Submission No 34

INQUIRY INTO COMMENCEMENT OF THE FISHERIES MANAGEMENT AMENDMENT ACT 2009

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Submission to Portfolio Committee No. 4 – Regional New South Wales, Water and Agriculture.

Inquiry into the failure to proclaim the commencement of Schedule 1 of the *Fisheries Management Amendment Act 2009* concerning Aboriginal cultural fishing

1. Thank you for the opportunity to provide this submission. We are independent members of the New South Wales Bar who regularly appear (often pro-bono) in cases in which Aboriginal people face prosecution by the State for alleged offences under the *Fisheries Management Act 1994* (NSW) ("FMA") in circumstances where the conduct complained of is, according to those accused and many in their communities, no more than a continuation of traditions that pre-date Britain's assertion of sovereignty.
2. We are moved to make this submission because the laws presently in force, the manner of their enforcement, and the impact on Aboriginal peoples and communities is beyond unsatisfactory.
3. The subject matter of the present inquiry, the prolonged failure of successive governments to bring about the commencement of *Fisheries Management Amendment Act 2009* ("FMAA 2009") Schedule 1[27], is one of many features of the legislative scheme concerning indigenous fishing activities in New South Wales that contributes to the unsatisfactory state of affairs. We record however that this particular failing, which has the effect of denying Aboriginal fishers a defence to charges when they are engaged in "*Aboriginal cultural fishing*" is by no means the only manner in which Aboriginal people fishing in New South Wales might have cause to feel aggrieved. Many issues are related but we attempt in this submission to confine explanation and comments to the subject matter of the reference to the Committee.
4. The focus of this submission is on the first two matters noted in the Committee's terms of reference, historical reasons for FMAA 2009 Schedule 1[27] not having commenced and the absence of any barrier to immediate commencement of a provision. It is not intended by this submission to attempt to address the impact of non- commencement of *Fisheries Management Act 1994* s.21AA (the provision in *Fisheries Management Amendment Act 2009* ("FMAA 2009") Schedule 1 [27] on the people and communities concerned. You will no doubt receive many other submissions that underscore the very serious consequences that befall Aboriginal people and communities when their capacity to continue tradition is denied them.
5. We add, at this early point, the observation that the regulation of fishing and related activities is, in New South Wales, (and all States and Territories) made less than straightforward by the interaction of Commonwealth and State legislation, and the unavoidable force of s.109 of the Constitution, which provides that if inconsistency arises between State and Commonwealth law, the law of the Commonwealth will

prevail. These peculiarities do not however create any excuse for the inaction that has occurred.

6. We submit that the many of the facts and circumstances and propositions of law noted below are uncontroversial, but we record them by way of background and context.

Traditional fishing and exploitation of marine resources

7. Aboriginal Peoples' (and in particular those of coastal New South Wales) have always fished and exploited marine resources in accordance with their law and custom. This customary practice is protected by the common law[1] and by Commonwealth statute, the *Native Title Act 1993* (Cth) ("NTA")[2]. This submission does not therefore attempt to describe or demonstrate the existence or the extent of traditional use of marine resources by Aboriginal people, especially those of the South Coast of New South Wales. Rather, to the extent that there may be any doubt as to the existence and continuity of such practices from a time before European settlement, we refer by way of example to two independent reports commissioned and obtained by Department of Primary Industries (and its predecessor entities) in 2004 and 2005 respectively: "*Report on Illegal fishing for commercial gain or profit in NSW*", Mick Palmer, May 2004" ("Palmer 2004"), and *NSW Commercial Abalone Draft Fishery Management Strategy: Assessment of Impacts on Heritage and Indigenous Issues*" Umwelt Environmental Consultants, August 2005 ("Umwelt 2005").

8. There is an abundance of additional material but for present purposes these two reports, chosen because they are publicly available and independently created documents originating from the DPI, provide sufficient information and a context to the legislation passed by the NSW Parliament in 2009.[3]

Traditional cultural fishing and native title rights have not been extinguished

9. For the avoidance of any misunderstanding, at no time has the New South Wales legislature evidenced a clear and plain intention to extinguish the common law public right to take fish from tidal waters, and the right of fishers to personal property rights in their catch.[4] Nor has such an intention been evidenced in relation to the traditional native title rights of Aboriginal peoples. Such legislation as has existed, and as currently exists seeks to regulate, rather than extinguish, rights.

10. Pre-existing native title rights and interests of Aboriginal People were first formally recognised by the High Court in 1992 in *Mabo v Queensland (No 2).*[5] Where the

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1 *Mabo v Queensland [No 2]* [1992] HCA 23, (1992) 175 CLR 1; *Mason v Tritton* (1994) 34 NSWLR 572, at 591 and 594-5. *Leo Akiba on Behalf Of The Torres Strait Regional Seas Claim Group v Commonwealth of Australia & Ors* [2013] HCA 33, at [75].

