- Finding 1** 28
That the NSW Government has failed to effect the will of the Parliament by not commencing Schedule 1 of the *Fisheries Management Amendment Act 2009* to make special provision for cultural fishing.
- Finding 2** 28
That the NSW Government's implementation of a local management approach to make provision for cultural fishing has been too slow and lacks the full support of stakeholders.
- Finding 3** 29
That the regulatory and policy settings applied by the NSW Department of Primary Industries Fisheries mean it is unable to differentiate between trade and barter, as part of cultural fishing practice, and being in possession of fish for the purpose of a commercial activity without a licence.
- Finding 4** 29
That the compliance activity and prosecutions against Aboriginal people for practising cultural fishing, particularly on the South Coast of NSW, are unacceptable and creating perverse outcomes inconsistent with the NSW Government's commitments to the Closing the Gap Agreement.

Recommendations

Recommendation 1

29

That the NSW Department of Primary Industries immediately, and until Schedule 1 of the *Fisheries Management Act 2009* is commenced:

- cease all surveillance, compliance actions and prosecution actions against Aboriginal cultural fishers
- review and withdraw any penalty infringement notices issued to Aboriginal individuals on the South Coast who were practising cultural fishing.

Recommendation 2

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That the NSW Department of Primary Industries review and implement a comprehensive training program for all Fisheries compliance officers, to be delivered in partnership with key Aboriginal stakeholders, covering Aboriginal cultural fishing practices (including the trade or barter of fish for other items) and native title rights.

Recommendation 3

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That the NSW Government conduct an independent review of the culture and regulatory practices of the compliance division of the Department of Primary Industries Fisheries, to identify any systemic cultural problems and implement changes which will lift the cultural capability of the organisation.

Recommendation 4

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That the NSW Government commence Schedule 1 of the *Fisheries Management Amendment Act 2009* by 30 June 2023, and take immediate steps to develop a supporting regulation in consultation with Aboriginal communities and peak bodies, and other stakeholders.

Recommendation 5

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That the NSW Department of Primary Industries, Department of Regional NSW and Department of Aboriginal Affairs proactively work with the Aboriginal community on the South Coast to support the community make an application to the Aboriginal Fisheries Business Development Program, or other programs, to give them greater opportunities for commercial fishing businesses, for the broader benefit of the local community.

Recommendation 6

51

That the NSW Department of Primary Industries explore other options that would enable local Aboriginal communities to have greater access to the commercial fishing industry.

Recommendation 7

51

That the NSW Department of Primary Industries implement measures to better educate the broader fishing community about Aboriginal cultural fishing practices.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 21 November 2021.

The committee received 49 submissions and four supplementary submissions.

The committee held one public hearing at Parliament House in Sydney.

The committee also held a community roundtable meeting in Narooma on the South Coast of NSW, and visited the Mystery Bay fish traps.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

Chapter 1 Introduction to cultural fishing and context of the inquiry

This chapter outlines the background and context of the committee's inquiry, exploring the circumstances in which the inquiry was established and the current regulatory framework that regulates and promotes Aboriginal cultural fishing. Importantly, this chapter also sets out evidence as to what constitutes Aboriginal cultural fishing, emphasising its relevance to Aboriginal identity and connection to Country.

Establishment of the inquiry

- 1.1** On 25 November 2021 Portfolio Committee No. 4 – Customer Service and Natural Resources self-referred an inquiry into the failure to proclaim the commencement of Schedule 1 of the *Fisheries Management Amendment Act 2009* concerning Aboriginal cultural fishing, despite the legislation being agreed to by the New South Wales Parliament 11 years earlier.
- 1.2** The *Fisheries Management Amendment Act 2009* introduced a number of important reforms to the *Fisheries Management Act 1994*, including recognition and promotion of Aboriginal cultural fishing in certain ways.
- 1.3** Schedule 1 of the *Fisheries Management Amendment Act 2009* contained a special provision for Aboriginal cultural fishing, stating:

21AA Special provision for Aboriginal cultural fishing

- (1) An Aboriginal person is authorised to take or possess fish, despite section 17 or 18, if the fish are taken or possessed for the purpose of Aboriginal cultural fishing.
- (2) The authority conferred by this section is subject to any regulations made under this section.
- (3) The regulations may make provision for the management of Aboriginal cultural fishing as authorised by this section.
- (4) without limiting the above the regulations may:
 - (a) prescribe the circumstances in which the taking or possession of fish by Aboriginal persons for the purpose of Aboriginal cultural fishing is authorised by this section, and
 - (b) specify restrictions as to the quantity of fish or a specified species or of a specified class that may be taken by or be in the possession of Aboriginal persons for the purposes of Aboriginal cultural fishing as authorised by this section.
- (5) The Minister must not recommend the making of a regulation under this section unless an advisory council for the Aboriginal sector of the fishing industry has been established under section 229 and the Minister certifies that the advisory council has been consulted on the proposed regulation.

(6) A person does not commit an offence against section 17 or 18 in respect of the taking or possession of fish if the taking or possession of the fish is authorised under this section.

(7) This section does not prevent the issue of a permit under section 37 for Aboriginal cultural fishing purposes.

(8) This section does not authorise an Aboriginal person to do anything that is inconsistent with native title rights and interests under an approved determination of native title (within the meaning of the Native Title Act 1993 of the Commonwealth) or with the terms of an indigenous land use agreement (within the meaning of that Act).

1.4 Ultimately, the *Fisheries Management Amendment Act 2009*, including Schedule 1, passed Parliament on 3 December 2009, and received assent on 14 December 2009.²

1.5 On 1 April 2010, all of the provisions of the *Fisheries Management Amendment Act 2009* commenced, except for section 21AA.³ The current inquiry was therefore established to consider, among a range of things, the historical reasons for not commencing Schedule 1, the present challenges to commencing it and the impact of not commencing Schedule 1 on Aboriginal peoples and the practice of cultural fishing.

Current regulatory framework for Aboriginal cultural fishing

1.6 To understand the context of the 2009 amendments, including Schedule 1, it is necessary to consider the broader regulatory framework for Aboriginal cultural fishing. The NSW Government currently regulates cultural fishing through various regulatory instruments and arrangements, including through the *Fisheries Management Act 1994*, cultural fishing permits and interim access arrangements.

Fisheries management legislation

1.7 The *Fisheries Management Act 1994* governs the management of fishery resources, containing provisions related to bag and possession limits for fishing, recreational fishing requirements, fishing determinations and quotas and licensing arrangements.

1.8 The legislation aims to:

- promote viable commercial fishing and aquaculture industries
- promote quality recreational fishing opportunities
- share fisheries resources between users
- provide social and economic benefits for the wider community of New South Wales.⁴

² *Hansard*, NSW Legislative Council, 3 December 2009, p 20512; Fisheries Management Amendment Bill 2009, <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=1728>

³ Submission 40, NSW Government, p 6.

⁴ *Fisheries Management Act 1994*, s 3.

- 1.9** Prior to the *Fisheries Management Amendment Act 2009* the *Fisheries Management Act 1994* did not reference Aboriginal cultural fishing. It had as its objects 'to conserve, develop and share the fisheries resources of the State for the benefit of present and future generations'. This included the object to 'appropriately share fisheries resources between the users of those resources'.⁵
- 1.10** The *Fisheries Management Amendment Act 2009* was passed in December 2009, bringing in amendments to the *Fisheries Management Act 1994*. This included changes to formally recognise Aboriginal cultural fishing, including:
- changes to the objects of the Act 'to recognise the spiritual, social and customary significance to Aboriginal persons of fisheries resources and to protect, and promote the continuation of, Aboriginal cultural fishing'
 - section 37 permits, for the express purpose of Aboriginal cultural fishing
 - the introduction of a definition of Aboriginal cultural fishing: 'fishing activities and practices carried out by Aboriginal persons for the purpose of satisfying their personal, domestic or communal needs, or for educational, ceremonial or other traditional purposes, and which do not have a commercial purpose'.⁶
- 1.11** This definition explicitly excluded the practice of commercial fishing, consistent with how cultural fishing is described in the Commonwealth *Native Title Act 1993* and local management plans.⁷
- 1.12** During debate of the *Fisheries Management Amendment Act 2009* in the Legislative Council in 2009, further amendments were agreed to, including:
- the establishment of an Aboriginal Fishing Advisory Council
 - waiving of recreational fishing licence fees for Aboriginal people
 - the introduction of a provision for Aboriginal cultural fishing – namely section 21AA (in Schedule 1)
 - the requirement for any regulations formed as per section 21AA to be developed in consultation with the Aboriginal Fishing Advisory Council.⁸
- 1.13** As noted above, all provisions commenced on 1 April 2010, except Schedule 1. According to the NSW Government, the non-commencement of section 21AA at the same time as the rest of the amendments was based on the need for:
- regulations to be introduced to manage Aboriginal cultural fishing
 - an advisory council to be established and consulted on the regulations.⁹

⁵ Submission 40, NSW Government, p 17.

⁶ Submission 40, NSW Government, p 18.

⁷ Submission 40, NSW Government, p 7.

⁸ *Hansard*, NSW Legislative Council, 3 December 2009, pp 20385-20391.

⁹ Submission 40, NSW Government, p 9.

- 1.14** The Aboriginal Fishing Advisory Council, established in 2011, included representatives from key stakeholders, namely the NSW Aboriginal Land Council and NTSCORP.¹⁰
- 1.15** According to the NSW Government, while the process was underway between the government and the Aboriginal Fishing Advisory Council to develop the regulation to support section 21AA, simultaneous development and implementation of the Aboriginal Cultural Fishing Interim Access Arrangements occurred, to operate as an interim measure (discussed further at paragraph 1.24).¹¹
- 1.16** However, in 2016, the NSW Aboriginal Land Council, NTSCORP, and the Aboriginal Fishing Advisory Council advised the government that they no longer supported the development of a state-wide regulation to prescribe take and possession limits for cultural fishing purposes. Instead, the NSW Government stated that stakeholders indicated their support for a local management approach.¹²
- 1.17** In the absence of a regulation, the NSW Government has not commenced section 21AA, and has instead focused on developing local management plans, which do not require section 21AA, but 'achieve the same natural resource management outcomes originally intended to be achieved through a regulation'.¹³

Local management plans

- 1.18** Currently there is only one local management plan in operation, in the Hastings area of northern New South Wales, which commenced in June 2022 on a trial basis. This covers cultural fishing in the waterways and state waters in the Birpai and Bunyah Local Aboriginal Land Council areas.¹⁴
- 1.19** The NSW Government also plans to develop a local plan for the Tweed Aboriginal community.¹⁵
- 1.20** The NSW Government characterised local management plans as a better way to address cultural fishing at a community level, covering issues such as:
- areas to be fished, equipment and fish species
 - take and possession limits
 - recognition of cultural fishing events
 - community based management of cultural fishing.¹⁶

¹⁰ Submission 40, NSW Government, p 18.

¹¹ Submission 40, NSW Government, p 6.

¹² Submission 40, NSW Government, p 7.

¹³ Submission 40, NSW Government, p 4.

¹⁴ Supplementary information, NSW Department of Primary Industries, 25 July 2022, p 3; Tabled document, Department of Primary Industries, Fisheries, *Timeline from 2009 to 2022 of NSW Government actions and engagement with Aboriginal stakeholders*, 19 August 2022, p 2.

¹⁵ Supplementary information, NSW Department of Primary Industries, 25 July 2022, p 3.

¹⁶ Submission 40, NSW Government, p 7.

- 1.21** Based on feedback from key stakeholders, the NSW Government noted that local management plans are the preferred pathway to provide a management solution for Aboriginal cultural fishing, which will 'address, in greater detail than s21AA may allow, the specific needs and aspirations of Aboriginal fishers at a community level'.¹⁷ Local management plans have legal effect pursuant to a Ministerial Order made under section 37(1)(d) of the *Fisheries Management Act 1994*.¹⁸
- 1.22** In its submission, the NSW Government stated that it is 'committed to working with Aboriginal communities to develop a fit-for-purpose framework that allows for Aboriginal cultural fishing balanced with the need to protect the fisheries resources for the benefit of current and future generations'.¹⁹
- 1.23** Feedback on the effectiveness of these plans and whether they should continue to be the focus in promoting and regulating Aboriginal cultural fishing is covered in chapter 3.

Interim access arrangements

- 1.24** As noted above, and given the government's plans to initially develop a regulation to support section 21AA, and then the move to local management plans, interim access arrangements were implemented to provide greater daily access for cultural fishing needs through extended take and possession limits.
- 1.25** These arrangements, known formally as the Aboriginal Cultural Fishing Interim Access arrangements, were developed in consultation between the NSW Government, the NSW Aboriginal Land Council and NTSCORP from 2010.²⁰
- 1.26** In essence, the interim arrangements allow Aboriginal cultural fishers to have bag limits beyond those for recreational fishers, usually double the recreational fisher limits but up to five times the limit in some cases.²¹

Cultural fishing permits

- 1.27** Along with the interim arrangements put in place in 2010, the NSW Government also implemented section 37 permits, which enable the 'taking and possession of fish or marine vegetation of any kind or of a specified kind' for specific purposes, including for Aboriginal cultural fishing.²² Since 2010, 144 permits have been granted for Aboriginal cultural fishing.²³

¹⁷ Submission 40, NSW Government, p 7.

¹⁸ Submission 40, NSW Government, p 7.

¹⁹ Submission 40, NSW Government, p 4.

²⁰ Submission 40, NSW Government, p 10.

²¹ Submission 40, NSW Government, p10; NSW Department of Primary Industries, *Aboriginal Cultural Fishing Interim Access*, https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/632695/aboriginal-cultural-fishing-interim-access-arrangement.pdf

²² *Fisheries Management Act 1994* s37(1)(d)

²³ Tabled document, NSW Department of Primary Industries, *Summary of Section 37 cultural fishing permits issued from 2010 to August 2022*, 19 August 2022.

Cultural fishing permits may be granted for various community events, or for other occasions including birthdays, funerals, and cultural celebrations.²⁴

- 1.28 Under the *Marine Estate Management Act 2014*, permits can also be provided for cultural fishers to take up to several hundred species from a marine park or aquatic reserve within a specified period of time.²⁵

Other government initiatives that support cultural fishing

- 1.29 In addition to cultural fishing permits and the interim access arrangements which provide for cultural fishing, the NSW Government outlined several initiatives which have been specifically designed to support the practice of Aboriginal cultural fishing. This includes:

- the 10-year Marine Estate Management Strategy initiative 4, which aims to broaden the community's understanding of Aboriginal Sea Country values, increase opportunities for Local Aboriginal Land Councils and other Aboriginal organisations to secure contracts and employment in the marine sector, train Aboriginal people in areas such as general boat licence and safety, coxswain, tourism; and other cultural initiatives
- the Aboriginal Fisheries Officer career pathway program, which employs Aboriginal people to assist with compliance and community engagement
- a Joint project with the Aboriginal Fishing Advisory Council, the Fisheries Research and Development Corporation and the Indigenous Land and Sea Corporation to support Aboriginal owned and operated commercial fishing, aquaculture or aquatic tourism businesses.²⁶

- 1.30 Separately, there is also the Aboriginal Fishing Trust Fund, administered by Department of Primary Industries Fisheries, which provides grants and loans for fishing related opportunities that 'enhance, protect or promote Aboriginal cultural fishing'. This includes funding for community projects and economic opportunities such as:

- Aboriginal cultural camps to educate local community about sustainable take
- acquisition of commercial fishing quota
- purchase of capital equipment for a commercial fishing business
- workshops to make fishing equipment such as nets for catching fish for cultural events
- marine environment improvement activities, including marine debris clean-ups.²⁷

²⁴ Submission 40, NSW Government, p 10.

²⁵ Submission 40, NSW Government, p 10.

²⁶ Submission 40, NSW Government, pp 10-12; Evidence, Mr Sean Sloan, Deputy Director General Fisheries, Department of Primary Industries, 19 August 2022, p 47.

²⁷ Submission 40, NSW Government, pp 11-12; Tabled document, *NSW Government Aboriginal Fishing Trust Fund (established under the Fisheries Management Act 1994), expenditure from 2017-18 to 2020-01*, 19 August 2022.

What is cultural fishing?

1.31 Before turning to the key issues in this report, including further discussion as to why section 21AA has not been commenced and the impact of this on Aboriginal people and communities, it is essential to understand the concept of cultural fishing, and its recognition, practice and significance to Aboriginal people and communities.

1.32 Many stakeholders emphasised in this inquiry the need to understand cultural fishing as more than just catching fish, or the 'take', or the methods used to practice cultural fishing. For Aboriginal people, the committee heard that cultural fishing is an integral part of identity and connection to Country.

1.33 Indeed, the significance of cultural fishing to Aboriginal identity and connection to Country was recognised by the NSW Government in its submission:

There is an innate connection between waterways and cultural identity and wellbeing of Aboriginal people. Fishing and access to the many and varied water resources has always been a critical element of the relationship between Aboriginal people and their traditional country. The importance of sea or other waters is reflected in dreaming, languages, art, music, dance and stories.²⁸

1.34 This connection and significance was emphasised in most of the submissions the committee received from Aboriginal cultural fishers, many of which described cultural fishing practices, cultural obligations and connection to Country. Cultural fishers highlighted that cultural fishing:

- includes learning to dive with family members
- incorporates expectations of providing for extended family
- is a means of bringing family together
- is a way to connect with younger community members by teaching them fishing skills
- strengthens connection to Country
- meets cultural obligations to pass on knowledge
- is a tradition that has been carried out for thousands of years
- is not defined by the equipment or technology used
- includes trade or barter of fish for other goods, particularly meat or vegetables.²⁹

1.35 The following first-person account captures the lived experience of an Aboriginal cultural fisher:

... all my Elders ... taught me to fish since I was born pretty much. It's just been in my life all my life. ... I've always been diving ... We always take from the ocean to eat food and stuff like that. Take it home, take it to my Elders and my cousins and my family. If my uncles and aunties call me up one day and say they want some feed, I'll get up

²⁸ Submission 40, NSW Government, p 5.

²⁹ See, for example, Submission 13, Mr Wally Stewart, pp 1-2; Submission 19, Mr Douglas Seymour, p 1; Submission 15, Mr Andrew Nye, p 3; Evidence, Mr John Carriage, 19 August 2022, p 16.

straight away and go get it for them, no matter what I'm doing I go out of my way to go get them food.³⁰

- 1.36** Mr John Carriage, an Aboriginal fisher from Yuin Country on the South Coast, provided an account of a life of recreation and hard work based on a strong dependence and relationship with the sea. He described the activities of previous generations dependent on the ocean for their livelihood; his own childhood being passed skills and knowledge by extended family; his current familial responsibilities; and a desire to pass fishing skills and knowledge on to his own children.³¹
- 1.37** Mr Carriage explained that during his childhood, he lived close to the beach with extended family and learnt how to gather the many different varieties of seafood which formed their diet. Despite his family later being forced to move from the beach to Mogo, it 'didn't stop our connection to the ocean; it did not stop us from collecting, gathering our natural resources from the land or water.' He went on to describe the importance to his family of going back to specific campsites by the ocean; 'it's good to go back ... keep the spirits alive, keep the land occupied'.³²
- 1.38** Owing to the broad views on what can constitute cultural fishing, Dr Natalie Kwok, a consultant anthropologist, provided a comprehensive definition of culture from an anthropological perspective. This provides a useful framework for understanding Aboriginal cultural fishing. Her definition includes the following concepts, that:
- culture encompasses perspective, actions and values
 - culture is a concept whereby people make sense of the world
 - culture frames action
 - culture is reflected in formal words and social rules
 - culture is also reflected through unspoken and unwritten codes
 - culture is not 'stagnant'
 - culture is habitual behaviours that are a part of everyday life.³³
- 1.39** As defined by Dr Kwok, culture extends beyond day to day to actions, and the submissions the committee received from Aboriginal fishers highlighted this. There was evidence of Aboriginal fishers being taught skills by Elders from a young age; acknowledgment of family obligations, particularly related to the provision of food; and clear connection to Country and fishing places. As one individual submitter noted, Aboriginal cultural fishing cannot just be described as a leisure activity or a way to exercise and get food on the table.³⁴
- 1.40** Reinforcing that Aboriginal cultural fishing is broader than just the take, Mr Kevin Mason, a South Coast Yuin man, described his fishing practice:

³⁰ Submission 20, Name suppressed, p 1.

³¹ Submission 21, Mr John Carriage, pp 1-6.

