Submission No 17

INQUIRY INTO COMMENCEMENT OF THE FISHERIES MANAGEMENT AMENDMENT ACT 2009

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Date Received: 22 February 2022

Inquiry into the Fisheries Management Amendment Act 2009.

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February 2022.

Thank you for the opportunity to respond to the Parliamentary Inquiry you are currently undertaking into the Fisheries Management Amendment Act 2009. I write in response to the Terms of Reference, particularly paragraph (c) the impact of the non-commencement of Schedule 1 on Aboriginal peoples and the practice of Aboriginal cultural fishing.

At the outset I draw to the Committee's attention that fishing rights have never been ceded by First Nations people in NSW. As Danny Chapman, then Chair of the Aboriginal Fishing Advisory Council of NSW, wrote in a submission to a 2011 Independent Review of Commercial Fisheries Policy, Management and Administration in NSW,

> 'It should be recognised that Aboriginal fisheries were the first fisheries in NSW and the rights to catch traditionally targeted species were never ceded to colonisers." (Chapman 2011:3)

This should be recognised as the Committee undertakes its investigations. There has never been a treaty signed between First Nations and the colonisers, and as things stand in the High Court, by the Commonwealth Government's own admission, Aboriginal residual sovereignty has now been legally acknowledged (Karp, P. 2022).

I would be interested to know the real answers to your TORs (a) and (d) as I am amazed that Schedule 1 has not been implemented since 2009, despite advocacy by myself[1] and many others about this and even a recommendation (39) of the NSW Legislative Council's Standing Committee on State Development Report into Economic Development in Aboriginal Communities in 2016, 'That the NSW Government proclaim section 21AA of the Fisheries Management Act 1994' (p xiv). There seem to have been a series of blockages created over time, in defiance of the Parliament's wishes. I see no challenges to commencing the Schedule 1 immediately.

I am aware that there have been many compliance actions taken in the intervening years with some serious consequences for the individuals involved. Yet these actions conflict with the Native Title Act, which is the overriding Commonwealth legislation.

As section 287 of the FMA 2014 states,

> "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."

I suggest that compliance actions taken against Aboriginal people for fishing in line with their law and culture since 2009 have conflicted with Commonwealth and NSW law. This is because the Native Title Act 2003 overrides the Fisheries Management Act (FMA) and allows people to practice their law and culture in line with their native title rights and interests. I would also make the point that these

[1] See for example letter by myself and Linda Carlson, CEO of Mogo LALC, 7 December 2017 to Marine Estate Secretariat.

native title rights and interests exist; when a native title claim is determined, they are simply recognised in settler law. So, 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. A number of native title claims have already been determined on the NSW coast, notably the Bandjalang, Western Bundjalung, the Bundjalung people of Byron Bay, Yaegl and Gumbaynggirr Peoples. Other claims are registered and awaiting determination, most notably the South Coast Aboriginal Peoples' claim.

Furthermore. in 2004, the National Native Title Tribunal facilitated a nationwide alternative dispute resolution process through the National Indigenous Fishing Principles[2] which provided States would voluntarily recognise native title rights and interests in fisheries without requiring native title claims to be in place or settled. The principles agreed are:

> 1. Indigenous people were the first custodians of Australia's marine and freshwater environments: Australia's fisheries and aquatic environment management strategies should respect and accommodate this.
>
> 2. Customary fishing is to be defined and incorporated by Governments into fisheries management regimes, so as to afford it protection.
>
> 3. Customary fishing is fishing in accordance with relevant Indigenous laws and customs for the purpose of satisfying personal, domestic or non-commercial communal needs. Specific frameworks for customary fishing may vary throughout Australia by reference, for example, to marine zones, fish species, Indigenous community locations and traditions or their access to land and water.
>
> 4.Recognition of customary fishing will translate, wherever possible, into a share in the overall allocation of sustainable managed fisheries.
>
> 5. In the allocation of marine and freshwater resources, the customary sector should be recognised as a sector in its own right, alongside recreational and commercial sectors, ideally within the context of future integrated fisheries management strategies.
>
> 6. Governments and other stakeholders will work together to, at minimum, implement assistance strategies to increase Indigenous participation in fisheries-related businesses, including the recreational and charter sectors.
>
> 7. Increased Indigenous participation in fisheries related businesses and fisheries management, together with related vocational development, must be expedited.