³² Submission 21, Mr John Carriage, p 2.

³³ Submission 42, Dr Natalie Kwok, Consultant Anthropologist, p 3.

³⁴ Submission 27, Name suppressed, p 1.

When I fish, I am not fishing to make money, or just for food, but to practice the oldest continuous living culture on earth. I connect with the people who taught me how to fish in accordance with law and custom, and I connect with all the generations before them, and when I teach, I am connecting with all the future generations in an unbroken timeless chain of culture.³⁵

- 1.41** Mr Danny Chapman, an Aboriginal man, also from the Yuin nation, stated: 'It's our life. We say to you "cultural fishing" so that you can put it in a box ... and create fences ... but it's not that. We've got to be able to find a better language to communicate to you about what we feel'.³⁶ A similar sentiment was expressed by Mr Wally Stewart, who emphasised: 'It's not just about our "rights" what they call it. It's part of us. It's who we are down here ... it's there inside us'.³⁷
- 1.42** Evidence provided to the committee by other stakeholders equally captured the concept of cultural fishing as described above by individual Aboriginal fishers. For example:
- fishing is governed by widely recognised cultural laws and cultural norms³⁸
 - fishing does not just provide food, but maintains and strengthens family connections through sharing³⁹
 - fishing knowledge and practice are central to the culture of saltwater people, hence fishing is a way of practising culture⁴⁰
 - cultural education occurs through fishing with younger generations, and this includes learning cultural laws related to fishing practices⁴¹
 - fishing provides an opportunity for family and community to come together and share knowledge⁴²
 - trade and barter of goods is a long standing cultural practice.⁴³
- 1.43** Professor Kate Barclay, from the Climate, Society and Environment Research Centre with the University of Technology, noted that, while a distinction between commercial fishing and

³⁵ Submission 14, Mr Kevin Mason, pp 5-6.

³⁶ Evidence, Mr Danny Chapman, community member and representative for the South Coast, NSW Aboriginal Land Council, Narooma community roundtable, 28 July 2022, p 13.

³⁷ Submission 13, Mr Wally Stewart, p 3.

³⁸ Submission 23, Australian Institute of Aboriginal and Torres Strait Islander Studies (hereafter referred to as AIATSIS), p 4; Evidence, Ms Kate Thomann, Executive Director, Research and Education Group, AIATSIS, 19 August 2022, p 12.

³⁹ Submission 9, Professor Kate Barclay, Director, Climate, Society and Environment Research Centre, University of Technology, Sydney, p 5.

⁴⁰ Submission 17, Dr Janet Hunt, Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University, p 5; Submission 23, AIATSIS, p 4.

⁴¹ Submission 23, AIATSIS, p 4; Submission 31, Katungal Aboriginal Corporation Regional Health and Community Services, p 2.

⁴² Submission 35, Dr Michelle Voyer, Senior Research Fellow, Australian National Centre for Ocean Resources and Security, p 1.

⁴³ Evidence, Dr Paul Cleary, Policy and Advocacy Lead, First Peoples Program, Oxfam Australia, 19 August 2022, p 9; Submission 42, Dr Natalie Kwok, Consultant Anthropologist, pp 19-23.

cultural fishing should be made for regulatory purposes, trade does have a place in cultural fishing and should be accommodated in the implementation of section 21AA.⁴⁴

1.44 Dr Kwok also provided evidence to show the continuing practice of culture linked to the sea by Aboriginal people on the South Coast. She drew on information from many sources, including archaeological evidence, historical (written) evidence, oral histories from Aboriginal fishers, and current practices in Aboriginal communities. This evidence included:

- middens⁴⁵ and other archaeological sites, which provide evidence of the collection and consumption of fish, molluscs and crustaceans as far back as 20,000 years ago
- the practice of holiday camps, held at traditional locations where families return each year, which continue to this day
- family attachments to particular areas, where attachments have been maintained either through permanent residence or frequent visiting.⁴⁶

Abalone and cultural fishing on the South Coast

1.45 Many submissions from Aboriginal cultural fishers outlined how they were taught to dive, collect and share abalone, and their pride in providing abalone for their family and community. Various submissions described the skills required to be a successful diver for seafood, particularly abalone. These skills were learned and refined over many years, with diving connected to their identity.⁴⁷

1.46 Dr Kwok identified abalone and diving for seafood as 'iconic' within South Coast Aboriginal culture, noting that diving for abalone requires skill and knowledge.⁴⁸ In his evidence, Dr Paul Cleary, Policy and Advocacy Lead, First Peoples Program, Oxfam Australia, emphasised the physicality associated with this Aboriginal diving practice: 'They don't even have a tinnie. They've actually got a screwdriver or a small knife and a snorkel and a wetsuit, and they're free diving, and they're extremely healthy people'.⁴⁹

1.47 Dr Kwok also observed that the retention of the old European term 'muttonfish' for abalone on the South Coast indicates it has long been part of the diet and was a highly valued food source well before abalone became a commercial product.⁵⁰

⁴⁴ Submission 9, Professor Kate Barclay, Director, Climate, Society and Environment Research Centre, University of Technology, Sydney, p 1.

⁴⁵ A midden is a mound made up of the remains of shells, fish bones, charcoal, the bones of mammals and, sometimes, tools. Middens are generally found at important sites where people from the area, or even neighbouring areas, have gathered. On the coast, they are found near places of good fishing or abundant shellfish, such as in estuaries, on beaches and dunes, and near rocky headlands. See https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0010/656317/FINAL_LHIMP_mod4.pdf

⁴⁶ Submission 42, Dr Natalie Kwok, Consultant Anthropologist, pp 3, 4 and 9.

⁴⁷ Submission 25, Mr Adrian Connolly, p 1; Submission 26, Mr Craig Wellington, p 1; Submission 28, Mr Ewan Thomas, p 1.

⁴⁸ Submission 42, Dr Natalie Kwok, Consultant Anthropologist, p 12.

⁴⁹ Evidence, Dr Cleary, 19 August 2022, p 11.

⁵⁰ Submission 42, Dr Natalie Kwok, Consultant Anthropologist, p 18.

- 1.48 In this regard, Mr Wally Stewart, Aboriginal cultural fisher and Elder, submitted that there was no commercial interest in abalone when he was growing up, but it was a common, easily collected seafood in his community: 'They were like bread and butter ...'.⁵¹

Cultural fishing practices and resource management

- 1.49 Individual submissions highlighted the connection between cultural fishing practices and resource management and sustainability.

- 1.50 Several Aboriginal fishers described how resource management was captured in the customs and lore handed down from Elders, often with respect to abalone. Aboriginal people were taught to:

- take only what is needed for family and community
- always leave some for later
- catch medium fish, not the large sized breeders
- only fish for abalone from the shore
- rotate sites that are fished so that areas have the opportunity to recover
- not take all the lobsters from a nest.⁵²

- 1.51 Many submissions noted that Aboriginal people have maintained these resources for thousands of years. In her evidence, Ms Kayeleen Brown, Chief Executive Officer, Katungal Aboriginal Corporation Regional Health and Community Services, stated that sustainability of resources was not an issue for 100,000 years of Aboriginal existence, and that the *Australia: State of the Environment 2021* report recognised Aboriginal people as the experts at caring for Country.⁵³

- 1.52 Ms Kate Thomann, Executive Director, Research and Education Group, Australian Institute of Aboriginal and Torres Strait Islander Studies, emphasised that cultural fishing encompassed many practices, but that sustainability and resource management was a central element:

...these practices are handed down by generation to generation through Elders to young ones and then that trend continues on, and inherent in that is also protection of species of marine resources due to the very nature of Aboriginal and Torres Strait Islander customary laws and cultural practices, which also affirm and support sustainability of marine resources. It really does sort of encompass that whole sense of community as well, not just cultural transmission but sharing of food, feeding families, leisure and wellbeing, physical health, mental health.⁵⁴

⁵¹ Submission 13, Mr Wally Stewart, p 2.

⁵² Submission 13, Mr Wally Stewart, p 4; Submission 14, Mr Kevin Mason, p 2; Submission 11, Mr Stewart Davison, p 1; Submission 21, Mr John Carriage, pp 4-5.

⁵³ Evidence, Ms Kayeleen Brown, Chief Executive Officer, Katungal Aboriginal Corporation Regional Health and Community Services, Narooma community roundtable, 28 July 2022, p 4.

⁵⁴ Evidence, Ms Kate Thomann, 19 August 2022, p 12.

Committee comment

- 1.53** The committee recognises the significance of cultural fishing to Aboriginal peoples and communities, and how it is an intrinsic part of Aboriginal identity and connection to Country. We acknowledge that cultural fishing is about more than the method or the take, and that it incorporates many aspects such as the obligation to provide for extended family and the wider community.
- 1.54** The committee also understands that resource management is an intrinsic part of Aboriginal fishing practices, such that cultural fishers generally only take only what is needed, ensuring resources are sustainable into the future. In this context, we note the observation from a community member that 'cultural fishing' is a label that can sometimes constrain the understanding of cultural fishing by non-Aboriginal people.
- 1.55** In July 2022, the committee had the privilege of travelling to Narooma on the South Coast of NSW, where we visited the Mystery Bay Aboriginal fish traps and met with community representatives. We were kindly welcomed to Country and had the benefit of discussing and witnessing first-hand the connection Aboriginal cultural fishers felt to Sea Country. This meeting provided an important opportunity for the committee to hear stakeholders' views.
- 1.56** Overall, this inquiry has clearly been important in highlighting the need for cultural fishing to be better promoted and protected. It was also necessary to explore the reasons why the NSW Government failed to commence section 21AA since the provision was passed 13 years ago.
- 1.57** In this regard, the committee notes that the non-commencement of 21AA has been raised as an issue by a number of Aboriginal stakeholders and peak bodies over the years, and has also been raised by members of the Legislative Council, both in the House and in Budget Estimates hearings.
- 1.58** In the next chapter we examine why the section was not commenced, and the effect this has had, and is continuing to have, on Aboriginal cultural fishers, their communities, and the transmission of culture.

Chapter 2 Circumstances related to and the impact of not commencing section 21AA

This chapter discusses why the NSW Government has not commenced section 21AA of the *Fisheries Management Amendment Act 2009*, including its initial steps to establish an advisory council and develop a supporting regulation, along with its later shift to a local management plan approach. The chapter then turns to the impact of not commencing section 21AA on Aboriginal people and the practice of cultural fishing, including higher levels of compliance and prosecution of Aboriginal cultural fishers for fisheries offences. It also considers health and wellbeing impacts and the loss of transmission of culture, arising as a result of Aboriginal fishers not being able to practice cultural fishing in a manner that section 21AA would promote.

The historical reasons for not commencing section 21AA

- 2.1** Throughout this inquiry, the NSW Government maintained that it actively took steps towards commencing section 21AA in Schedule 1 of the *Fisheries Management Amendment Act 2009* until the change of direction to local management plans.
- 2.2** After the 2009 amendments passed, the government's view was that section 21AA, which was part of Schedule 1, and which provided for Aboriginal cultural fishing, required the establishment of the Aboriginal Fishing Advisory Council and development of a supporting regulation.
- 2.3** In 2011, the Aboriginal Fishing Advisory Council was formed, consisting of representatives from the NSW Aboriginal Land Council and NTSCORP; and Aboriginal persons representing different regions of the state.⁵⁵
- 2.4** In the period 2010 to 2015, in order to develop the draft regulation to support the provision, the following activities took place:
- the Aboriginal Fishing Advisory Council met eight times
 - a regulation working group met six times
 - a broader working group was convened, meeting three times
 - state-wide Aboriginal community consultation took place in 2014, which included community meetings attended by 55 Aboriginal people, with six submissions received.⁵⁶
- 2.5** The consultations enabled the development of a draft regulation based on the input of the Aboriginal Fishing Advisory Council.⁵⁷

⁵⁵ *Fisheries Management (General) Regulation 2010*.

⁵⁶ Submission 40, NSW Government, pp 6-7; Tabled document, NSW Department of Primary Industries Fisheries, *Timeline from 2009 to 2022 of NSW Government actions and engagement with Aboriginal stakeholders since the introduction of the Fisheries Management Amendment Act 2009*.

⁵⁷ Tabled document, *Timeline from 2009 to 2022 of NSW Government actions and engagement with Aboriginal stakeholders since the introduction of the Fisheries Management Amendment Act 2009*.

- 2.6** However, according to the NSW Government, before the draft regulation was released for public consultation in 2016, the NSW Aboriginal Land Council, NTSCORP and the Aboriginal Fishing Advisory Council advised the NSW Government they were 'opposed to a state-wide regulation' and wished to explore a local management approach.⁵⁸
- 2.7** Mr Sean Sloan, Deputy Director General Fisheries, NSW Department of Primary Industries, told the committee:
- Since 2016 when AFAC and other key stakeholders advised the New South Wales Government they no longer supported the draft statewide regulation, DPI has been working on alternative place-based arrangements to facilitate cultural fishing, namely local management plans. LMPs provide access to fisheries resources for Aboriginal communities to support their cultural practices and ensure they have greater involvement in local fisheries management, including aspects of self-regulation. Importantly, these plans are community led, with DPI providing support to deliver them.⁵⁹
- 2.8** The Government's view is that section 21AA can only commence if there are regulations in place which regulate the amount of fish taken:
- ... limits must be applied across all fishing sectors, including cultural fishers, in order to appropriately manage the fisheries resource and avoid the potential for detrimental ecological impacts.⁶⁰
- 2.9** Mr Sloan reiterated this position to the committee, advising that if section 21AA were enacted without a regulation, any Aboriginal person would 'be able to conduct cultural fishing without a take or possession limit', which is inconsistent with the department's preference to manage natural resources within the broader framework of sustainability.⁶¹
- 2.10** Therefore, since 2016, the government has shifted its focus to the development and implementation of local management plans, which include bag limits and other regulatory restrictions on cultural fishing activities, as an alternative to commencing section 21AA and a draft regulation.

The move to local management plans

- 2.11** From 2016 to 2020, the NSW Government engaged with three separate Aboriginal communities to develop local management plans in two coastal and one inland area:
- The inland local management plan did not proceed beyond an initial workshop with the Moama/Cummeragunja community in 2018, with the trial deferred 'due to a lack of consensus from the community regarding how to develop and implement the trial'.
 - The Tweed Local Management Plan, which the NSW Government noted has majority community support, is currently being finalised but has not yet commenced.

⁵⁸ Submission 40, NSW Government, p 7.

⁵⁹ Evidence, Mr Sean Sloan, Deputy Director General Fisheries, NSW Department of Primary Industries, 19 August 2022, p 51.

⁶⁰ Submission 40, NSW Government, p 9.

⁶¹ Evidence, Mr Sloan, 19 August 2022, p 50.

- The two year trial of the Birpai Barray (Hastings) Local Management Plan was gazetted in June 2022 in the Hastings (North Coast) area and has officially commenced.⁶²

2.12 Local management plans are developed in accordance with an Engagement Protocol which was first developed with Aboriginal communities and key stakeholders. The NSW Government advised that the length of time taken to complete this engagement work has been impacted by a number of factors, including periods of sorry business, COVID-19 restrictions, and a period of 'relationship, knowledge and capacity building' for the communities and the government.⁶³

2.13 Mr Wayne Anderson, a Birpai Local Aboriginal Land Council community member who was on the steering committee for the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan, praised the consultation and development process. Important outcomes included that the Local Management Plan allows the community to use cultural fishing methods that were previously illegal, and to legally collect pipis.⁶⁴

2.14 The Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan is a public document that includes information on:

- the geographical area covered by the plan
- fishing equipment allowed to be used
- species of fish that can be taken
- take, possession and size limits
- management of the trial, including an evaluation process.⁶⁵

2.15 The plan includes criteria for eligibility to be recognised as a local cultural fisher, and indicates that the Steering Committee for the plan will provide the Deputy Director General of the Department of Primary Industries, with the details of these individuals. The plan also allows for the option for local cultural fishers to request the issue of identification from the agency.⁶⁶

Impacts of not commencing section 21AA on Aboriginal people and the practice of cultural fishing

2.16 The non-commencement of section 21AA means Aboriginal fishers are currently subject to limits on their take and how they process their catch, which may conflict with traditional cultural

⁶² Submission 40, NSW Government, p 8; Tabled document, *Timeline from 2009 to 2022 of NSW Government actions and engagement with Aboriginal stakeholders*, 19 August 2022, p 2.

⁶³ Submission 40, NSW Government, pp 8-9.

⁶⁴ Submission 47, Mr Wayne Anderson, Member, Aboriginal Fishing Advisory Council, and Member, Steering Committee for the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan Trial, pp 4-5.

⁶⁵ Supplementary information, NSW Department of Primary Industries, pp 9-79; NSW Department of Primary Industries, *Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan*, June 2022, https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0016/1410406/DOC22-31552-Att-A-Birpai-Barray-Hastings-Aboriginal-Cultural-Fishing-Local-Management-Plan-Trial-Plan.pdf

⁶⁶ *Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan*, June 2022, pp 11-12 and 14-15.

fishing practices. While interim access arrangements are in place to allow cultural fishing, and cultural fishing permits can provide greater access for cultural fishing needs, the committee received evidence that the failure to commence section 21AA has caused significant impact on Aboriginal people and communities.

- 2.17** Perhaps the most significant impact discussed during this inquiry related to compliance activities by the Fisheries division of the Department of Primary Industries against Aboriginal fishers, particularly on the South Coast, and often related to abalone offences. The committee also heard concerns about mental health and wellbeing impacts on Aboriginal people and communities, and concerns related to the loss of transmission of culture.

Compliance and prosecution impacts

- 2.18** Many inquiry stakeholders contended that Aboriginal people are over-represented in prosecutions and compliance activity related to fisheries offences, particularly on the South Coast.
- 2.19** The *Fisheries Management Act 1994* contains legal penalties for contravening fish size, bag and possession limits, especially for high value species such as abalone and lobster.⁶⁷
- 2.20** Mr Tony McAvoy SC and Mr John Waters SC, Barristers, noted that the *Fisheries Management Amendment Act 2009* introduced greater penalties and increased regulation of fishing, such as:
- notions of 'commercial quantities'
 - 'indictable quantities' and 'indictable species'
 - 'trafficking in fish'
 - penalties 10 times the value of the fish taken
 - escalating penalties for second or subsequent offences.⁶⁸
- 2.21** Under the legislation, trafficking includes 'possessing' fish of an 'indictable quantity' or 'indictable species', with the maximum penalty for trafficking being imprisonment for 10 years.⁶⁹
- 2.22** Mr McAvoy and Mr Waters noted that in the absence of the commencement of section 21AA, which explicitly protects the right of Aboriginal people to continue their cultural fishing practices, these amendments have resulted in numerous charges against Aboriginal fishers since 2010.⁷⁰
- 2.23** The committee was provided with various data to show how Aboriginal fishers account for a high proportion of those being charged and/or convicted of fishing offences. In its submission, Oxfam Australia provided the following table (Table 1) to show the number of fisheries

⁶⁷ *Fisheries Management Act 1994*, ss 16, 17, 17A, 17B, 17C, 18 and 18A.

⁶⁸ Submission 34, Mr Tony McAvoy SC and Mr John Waters SC, pp 10-11.

⁶⁹ *Fisheries Management Act 1994*, s 21B.

⁷⁰ Submission 34, Mr Tony McAvoy SC and Mr John Waters SC, pp 10-11.

prosecutions in NSW between 1996 to 2020. It noted that of all cases before the courts for fisheries offences in this period, 31 per cent involved prosecutions of Aboriginal fishers.⁷¹

Table 1 Fisheries prosecutions in NSW, 1996-2000

| TABLE 1 Fisheries prosecutions in NSW, 1996–2020 | | | | | | |
|---|------------------|------------------------|------------------------|-------|--|---------------|
| | Custody (prison) | Custodial alternatives | Community-based orders | Fines | Conditional release without conviction | No conviction |
| Number Aboriginal | 30 | 23 | 93 | 279 | 6 | 5 |
| Percentage Aboriginal | 67 | 58 | 59 | 26 | 18 | 7 |
| Times over-represented | 22 | 19 | 19 | 9 | 6 | 2 |
| Additional Aboriginal* | 1 | 3 | 23 | 323 | 13 | 15 |

Source: NSW Bureau of Crime Statistics and Research
* These additional figures obtained from applying the Indigenous percentage to prosecutions with no Indigenous status declared.

2.24 Supplementary evidence was provided by Oxfam Australia, based on data from the NSW Bureau of Crime Statistics and Research on penalties under the *Fisheries Management Act 1994* for the period 2017 to 2021. The data showed:

- of the 4 custodial sentences handed down, 1 was for an Aboriginal person, 1 was for a non-Aboriginal person and 2 the status was unknown
- of the 13 custodial alternatives imposed, 7 were for Aboriginal persons, 2 were for non-Aboriginal persons and in the remaining 4 the status was unknown
- of the 27 non-custodial community-based orders made, 3 were for Aboriginal persons, 16 were for non-Aboriginal persons and in the remaining 8 cases, Aboriginal status was unknown
- of 187 fines imposed, 9 were for Aboriginal people, 79 were for non-Aboriginal people, and in 99 cases the Aboriginal status was unknown.⁷²

2.25 The Department of Primary Industries Fisheries also provided the committee with prosecution statistics from 2009 to present. Showing some regional variances, it noted that inland fishing compliance issues with Aboriginal fishers are negligible, with only 11 non-custodial sentences in the last 13 years to date.⁷³

2.26 Overall, the statistics provided by the department of fisheries prosecutions showed the following outcomes:

⁷¹ Submission 30, Oxfam Australia, p 4.

⁷² Answers to questions on notice, Dr Paul Cleary, Policy and Advocacy Lead, First Peoples Program, Oxfam Australia, 23 September 2022, p 4.

⁷³ Supplementary information, NSW Department of Primary Industries Fisheries, 25 July 2022, p 8.

- 38 of 65 people given a jail sentence or suspended sentence were Aboriginal people (34 of which were Aboriginal people from the South Coast)
- 6 of the 12 people given intensive corrections orders were Aboriginal people (all 6 Aboriginal people being from the South Coast)
- 176 of the 1020 non-custodial sentences given were Aboriginal people (113 of which were Aboriginal people from the South Coast).⁷⁴

2.27 According to Dr Paul Cleary, Policy and Advocacy Lead, First Peoples Program, Oxfam Australia, the data provided by the Department of Primary Industries may have underestimated the proportion of Aboriginal people being prosecuted from 2016 onwards.⁷⁵ In his answers to questions on notice, Dr Cleary suggested that this is likely because the department has included in the total numbers the cases in which Aboriginal status is unknown.⁷⁶

2.28 The committee also explored to what extent these offences relate to abalone offences on the South Coast. The NSW Government indicated that 'of the 45 matters that the NSW Government is currently prosecuting involving Aboriginal persons, a total of 37 involve abalone offences from the South Coast'. It noted that:

- 11,462 abalone have been seized in connection with the 37 offences on the South Coast
- 11 of these matters involve the illegal sale of 7,609 abalone.⁷⁷

2.29 Noting that the bag limit for abalone is 2 per person per day for recreational fishers and 10 per person per day under the interim access arrangements, the NSW Government explained that some of the sentences resulting in imprisonment have occurred due to recidivist offenders being found guilty of possessing indictable quantities of abalone, ranging from 51 to 736 abalone. The government also noted that some offenders had charges against them relating to threats, abuse and obstruction of Fisheries officers.⁷⁸

2.30 The committee heard various concerns about these prosecutions, including contention as to whether certain people were practising cultural fishing or taking abalone to sell and profit.

2.31 Dr Cleary provided his views on some of the court cases in which Aboriginal people were prosecuted for abalone fishing:

I ... followed some of the court cases. These are people that are described by the Government as "recidivists". I would actually describe them as people who are immersed in their culture, who have a very strong belief in sustainability and working with their communities, helping to feed their communities, as well as doing some trading and earning a living. But they are very much people who are culturally rich, I would say. I think this claim that they're somehow involved in organised crime—I've

⁷⁴ Supplementary information, NSW Department of Primary Industries Fisheries, 25 July 2022, p 8

⁷⁵ Evidence, Dr Paul Cleary, Policy and Advocacy Lead, First Peoples Program, Oxfam Australia, 19 August 2022, p 10.

⁷⁶ Answers to questions on notice, Dr Paul Cleary, Policy and Advocacy Lead, First Peoples Program, Oxfam Australia, received 23 September 2022, p 1.

⁷⁷ Submission 40, NSW Government, p 14.

⁷⁸ Submission 40, NSW Government, p 14.

sat in on some of these cases, and there has been no evidence whatsoever that organised crime has been involved in some of these so-called recidivist cases.⁷⁹

- 2.32** Dr Cleary subsequently discussed the case of Mr Keith Nye who was charged with being in possession of approximately 500 abalone. The abalone was frozen and had been collected by Mr Nye over a period of months from people in his community, who, in Dr Cleary's view, had been 'fishing in their culture and in a sustainable way'. Mr Cleary explained that evidence was given in court by an anthropologist that Mr Nye was acting as a 'go between' in order to trade the abalone with non-Aboriginal people. Dr Cleary went on to say more generally '... from what I've seen, what they're taking they are feeding their communities. They might be selling a bit on the side as well; as I say, that's part of their culture'.⁸⁰
- 2.33** Mr Bill Cooley, an Aboriginal fisher, gave evidence to the committee of his fishing practice and encounters with Fisheries compliance officers:
- Diving for abalone and fishing ... I'd been taught as a child ... if times get tough, that's what I'd do. There have been so many instances where I've gone to do that, as I've been taught by my Elders ... and I've been apprehended by the Fisheries. They've taken my catch off me ... confiscated all the diving gear that was associated with the catch ...⁸¹
- 2.34** In response to questioning from the committee about how many fish were in his possession at the time of being apprehended, Mr Cooley indicated he had 50 abalone. He said he was being charged on the basis of the assumption that he was intending to sell his take. He said that this was a common occurrence, and that 'every judge in their summing up will refer to the "black market". We're not earning black market dollars, we're out there getting a feed'.⁸²
- 2.35** Concerns were put forward that Fisheries officers have a culture of targeting Aboriginal fishers due to a poor understanding of what constitutes cultural fishing, including cultural aspects related to trade and barter and the expectation to provide catch to family.
- 2.36** Some individual fishers highlighted how they have felt racially profiled, targeted and subject to over-surveillance by Fisheries officers, often making them feel scared and harassed.⁸³
- 2.37** Community members at the Narooma roundtable meeting shared some examples on this point. Mr Danny Chapman recounted the experience of Mr Kevin Mason, a 72 year old cultural fisher, who was chased out of the water and physically apprehended, with all fisheries related charges later being dropped. Mr Keith Nye, representative of Mogo Aboriginal Land Council and the

⁷⁹ Evidence, Dr Cleary, 19 August 2022, p 8.

⁸⁰ Evidence, Dr Cleary, pp 9 and 10.

⁸¹ Evidence, Mr Bill Cooley, 19 August 2022, p 17.

⁸² Evidence, Mr Cooley, 19 August 2022, p 20.

⁸³ See, for example, Submission, NSW Aboriginal Land Council, p 7; Submission 23, AIATSIS, p 10; Submission 21, Mr John Carriage, p 7; Submission 26, Mr Craig Wellington, p 2 and 4; Evidence, Mr Troy Tungai, 19 August 2022, p 17; Mr Nicholas Glover, 19 August 2022, p 19; Submission 28, Mr Ewan Thomas, p 1; Submission 24, Mr Troy Tungai, p 1.

Mogo area, told the committee that he was characterised as a 'danger' or 'threat' to the ocean during his court appearance, and was accused of being involved in 'drug trading'.⁸⁴

- 2.38** Some stakeholders argued that the withdrawal of court cases is one indication that Fisheries officers are not able to make sound decisions as to whether someone is practising cultural fishing. The committee also heard how this is particularly unfair for Aboriginal fishers, given the time, stress and costs associated with court appearances.
- 2.39** Based on its analysis of data from the NSW Bureau of Crime Statistics and Research in the 18 months to June 2021, Oxfam Australia noted that 70 Aboriginal people and 12 non-Aboriginal people were charged with fisheries offences that did not result in a court outcome.⁸⁵
- 2.40** Similar evidence was provided by Mr Tony McAvoy SC, Barrister, who commented on his experience representing those charged with fishing offences. He noted that all nine matters he has been involved in since 2014 have been withdrawn.⁸⁶
- 2.41** Evidence from the NSW Department of Primary Industries Fisheries indicated that since December 2009 there have been 24 cases against Aboriginal people which have been withdrawn by the department. Some of these charges were withdrawn as a result of defendants producing 'information in support of a Native Title defence after proceedings were commenced'.⁸⁷
- 2.42** In Mr McAvoy's view, Fisheries officers have not been trained to make effective on the spot decisions as to whether an Aboriginal person is practising cultural fishing. He explained that this often results in drawn out court cases, with significant time and expense involved for those charged.⁸⁸
- 2.43** Evidence was provided by Mr Sean Sloan, Deputy Director General Fisheries, NSW Department of Primary Industries, and Ms Sarah Fairfull, Director, Aboriginal Fishing and Marine and Coastal Environment, NSW Department of Primary Industries, about the training provided to fisheries compliance officers to determine if they are dealing with someone who has native title rights. If the person identifies as Aboriginal, and as a native title claimant, then they have specific work instructions where they will ask a series of questions that aim to identify that person. However, they noted that where there are commercial quantities of fish it is very difficult for the fisheries officer to determine whether the fishing is taking place in accordance with native title rights or is in fact illegal activity. If they are still unsure the matter will be referred to the court.⁸⁹

⁸⁴ Evidence, Mr Danny Chapman, community member and representative for the South Coast, NSW Aboriginal Land Council, Narooma community roundtable, 28 July 2022, p 6; Evidence, Mr Keith Nye, Mogo Aboriginal Land Council, Narooma community roundtable, 28 July 2022, p 8.

⁸⁵ Submission 30, Oxfam Australia, p 4.

⁸⁶ Evidence, Mr Tony McAvoy SC, Barrister and Representative of the Aboriginal Legal Service (NSW/ACT), 19 August 2022, pp 34-35.

⁸⁷ Answers to questions on notice, NSW Department of Primary Industries Fisheries, received 5 October 2022, p 4.

⁸⁸ Evidence, Mr McAvoy SC, 19 August 2022, pp 34-35.

⁸⁹ Evidence, Mr Sloan, 19 August 2022, p 48.

- 2.44** In the absence of protections against prosecution which would be provided if section 21AA was commenced, some Aboriginal cultural fishers are claiming a defence of native title to prosecutions for fishery offences.
- 2.45** This defence is only possible if a native title claim or right is recognised to exist. As explained by Mr McAvoy, where a native title determination has already been made it is relatively simple to use this as a defence against prosecution. In the absence of a native title determination, the onus is on the accused to provide proof of the existence of native title, and that they are a recognised native title holder. This is a time consuming process, requiring months of preparation and the hearing of expert and non-expert evidence by the court.⁹⁰
- 2.46** Legal support to run this type of defence may also be challenging to obtain. The Aboriginal Legal Service (NSW/ACT) noted that it does not have sufficient resources to support native title defences.⁹¹
- 2.47** Mr Wally Stewart, Aboriginal cultural fisher and advocate and convenor South Coast Aboriginal Fishing Rights Group, pointed to a lack of understanding of native title rights amongst Aboriginal fishers, who were often advised to plead guilty to minimise penalties. He observed that once Aboriginal fishers started using native title as a defence in court the charges started to be withdrawn.⁹²
- 2.48** Other evidence put before the committee also indicated that native title defences have led to charges being withdrawn. For example, Mr Kevin Mason, Aboriginal cultural fisher, submitted that prosecutions against his son for illegal fishing have been withdrawn when the defence of native title was raised.⁹³
- 2.49** The Australian Institute of Aboriginal and Torres Strait Islander Studies also noted that while charges have 'often been dropped' when native title was raised as a defence in court, this has not protected Aboriginal people from being questioned when fishing or from being obliged to appear in court.⁹⁴
- 2.50** Separate to this, several Aboriginal fishers also highlighted a concern with prosecution activity involving the confiscation of their fishing equipment and gear.⁹⁵ Mr Sloan gave evidence that Fisheries officers have 'powers of seizure' in order to gather evidence. Powers of seizure can be used where a serious offence has been committed, and equipment, even vehicles and boats can be seized.⁹⁶
- 2.51** The committee also received evidence about the financial impacts of compliance actions on Aboriginal people, including the legal fees associated with court action, large financial penalties,

⁹⁰ Submission 34, Mr Tony McAvoy SC and Mr John Waters SC, p 6.

⁹¹ Submission 43, Aboriginal Legal Services (NSW/ACT), p 3.

⁹² Submission 13, Mr Wally Stewart, pp 5-6.

⁹³ Submission 14, Mr Kevin Mason, p 6.

⁹⁴ Submission 23, Australian Institute of Aboriginal and Torres Strait Islander Studies (subsequently referred to as AIATSIS), p 6.

⁹⁵ See, for example, Evidence, Mr Cooley, 19 August 2022, p 17; Evidence, Mr Kevin Mason, 28 July 2022, p 11.

⁹⁶ Evidence, Mr Sloan, 19 August 2022, p 48.

loss of income due to jail time, inability to obtain work due to criminal records and cancellation of car registration or driver's licence due to unpaid fines.⁹⁷

- 2.52** In particular, the committee received evidence about the substantially large fines given to Aboriginal fishers for breaching fishing laws, along with bans being imposed which prevent people from going near the water.
- 2.53** Mr Danny Chapman, Chair, NSW Aboriginal Land Council, gave an example of a fine of \$35,000 for one person, and at least two instances of convicted individuals being banned from going near the water for five and seven years respectively.⁹⁸ Evidence from Mr John Carriage and Mr Troy Tungai indicated that they each were banned from the water for two years, although Mr Tungai's ban was subsequently overturned. In addition, Mr Carriage was banned from possessing diving equipment such as goggles, flippers or a wetsuit.⁹⁹
- 2.54** At the Narooma community roundtable meeting, Mr Chapman told the committee about the impact of fines on his sons. They received fines of \$10,000 and \$15,000 respectively. Mr Chapman explained that the combined effect of paying back the fines and having a criminal conviction meant his sons did not have driving licences and could not obtain employment.¹⁰⁰
- 2.55** Other individual submissions listed the following penalties:
- three court appearances, three lots of diving gear confiscated and fines totalling over \$16,000¹⁰¹
 - two fines, one of approximately \$2,000 and one of \$5,000 to \$6,000, and diving gear being confiscated¹⁰²
 - a total of \$30,000 in fines from nine different offences, with diving gear confiscated each time.¹⁰³
- 2.56** The case study set out in the box below outlines the case of Mr Anthony Henry, who was prosecuted for abalone offences. Mr Henry explained how he felt this was unfair, considering he was practising cultural fishing, and how the conviction has led to significant legal, financial and family impacts.

⁹⁷ Evidence, Dr Janet Hunt, Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University 19 August 2022, p 29; Evidence, Ms Kayeleen Brown, CEO, Katungal Aboriginal Corporation Regional Health and Community Services, Narooma community roundtable, 28 July 2022, p 4; Evidence, Ms Kate Thomann, Executive Director, Research and Education Group, AIATSIS, 19 August 2022, p 15; Submission 20, Name suppressed, p 2.

⁹⁸ Evidence, Mr Danny Chapman, Chair, NSW Aboriginal Land Council, 19 August 2022, p 31.

⁹⁹ Evidence, Mr Troy Tungai and Mr John Carriage, 19 August 2022, p 17.

¹⁰⁰ Evidence, Mr Chapman, 28 July 2022, p 13.

¹⁰¹ Submission 18, Mr Nicholas Glover, p 2.

¹⁰² Submission 19, Mr Douglas Seymour, pp 2-3.

¹⁰³ Submission 24, Mr Tungai, p 2.

Case study: The prosecution of Djirringanj man and cultural fisher, Anthony Henry, for abalone fishing¹⁰⁴

Anthony Henry is a 21-year-old Djirringanj man from Moruya on the South Coast. He taught himself how to dive, and also taught his brothers. Mr Henry has grown up diving and providing seafood for family, extended family and Elders.

In 2019 Mr Henry and three other Koori men were diving to collect abalone for a large family gathering for his brother's birthday. They were pulled up by Fisheries officers on the rocks and had their diving equipment confiscated.

Two years later Mr Henry was served court papers relating to these offences. Another year of numerous court dates passed before the prosecutors settled on the charges. In his submission, Mr Henry explained that he felt he was forced to plead guilty, despite being part of the current native title claim on the South Coast, which while registered, has not been finally determined. While he had the option of using native title as a defence, this would have cost him \$30,000 to \$40,000 in legal fees.¹⁰⁵

Prior to his court date on 8 August 2022, Mr Henry was told he was facing \$50,000 in fines for his alleged offences. On the day of the hearing, he was told this was a mistake, and that the fine was in fact \$94,000.

Although he was originally charged with 'trafficking' abalone, this charge was ultimately dropped. Mr Henry questioned how he could be charged with trafficking while still sitting on the rocks with his catch. He pointed out that shucking abalone on the rocks is a common cultural practice, as demonstrated by the many middens up and down the South Coast, created by his ancestors leaving their shells on the rocks.

In addition to a total fine of \$11,300 (\$3,000 which was for shucking abalone on the rocks), Mr Henry was given 50 hours of community service and a 12 month community corrections order. As a full time worker the community service hours will interfere with his job. If he does not pay the fine, his car registration may be cancelled and he may lose his licence, which will affect his ability to do his job. In addition, he is still to pay back the loan for hiring a lawyer.

Mr Henry stated: 'The whole process has not just affected me but my family as well with the stress of the last three years. Even though the court has finished, the outcome will affect me for years to come'.

- 2.57** Taking into account the significant jail sentences imposed for some fisheries offences, and the large fines and flow on employment and financial impacts arising as a result of a conviction, several stakeholders contended that prosecutions and compliance activity by the Department of Primary Industries is inconsistent with the NSW Government's commitments to Closing the Gap, particularly in the areas of justice and health targets.
- 2.58** The NSW Government has made commitments to work with and improve the lives of Aboriginal people through the National Agreement on Closing the Gap. The purpose of the National Agreement on Closing the Gap is to overcome the inequality in outcomes experienced

¹⁰⁴ Submission 48, Mr Anthony Henry, p 1.

¹⁰⁵ Evidence to the committee from Mr McAvoy SC explained that that using native title as a defence requires the defendant to prove that his right to fish exists, that he was entitled to that right, and that the way he was fishing was an exercise of those rights. Evidence, Mr McAvoy SC, 19 August 2022, p 34.

by Aboriginal and Torres Strait islander people and achieve life outcomes equal to all Australians.¹⁰⁶

2.59 Dr Janet Hunt, from the Centre for Aboriginal Economic Policy Research, Australian National University, contended that the issues on the South Coast are at odds with the Closing the Gap targets, in particular the NSW Government's commitments in the area of health, employment and reducing incarceration.¹⁰⁷

2.60 Mr Chapman similarly argued that the government 'is not making good on commitments to Closing the Gap', stating:

The New South Wales Government has an obligation to meet its commitment outlined in the National Agreement on Closing the Gap. Nevertheless, despite the Government's commitments to reduce incarceration rates of Aboriginal people, to recognise Aboriginal people's rights and interest in the sea and to transform the way government and its agencies work, the New South Wales Government continues to criminalise Aboriginal cultural practices.¹⁰⁸

2.61 Other stakeholders echoed this view, calling for the unique nature of Aboriginal cultural fishing to be recognised and promoted, and for the NSW Government to commence section 21AA and demonstrate its commitment to its obligations under the Closing the Gap agreement.¹⁰⁹

Health and wellbeing impacts

2.62 In addition to Aboriginal people being prosecuted for practising cultural fishing, the committee also heard about other health and wellbeing impacts arising as a result of the non-commencement of section 21AA.

2.63 It was clear from the evidence that cultural fishing is vital to the health and wellbeing of the Aboriginal community. Cultural fishing provides:

- fresh seafood, which is a readily available source of protein
- exercise for the fishers
- reinforcement of social and cultural bonds, through sharing of the catch and passing on cultural fishing knowledge
- a form of relaxation and stress management.¹¹⁰

2.64 Mr Troy Tungai explained why his cultural fishing practices were so important and why he will not stop diving and practising his culture:

¹⁰⁶ Closing the Gap, *National Agreement on Closing the Gap*, At a Glance, <https://www.closingthegap.gov.au/national-agreement>

¹⁰⁷ Evidence, Dr Hunt, 19 August 2022, p 29.

¹⁰⁸ Evidence, Mr Chapman, 19 August 2022, p 31.