The NSW Government subsequently agreed to implement these National Indigenous Fishing Principles. When the NSW Parliament passed the *Fisheries Management Amendment Act 2009 No 114* including section 21AA which provided a process for recognising Aboriginal cultural fishing, this should have implemented the National Indigenous Fishing Principles to the extent at least of recognising (non-commercial) customary take. (Certain other aspects of the principles have still not been implemented. It is now 18 years since the Fishing Principles have been agreed, yet not

[2] http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Fishing_principles_to_guide_Indigenous_i.aspx

implemented in full in NSW). I note that the purpose of incorporating customary (or cultural) fishing into laws is ***to afford it protection*** (see principle 2*).* But the current situation is working not to *protect* cultural fishing but to *criminalise* it.

I also find it ironic that a settler court can take it upon itself to determine what is or is not 'cultural fishing' or fishing in line with Aboriginal law and culture. Surely the only people who can legitimately determine that question are elders within that culture? And cultural differences are evident across Australia in relation to the role and extent of small-scale commercial transactions within that culture as an AIATSIS study (Smyth, Egan and Kennett 2018) revealed. Even within NSW such differences may exist.

TOR (c) Impact

The impact of all the compliance actions has been very great. Aboriginal people are seriously overrepresented among those jailed or convicted in New South Wales for offences related to abalone fishing (Cleary 2021).

The rate of prosecutions by the State of NSW has increased tenfold since the registration of Aboriginal people's native title right to fish for any purpose which was not opposed by the State of NSW. Over the last 15 years, over 2000 Aboriginal people have been prosecuted for Fisheries Management Act 1994 (NSW) Act offences. At least 600 of those have been on the South Coast. Only 437 of over 2000 prosecutions resulted in a conviction, indicating that many Aboriginal people are being unreasonably subjected to the stress and high cost of a prosecution. Since more than three quarters of the State's prosecutions fail, this is also a waste of State resources.

Across NSW, over the same period, at least 28 Aboriginal people have been incarcerated. At least 22 Aboriginal people have been given non-custodial alternatives, and 93 non-custodial community-based orders. At least 241 Aboriginal people were fined, and one Aboriginal person had a conviction, only without any fine or custodial sentence. Three had conditional release with no conviction. Five had no conviction recorded. Twenty-three were found not guilty. [3]

The statistics also reveal that Aboriginal people are more likely to be charged, and then prosecuted compared to non-Aboriginal people. This is evidence of structural racism which needs to be properly interrogated as the State's practice of these prosecutions may in fact be in breach of the Commonwealth's Racial Discrimination Act (RDA) 1975. According to research undertaken by Paul Cleary (2021) over a slightly different period from the earlier data,

> "Indigenous people dominate criminal convictions for NSW fisheries offences. In the 10 years to 2017 (the latest available data), 25 of the 32 people jailed for these offences identified as Indigenous (or 78 per cent). As Indigenous people make up 3.4 per cent of the state's population, this makes them 23 times over-represented. Of the 60 people convicted with bonds whose Indigenous status was recorded in the data, half identified as Indigenous, making them 15 times over-represented."

Of course, the RDA is only one piece of legislation which reflects Australia's (and by implication the State of NSW's) commitments to international human rights principles. These include the UN Declaration of the Rights of Indigenous Peoples (UNDRIP), and the ratified Covenants and

[3] NSW Criminal Court Statistics 1996 to September 2020, Number of finalised charges under the Fisheries Management Act 1991 and the Fisheries Management Act 1994 by Aboriginality and charge outcome, Reference: sr21-19954, NSW Bureau of Crimes Statistics and Research.

Conventions it was drawn from, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and the Convention on Biological Diversity all of which the Australian Government has endorsed. Rights to customary fishing derive ultimately from these documents. The persistence of ongoing prosecutions breaches many of these international human rights agreements. Thus, one impact of the non-implementation of S21AA is that the State of NSW is breaching human rights standards that it has agreed to uphold, by virtue of its membership of the Australian federation, and Aboriginal people are being denied their human rights.