¹⁰⁹ See, for example, Evidence, Ms Mishka Holt, Principal Solicitor, NTSCORP, 19 August 2022, p 33; Evidence, Mr McAvoy SC, 19 August 2022, p 38.

¹¹⁰ Submission 31, Katungal Aboriginal Corporation Regional Health and Community Services, p 2; Submission 23, AIATSIS, p 4.

I've told them I'm not going to stop diving because it provides us with our food in some way. I've taught my children. I've got two boys and five girls, and they all know how to dive. If they get hungry or whatever, they just go and get their own feed. It's also good for our Elders. That's why our Elders have got sugar diabetes, heart problems, kidney problems. You're not allowed to go and get their food for them no more because they've got to be down on the rocks, or 100 metres within the water's edge. Some of them Elders can't get out of the House. When I'd go to get a feed for them I've been prosecuted for it. I've been jailed for it, so what else can I do?¹¹¹

- 2.65** Mr Craig Wellington stated that 'in the water, you just feel at peace ...'.¹¹²
- 2.66** Numerous submissions indicated that the inability to continue this cultural practice legally has meant reduced access to fresh, healthy seafood in Aboriginal communities. Several stakeholders highlighted that this has resulted in poor nutrition and poor health.¹¹³
- 2.67** Mr Wally Stewart expressed strong views about the impact of compliance actions on the health and wellbeing of his community:
- It scared a lot of people: scared them out of the water; changed their diet; sent people to jail to come out with mental health issues and not able to understand why they were put into jail for cultural fishing; their families breaking up while they were in jail because they were the bread winners; Elders and people who couldn't go fishing lost those people that would share their resources with them. Fishing laws, that were wrong, destroyed people and it ripped right through our community.¹¹⁴
- 2.68** Several Aboriginal community members also reported reduced physical and mental health outcomes as an impact of not being able to practice cultural fishing. This included putting on weight and becoming diabetic. Some also highlighted how being able to fish provides an outlet and an opportunity to get together with other fishers. Unable to dive, Aboriginal men reported they were getting less physical exercise, and smoking and drinking more.¹¹⁵
- 2.69** Ms Kayeleen Brown, CEO of the health and medical peak body on the South Coast, Katungal Aboriginal Corporation Regional Health and Community Services, described the impact of reduced cultural fishing on the community '... chronic disease, comorbidities, mental health, drug and alcohol and long-term disability impacts stemming from denial of access to staple traditional diets'.¹¹⁶
- 2.70** Emphasising that cultural fishing has physical and mental health benefits for Aboriginal people, Dr Cleary stated:

¹¹¹ Evidence, Mr Troy Tungai, 19 August 2022, p 17.

¹¹² Submission 26, Mr Craig Wellington, p 2.

¹¹³ Submission 31, Katungal Aboriginal Corporation Regional Health and Community Services, p 4; Submission 42, Dr Natalie Kwok, Consultant anthropologist, p 37; Submission 9, Professor Kate Barclay, Director, Climate, Society and Environment Research Centre, University of Technology Sydney, p 4.

¹¹⁴ Submission 13, Mr Wally Stewart, p 2.

¹¹⁵ Submission 5, Mr Troy Pender, p 1; Submission 13, Mr Wally Stewart, p 6; Submission 21, Mr John Carriage, p 9; Submission 25, Mr Adrian Connolly, p 5.

¹¹⁶ Evidence, Ms Brown, Narooma community roundtable, 28 July 2022, p 4.

What was clear when I went down the South Coast and met some of the fishers, both commercial and cultural, was that here you have these fit, healthy people—men and women in their 50s and 60s and 70s—and they're not turning up in our hospitals with complex and costly medical conditions, which you often find, sadly, with many Indigenous people. Here they are, living a healthy and productive lifestyle that had been criminalised.¹¹⁷

Broader impacts, including the loss of transmission of culture

- 2.71** As described above, the non-commencement of section 21AA has meant that Aboriginal people are being charged and prosecuted for carrying out their cultural fishing practices. Some Aboriginal fishers gave evidence to the committee that they have resisted curtailing their practices, despite facing potential charges and prosecutions. Others, however, have reduced their practices or abandoned it entirely, leading to concerns about the loss of transmission of culture in Aboriginal communities.
- 2.72** Dr Michelle Voyer, Senior Research Fellow, Australian National Centre for Ocean Resources and Security, University of Wollongong, summed up the impact of fishing restrictions and compliance actions on Aboriginal communities:
- I've seen expressions of despair, anger and stress as a result of Fisheries restrictions on cultural practices such as beach haul, abalone and lobster fishing. ... These include significant mental health impacts, financial impacts, loss of culture and family breakdowns.¹¹⁸
- 2.73** The Katungal Aboriginal Corporation Regional Health and Community Service discussed the stress in Aboriginal communities being caused by the lack of protection for cultural fishing practices. The service noted that Aboriginal people were not practising their fishing as they fear being harassed or embarrassed if they are accused of breaking the law in front of family or the broader community. The submission speaks of shame and hurt, and even of harassment from non-Aboriginal people who will call Fisheries officers when they see an Aboriginal person planning to fish.¹¹⁹ These fears were echoed in many individual submissions, with the fear of jail time being particularly prevalent.¹²⁰
- 2.74** In its submission, the Australian Institute of Aboriginal and Torres Strait Islander Studies, noted the 'mental burden associated with the criminalisation ... of cultural practices.' Importantly, it pointed out that in the context of historical poor treatment of Aboriginal people by law enforcers, any encounter with fisheries authorities can be traumatic.¹²¹
- 2.75** Ms Kate Thomann, Executive Director, Research and Education Group, Australian Institute of Aboriginal and Torres Strait Islander Studies, explained to the committee how health impacts,

¹¹⁷ Evidence, Dr Cleary, 19 August 2022, p 8.

¹¹⁸ Evidence, Dr Michelle Voyer, Senior Research Fellow, Australian National Centre for Ocean Resources and Security, University of Wollongong, 19 August 2022, p 24.

¹¹⁹ Submission 31, Katungal Aboriginal Corporation Regional Health and Community Services, p 3 and p 4.

¹²⁰ Submission 19, Mr Douglas Seymour, p 3; Submission 33, Mr Wayne Carberry, p 3; Submission 26, Mr Craig Wellington, p 4; Submission 25, Mr Adrian Connolly, p 9.

¹²¹ Submission 23, AIATSIS, p 10.

among other employment and economic impacts associated with not being able to practice cultural fishing, can have extensive and broader impacts across Aboriginal communities:

Throughout our research, we have had evidence of Aboriginal and Torres Strait Islander people self-reporting impacts on their physical health, not being able to go out and actually undertake the cultural fishing practices; mental health, stemming from the inability to be able to practice and support and transmit and share cultural norms or, indeed, the outcomes of cultural fishing activities through sharing of meals; and the economic impact that I mentioned previously. So it has been quite extensive, the impact on families and communities—not just felt within the immediate nuclear family, but also extended families and ripple effects right across the entire Aboriginal community that we're talking about.¹²²

2.76 Mr John Carriage gave evidence to the committee of the impact of prosecutions on himself and his family and the ability to practice his culture:

I've been charged and had big fines on me. They have locked me out of my waters, have taken my resources, my catch, stolen my diving gear and continue to prosecute me and criminalise me with your laws, rules and regulations. Today, because of your orders, I am not allowed to get in the water and teach my little son about the ocean. I have been in jail for doing what I was taught was my right and my responsibility. My old people have never given up our rights to the land, water and our resources. Today I will continue this fight—to fight for my full rights, to fight for my kids. Today my 21-year-old son is going through your court system. I will fight so you don't drag my two-year-old son through it too.

2.77 The loss of culture, arising out of Aboriginal people not being able to practice cultural fishing or being prosecuted for fisheries offences, was also noted by several stakeholders. Dr Janet Hunt summed it up by stating:

Apart from these terrible socio-economic effects, intergenerational cultural transmission is threatened. If the culture is to survive it must be transmitted to younger generations, but fear of harassment and prosecution is impeding that now.¹²³

2.78 Mr Wally Stewart provided a compelling description of the importance of cultural fishing to his community, and how compliance was having an enormous impact on the culture of his people:

All of a sudden, every blackfella is punished. It was confronting to me. Knowing that this is where we come from, this is my father's country, and then we were made out to be criminals for something that we'd be doing forever, around 12,000 years.

...

Until they respect our culture and rights, and our obligations to look after country, there will be no end to this problem. Our mob have already proven this, because they keep going back. They are determined not to let that cultural connection die. There's something inside making them, telling them, to go back and practice culture. It's a good thing, but it's a sad thing that they keep going back to the water and get prosecuted. It just goes to show how strong our mob are and culturally and spiritually connected.¹²⁴

¹²² Evidence, Ms Thomann, 19 August 2022, p 15.

¹²³ Evidence, Dr Voyer, 19 August 2022, p 24; Evidence, Dr Hunt, 19 August 2022, p 23.

¹²⁴ Submission 13, Mr Wally Stewart, pp 3 and 8.

Committee comment

- 2.79** Section 21AA was passed by the Parliament 13 years ago to make special provision for Aboriginal cultural fishing, in recognition of Aboriginal people's unique cultural connection to sea and inland waters.
- 2.80** Despite the will of the Parliament, this special provision was never commenced. While we acknowledge some initial work occurred to form the advisory council and develop a draft supporting regulation, the NSW Government later shifted its plan to a local management approach, apparently on the basis of feedback provided by key stakeholders that there was a preference for a localised approach, instead of a state-wide regulation.
- 2.81** While this may be the case, it is clear that all parties were not on the same page, and that there were continuing concerns held by Aboriginal stakeholders about the NSW Government's plans. In the absence of commencing section 21AA, interim access arrangements and a permit process were put in place, aimed at promoting greater access to fishing for Aboriginal people. The committee examines the effectiveness of these arrangements in more detail in chapter 3.
- 2.82** Taking all of the circumstances into account, the committee is not satisfied that the NSW Government has worked effectively to ensure Aboriginal cultural fishing is adequately supported through the legislative framework. Even the development of local management plans has been extraordinarily slow, and only one plan, for the Hastings area, is in operation.
-

Finding 1

That the NSW Government has failed to effect the will of the Parliament by not commencing Schedule 1 of the *Fisheries Management Amendment Act 2009* to make special provision for cultural fishing.

Finding 2

That the NSW Government's implementation of a local management approach to make provision for cultural fishing has been too slow and lacks the full support of stakeholders.

- 2.83** Unfortunately, in the absence of section 21AA, Aboriginal people have faced significant and unacceptable impacts. In the absence of protection from prosecution for exceeding bag limits, while following their cultural practices, some Aboriginal fishers have been subject to terrible consequences, including jail terms, fines in the thousands of dollars, and reduced mental health and wellbeing as cultural activities are impeded. These consequences have gone beyond individual fishers, with the impacts being felt across the whole community. Sadly, we have heard how this is diminishing the transmission of culture from one generation to the next.
- 2.84** In this respect, the committee notes that much of the evidence presented to this inquiry has concerned access to and conflict over abalone on the South Coast of NSW. We understand that abalone is a highly valued resource, by both Aboriginal and commercial fishers.
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- 2.85** While some in the sector may believe there are cases of illegal poaching or fishing occurring, evidence provided to this inquiry was unable to establish this either way. In our view, it seems that the Department of Primary Industries, in enforcing fisheries legislation and setting other fisheries policies, has been unable to differentiate between cases involving cultural trading practices and cases where people are in the possession of fish for the purpose of a commercial activity without a licence. In particular, it appears there is a difficulty in understanding how trade and barter occur in the context of cultural fishing.

Finding 3

That the regulatory and policy settings applied by the NSW Department of Primary Industries Fisheries mean it is unable to differentiate between trade and barter, as part of cultural fishing practice, and being in possession of fish for the purpose of a commercial activity without a licence.

- 2.86** The committee is also particularly concerned about the deleterious impact compliance actions have had, and continue to have, on the health and wellbeing of Aboriginal people and communities, and the practice and transmission of Aboriginal culture. In the committee's view, this approach and the outcomes occurring as a result of heavy compliance actions, are clearly inconsistent with the NSW Government's commitments to the Closing the Gap Agreement.

Finding 4

That the compliance activity and prosecutions against Aboriginal people for practising cultural fishing, particularly on the South Coast of NSW, are unacceptable and creating perverse outcomes inconsistent with the NSW Government's commitments to the Closing the Gap Agreement.

Recommendation 1

That the NSW Department of Primary Industries immediately, and until Schedule 1 of the *Fisheries Management Act 2009* is commenced:

- cease all surveillance, compliance actions and prosecution actions against Aboriginal cultural fishers
- review and withdraw any penalty infringement notices issued to Aboriginal individuals on the South Coast who were practising cultural fishing.

- 2.87** As we also discuss in the next chapter, all stakeholders within the fishing sector would undoubtedly benefit from education about Aboriginal cultural fishing practices. A key part of this is more comprehensive training for Fisheries compliance officers. The committee heard too many stories from the South Coast where Aboriginal people were harassed and subjected to intense scrutiny while pursuing their cultural practices. The fact that many cases are withdrawn before they go to court also suggests that there has an over-zealous approach by Fisheries officers, and that significant training and education continues to be required.

Recommendation 2

That the NSW Department of Primary Industries review and implement a comprehensive training program for all Fisheries compliance officers, to be delivered in partnership with key Aboriginal stakeholders, covering Aboriginal cultural fishing practices (including the trade or barter of fish for other items) and native title rights.

Recommendation 3

That the NSW Government conduct an independent review of the culture and regulatory practices of the compliance division of the Department of Primary Industries Fisheries, to identify any systemic cultural problems and implement changes which will lift the cultural capability of the organisation.

Chapter 3 The way forward

In the context of the shift to local management plans, this chapter considers whether stakeholders still support the commencement of section 21AA to better promote Aboriginal cultural fishing. In this manner, it examines limitations associated with current regulatory arrangements, including restrictions associated with local management plans and concerns related to permits and the current interim access arrangements. The chapter also looks at sustainability and resource management concerns, and the intersection of native title rights with cultural fishing regulation. In closing, this chapter touches on the potential of having a community fishing licence for Aboriginal fishers, along with the need for better education in the fishing sector about Aboriginal cultural fishing practices.

Is there still support for section 21AA?

- 3.1** Despite the NSW Government's shift to local management plans, many stakeholders expressed their continued support for the commencement of section 21AA. This section looks at these views, and a range of other considerations, including whether current regulatory arrangements are effective. It also examines whether section 21AA needs to be supported by a regulation to ensure fishery stocks are appropriately managed and sustainable for current and future generations.

Calls for section 21AA to be commenced

- 3.2** There was broad dissatisfaction among peak Aboriginal stakeholder groups and other organisations regarding section 21AA not having been commenced. These stakeholders were of the strong view that there was no impediment to the commencement of the provision, and that a regulation was not required as it would operate to limit cultural fishing practices.
- 3.3** The NSW Aboriginal Land Council was of the view that section 21AA should be commenced without accompanying regulations. The NSW Aboriginal Land Council was particularly concerned that the draft regulation developed restricted the practice of cultural fishing as it imposed daily bag and possession limits for Aboriginal cultural fishers.¹²⁵
- 3.4** Similarly, NTSCORP advocated for the commencement of section 21AA without further regulation, noting that regulated take and possession limits are not appropriate for Aboriginal cultural fishing. It highlighted that:
- regulations are not enforceable where Aboriginal people are fishing in according with their native title rights
 - regulations are not in keeping with the objects of the Act introduced in 2009 to protect and promote Aboriginal cultural fishing
 - regulations will result in the continuing prosecutions of Aboriginal people
 - Aboriginal communities already regulate their fishing take through traditional law and custom.¹²⁶

¹²⁵ Submission 22, NSW Aboriginal Land Council, pp 9-10.

¹²⁶ Submission 41, NTSCORP, pp 6-7.

- 3.5** Mr Tony McAvoy SC and Mr John Waters SC, Barristers, submitted that in the absence of 21AA, the objects of the *Fisheries Management Act 1994*, to 'recognise, promote and protect' cultural fishing are not being met.¹²⁷
- 3.6** The Australian Institute of Aboriginal and Torres Strait Islander Studies also contended that there are no barriers to the commencement of section 21AA. It noted that local management plans could complement section 21AA.¹²⁸
- 3.7** There was also unanimous support for the commencement of section 21AA from all the participants at the Narooma community roundtable on 28 July 2022, which included representatives from key Aboriginal stakeholder groups and individual cultural fishers. At that meeting, Mr Robert Chewying, of the South Coast Aboriginal Fishing Rights Group, stated: 'Section 21AA not being enacted has had hideous consequences. It's all tied to cultural practices and our rights have been ignored'.¹²⁹
- 3.8** The submission from Oxfam Australia noted that implementation of section 21AA would in effect implement the National Indigenous Fishing Principles, which provided that 'states can voluntarily recognise native title rights and interests in fisheries' without the need to recognise claims.¹³⁰
- 3.9** Commercial fishing stakeholders presented a slightly different view to the committee, suggesting the need for Aboriginal cultural fishing to be regulated, similar to commercial and recreational fishing, to ensure resources are shared and sustainable.
- 3.10** For example, the Abalone Association of NSW, while supportive of the need to commence section 21AA, suggested supporting regulations would be necessary. In evidence to the committee, Mr Stephen Bunney, Industry Liaison, Abalone Association of NSW, stated that regulations under section 21AA are necessary to protect fisheries.¹³¹ In the Association's view, 'the solution to conflict and abuse is to set cultural bag limits'.¹³²
- 3.11** Similarly, the Professional Fisher's Association was also of the view that all fishing sectors, including commercial, recreational and Indigenous, need regulation, to ensure fisheries are sustainable and provide maximum value to the community.¹³³
- 3.12** The NSW Government expressed a similar view, noting that limits are in place for all fishing sectors in NSW. In its view the current framework strikes a balance between all sectors accessing NSW's fisheries resources, and will ensure the long term sustainability of fish stocks. It added: 'If that balance was to be changed, for example by removing any catch or possession limits for

¹²⁷ Submission 34, Mr Tony McAvoy SC and Mr John Waters SC, p 9.

¹²⁸ Submission 23, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), p 13.

¹²⁹ Evidence, Mr Robert Chewying, South Coast Aboriginal Fishing Rights Group, Narooma community roundtable, 28 July 2022, p 8.

¹³⁰ Submission 30, Oxfam Australia, p 3.

¹³¹ Evidence, Mr Stephen Bunney, Industry Liaison, Abalone Association of New South Wales, 19 August 2022, p 2.

¹³² Submission 44, Abalone Association NSW, p 3.

¹³³ Submission 49, Professional Fisher's Association, p 4.

Aboriginal cultural fishing, then the increased effort and catch for that sector must be accounted for by decreases in catch and possession limits for another sector'.¹³⁴

- 3.13** Mr Sean Sloan, Deputy Director General Fisheries, Department of Primary Industries, also highlighted that commencement of section 21AA without any other arrangements in place would still leave constraints in place for cultural fishers. He explained that while it allows take and possession outside the limits of the *Fisheries Management Act 1994*, 'it doesn't deal with gear and fishing method. It doesn't deal with size limits'.¹³⁵
- 3.14** Mr Sloan also noted that section 21AA 'would essentially allow someone who was based on the North Coast the ability to come to the South Coast and vice versa'.¹³⁶
- 3.15** In the NSW Government's view, the challenge to commencing section 21AA is that there is no agreement between the NSW Government and Aboriginal peak bodies regarding what limits should be placed on those exercising cultural fishing through a statewide regulation. It added:

The NSW Government position has been clear and consistent since 2009, namely, that limits must be applied across all fishing sectors, including cultural fishers, in order to appropriately manage the fisheries resource and avoid the potential for detrimental ecological impacts.¹³⁷

Limitations of current regulatory arrangements

- 3.16** Lending weight to stakeholders calls for section 21AA to be commenced were concerns that the current regulatory arrangements relating to cultural fishing are inadequate. While there was some positive feedback about local management plans, some stakeholders also contended the plans are restrictive, instead preferring section 21AA to be in operation. The committee also heard concerns related to obtaining permits, and issues with the interim access arrangements which were put in place with the intention of allowing greater access for Aboriginal people to culturally fish while regulations were being developed.

Local management plans

- 3.17** As outlined in chapter 1, the development of local management plans commenced in 2016, in response to the feedback from key Aboriginal stakeholders that state-wide regulations would not address individual community needs. Local management plans are characterised by the NSW Government as 'place-based' solutions, and are considered to be an alternative to commencing section 21AA with a supporting regulation.¹³⁸

¹³⁴ Submission 40, NSW Government, p 22.

¹³⁵ Evidence, Mr Sean Sloan, Deputy Director General Fisheries, NSW Department of Primary Industries, 19 August 2022, p 54.

¹³⁶ Evidence, Mr Sloan, 19 August 2022, p 54.

¹³⁷ Submission 40, NSW Government, p 9.

¹³⁸ Evidence, Mr Sloan, 19 August 2022, p 51.

- 3.18** The first local management plan, the Birpai Burray (Hastings) Cultural Fishing Local Management Plan, commenced in June 2022 and was given effect under section 37 of the *Fisheries Management Act 1994*.¹³⁹
- 3.19** Mr Jamie Donovan and Mr Wayne Anderson, Members, Steering Committee for the Birpai Burray (Hastings) Aboriginal Cultural Fishing Local Management Plan Trial, were both quite positive about the process and the role of the plan in recognising cultural fishing rights. In evidence, Mr Anderson and Mr Donovan highlighted some positives:
- Aboriginal fishers can now conduct cultural fishing in previously restricted waterways
 - Aboriginal people are able to hunt and gather without fear of prosecution or harassment by Fisheries officers
 - cultural fishing practices which were not previously permitted are allowed
 - the limits on certain types of equipment do not apply
 - bag limits are greater when fishing for a family group or social gathering
 - there was plenty of time for consultation, including time to get as many members of the local Aboriginal community involved as possible
 - there was consultation with local recreational fishers and commercial fishers.¹⁴⁰
- 3.20** Mr Donovan and Mr Anderson also noted other benefits arising from the consultation process to develop the plan, including:
- there is a better sense of community and unity between the two Local Aboriginal Land Councils, Bunyah and Birpai
 - there is a better relationship with Fisheries compliance officers and a better understanding of Aboriginal cultural fishing by compliance officers.¹⁴¹
- 3.21** Despite these positive aspects, both Mr Donovan and Mr Anderson agreed that they would prefer section 21AA to operate. Mr Anderson noted that only one side of the Hastings River is covered by the Birpai Burray (Hastings) Cultural Fishing Local Management Plan, and that he could be fined for practising cultural fishing on the other side of the river. He summed it up: 'I'd like to be able to practice my cultural fishing in any family area, anywhere that I'm connected to people. ... It should be opened right up across New South Wales. You can't just have a dotted line and say "Culture here" and a dotted line outside – "Stop your culture"'.¹⁴²
- 3.22** Similarly, Mr Donovan explained that he is from Worimi country on his mother's side, which is not covered by the plan, so he cannot 'go and out fish to [his] full cultural capacity ... in Worimi

¹³⁹ NSW Department of Primary Industries, *Birpai Burray (Hastings) Cultural Fishing Local Management Plan*, June 2022, https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0016/1410406/DOC22-31552-Att-A-Birpai-Burray-Hastings-Aboriginal-Cultural-Fishing-Local-Management-Plan-Trial-Plan.pdf, p 8.

¹⁴⁰ Evidence, Mr Jamie Donovan and Mr Wayne Anderson, Members, Steering Committee for the Birpai Burray (Hastings) Aboriginal Cultural Fishing Local Management Plan Trial, 19 August 2022, pp 40-42.

¹⁴¹ Evidence, Mr Donovan and Mr Anderson, pp 40-41.

¹⁴² Evidence, Mr Anderson, 19 August 2022, p 44.

country.' He explained the impact of this, and why he has supported the local plan given section 21AA is not in place:

I'm from Birpai and Worimi country. I'm currently sitting on my mother's homelands at the moment. I know now that I can't go out and fish to my full cultural capacity here in Worimi country. That, for me, spiritually impacts on me and my abilities to be able to go and share that with my children. I'd just like to echo, if that section 21AA is what's going to give all Aboriginal people access to their cultural fishing rights and obligations right throughout the State, then I would definitely back that. But, at this time point in being, with that Act not being in place, this LMP is what our community needs and what gives me access to fisheries to allow me to teach and show my children and the future generations that will continue to carry on my cultural practices into the future the ability to be able to continue practising that.¹⁴³

3.23 Other inquiry stakeholders indicated that they did not support local management plans as a substitute for commencing section 21AA, including the NSW Aboriginal Land Council. In its view, the original support for local management plans was based on a view that section 21AA was to immediately commence without regulations and that local plans were to encompass issues such as:

- fish habitat protection
- annual meetings with Fisheries NSW to discuss fisheries resources
- annual meetings with commercial and recreational fishers to discuss fisheries resources
- cultural camps to provide an opportunity for Elders to pass on knowledge of sustainable practices to young people
- the development of education resources for the community in relation to sustainable fishing practices.¹⁴⁴

3.24 The NSW Aboriginal Land Council also explained that its support for local management plans was predicated on the basis that the plans were not to include bag and possession limits, or dictate fishing methods, and were not a substitute for regulations. The NSW Aboriginal Land Council was also critical of the process used to consult and introduce the trial local management plans, noting that it had sought to be included in the process for the draft Tweed region cultural fishing local management plan during the community consultation period but was advised 'this was not possible'.¹⁴⁵

3.25 The committee noted that the steering committee for the development of the Birpai Burray (Hastings) Cultural Fishing Local Management Plan consisted of Aboriginal representatives of members of the local Aboriginal community, drawn from the areas covered by the two Local Aboriginal Land Councils, Bunyah and Birpai.¹⁴⁶

¹⁴³ Evidence, Mr Donovan, 19 August 2022, pp 44-45

¹⁴⁴ Submission 22, NSW Aboriginal Land Council, p 11.

¹⁴⁵ Submission 22, NSW Aboriginal Land Council, pp 11-12.

¹⁴⁶ Submission 47, Mr Wayne Anderson, Member, Aboriginal Fishing Advisory Council, and Member, Steering Committee for the Birpai Burray (Hastings) Aboriginal Cultural Fishing Local Management Plan Trial, p 3.

3.26 The Birpai Burray (Hastings) Cultural Fishing Local Management Plan specifically outlines the following roles for NTSCORP and the NSW Aboriginal Land Council:

- 'NSW ALC [Aboriginal Land Council] may be involved in supporting LALCs [Local Aboriginal Land Councils] through the LMP process, where requested by LALCs.'
- 'NTSCORP may be requested by traditional owner groups to provide advice to traditional owners through the LMP [Local Management Plan] process.'¹⁴⁷

3.27 In his submission, Mr Wayne Anderson, who was on the steering committee for the Birpai Burray (Hastings) Cultural Fishing Local Management Plan, advised the committee that that the NSW Aboriginal Land Council and the Aboriginal Fishing Advisory Council (on which both NTSCORP and NSW Aboriginal Land Council are represented) were involved in the development of the plan, however, COVID-19 restrictions at the time made it difficult for them to join meetings.¹⁴⁸

3.28 Mr Anderson also reflected on the high level of 'compartmentalisation' in consultation processes with the Aboriginal community. He stated he was involved in the North Coast Regional Water Strategy, the marine estate strategy, and the Aboriginal Fishing Advisory Council. While he respected that the Government was trying to improve the way it worked with Aboriginal people:

The whole structure, when it comes to working with and getting feedback and supporting Aboriginal people, is a very compartmentalised process. It would be wonderful if, in the process of the ... implementation of cultural fishing being improved across New South Wales, the other departments of DPI, National Parks, Water all come together and be at the table, to be able to actually find out what will be the impact of this, what will happen when Aboriginal people walk into or go to places to practise cultural fishing. If we continue to compartmentalise, it makes it very difficult for Aboriginal people to still be comfortable, to be able to travel country and carry out cultural practices'.¹⁴⁹

3.29 Mr Tony McAvoy SC, Barrister and representative of Aboriginal Legal Services (NSW/ACT), also expressed concerns with a local approach to consultation which excluded the state level representative bodies:

This type of activity, where small sections of the [community] are broken off and entered into agreements which are not done in the context of the broader community, we've seen many, many times. It is a standard tactic in terms of trying to undermine the broader rights of Aboriginal people, and that's what's happening in this case.¹⁵⁰

¹⁴⁷ NSW Department of Primary Industries, *Birpai Burray (Hastings) Cultural Fishing Local Management Plan*, June 2022, https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0016/1410406/DOC22-31552-Att-A-Birpai-Burray-Hastings-Aboriginal-Cultural-Fishing-Local-Management-Plan-Trial-Plan.pdf, p 43.

¹⁴⁸ Submission 47, Mr Wayne Anderson, Aboriginal Fishing Advisory Council, and Member, Steering Committee for the Birpai Burray (Hastings) Aboriginal Cultural Fishing Local Management Plan Trial, p 4.

¹⁴⁹ Evidence, Mr Anderson, 19 August 2022, p 45.

¹⁵⁰ Evidence, Mr Tony McAvoy SC, Barrister and representative of Aboriginal Legal Services (NSW/ACT), 19 August 2022, p 35.

Cultural fishing permits

- 3.30** In addition to concerns about local management plans and whether they were a good alternative to section 21AA, the committee also received feedback on cultural fishing permits available under section 37 of the *Fisheries Management Act 1994*. As noted in chapter 1, these permits generally allow more fish to be collected, above the usual permitted amount, for special occasions.
- 3.31** Several stakeholders, however, contended that the permit process is onerous for applicants. The Australian Institute of Aboriginal and Torres Strait Islander Studies noted that the process for applying for a section 37 permit can be cumbersome for community members. Given the application usually has to include specific details, such as dates and locations, it stated that 'the exact date of fishing is often unknown, and can depend on culturally specific cues, as well as weather and water conditions.' The organisation also suggested it was inappropriate for Aboriginal people to have to apply for a permit to practice and maintain their cultural traditions. In her evidence to the inquiry, Ms Kate Thomann, Executive Director, Australian Institute of Aboriginal and Torres Strait Islander Studies, explained it is also difficult for those with literacy or numeracy issues to fill in the forms.¹⁵¹
- 3.32** Similarly, Mr Anderson noted that section 37 permits had a high administrative burden on both the Aboriginal applicant and the Fisheries staff to process.¹⁵²
- 3.33** Concerns were also put forward by the Recreational Fishing Alliance of NSW in relation to the lack of consultation other fishing sectors receive in relation to these permits. Although supportive of Aboriginal cultural fishing, the Alliance expressed concern that there is little ongoing consultation around further cultural fishing activities, or that consultation is only taking place with local fishing clubs, rather than the state body.¹⁵³
- 3.34** Mr Stan Konstantaras, President of the Recreational Fishing Alliance of NSW, expanded on this issue, explaining that as more section 37 permits are granted up and down the coast there is no engagement with the local recreational fishing clubs, and opportunities to counter negative perceptions of cultural fishing were being lost.¹⁵⁴
- 3.35** In response to this specific concern, Mr Sloan advised that there are privacy issues that need to be taken into consideration. As the permits relate to specific events, including funerals, it is generally not appropriate to consult with the recreational fishing community about issuing a permit. However, Mr Sloan did note that the reporting around this issue could be better publicised.¹⁵⁵

¹⁵¹ Submission 23, Australian Institute of Aboriginal and Torres Strait Islander Studies, p 5; Evidence, Ms Kate Thomann, Executive Director, Research and Education Group, AIATSIS, 19 August 2022, p 13.

¹⁵² Submission 47, Mr Wayne Anderson, Aboriginal Fishing Advisory Council, and Member, Steering Committee for the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan Trial, p 4.

¹⁵³ Submission 36, Recreational Fishing Alliance of NSW, pp 3-4.

¹⁵⁴ Evidence, Mr Stan Konstantaras, President, Recreational Fishing Alliance of NSW, 19 August 2022, p 4.

¹⁵⁵ Evidence, Mr Sloan, 19 August 2022, p 50.

Interim access arrangements

- 3.36** Concerns were also put forward about the Aboriginal Cultural Fishing Interim Access arrangements and whether these were operating to limit the practice of cultural fishing.
- 3.37** As described in Chapter 1, the Aboriginal Cultural Fishing Interim Access arrangements were originally put in place until regulations were finalised to support the commencement of section 21AA. The interim arrangements allow Aboriginal cultural fishers to have bag limits beyond those for recreational fishers, usually double the recreational fisher limits but up to five times the limit in some cases.¹⁵⁶
- 3.38** In the absence of section 21AA being commenced, the NSW Aboriginal Land Council indicated that it was no longer supportive of the interim arrangements.¹⁵⁷ The Australian Institute of Aboriginal and Torres Strait Islander Studies also noted limitations with these arrangements, explaining that under the policy, the daily abalone catch limit for Aboriginal people was increased from 2 to 10, but 'continues to be insufficient and culturally inappropriate'. It added:
- It is indicative of incremental temporary measures which do not address underlying issues or acknowledge the fundamental rights of Indigenous peoples to their waters and resources.¹⁵⁸
- 3.39** Another submission author described limits as an 'arbitrary' number which do not take into account cultural requirements such as the obligation to share.¹⁵⁹ Similarly, Mr Wayne Anderson, who was involved in the development of the only local management plan to commence so far, indicated that the local plan was developed in part as an acknowledgement that the interim arrangements were inadequate for cultural fishing needs.¹⁶⁰ In evidence, Mr Anderson noted that the interim arrangement also does not cover traditional fishing methods such as using a spear, or building a traditional fish trap.¹⁶¹

Resource management and sustainability considerations

- 3.40** The evidence presented to the inquiry in support of regulations generally drew on the need to ensure all sectors, including Aboriginal fishers, had their access to fish regulated to ensure sustainability. Government and industry stakeholders advocated strongly for the current approach to fishery management where all sectors are regulated, including the imposition of limits on the number of fish taken and size of fish.
- 3.41** Mr Sean Sloan gave evidence that 'the intention of the Government has been for section 21AA to commence with a supporting regulation to underpin the conservation, development and

¹⁵⁶ NSW Department of Primary Industries, *Aboriginal Cultural Fishing Interim Access*, https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/632695/aboriginal-cultural-fishing-interim-access-arrangement.pdf

¹⁵⁷ Submission 22, NSW Aboriginal Land Council, p 9.

¹⁵⁸ Submission 23, AIATSIS, p 6.

¹⁵⁹ Submission 27, Name suppressed, p 1.

¹⁶⁰ Submission 47, Mr Wayne Anderson, p 4.

¹⁶¹ Evidence, Mr Anderson, 19 August 2022, p 42.

sharing of fisheries resources and to enable cultural fishing to operate within the fisheries management framework.¹⁶²

- 3.42 By contrast, Aboriginal cultural fishers, Aboriginal peak bodies and many other inquiry participants argued that Aboriginal cultural fishing is by definition sustainable, and should not be subject to any form of government restriction or regulation.

Perspective of government and industry stakeholders

- 3.43 As noted in chapter 1, the object of the *Fisheries Management Act 1994* is to 'conserve, develop and share the fishery resources of the State for the benefit of present and future generations'.¹⁶³

- 3.44 In the NSW Government's view, access rights, limits and rules are necessary to help ensure fisheries resources are managed sustainably for the current and future needs of the community. Some of the benefits of this approach, it argued, included:

- conserving fish stocks and aquatic habitats
- sharing the catch between users
- encouraging responsible and ethical use of fisheries resources
- ensuring ecologically sustainable development
- assisting in reducing illegal fishing and sales
- protecting threatened species and their habitats.¹⁶⁴

- 3.45 The committee heard that the NSW Government relies on a scientific, data driven approach to fish stock assessment for determining catch limits. Stock assessment includes information on catch by all participants, including Aboriginal fishers. This approach seeks to 'strike a balance between all sectors' to ensure sustainability of fish stocks.¹⁶⁵

- 3.46 In particular, the committee received evidence about the need to manage abalone stocks, to ensure there is enough adult biomass to replenish stock every year, as 'without sufficient densities of adult abalone on a reef system, local depletion can and does occur'.¹⁶⁶

- 3.47 A regulated approach to the management of fishery stocks was also supported by industry stakeholders who participated in this inquiry. Noting some media reported instances in which large volumes of abalone have been taken by cultural fishers, the Abalone Association NSW contended that 'all commercial fishing needs to be sustainably managed for future generations, hence the need for regulations such as size limits and catch controls such as quotas and bag limits'.¹⁶⁷

- 3.48 In evidence Mr Bunney explained that:

¹⁶² Evidence, Mr Sloan, 19 August 2022, p 46.

¹⁶³ *Fisheries Management Act 1994* s 3(1).

¹⁶⁴ Submission 40, NSW Government, p 21.

¹⁶⁵ Submission 40, NSW Government, p 22.

¹⁶⁶ Submission 40, NSW Government, p 23.

¹⁶⁷ Submission 44, Abalone Association NSW, p 3.

Today's New South Wales abalone fishery exists in a modern post-industrial marine estate environment that is influenced by an array of people-driven consequences such as population, pollution, resource conflict, aquatic biosecurity and climate change. These stressors are combining to change the ecological trajectories of some of our key coastal habitats and species such as abalone.¹⁶⁸

- 3.49** This view was echoed by Mr Stan Konstantaras of the Recreational Fishing Alliance. The Alliance was supportive of cultural fishing: 'we believe it should occur if "the rules and regulations surrounding fishing can be relaxed without harming the general health and sustainability of our fishery". We all need to acknowledge that our fishery is under stress ... we are not fishing the once pristine waters we often speak about'.¹⁶⁹
- 3.50** Mr Bunney was of the view that Aboriginal peak bodies must accept the need for size and bag limits to ensure that abalone fishery is sustainable, and that not to do so is 'disengaging cultural fishers from and making them irrelevant to the process of resource sustainability regulation development'.¹⁷⁰
- 3.51** Also concerned about resource management, the Professional Fisher's Association pointed to evidence in other countries that the recreational fishing sector is being recognised as a potential impact on fish stocks. It pointed to the lack of data on Aboriginal fish takes as an impediment to making decisions in fishery management.¹⁷¹

Perspective of cultural fishers and other Aboriginal stakeholders

- 3.52** In a different vein to government and industry stakeholders, Aboriginal fishers and other stakeholders emphasised that cultural fishing incorporates aspects of resource management which address sustainability considerations.
- 3.53** As described in chapter 1, cultural transmission has a strong element of sustainable practice, including taking only what is needed, leaving the larger sized breeders, not removing all the fish from one area, and rotating fishing sites.¹⁷²
- 3.54** Mr Bill Cooley, Aboriginal cultural fisher, described his cultural heritage and its relationship to sustainability:

My family has a strong cultural connection to the ocean. I've traced my heritage back seven generations to a tribal fella from Ulladulla named Kandoo, keeper of the ocean, with his role to monitor the fishing activity for the local tribespeople and make sure there were enough resources there for tribes travelling through country on the way north or heading south.¹⁷³

¹⁶⁸ Evidence, Mr Bunney, 19 August 2022, p 2.

¹⁶⁹ Evidence, Mr Konstantaras, p 3.

¹⁷⁰ Evidence, Mr Bunney, 19 August 2022, p 2.

¹⁷¹ Submission 49, Professional Fisher's Association, pp 4-5.

¹⁷² Submission 13, Mr Wally Stewart, p 4; Submission 12, Mr Kevin Mason, p 2; Submission 11, Mr Stewart Davison, p 1; Submission 21, Mr John Carriage, pp 4 -5.

¹⁷³ Evidence, Mr Bill Cooley, 19 August 2022, p 16.