It is not clear why this persecution persists. It can't be to protect the fish stocks, as most total allowable catch assessments[4] for the New South Wales coast don't even assess the Aboriginal catch, presumably because, compared to commercial and general recreational catches, fisheries managers consider it insignificant. However, they recognise that such a catch exists, and hence presumably allow for it in assessing the catch allowable overall.

As a researcher who works from time to time with NSW south coast Aboriginal people, I have observed the impact of the non-commencement of Schedule 1 on many Aboriginal individuals and have been aware of many charged and brought to court for alleged breaches of the FMA. Those whom compliance actions touched have experienced:

- Prohibition from further fishing,
- Seizure of costly fishing or diving gear and even vehicles
- Fines or jail time, with implications for families as well as the accused
- Having a criminal record which makes obtaining a job more difficult
- The stress of the charges and court processes on them and their families.

The effect on many other people has also been chilling – in that they don't risk going into the water to dive or go fishing because of fear of interacting with compliance officers (even when they would be complying with existing laws).

There are several implications of all of this:

- Loss of cultural knowledge and intergenerational transmission of this significant saltwater culture
- Poorer diet, and sometimes family hunger, as inability to fish means no seafood to eat
- Poorer health and well-being (particularly for more vulnerable members of the community)
- Continued or exacerbated poverty and unemployment.

All the above is inconsistent with the NSW Government's stated policy of Closing the Gap.

Loss of cultural knowledge

Prosecution of Aboriginal people for charges associated with abalone diving, illustrates the criminalisation [5]of those who harvest seafood that has been part of their diet since well before colonisation. In the early years of colonisation Aboriginal people, who have fished and dived for thousands of years, played crucial roles in the establishment of fishing industries and in the food security of the new settler arrivals on the NSW south coast but are now almost entirely excluded

[4] See https://www.dpi.nsw.gov.au/fishing/commercial/total-allowable-fishing
[5] See, for example: Catch of Cultures by Mark White and Nick Cubbin, SBS Online. https://www.sbs.com.au/news/feature/catch-cultures

from these industries (Egloff 2000). They were also the original abalone divers trading with China, but when permits were introduced in the 1970s they were excluded (Cruse et al 2005). Since colonisation, Aboriginal cultural practice has been overwhelmingly subsistence fishing, with some bartering and small-scale trading, recognised as 'cultural-commercial fishing'. South coast Aboriginal people are proud of their saltwater culture, but tired of being stigmatised as 'poachers' who plunder the ocean. The cultural rules that they practice, are:

- Take only what you need
- Don't take individuals that are too small or too large
- Take species in season only
- Don't overfish any area (Smyth, Egan and Kennett 2018: p.22).

As Smyth, Egan and Kennett (2018) recognised:

> "As saltwater people, all of the knowledge and practices related to marine foods are central to their culture, and part of what makes it unique. This means that fishing and gathering other seafood is one of the main ways people practice their culture. It's also about getting out on country, and feeling connected to country and ancestors by fishing and gathering the way they did."

The ability of older people to take young people out fishing and diving is also essential to being able to pass on their knowledge of the marine environment. The study found that,

> "…taking children fishing is necessary for their cultural education. Through fishing they learn cultural knowledge of local fauna and flora, different fishing techniques and practices, knowledge of their country and the right places to get different species – as well as the stories of those places. They also learn the cultural laws that govern fishing." (p.22-23)

Thus these prosecutions have the effect of severing the transmission of cultural knowledge and depriving future generations of their culture and relationship to their sea country. These prosecutions are in effect killing a culture that is thousands of years old and which the law is supposed to be protecting.

Diet, Health, Wellbeing, and Poverty

Instead of fishing providing healthy food (Hosomi et al 2012) and exercise, prosecutions generate stress (Thoits 2010), which is not conducive to a long healthy life. The sea has always been the coastal Aboriginal supermarket, and when fish and fishing gear are seized, some families go hungry. In this culture, a skilled fisher or diver is obligated to share their catch with a large extended family, with elders, and with people who are unable to dive or fish themselves. Fishing is not just for a family of four. As Smyth, Egan and Kennett (2018) document, people,

> "…share their catch with their siblings, parents, grandparents, aunties and uncles, cousins, neighbours, friends, and sometimes even complete strangers…. This sharing creates a social safety net that supports vulnerable people within the community." (p23)