- 3.55** Some Aboriginal fishers even expressed concerns about the practices they have observed in non-Aboriginal fishers, particularly in relation to clearing areas of populations of shellfish.¹⁷⁴
- 3.56** Mr Chewying expressed his dismay that Aboriginal science has not been taken into account in managing fish stocks and that 80 per cent of the original resource was missing.¹⁷⁵ Mr John Brierley, an Aboriginal professional fisher, discussed the need to spread fishing catch across different species, rather than set a quota which encourages 'catch as much as you can of that one species.' His view was that the quota system has led to a large reduction in fish stocks.¹⁷⁶
- 3.57** Some stakeholders also contended that the catch from cultural fishing is so small, in comparison to other sectors, and unlikely to affect sustainability. Dr Janet Hunt made this observation, noting that Aboriginal cultural fishing is small compared to the 'large-scale' commercial catch, and is already accounted for in total catch assessments.¹⁷⁷
- 3.58** The Total Allowable Commercial Catch determination for abalone, for example, takes into account the recreational, Aboriginal cultural, and illegal, under-reported and unregulated catch:
- the legal recreational catch is estimated to be approximately 10 tonnes per year,
 - the Aboriginal cultural catch is estimated to be less than one tonne per year.
 - Illegal, unregulated and under-reported catch is estimated to be around 20 tonnes per year.¹⁷⁸
- 3.59** In the view of Dr Hunt, Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University, existing quotas should be adjusted to recognise the pre-existing rights of Aboriginal people. Dr Hunt also noted that 'no review of Aboriginal cultural fishing or any fishery in NSW has identified Aboriginal cultural fishing as having a negative impact on marine resources'.¹⁷⁹
- 3.60** Similarly, and in the case of abalone stocks, Ms Kathryn Ridge, Doctoral Researcher, University of Technology Sydney, contended that the amount taken by Aboriginal cultural fishers is small in comparison to other sectors.¹⁸⁰
- 3.61** The maximum amount, or quota, of abalone available for commercial harvesting each year is determined by the NSW Total Allowable Fishing Committee, an independent statutory

¹⁷⁴ Submission 13, Mr Wally Stewart, p 3; Submission 21, Mr John Carriage, p 7.

¹⁷⁵ Evidence, Mr Robert Chewying, South Coast Aboriginal Fishing Rights Group, Narooma community roundtable, 28 July 2022, p 8.

¹⁷⁶ Evidence, Mr John Brierley, Professional fisher, Narooma community roundtable, 28 July 2022, p 9.

¹⁷⁷ Evidence, Dr Janet Hunt, Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University, 19 August 2022, p 26.

¹⁷⁸ NSW Total Allowable Fishing Committee, Abalone Fishery, *Determination for the 2022/23 Fishing Period*, 11 April 2022, https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0006/1420890/Abalone-Fishery-Report-and-Determination-for-the-2022-23-fishing-period.pdf, p 9.

¹⁷⁹ Evidence, Mr Brierley, 28 July 2022, p 14; Submission 17, Dr Janet Hunt, p 7.

¹⁸⁰ Evidence, Ms Kathryn Ridge, Doctoral researcher, University of Technology Sydney, 19 August 2022, p 24.

authority. The committee determined the Total Allowable Commercial Catch to be 100 tonnes of abalone for the 2022-23 fishing period.¹⁸¹

3.62 Reflecting on these limits, Ms Ridge noted that '... the amount of fish being caught [by Aboriginal cultural fishers] is accommodated within the existing framework in sustainability assessment reports for the industry'.¹⁸²

3.63 To explore this issue further, the committee inquired into whether there is any data on the number of cultural fishers on the South Coast, and their take, particularly in relation to abalone.

3.64 The committee questioned Mr Chapman, Chair, NSW Aboriginal Land Council, as to the number of people who would regularly collect abalone on the South Coast. Mr Chapman advised that there is no definitive answer to this, as it would be influenced by a number of factors, including the number of Aboriginal people on the South Coast, swimming and diving ability, and weather and ecological impacts. He also explained that Aboriginal people on the South Coast travel or migrate regularly, which can extend the coastline, making it difficult to ascertain the exact number of people on the coast at one time.¹⁸³

3.65 A similar question was asked of Ms Ridge by the committee, who responded that it was likely to be a small percentage of the population, as diving requires fitness, and knowledge of tides and currents, and conditions suitable for diving safely would not occur very frequently.¹⁸⁴

3.66 Dr Janet Hunt also noted that not every cultural fisher is able to dive, also noting that the wild seas on the South Coast make it impossible to dive on many days.¹⁸⁵

3.67 Evidence from Mr John Carriage reinforced the influence of weather in restricting the conditions suitable for diving for abalone:

When I go diving, I've got to depend on the swell, the weather, the ocean and which way the swell—the fisheries seem to think we're out there every day, that we're just taking and taking. I could probably get in the water for two days a week and the southerly swell comes up and I'm out of the water for about three weeks. We don't use boats and stuff.¹⁸⁶

3.68 Many Aboriginal fishers and stakeholders ultimately turned the question of sustainability of cultural fishing on its head, reframing it as a need for government to sustainably manage the commercial fishing industry. Further comments centred on the small numbers of Aboriginal cultural fishers, and by comparison, the enormous size of commercial fishers:

¹⁸¹ NSW Total Allowable Fishing Committee, Abalone Fishery, *Determination for the 2022/23 Fishing Period*, 11 April 2022, p 2.

¹⁸² Evidence, Ms Ridge, 19 August 2022, p 25.

¹⁸³ Answers to questions on notice, Mr Danny Chapman, NSW Aboriginal Land Council, received 13 October 2022, p 1.

¹⁸⁴ Evidence, Ms Ridge, 19 August 2022, p 28.

¹⁸⁵ Evidence, Dr Hunt, 19 August 2022, p 25.

¹⁸⁶ Evidence, Mr Carriage, 19 August 2022, p 19.

- 'You should be asking Fisheries: How are we going to make this sustainable to fit blackfellas into Fisheries? it's a really good question and I appreciate it. But it's not a question you should direct to us'¹⁸⁷
- 'I would say that a hundred thousand kilograms of abalone a year [total allowable commercial catch] is possibly what's actually been doing the damage'¹⁸⁸
- 'The commercial industry has the largest take and has the most impact on the fishing resource. ... we're looking at a very small number of people [Aboriginal cultural fishers] who are targeted in the name of managing the fishing resource... I think you're attempting to understand it in the language of the Fisheries Management Act, but it needs to be understood in the language of Aboriginal people's traditional system of lore and custom, which does have in-built mechanisms to sustainably manage the resource'.¹⁸⁹

The intersection between section 21AA and native title rights

3.69 Noting that some cultural fishers were defending prosecutions on the basis of native title rights, the committee explored to some extent the intersection between native title rights and the potential operation of section 21AA.

3.70 Section 287 of the *Fisheries Management Act 1994* explicitly states that native title rights are not affected by the operation of the legislation:

287 Native title rights and interests

This Act does not affect the operation of the Native Title Act 1993 of the Commonwealth or the Native Title (New South Wales) Act 1994 in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect.

3.71 As NTSCORP explained, this means that native title owners are not subject to any of the limits posed by the fisheries legislation.¹⁹⁰

3.72 In addition, section 211 of the *Native Title Act 1994* (Cth) also applies to protect native title holders from being charged with offences under the *Fisheries Management Act 1994* where they are 'fishing ... in the exercise of their native title rights and interests'.¹⁹¹

3.73 Evidence was presented to the committee that native title rights are not established by the courts but are pre-existing:

... native title rights ... must be understood as pre-existing rights with arise from the laws and customs of the Aboriginal people concerned. No determination, declaration

¹⁸⁷ Evidence, Mr Danny Chapman, community member and representative for the South Coast, NSW Aboriginal Land Council, Narooma community roundtable, 28 July 2022, p 12.

¹⁸⁸ Evidence, Dr Paul Cleary, Policy and Advocacy Lead, First Peoples Program, Oxfam Australia, 19 August 2022, p 10.

¹⁸⁹ Evidence, Ms Mishka Holt, Principal Solicitor, NTSCORP, pp 36 and 37.

¹⁹⁰ Submission 41, NTSCORP, p 4.

¹⁹¹ Submission 41, NTSCORP, p 4.

or order of a Court is required for native title rights to be exercised or enjoyed or for such rights to enjoy protection.¹⁹²

3.74 Dr Hunt stated that the 'the absence of a finally determined claim does not mean the rights and interests do not exist. It simply means that the Commonwealth has not yet recognised them in law'.¹⁹³

3.75 Mr Tony McAvoy SC and Mr John Waters SC, Barristers, advised that Aboriginal people have always fished 'in accordance with their law and custom' and this is protected by common law and Commonwealth native title legislation.¹⁹⁴

3.76 However, as noted in chapter 2, in the absence of a finalised native title determination, a native title defence can be difficult for Aboriginal fishers to use in court when charged with offences under the *Fisheries Management Act 1994*. As NTSCORP explained, there are a number of barriers faced by Aboriginal cultural fishers in this instance:

- there is no legal aid funding available for those that wish to use a native title defence
- there are fees for engaging legal counsel
- there is a requirement for expert evidence from anthropologists
- there is limited access to legal advisors and anthropologists with native title expertise.¹⁹⁵

3.77 A consequence of this, as described in the case of Anthony Henry in chapter 2, is that some Aboriginal people will plead guilty when charged with offences under the *Fisheries Management Act 1994* as it is cheaper than pleading not guilty and using native title as a defence.¹⁹⁶

3.78 Taking into account that some of the impacts of not commencing section 21AA are having a significant impact on the South Coast, the committee also considered the current native title claim in that area that has been lodged, and other claims that may be relevant.

3.79 Oxfam Australia and the South Coast Aboriginal Fishing Rights Group noted that a native title claim over the NSW South Coast from Southern Sydney to the Victorian border was accepted and registered by the National Native Title Tribunal in January 2018.¹⁹⁷

3.80 Oxfam Australia suggested that the NSW Government has 'avoided testing legal rights in court by abandoning prosecutions at the eleventh hour.' It also suggested that as the native title right to fish on the South Coast of NSW has not yet been determined, the continued prosecution of Aboriginal people on the South Coast will 'undermine' their native title rights.¹⁹⁸ This view was shared by Dr Hunt:

¹⁹² Submission 34, Mr Tony McAvoy SC and Mr John Waters SC, p 3.

¹⁹³ Submission 17, Dr Janet Hunt, Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University, p 2.

¹⁹⁴ Submission 34, Mr Tony McAvoy and Mr John Waters SC, p 2.

¹⁹⁵ Submission 41, NTSCORP, p 9.

¹⁹⁶ Submission 41, NTSCORP, p 9.

¹⁹⁷ Submission 30, Oxfam Australia, pp 6-7; Submission 39, South Coast Aboriginal Fishing Rights Group, p 4.

¹⁹⁸ Submission 30, Oxfam Australia, pp 6-7.

... south coast Aboriginal people are being asked to prove that they continue to practise this culture in the assessment of their current native title claim. While the Commonwealth Government requires them to demonstrate continuance of their cultural practices to gain their native title rights, the State Government pursues and criminalises them if they do so.¹⁹⁹

- 3.81** In a similar vein, evidence from Katungal Aboriginal Corporation Regional Health and Community Services highlighted the irony of the government posting signage along south coast headlands explaining Aboriginal Sea Country culture and history for tourists while at the same time limiting and policing Aboriginal Sea Country peoples' practising of their culture.²⁰⁰
- 3.82** Information on the NSW Department of Primary Industries website indicates there are currently six recognised claims over NSW inland waters and Sea Country.²⁰¹ Information sheets on the Department's website describing the native title areas include a statement that native title holders' fishing activities, as they are a continuation of historical practice, would not change the methods or levels of harvest of fish stocks in the area.²⁰²
- 3.83** Looking more closely at the operation of native title rights with respect to cultural fishing, and how this may intersect with the operation of section 21AA, the committee heard a range of views.
- 3.84** In her evidence, Professor Kate Barclay, Director, Climate, Society and Environment Research Centre, University of Technology, Sydney, said 'The FMA amendment is how native title should be implemented for fisheries in New South Wales'. This was echoed by Dr Janet Hunt who stated that section 21AA was meant 'to help align the Native Title Act with the State Fisheries Management Act'.²⁰³
- 3.85** Mr McAvoy SC, Barrister and representative of Aboriginal Legal Services (NSW/ACT), emphasised that there does not need to be bag, possession or size limits, as given native title rights, 'there are no general size limits that you can apply to the taking of any fish species where there's a recognition of the Aboriginal people's rights to take that resource and manage that resource'.²⁰⁴
- 3.86** Expanding on this view, Ms Mishka Holt, Principal Solicitor, NTSCORP, explained that with native title rights, 'it's an Aboriginal community's traditional system of lore and custom that

¹⁹⁹ Submission 17, Dr Janet Hunt, Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University, pp 6-7.

²⁰⁰ Submission 31, Katungal Aboriginal Corporation Regional Health and Community Services, p 3.

²⁰¹ NSW Department of Primary Industries, *Native Title and Indigenous Land Use Agreements* <https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/native-title>

²⁰² See, for example, NSW Department of Primary Industries, *Bundjalung People of Byron Bay Native Title and Fishing*, May 2019, p 2 https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0005/1125689/bundjalung-people-of-byron-bay-native-title-and-fishing.pdf

²⁰³ Evidence, Professor Kate Barclay, Director, Climate, Society and Environment Research Centre, University of Technology, Sydney, 19 August 2022, p 23; Evidence, Dr Janet Hunt, 19 August 2022, p 27.

²⁰⁴ Evidence, Mr McAvoy, 19 August 2022, p 35.

dictates how those resources are used'. Reflecting on the introduction of section 21AA, Ms Holt added:

I was involved, as was Mr McAvoy and Mr Chapman, in the Fisheries Management Amendment legislation when it passed in 2009 in the work that led up to it. I guess we all felt that that was the watershed moment where there was a recognition from government about what needed to change to reflect the rights and interests of Aboriginal people in New South Wales. That's part of what is so disappointing and disturbing about the lack of implementation because that is something at a bureaucratic level that the views and opinions have not changed even though Parliament well debated that matter and formed a view that things should change.²⁰⁵

Additional initiatives to support cultural fishing

- 3.87** Two other key matters were discussed during the inquiry which may better promote cultural fishing – commercial licencing arrangements for cultural fishers and education across the fishing sector on cultural fishing practices.

Commercial fishing

- 3.88** Some witnesses suggested the creation of an Indigenous fishery, or a community held licence allowing access to commercial fishing quota.
- 3.89** Mr Robert Chewying, of the South Coast Aboriginal Fishing Rights Group, questioned whether the current management of fisheries was working, raising the issue of declining fish stocks. Mr Chewying suggested that an 'Indigenous fishery' would be better at sustainable management. The South Coast Aboriginal Fishing Rights Group and Oxfam Australia both advocated for a community held licence which could be accommodated within commercial quotas.²⁰⁶
- 3.90** In its submission, the NSW Government noted that during the consultation process for a state-wide regulation in 2014 there was a 'desire to establish a community-managed commercially viable Aboriginal fishing industry.' Measures were put in place to support the ongoing viability of established Aboriginal fishing businesses including partial fee waivers and special permitting arrangements intended to assist fishers in adapting to new arrangements stemming from the Commercial Fisheries Business Adjustment Program.²⁰⁷
- 3.91** In 2014, amendments to the legislation also enabled the potential reallocation of forfeited shares to the Aboriginal community. The Minister could also retain or reissue surrendered shares, although the committee heard that to date this measure has not been used.²⁰⁸

²⁰⁵ Evidence, Ms Holt, 19 August 2022, pp 37-38.

²⁰⁶ Evidence, Mr Chewying, 28 July 2022, p 12. Submission 39, South Coast Aboriginal Fishing Rights Group, p 7; Submission 30, Oxfam Australia, p 9.

²⁰⁷ Submission 40, NSW Government, p 10.

²⁰⁸ Submission 40, NSW Government, p 10.

- 3.92** The NSW Government, in its submission, also indicated that section 222B(1)(e) of the *Fisheries Management Act 1994* allows for some 'fishing assets to be held centrally by the Minister and contracted to the community for use'.²⁰⁹
- 3.93** Relevant to this, there is also the Aboriginal Fishing Trust Fund, administered by the Department of Primary Industries, which provides funding for the purchase of commercial fishing quota and purchase of equipment for Aboriginal fishing businesses, among other things. Evidence provided by the department indicates that the total funding provided since 2017-18 across NSW was \$944,800, with a further \$1.8 million available. As an example, the fund provided \$100,000 in 2018-19 for the purchase of additional quota for a business on the North Coast.²¹⁰
- 3.94** As outlined in chapter 1, the NSW Government also supports a joint project with the Aboriginal Fishing Advisory Council, the Fisheries Research and Development Corporation and the Indigenous Land and Sea Corporation to support Aboriginal owned and operated commercial fishing, aquaculture or aquatic tourism businesses.²¹¹ The new Aboriginal Fisheries Business Development Program was launched on 29 September 2022, which aims to support the establishment of up to three new Aboriginal community owned fisheries businesses.²¹²

Education for the broader sector about Aboriginal cultural fishing practices

- 3.95** In the context of some submissions suggesting that cultural fishing should only be considered as such when traditional methods or tools were used, and other stakeholder views, the committee also heard evidence about the need for education in the fishing sector about Aboriginal cultural fishing practices.
- 3.96** The Recreational Fishing Alliance of NSW, in particular, noted that there may not be a good understanding of the concept of cultural fishing in the recreational fishing community.²¹³ In evidence, Mr Stan Konstantaras, President of the NSW Recreational Fishing Alliance, acknowledged this: 'What some non-Indigenous fishers might lack is the understanding of fishing in terms of connection to ancestors and country, and how it is central to Indigenous culture and identity'.²¹⁴
- 3.97** Mr Sean Sloan, Deputy Director General Fisheries, Department of Industries, acknowledged this need, stating that the department is 'always open to suggestions for improvement'. Mr Sloan pointed to various mechanisms in which consultation and communication is occurring in the sector in relation to Aboriginal cultural fishing, including through the local management plans and the process to grant section 37 permits.²¹⁵

²⁰⁹ Submission 40, NSW Government, pp 10-11.

²¹⁰ Tabled document, *Aboriginal Fishing Trust Fund Expenditure, Summary of the 28 Aboriginal Fishing Trust Funded Projects 2017-18 to 2020-21*, tabled 19 August 2022, pp 1 and 3.

²¹¹ Submission 40, NSW Government, pp 10-12; Evidence, Mr Sloan, 19 August 2022, p 47.

²¹² Answers to question on notice, NSW Department of Primary Industries, 5 October, p 1.

²¹³ Submission 36, The Recreational Fishing Alliance of NSW, p 2.

²¹⁴ Evidence, Mr Konstantaras, 19 August 2022, p 4.

²¹⁵ Evidence, Mr Sloan, 19 August 2022, p 50.

- 3.98** More specifically, the committee heard about the need for fisheries staff to have greater education and training.
- 3.99** Oxfam Australia and the South Coast Aboriginal Fishing Rights Group called for better training of compliance officers in
- native title rights and interests
 - Aboriginal culture
 - the international human rights of Aboriginal people.²¹⁶
- 3.100** Mr Troy Tungai, Aboriginal cultural fisher, called for greater cultural awareness for compliance officers:
- These fisheries officers, they want to go and do some cultural awareness programme or something. Cause they need to know what we went through. Through the land and how we lived off the land. They need to be more aware of it. I don't think they realise how much the sea and land mean to us.²¹⁷
- 3.101** Mr Sloan, Deputy Director General Fisheries, Department of Primary Industries, explained that:
- new Fisheries officers are inducted with specific training related to cultural fishing
 - there is a standard cultural awareness training which all staff participate
 - the department has plans to repeat cultural training for the whole of fisheries staff, and conduct it regularly given turnover of staff in the agency.²¹⁸

Committee comment

- 3.102** This inquiry essentially considered whether section 21AA is still relevant and supported, or alternatively whether current regulatory arrangements are adequate in making provision for cultural fishing, including the interim access arrangements and permit process, and perhaps most importantly local management plans.
- 3.103** Based on the evidence before us, the committee has concluded that none of these arrangements are adequate in meeting the needs of Aboriginal people to practice and pass on their culture and fishing practices.
- 3.104** There is no doubt that the Birpai Burray (Hastings) Cultural Fishing Local Management Plan on the North Coast has been welcomed by the community and allows greater freedom to practice and promote cultural fishing than other regulatory measures, such as permits and the interim arrangements. Indeed, we received evidence showing the goodwill and cooperation on the North Coast between the Department of Primary Industries Fisheries and the local Aboriginal community.

²¹⁶ Submission 39, South Coast Aboriginal Fishing Rights Group, p 7; Submission 30 Oxfam Australia, p 9.

²¹⁷ Submission 24, Mr Troy Tungai, p 5.

²¹⁸ Evidence, Mr Sloan, 19 August 2022, pp 47-48.

- 3.105** The committee notes, however, that the Birpai Burray (Hastings) Cultural Fishing Local Management Plan is highly prescriptive and took approximately five years from initial consultations to its commencement. While the committee understands the need for long timeframes to work with diverse Aboriginal communities, and the advent of COVID-19, the committee is concerned that local management plans have been time and resource consuming to develop.
- 3.106** The committee also notes feedback that the one plan in place covers a relatively small area, and that despite the positive feedback and goodwill around it, aspects of the plan make it less popular than the access section 21AA would allow if commenced. A particular concern relates to the fact that the plan's geographic coverage is not necessarily representative of the diverse and complex family relationships and obligations of Aboriginal people. This can mean that Aboriginal community members may only be able to express their fishing culture related to one side of their family depending on where their Country is located.
- 3.107** The committee is also concerned that some key stakeholders, such as the NSW Aboriginal Land Council, felt excluded from the process to develop the local management plan.
- 3.108** Evidence was also provided to the committee about the limitations of other regulatory arrangements, including cultural fishing permits and the interim access arrangements put in place while local management plans were being developed. The cultural fishing permits, enabled under section 37 of the Act, while good in intent, and allowing larger volumes of catch, have significant drawbacks. A huge amount of personal information is required, and applicants need to submit the paperwork weeks in advance.
- 3.109** Similarly, while the interim access arrangements enable a greater catch than that of recreational fishers, evidence was that the bag limits are still insufficient for Aboriginal cultural fishers to meet cultural obligations.
- 3.110** In the committee's view, any approach that regulates cultural fishing must take into account that cultural fishing take is for the benefit of the community rather than the individual. As we noted in chapter 1, cultural fishing is about more than the take and the method, and can also include trade and barter. Cultural fishers have particular obligations to provide food beyond their immediate family, including to those who are unable to fish for themselves, such as Elders.
- 3.111** Overall, this inquiry seemed to centre on the issues being experienced in the South Coast, particularly over abalone, and whether section 21AA should be commenced with or without regulation.
- 3.112** The committee heard conflicting views as to whether Aboriginal cultural fishing is by definition a sustainable practice, or whether there needs to be government regulation of cultural fishing to ensure fish stocks are preserved for current and future generations.
- 3.113** While there is very little data available to indicate the number of Aboriginal cultural fishers or the amount of fish taken, the committee accepts that Aboriginal cultural fishing would likely account for a very small proportion of the sectors, especially considering Aboriginal people make up only 3.4 per cent of the New South Wales population.
- 3.114** Despite that, it is still the committee's view that section 21AA should be commenced with a supporting regulation, to ensure fishery stocks are managed appropriately and sustainably into

the future. Without a supporting regulation it would seem that cultural fishing could occur in any location even where this is no connection to that Country. At a minimum, the regulation should specify that an individual can only culturally fish on Country.

- 3.115** The committee also notes that section 21AA does not deal with minimum fish size limits or fishing gear and methods. Given the trial local management plan in the Hastings area permits the use of traditional fishing methods, it may be necessary for any supporting regulation to consider these issues.
- 3.116** Moving forward, one option the NSW Government could consider is incorporating the local management approach or plans into the supporting regulation for 21AA. Alternatively, the government could work with stakeholders to develop a new supporting regulation and the limits it contains.
- 3.117** While we acknowledge that some stakeholders may not be satisfied with this approach, and that there are views that Aboriginal cultural fishing should not be regulated at all, the committee believes this is the best way forward, given all of the circumstances and views across the fishing sector.
- 3.118** The committee therefore encourages both the NSW Department of Primary Industries and all key stakeholders, across the Aboriginal, recreational and commercial fishing sectors, to work together on a draft regulation. As part of that work, Aboriginal cultural fishing should undoubtedly be promoted and respected, in all the forms it can take.

Recommendation 4

That the NSW Government commence Schedule 1 of the *Fisheries Management Amendment Act 2009* by 30 June 2023, and take immediate steps to develop a supporting regulation in consultation with Aboriginal communities and peak bodies, and other stakeholders.

- 3.119** In making the recommendation above, the committee acknowledges that any native title holder would clearly have rights that sit outside of this regulatory framework.
- 3.120** During this inquiry, the committee was encouraged to learn of the work currently being undertaken by the NSW Government to support Aboriginal owned commercial fishing businesses. In particular, the committee notes the recent launch of the Aboriginal Fisheries Business Development Program, which can support Aboriginal community organisations and community-led businesses to develop new economically viable fisheries businesses that provide a strong connection between Aboriginal communities and the management of aquatic resources.
- 3.121** The committee encourages the agencies involved in this program to support stakeholders on the South Coast of NSW to make an application so that they can potentially access commercial abalone, or other fish stock, for the broader benefit of the local Aboriginal community. We also encourage other options to be considered that would enable local Aboriginal communities to have greater access to the commercial fishing industry.

Recommendation 5

That the NSW Department of Primary Industries, Department of Regional NSW and Department of Aboriginal Affairs proactively work with the Aboriginal community on the South Coast to support the community to make an application to the Aboriginal Fisheries Business Development Program, or other programs, to give them greater opportunities for commercial fishing businesses, for the broader benefit of the local community.

Recommendation 6

That the NSW Department of Primary Industries explore other options that would enable local Aboriginal communities to have greater access to the commercial fishing industry.

- 3.122** Evidence to this inquiry also highlighted the need for broader education about cultural fishing within the fishing sector. In our view, all sectors need to recognise and understand that cultural fishing is about more than the method and the take, and can incorporate modern fishing equipment. We therefore call upon the NSW Department of Primary Industries to implement measures to better educate the broader fishing community about cultural fishing practices. Any training and education strategies should be developed in consultation with Aboriginal stakeholders.
-

Recommendation 7

That the NSW Department of Primary Industries implement measures to better educate the broader fishing community about Aboriginal cultural fishing practices.

Appendix 1 Submissions

| No. | Author |
|-----|---|
| 1 | Mr Julian Richards |
| 2 | Name suppressed |
| 3 | Name suppressed |
| 4 | Name suppressed |
| 5 | Mr Troy Pender |
| 5a | Mr Troy Pender |
| 6 | Name suppressed |
| 7 | Mr Steven Holmes |
| 7a | Mr Steven Holmes |
| 8 | Mr Robert Chewying |
| 9 | University of Technology Sydney |
| 10 | Ms Linda Longbottom |
| 11 | Mr Stewart Davison |
| 12 | Mr Chris Young |
| 13 | Mr Wally Stewart |
| 13a | Mr Wally Stewart |
| 14 | Mr Kevin Mason |
| 15 | Mr Andrew Nye |
| 16 | Name suppressed |
| 17 | Honorary Associate Professor Janet Hunt |
| 18 | Mr Nicholas Glover |
| 19 | Mr Douglas Seymour |
| 20 | Name suppressed |
| 21 | Mr John Carriage |
| 22 | NSW Aboriginal Land Council |
| 23 | Australian Institute of Aboriginal and Torres Strait Islander Studies |
| 24 | Mr Troy Tungai |
| 25 | Mr Adrian Connolly |
| 26 | Mr Craig Wellington |
| 27 | Name suppressed |
| 28 | Mr Ewan Thomas |
| 28a | Mr Ewan Thomas |

| No. | Author |
|------------|--|
| 29 | Mr Bill Cooley |
| 30 | Oxfam Australia |
| 31 | Katungul Aboriginal Corporation Regional Health and Community Services |
| 32 | Confidential |
| 33 | Mr Wayne Carberry |
| 34 | Mr Tony McAvoy SC and Mr John Waters SC |
| 35 | Australian National Centre for Ocean Resources and Security |
| 36 | The Recreational Fishing Alliance of NSW |
| 37 | NSW Council for Civil Liberties |
| 38 | Nature Conservation Council of NSW |
| 39 | South Coast Aboriginal Fishing Rights Group (SCAFRG) |
| 40 | NSW Government |
| 41 | NTSCORP |
| 42 | Dr Natalie Kwok |
| 43 | Aboriginal Legal Service (NSW/ACT) Limited |
| 44 | Abalone Association NSW |
| 45 | Ms Vivienne Mason |
| 46 | Mr John Brierley |
| 47 | Mr Wayne Anderson |
| 48 | Anthony Henry |
| 49 | Professional Fisher's Association |

Appendix 2 Witnesses at hearings

| Date | Name | Position and Organisation |
|---|---|---|
| Thursday 28 July 2022 Club Narooma 88 Princes Highway Narooma NSW 2546 | Mr Douglas Seymour | Individual |
| | Ms Kayeleen Brown | Katungal Aboriginal Corporation Regional Health and Community Services |
| | Mr Danny Chapman | Representative for the South Coast for the NSW Aboriginal Land Council |
| | Mr Keith Nye | Mogo Aboriginal Land Council |
| | Mr John Brierley | Individual |
| | Mr Robert Chewying | NSW Aboriginal Fishing Rights Group |
| | Mr Wayne Carberry | Individual |
| | Mr Andrew Nye | Individual |
| | Mr Kevin Mason | Individual |
| Friday 19 August 2022 Room 814/815 Parliament House | Mr Stan Konstantaras | President, The Recreational Fishing Alliance of NSW |
| | Mr Greg Ryzy | President, NSW Abalone Association (AANSW) |
| | Mr Stephen Bunney | Industry Liaison, NSW Abalone Association |
| | Dr Paul Cleary | Oxfam Australia |
| | Ms Kate Thomann <i>(via videoconference)</i> | Executive Director, Research and Education Group, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) |
| | Ms Dora Bowles <i>(via videoconference)</i> | Research Officer, Indigenous Country and Governance, AIATSIS |
| Mr John Carriage | Individual | |

| Date | Name | Position and Organisation |
|------|--|---|
| | Mr Bill Cooley | Individual |
| | Mr Troy Tungai | Individual |
| | Mr Nicholas Glover <i>(via videoconference)</i> | Individual |
| | Dr Janet Hunt | Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University |
| | Dr Michelle Voyer <i>(via videoconference)</i> | Senior Research Fellow, Australian National Centre for Ocean Resources and Security, University of Wollongong |
| | Professor Kate Barclay | Professor Kate Barclay, Director, Climate, Society and Environment Research Centre, University of Technology, Sydney |
| | Ms Kathryn Ridge | Doctoral researcher, University of Technology, Sydney |
| | Mr Danny Chapman | Chair, NSW Aboriginal Land Council |
| | Ms Mishka Holt | Principal Solicitor, NTSCORP |
| | Mr Tony McAvoy | SC, Barrister and representative of the Aboriginal Legal Service NSW/ACT |
| | Mr Jamie Donovan <i>(via videoconference)</i> | Chair, Bunyah Local Aboriginal Land Council, member of Steering committee for the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan trial |
| | Mr Wayne Anderson <i>(via videoconference)</i> | Member, Aboriginal Fishing Advisory Council, member of Steering committee for the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan trial |

| Date | Name | Position and Organisation |
|-------------|-------------------|--|
| | Mr Sean Sloan | Deputy Director General Fisheries, NSW Department of Primary Industries |
| | Ms Sarah Fairfull | Director, Aboriginal Fishing and Marine and Coastal Environment, NSW Department of Primary Industries |

Appendix 3 Minutes

Minutes no. 73

Wednesday 20 July 2022

Portfolio Committee No. 4 – Customer Service and Natural Resources
Room 1254, Parliament House, Sydney, at 9:30 am

1. Members present

Mr Banasiak, Chair (from 1pm onwards, via videoconference)
Ms Hurst, Deputy Chair (acting as Chair until 1pm)
Mr Barrett
Mr D'Adam (substituting for Mr Veitch from 1.00pm)
Mr Martin (until 1.00 pm)
Mr Poulos
Mr Primrose
Mr Rath (substituting for Mr Martin from 1.00 pm)

2. Apologies

Mr Veitch

3. Inquiry into the commencement of the Fisheries Management Amendment Act 2009

3.1 Aboriginal cultural awareness training

Committee members participated in training provided by Mr Dave Widders. Also present were Steven Collins, Rick Biggs and Tess Vickery.

Due to videoconference issues experienced by the Chair when joining at 1pm, the Deputy Chair, Ms Hurst, continued to act as Chair for the remainder of the meeting.

4. Inquiry into Budget Estimates 2022-2023 – procedural resolutions

Mr Rath and Mr D'Adam joined the meeting.

The committee noted that the Budget Estimates timetable for 2022-2023 was agreed to by the House, with hearings commencing at 9.30 am and concluding by 5.15 pm. Below is a table of Portfolio Committee No. 4 hearings:

| Date | Portfolio |
|-------------------------------|---|
| Tuesday 30 August 2022 | Customer Service and Digital Government |
| Friday 2 September 2022 | Lands and Water, Hospitality and Racing |
| Monday 5 September 2022 | Agriculture and Western NSW |
| Wednesday 7 September 2022 | Small Business and Fair Trading |

4.1 Allocation of question time and total hearing time

The committee noted that under the Budget Estimates 2022-2023 resolution each portfolio, except The Legislature, will be examined concurrently by Opposition and Crossbench members only, from 9.30 am to 11.00 am, and from 11.15 am to 12.45 pm, then from 2.00 pm to 3.30 pm, and from 3.45 pm to 5.15 pm, with 15 minutes reserved for Government questions at the end of the morning and afternoon session, if required.

4.2 Witness requests

Resolved, on the motion of Mr Primrose: That for the portfolio of Customer Service and Digital Government the committee invite the following witnesses:

- Hon Victor Dominello MP, Minister for Customer Service and Digital Government
- Ms Emma Hogan, Secretary, Department of Customer Service
- Mr Adam Dent, Chief Executive Officer, State Insurance Regulatory Authority, Department of Customer Service
- Mr Greg Wells, Deputy Secretary, Digital.NSW, Department of Customer Service
- Mr Damon Rees, Chief Executive Officer, Service NSW, Department of Customer Service
- Ms Mandy Young, Chief Operating Officer, Department of Customer Service
- Mr William Murphy, Deputy Secretary, Customer, Delivery and Transformation
- Ms Elizabeth Tydd, NSW Information Commissioner
- Ms Samantha Gavel, NSW Privacy Commissioner
- Ms Liz Livingstone, Chief Executive Officer, Independent Pricing and Regulatory Tribunal

Resolved, on the motion of Mr Primrose: That for the portfolio of Lands and Water, Hospitality and Racing the committee invite the following witnesses:

- Hon Kevin Anderson MP, Minister for Lands and Water, Hospitality and Racing
- Dr Jim Bentley, CEO NSW Water Sector, Department of Planning & Environment
- Mr Michael Wright, Deputy Secretary, Department of Planning & Environment
- Mr Steve Griffin, CEO, Greyhound Welfare Integrity Commission
- Mr Terry O'Brien, Director, Office of Racing
- Ms Natasha Mann, Fair Trading Commissioner/Deputy Secretary, Department of Customer Service
- Ms Melanie Hawyes, Deputy Secretary, Department of Planning & Environment
- Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service
- Ms Amanda Jones, CEO Water Infrastructure, Department of Planning & Environment
- Mr Grant Barnes, Chief Regulatory Officer, Natural Resources Access Regulator
- Mr Andrew George, CEO, Water NSW
- Mr Roch Cheroux, Managing Director, Sydney Water
- Mr Darren Cleary, Managing Director, Hunter Water
- Ms Jen Hickey, CEO, Cemeteries and Crematoria NSW
- Mr Phillip Crawford, Chairman, Independent Liquor and Gaming Authority
- Natural Resources Commission

Resolved, on the motion of Mr Primrose: That for the portfolio of Agriculture and Western NSW the committee invite the following witnesses:

- Hon Dugald Saunders MP, Minister for Agriculture and Western New South Wales
- Mr Gary Barnes, Secretary, Regional NSW
- Ms Kate Lorimer-Ward, Deputy Director General, Agriculture, NSW Department of Primary Industries (DPI) and Chief Executive of the NSW Rural Assistance Authority
- Mr Scott Hansen, Director General, Primary Industries, Primary Industries
- Mr Anshul Chaudhary, CEO, Forestry Corporation, Forestry Corporation

- Mr Steve Orr, CEO, Local Land Services, Local Land Services
- Mr Adam Tyndall, Director, Policy & Reform, Local Land Services
- Dr John Tracey, Deputy Director General, Biosecurity & Food Safety, Primary Industries
- Mr Sean Sloane, Deputy Director General, Fisheries, Primary Industries
- Mr Peter Turnell, Fisheries, Primary Industries
- Mr Daryl Quinlivan, NSW Agriculture Commissioner, Primary Industries
- Dr Kim Filmer, Chief Animal Welfare Officer, Primary Industries
- Mr David McPherson, Deputy Director General, Forestry & Land Reform, Primary Industries
- Mr Rob Kelly, Executive Director, Regional Operations, Local Land Services
- Mr Jonothan Wheaton, Executive Director, Regional Development, Regional NSW
- Ms Suzanne Robinson, Acting Director, Animal Welfare, NSW DPI
- Natural Resources Commission

Resolved, on the motion of Mr Primrose: That for the portfolio of Small Business and Fair Trading the committee invite the following witnesses:

- Hon Eleni Petinos MP, Minister for Small Business and Fair Trading
- Ms Vanessa Carmody-Smith, Director, Construct NSW
- Acting Property Services Commissioner (as appointed from August 2022)
- Emma Hogan, Secretary, Department of Customer Service
- Chris Lamont, Small Business Commissioner, Small Business Commission
- Hon Lou Amato MLC, Parliamentary Secretary - Small Business
- Natasha Mann, Fair Trading Commissioner; Deputy Secretary, Better Regulation, Department of Customer Service
- John Tansey, Executive Director, Policy & Strategy, Department of Customer Service
- David Chandler, Building Commissioner, Department of Customer Service
- Tony Williams, Executive Director, Compliance and Dispute Resolution, Department of Customer Service
- Meagan McCool, Director, Construction Services Group, Metropolitan, SafeWork NSW, Department of Customer Service (DCS)
- Michael Gadiel, Executive Director, Economic Strategy, NSW Treasury

The committee noted that where a witness no longer occupies a position, invitations will be made based on the position.

Resolved, on the motion of Mr Primrose: That the committee submit any further witness requests to the secretariat by 5.00 pm, Friday 22 July 2022.

Resolved, on the motion of Mr Primrose: That the committee invite the Hon Lou Amato MLC, Parliamentary Secretary - Small Business to appear as a witness at the hearings.

4.3 Witness appearance time

The committee noted that under the Budget Estimates 2022-2023 resolution ministers are invited to appear for the morning sessions only, 9.30 am to 12.45 pm, unless requested by the committee to appear also for the afternoon session.

4.4 Recording of hearing

Resolved, on the motion of Mr Primrose: That all Budget Estimates 2022-2023 hearings be recorded and that these recordings be placed on the inquiry webpage as soon as practicable after the hearing.

5. Correspondence

The committee to note the following correspondence:

Received:

- 20 June 2022 – Correspondence from Ms Sarah Fairfull, Director, Aboriginal Fishing and Marine and Coastal Environments, NSW Department of Primary Industries, to secretariat, enclosing additional information for the inquiry into the commencement of the Fisheries Management Amendment Act 2009, including three factsheets and a copy of the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan (previously circulated)

Resolved on the motion of Mr Poulos: That the committee publish the supplementary information provided by the NSW Department of Primary Industries on 20 June 2022, including all of the attachments.

6. Inquiry into the commencement of the Fisheries Management Amendment Act 2009

6.1 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 8 (previously name suppressed but now fully public), 28a and 44.

6.2 Partially confidential submission

Resolved on the motion of Mr Primrose: That the committee publish supplementary submission 13a, with the exception of the proposed redaction, as highlighted by the secretariat and requested by the author, which is to be kept confidential.

6.3 Upcoming site visit/roundtable on 28 July

The committee noted that it agreed via email for the committee to:

- Visit Mystery Bay fish traps and be welcomed and briefed on Country by Mr Wally Stewart
- Conduct a roundtable with invited community representatives in Narooma, as an alternative to the usual public hearing format.

The members noted that the following arrangements will apply to the roundtable:

- members and community representatives to be seated around the table in more of a mixed format
- the roundtable will be open to the public and broadcast live, with a transcript produced by Hansard
- community representatives will not be requested to take an oath or affirmation
- community representatives will still be provided with an opportunity to make a short statement during introductions, and then there will be an opportunity for questions and discussion, as facilitated by the Chair.

7. Next meeting

28 July 2022, site visit/roundtable meeting in Narooma, for the inquiry into the commencement of the *Fisheries Management Amendment Act 2009*.

Tina Higgins / Rhia Victorino
Committee Clerk

Minutes no. 74

Thursday, 28 July 2022

Portfolio Committee no. 4 – Customer service and natural resources

394 Ross Smith Avenue, Mascot, 6.45 am

1. Members present

Mr Martin
Mr Poulos
Mr Primrose
Mr Veitch

2. Apologies

Mr Banasiak
Mr Barrett
Ms Hurst

3. Election of Chair and Deputy Chair

Mr Martin moved: That Mr Veitch be elected chair today. There being no other nominations, Mr Veitch was elected chair. Mr Veitch took the chair.