Thus, when a fisher has their catch seized, or when people don't go fishing for fear of compliance actions, many people suffer the absence of valuable protein and other nutritious elements contained in seafood in their diets. Nowadays south coast Aboriginal people struggle to get jobs and many live in poverty; both Eurobodalla (Eurobodalla Shire Council 2020) and Bega shires (Bega Valley Shire Council, 2013) have high rates of Indigenous unemployment. Significantly poorer Indigenous education outcomes than non-Indigenous people and longstanding racism also impact on their

employment (Fuller et al 2004). In the face of poverty, it is hardly surprising that people who are skilled fishers and divers head to the sea to gather highly nutritious seafood to supplement their diets.

Fishing /diving is excellent physical exercise too, and it contributes to keeping Aboriginal people healthier and fitter than they would otherwise be.

Hypertension, thyroid, diabetes and high cholesterol levels were associated by south coast Aboriginal people with easting less seafood and not getting the exercise fishing/diving provide, while fear of collecting species which are traditional medicines, (e.g. bimbillas) used to control high blood pressure is also reported (Smyth, Egan and Kennett 2018: p. 26).

As a social activity, or as an individual activity, fishing is also good for people's social and emotional well-being and their mental health (Smyth, Egan and Kennett 2018: pp 23-26).

So, fishing has multiple health benefits and contributes to people's overall wellbeing. Compliance actions which have stopped or reduced fishing activity therefore negatively affect all these aspects. People suffer the consequences.

A further consequence of the compliance and portrayal of Aboriginal people as 'poachers' is the harassment they experience and shame they feel if they go fishing. Verbal abuse and certain non-Indigenous people calling compliance officers as soon as they see an Aboriginal person approach the water, were reported. Some Aboriginal people have taken to only fishing/diving at night to avoid this, despite the dangers (Smyth, Egan and Kennett 2018, pp.28-29).

Working against Closing the Gap

The NSW Government, in its Implementation Plan for Closing the Gap says that its vision is that "Aboriginal and Torres Strait Islander people in NSW are determining their own futures"(p.6). (NSW-Government 2021). A clear message coming through from NSW Aboriginal people about the Plan is that central to their vision of the future is maintenance of their culture: "Culture and heritage needs to underpin the entire NSW Implementation Plan" (CAPO 2021: 18).

Rather than supporting a flourishing culture, the continued prosecution of south coast Aboriginal people does nothing towards the NSW Government's stated objective of Closing the Gap in 16 key socio-economic indicators. In fact it works against it: it certainly won't help reduce Aboriginal incarceration, contribute to Aboriginal employment or improve Aboriginal health (as indicated above). Once an Aboriginal person has a criminal conviction their chances of gaining employment plummet. These convictions may have life-long consequences particularly for younger people.

Concluding comments and recommendations

It is easy to document all these effects, but it is extremely important that the members of this Parliamentary Inquiry hear first-hand from those whom this non-enactment of the cultural fishing amendment affects.

I strongly recommend that the Committee hold hearings in a number of locations along the coast of NSW, especially the south coast, in order to hear from the divers and fishers themselves, to fully appreciate the impact of this situation. Words on paper cannot fully express it. Their voices need to be heard directly.

Ironically, 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. It's a no-win situation.

I recommend that the harassment and prosecutions stop and that S21AA be urgently implemented with no conditions and that all Fisheries Officers be properly educated about both the internationally recognised human rights and specific native title rights of Aboriginal fishers.

I recommend that the Committee investigate appropriate levels of compensation, and the Government provide fair compensation for wrongful convictions, loss of gear, fines paid, and the levels of harassment and harm that people have experienced over the long period since the non-enactment of S21 AA in defiance of the Parliament's clear wishes.

To the extent that any fisheries quotas may need to be adjusted to maintain a sustainable resource, I recommend that non-Indigenous quotas need to be adjusted to account for prior Aboriginal fishing rights. Interestingly, no review of Aboriginal cultural fishing or any fishery in NSW has identified Aboriginal cultural fishing as having a negative impact on marine resources. However, should it be deemed necessary to adjust quotas, this should be *after* Aboriginal rights to fish, dive and gather seafood have been allowed for, as these reflect prior rights**.**

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