Mr Primrose moved: That Mr Martin be elected for deputy chair for today. There being no other nominations Mr Martin was elected as deputy chair.

4. Draft minutes

Resolved on the motion of Mr Martin: that draft minutes no. 73 be confirmed.

5. Inquiry into the commencement of the *Fisheries Management Amendment Act 2009***5.1 Public submissions**

The committee noted that submission no. 45 was published by the Committee Clerk under the resolution appointing the Committee.

The committee noted a submission from Mr John Brierley.

Resolved, on the motion of Mr Poulos: That the committee invite Mr Brierley to attend the roundtable.

5.2 Partially confidential submissions

Resolved on the motion of Mr Poulos: that the committee keep the following information confidential, as per the request of the author: identifying information in submission no. 6.

5.3 Effective communication with Aboriginal stakeholders

Committee members noted the information provided "Guide to engaging effectively with Aboriginal and Torres Strait Islander stakeholders in parliamentary inquiries".

5.4 Site visit to Mystery Bay

The committee met with representatives of the local Aboriginal fishing community and were welcomed to country by Mr Nigel Stewart.

5.5 Community round table meeting

Participants, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The discussion was opened with the following participants:

- Mr Douglas Seymour
- Ms Kayeleen Brown, Katungal Aboriginal Corporation Regional Health and Community Services
- Mr Danny Chapman, representative for the South Coast for the NSW Aboriginal Land Council.
- Mr Keith Nye, Mogo Aboriginal Land Council

- Mr John Brierley
- Mr Robert Chewying, NSW Aboriginal Fishing Rights Group
- Mr Wayne Carberry
- Mr Andrew Nye
- Mr Kevin Mason

The public and the media withdrew.

The roundtable concluded at 3.30 pm.

6. Next meeting

19 August 2022 for the public hearing in Sydney for the inquiry into the commencement of the *Fisheries Management Amendment Act 2009*.

Tina Higgins

Committee Clerk

Minutes no. 75

Friday, 19 August 2022

Portfolio Committee no. 4 – Customer service and natural resources

Room 814/815, Parliament House, Sydney at 9.17 am

1. Members present

Ms Hurst, *Chair (from 11.15 am)*

Mr Barrett (*by videoconference*)

Mr Martin

Mr Poulos

Mr Primrose

Mr Veitch

2. Apologies

Mr Banasiak

3. Election of Chair

Mr Martin moved: That Mr Veitch be elected chair until Ms Hurst, Deputy Chair, arrives. There being no other nominations, Mr Veitch was elected chair.

Mr Veitch took the chair.

4. Draft minutes

Resolved on the motion of Mr Primrose: that draft minutes nos. 70 and 74 be confirmed.

5. Correspondence

The committee noted the following items of correspondence:

Received:

- 2 August 2022 – Email from Ms Jacquelyn Johnson, Executive Officer, Nature Conservation Council of NSW, to secretariat, declining the invitation to appear as a witness at the hearing on 19 August 2022, for the Aboriginal cultural fishing inquiry.
- 12 August 2022 – Email from Ms Michelle Falstein, Assistant Secretary, NSW Council for Civil Liberties, to secretariat, declining the invitation to appear as a witness at the hearing on 19 August 2022, for the Aboriginal cultural fishing inquiry.

- 17 August 2022 – Email from Ms Natalie Kwok to secretariat, advising she is unable to attend the hearing on 19 August, for the Aboriginal cultural fishing inquiry.

6. Inquiry into the commencement of the Fisheries Management Amendment Act 2009

6.1 Public submissions

Resolved, on the motion of Mr Martin: That the committee authorise the publication of submission no. 46.

6.2 Partially confidential submissions

Resolved, on the motion of Mr Poulos: That the committee authorise the publication of submission nos. 47, with the exception of identifying and/or sensitive information which are to remain confidential, as per the recommendation of the secretariat.

6.3 Witnesses and approach to questioning

The committee noted that the secretariat has been unable to invite the author of submission no.32 to provide evidence at a hearing.

The committee also noted that Mr Robert Cooley, Senior Ranger, Gamay Rangers, La Perouse Aboriginal Land Council, is unable to attend the hearing on 19 August 2022.

Resolved, on the motion of Mr Primrose: That the sequence for questioning of witnesses be left in the hands of the chair.

Mr Martin left the meeting.

6.4 Public hearing

Witnesses and members of the public were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Stan Konstantaras, President, The Recreational Fishing Alliance of NSW
- Mr Greg Ryzy, President, NSW Abalone Association (AANSW)
- Mr Stephen Bunney, Industry Liaison, NSW Abalone Association.

Mr Konstantaras tendered a copy of his opening statement.

Mr Bunney tendered the following documents:

- AANSW opening statement
- AANSW Submission
- NSW Environmental Code of Practice for the Abalone and, Sea Urchin and Turban Shell Fisheries
- The Abalone Brochure NSW
- NSW Total Allowable Fishing Committee Report Abalone Determination for the 2021-2022 fishing period
- Fine Scale Management: Training Module 3 by Rob Day for the Abalone Fishing Industry 2005, Australian Government Fisheries Research and Development Corporation project
- How do abalone live?: Training Module 1 by Rob Day for the Abalone Fishing Industry 2005, Australian Government Fisheries Research and Development Corporation project
- Graphics of historical seized and prosecution and infringement notices (non-commercial).

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Dr Paul Cleary, Policy and advocacy lead, Oxfam Australia.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Kate Thomann, Executive Director, Research and Education Group, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), by videoconference
- Ms Dora Bowles, Research Officer, Indigenous Country and Governance, AIATSIS, by videoconference.

The evidence concluded and the witnesses withdrew.

Ms Hurst and Mr Martin joined the meeting at 11.15am.

The following witnesses were sworn and examined:

- Mr John Carriage
- Mr Bill Cooley
- Mr Troy Tungai
- Mr Nicholas Glover, by videoconference.

Mr Tungai tendered the following document

- Notice of rebuttal of claim of title to land and claim of right.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Janet Hunt, Honorary Associate Professor, Centre for Aboriginal Economic Policy Research, Australian National University
- Dr Michelle Voyer, Senior Research Fellow, Australian National Centre for Ocean Resources and Security, University of Wollongong, via videoconference
- Professor Kate Barclay, Director, Climate, Society and Environment Research Centre, University of Technology, Sydney
- Ms Kathryn Ridge, Doctoral researcher, University of Technology, Sydney.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Danny Chapman, Chair, NSW Aboriginal Land Council
- Ms Mishka Holt, Principal Solicitor, NTSCORP
- Mr Tony McAvoy, SC, Barrister and representative of the Aboriginal Legal Service NSW/ACT.

The evidence concluded and the witnesses withdrew.

Mr Poulos left the meeting.

The following witnesses were sworn and examined:

- Mr Jamie Donovan, Chair, Bunyah Local Aboriginal Land Council, member of Steering committee for the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan trial, via videoconference
- Mr Wayne Anderson, Member, Aboriginal Fishing Advisory Council, member of Steering committee for the Birpai Barray (Hastings) Aboriginal Cultural Fishing Local Management Plan trial, via videoconference.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Sean Sloan, Deputy Director General Fisheries, NSW Department of Primary Industries
- Ms Sarah Fairfull, Director, Aboriginal Fishing and Marine and Coastal Environment, NSW Department of Primary Industries.

Mr Sloan tendered the following documents:

- Opening statement
- USB containing 16 videos of firsthand accounts of the impacts of the 10 year Marine Estate Management Strategy Initiative 4
- NSW Government Aboriginal Fishing Trust Fund (established under the *Fisheries Management Act 1994*) expenditure 2017-18 to 2020-01
- Timeline from 2009 to 2022 of NSW Government actions and engagement with Aboriginal stakeholders since the introduction of the *Fisheries Management Amendment Act 2009*
- Application form for an Authority to take fish for Aboriginal cultural fishing purposes under Section 37 of the *Fisheries Management Act 1994*
- Summary of Section 37 cultural fishing permits issued from 2010 to August 2022.

The evidence concluded and the witnesses withdrew.

The hearing concluded at 5:00 pm.

Witnesses, media and members of the public withdrew.

7. Tendered documents

Resolved, on the motion of Mr Veitch: That the committee accept and publish the following document(s) tendered during the public hearing:

- Opening statement from the Recreational Fishing Alliance of NSW
- AANSW opening statement
- AANSW Submission
- NSW Environmental Code of Practice for the Abalone and, Sea Urchin and Turban Shell Fisheries
- The Abalone Brochure NSW
- NSW Total Allowable Fishing Committee Report Abalone Determination for the 2021-2022 fishing period
- Fine Scale Management: Training Module 3 by Rob Day for the Abalone Fishing Industry 2005 Australian Government Fisheries Research and Development Corporation project
- How do abalone live?: Training Module 1 by Rob Day the Abalone Fishing Industry 2005 Australian Government Fisheries Research and Development Corporation project
- Graphics of historical seized and prosecution and infringement notices (non-commercial).
- Notice of rebuttal of claim of title to land and claim of right
- Opening statement from the Department of Primary Industries
- USB containing 16 videos of firsthand accounts of the impacts of the 10 year Marine Estate Management Strategy Initiative 4
- NSW Government Aboriginal Fishing Trust Fund (established under the *Fisheries Management Act 1994*) expenditure from 2017-18 to 2020-01
- Timeline from 2009 to 2022 of NSW Government actions and engagement with Aboriginal stakeholders since the introduction of the *Fisheries Management Amendment Act 2009*

- Application form for an Authority to take fish for Aboriginal cultural fishing purposes under Section 37 of the *Fisheries Management Act 1994*
- Summary of Section 37 cultural fishing permits issued from 2010 to August 2022

8. Next meeting
30 August 2022

Tina Higgins / Sarah Newlands
Committee Clerks

Minutes no. 80

Monday 12 September 2022
Portfolio Committee no. 4 – Customer service and natural resources
Room 814/815, Parliament House, Sydney at 10.00 am

1. Members present

Mr Banasiak, *Chair*
Ms Hurst, *Deputy Chair (via videoconference)*
Mr Martin
Mr Poulos
Mr Primrose
Mr Veitch

2. Apologies

Mr Barrett

3. Draft minutes

Resolved on the motion of Mr Martin: that draft minutes no. 75 be confirmed.

4. Inquiry into the commencement of the Fisheries Management Amendment Act 2009

4.1 Public submissions

Resolved, on the motion of Mr Veitch: That the committee authorise the publication of submission no. 48 and 49.

4.2 Proposed dates for report deliberative and tabling

Resolved on the motion of Mr Veitch: That the committee adopt the following timeline for the report

- 2 November – report deliberative
- 7 November – report tabling.

4.3 Recording of committee roundtable

Resolved on the motion of Mr Primrose: That the committee authorise the secretariat to record the roundtable discussion for the purposes of drafting the report.

4.4 Committee roundtable

The committee discussed the potential themes, findings and recommendations for the report.

5. Next meeting

11.30 am, 12 September 2022.

Tina Higgins / Sarah Newlands
Committee Clerks

Draft minutes no. 84

Wednesday 2 November 2022

Portfolio Committee No. 4 - Customer Service and Natural Resources

Room 1136, Parliament House, Sydney, at 9.15 am

1. Members present

Mr Banasiak, *Chair*

Mr Barrett (via videoconference)

Mr Martin (via videoconference)

Mr Poulos (via videoconference)

Mr Primrose

Mr Veitch

2. Apologies

Ms Hurst, *Deputy Chair*

3. Draft minutes

Resolved, on the motion of Mr Veitch: That draft minutes no. 80 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 19 September 2022 – Email from Mr John Carriage, Aboriginal cultural fisher, to secretariat, providing additional evidence to the inquiry and enclosing copies of his fines for certain offences
- 25 September 2022 – Email from Mr John Carriage, Aboriginal cultural fisher, to secretariat, providing additional evidence to the inquiry regarding his court imposed fines
- 17 October 2022 – Email from Ms Alyce Umback, Senior Policy Adviser, NSW Department of Primary Industries, Fisheries, clarifying information provided in answers to questions on notice.

Resolved, on the motion of Mr Veitch:

- That the committee keep both emails from Mr John Carriage, dated 19 and 25 September 2022, confidential, as they contain identifying and/or sensitive information.
- That the committee authorise the publication of correspondence from Ms Alyce Umback, regarding further information to answers to questions on notice, dated 17 October 2022.

5. Inquiry into the commencement of the Fisheries Management Amendment Act 2009**5.1 Answers to questions on notice and supplementary questions**

The committee noted the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to supplementary questions from Mr Robert Chewying, representative of the South Coast Aboriginal Fishing Rights Group, received on 29 August 2022
- answers to questions on notice from Dr Paul Cleary, Policy and advocacy lead, First Peoples program, Oxfam Australia, received 23 September 2022
- answers to questions on notice from Mr Sean Sloan, Deputy Director General Fisheries, NSW Department of Primary Industries, received on 5 October 2022
- answers to questions on notice from Ms Kate Thomann, Executive Director, Research and Education Group, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), received on 6 October 2022
- answers to questions on notice from Mr Danny Chapman, Chair, NSW Aboriginal Land Council, received 12 October 2022.

5.2 Transcript clarifications

Resolved, on the motion of Mr Veitch:

- That the committee authorise the insertion of footnotes in the transcript of 19 August 2022, to clarify the evidence of Dr Paul Cleary, Oxfam Australia.
- That the committee authorise the insertion of footnotes in the transcript of 19 August 2022, to clarify the evidence of Mr Sean Sloan, Deputy Director General Fisheries Department of Primary Industries.

5.3 Consideration of the Chair's draft report

The Chair submitted his draft report entitled *Commencement of the Fisheries Management Amendment Act 2009*, which, having been previously circulated, was taken as being read.

Chapter 1

Mr Barrett moved: That paragraph 1.56 be amended by omitting: 'It was also necessary to explore the reasons why the NSW Government failed to commence section 21AA since the provision was passed 13 years ago.'

Question put.

The committee divided.

Ayes: Mr Barrett, Mr Martin, Mr Poulos.

Noes: Mr Banasiak, Mr Primrose, Mr Veitch.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Chapter 2

Mr Barrett moved:

- That paragraph 2.82 be omitted: 'Taking all of the circumstances into account, the committee is not satisfied that the NSW Government has worked effectively to ensure Aboriginal cultural fishing is adequately supported through the legislative framework. Even the development of local management plans has been extraordinarily slow, and only one plan, for the Hastings area, is in operation' and the following new paragraph be inserted instead:

'The implementation of 21AA has faced some difficulties with shifting stakeholder views over time. However, even when considering this, this implementation has moved far too slowly. Even the development of local management plans has been extraordinarily slow, and only one plan, for the Hastings area, is in operation.'

- That Finding 1 be omitted: 'That the NSW Government has failed to effect the will of the Parliament by not commencing Schedule 1 of the *Fisheries Management Amendment Act 2009* to make special provision for cultural fishing' and the following new finding be inserted instead:

'Even considering difficulties associated with shifting stakeholder views over time, the commencement of Schedule 1 of the *Fisheries Management Amendment Act 2009* has been too slow and as a result has had negative impacts of the ability for Aboriginal people to conduct cultural fishing.'

Question put.

The committee divided.

Ayes: Mr Barrett, Mr Martin, Mr Poulos.

Noes: Mr Banasiak, Mr Primrose, Mr Veitch.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Mr Barrett moved: That Recommendation 1 be amended by omitting 'cease all surveillance, compliance actions and prosecution actions against Aboriginal cultural fishers' and inserting instead 'Review and amend

standard operating procedures and current compliance operations involving Aboriginal cultural fishers to ensure that fishers practicing their cultural fishing are not unnecessarily hindered when undertaking cultural fishing.'

Question put.

The committee divided.

Ayes: Mr Barrett, Mr Martin, Mr Poulos.

Noes: Mr Banasiak, Mr Primrose, Mr Veitch.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Barrett: That Recommendation 1 be amended by inserting the word 'infringement' after 'penalty'.

Resolved, on the motion of Mr Barrett: That Recommendation 2 be amended by inserting the words 'review and' before the word 'implement'

Mr Barrett moved: That Recommendation 3 be omitted: 'That the NSW Government conduct an independent review of the culture and practices of the compliance division of the Department of Primary Industries Fisheries, to identify any systemic cultural problems and implement changes which will lift the cultural capability of the organisation'

Question put.

The committee divided.

Ayes: Mr Barrett, Mr Martin, Mr Poulos.

Noes: Mr Banasiak, Mr Primrose, Mr Veitch.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Mr Barrett moved: That a new Recommendation 3 be inserted: 'That the NSW Government conduct an independent review of the regulatory practices of the compliance division of the Department of Primary Industries Fisheries, to identify any systemic problems and implement changes which will lift the cultural capability of the organisation.'

Question put.

The committee divided.

Ayes: Mr Barrett, Mr Martin, Mr Poulos.

Noes: Mr Banasiak, Mr Primrose, Mr Veitch.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Barrett that Recommendation 3 be amended by inserting the word 'regulatory' before 'practices'.

Chapter 3

Resolved, on the motion of Mr Barrett: That Recommendation 5 be amended by:

- a) Inserting the words ' support the community' before 'to make an application'
- b) Inserting the words 'or other programs' after 'Aboriginal Fisheries Business Development Program'
- c) Omitting the words 'access to commercial abalone stocks' and inserting instead 'opportunity for commercial fishing businesses'.

Resolved on the motion of Mr Veitch: That:

- the draft report, as amended, be the report of the committee and that the committee present the report to the House;
- the transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;
- upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- upon tabling, all unpublished submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- the secretariat is to table the report on the morning of Monday, 7 November 2022;
- dissenting statements are to be provided by 10 am Friday 4 November 2022.

Resolved on the motion of Mr Primrose: That the secretariat is authorised to notify media of the time and date of tabling of the report.

Sarah Newlands
Committee Clerk

Appendix 4 Dissenting statement

The Hon Scott Barrett MLC, The Nationals, Hon Taylor Martin MLC and Hon Peter Poulos MLC, Liberal Party

From the outset it's important to note that all Government members supported Recommendation 4 of this report, that is to commence Schedule 1 of the Fisheries Management Act 2009 by 30 June 2023. This to us is the key recommendation of the report and should be recognised as such.

The objects of this Act are to conserve, develop and share the fishery resources of the State for the benefit of present and future generations. In doing so, it is important we support the rights of Aboriginal cultural fishers operating within a sustainable natural resource management framework.

As such, it would have been preferable if the report was focused less on political point scoring and criticisms. Our committee system works best when looking for outcomes, in this case, for Aboriginal fishers, who receive no benefit from political game playing.

While acknowledging many participants felt unfairly targeted by surveillance and compliance actions, ceasing all such activity would place at risk community confidence that the fisheries resource are being managed. Given the feeling of unfair targeting by those involved in cultural fishing, it was felt a review and subsequent improvement was appropriate and required.

There are currently training programs undertaken by Fisheries Officers in relation to cultural awareness, as well as work instructions available for Fisheries Officers. The work instruction as explained in the Government's submission sets out detail of how Fisheries Officers are to approach suspected breaches of cultural fishing rules to ensure a culturally sensitive, consistent and transparent enforcement process.

This is not disagreeing with the importance of cultural awareness and training for Fisheries Officers and acknowledging more can be done. Training and education which is already incorporated into a Fisheries Officers workload most definitely should be maintained and possibly extended.

We should also be careful we are not unfairly targeting the culture of the Fisheries Officers and public servants rather than addressing the other issues heard throughout the inquiry process.

DPI has responsibility for administering fisheries laws governing the fisheries resources of the state, which they do through our Fisheries Compliance Unit. Fisheries Officers spend many hours on patrol, detecting and preventing illegal fishing and damage to fish habitats. Fisheries is not hiding their enforcement activities. This data is publicly available on the NSW DPI website.

We heard from DPI Fisheries in their submission and in the inquiry hearing that the cases that are taken to prosecution are associated with thousands of high value species being sold illegally.

Education and cultural awareness training which is recommended through recommendation 2 is considered a more appropriate way to manage this rather than targeting individuals in Fisheries Compliance area. Alternatively, it would be more appropriate to review the regulatory framework and practices which fisheries compliance officers operate under rather than the culture.

Hon Scott Barrett MLC

Hon Taylor Martin MLC

Hon Peter Poulos MLC