2 See NTA ss.4(1) and 10 .

3 Without detracting from the value of the reports in their entirety (except insofar as the depletion of Abalone stocks noted at the time of publication has subsequently been reversed), matters of particular relevance are summarized in Palmer 2004 from the paragraph 71 (p.31) and Umwelt 2005 Part 8.2 items 1 to 8 (pp.8.1 and 8.2) and *Table* 9.1 (pp.9.2 to 9.3).

4 Mason v Tritton (1994) 34 NSWLR 572 at [591], of *Mabo v Queensland (No 2)* (1992) [1992] HCA 23; 175 CLR 1 at [64]

5 *Mabo v Queensland (No 2)* (1992) [1992] HCA 23; 175 CLR 1

Court held that the native title rights and interests of Aboriginal People which existed before sovereignty and were not extinguished at the time of colonisation. All of the members of the High Court affirmed in Mabo that the exercise of power to extinguish native title requires a 'clear and plain intention'[6] to do so.[7] It was noted by the Court at [76] that a law which acts to merely to regulate the enjoyment of native title or which creates a regime of control over the enjoyment of native title does not act to extinguish native title rights and interests. The fisheries statutes of New South Wales are laws of this kind.

Other States and Territories have long-standing special provision for Aboriginal fishers

11. Aboriginal fishing traditions and rights have enjoyed statutory recognition and protection in States other than New South Wales, in many cases long before the decision in *Mabo v Queensland [No 2]*\ or the commencement of the *Native Title Act 1993* (Cth) ("NTA"). Some examples are: *Fisheries Act 1957* (Qld) s3; *Fisheries Act 1976* (Qld) s.5(d); *Fisheries Act 1994* (Qld) s14; *Fish Resources Management Act 1994* (WA) s.6; *Fisheries Act 1905* (WA) s.56; *Fisheries Act 1988* (NT) s.53.

The decision in *Mabo [No 2]* recognised the potential existence native title.

12. Following the *Mabo* decision, the NTA was enacted to reflect the judgment and formally legislate for the protection and establishment of native title rights over land and waters. The NTA recognises and protects the communal, group and/or individual native title rights and interests of Aboriginal and Torres Strait Island Peoples[8] over land and waters in accordance with their traditional laws and customs.[9]

13. A critical feature of native title rights and interests is that they are not established by the NTA or by any Court, but must be understood as pre-existing rights which arise from the laws and customs of the Aboriginal people concerned.[10] No determination, declaration or order of a Court is required for native title rights to be exercised or enjoyed or for such rights to enjoy protection.[11]

14. The definition of '*native title rights and interests'* is provided at NTA s.223. That provision makes it clear that native title rights are capable of including hunting, gathering, or fishing, rights and interests.

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6 *Mabo v Queensland (No 2)* (1992) [1992] HCA 23; 175 CLR 1 at [75].

7 See also *Mason v Tritton* (1994) 34 NSWLR 572, at [591].

8 NTA s.4(1).

9 NTA s 223.

10 *Yanner v Eaton* [1999] HCA 53 {1999) 201 CLR 351 at [35] – [40],

11 *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [45] "… native title rights and interests to which the Native Title Act refers are rights and interests finding their origin in pre-sovereignty law and custom, not rights or interests which are a creature of that Act.";
and at [76] "The Native Title Act, when read as a whole, does not seek to create some new species of right or interest in relation to land or waters which it then calls native title. Rather, the Act has as one of its main objects "to provide for the recognition and protection of native title" (emphasis added), which is to say those rights and interests in relation to land or waters with which the Act deals, but which are rights and interests finding their origin in traditional law and custom, not the Act."

15. In addition to formalizing the recognition of native title as then recognised by the common law, the NTA included provisions which supplement and reinforce the common law.[12] One example of such a provision, which appeared in the NTA in its original form, is NTA s.211, a provision to which we direct the Committee's particular attention.

NTA s.211

16. In 1993, the absence of special provisions for Aboriginal fishing interests in New South Wales was a factor that led the Senate to amend the *Native Title Bill 1993* (Cth) to incorporate what is now NTA s.211, a provision intended to ensure that Aboriginal people are not prevented from exercising their native title rights and interests in circumstances where State Territory or Commonwealth laws allow others to engage in those activities.

17. Hansard of proceedings in the Senate of Tuesday 21 December 1993 records the introduction of the provision that became NTA s 211 in terms that quote Dr Dermot's Smyth, then and honorary research fellow at James Cook University and a former consultant to the Resource Assessment Commission's coastal zone enquiry:

> "I am concerned that the bill as it now stands will not allow native title fishing rights to be exercised in New South Wales, Victoria, South Australia and Tasmania because laws in those states do not make any special provision for aboriginal fishing interests. In view of the current harassment, prosecution and occasional gaoling of Aboriginal fishers consultant states extremely unfortunate the native title Bill does not allow traditional fishing rights exist statutory fishing laws."[13]

The proceedings in the Senate include explanation that the provision:

> "is particularly important for those Aboriginal and Torres Strait Islander people who may already be largely dispossessed and whose native title rights are limited to particular activities or resources. Without it there could be a creeping a process of dispossession is native title rights are regulated out of existence one by one while other people remain free to carry out those same activities".

18. The concerns identified in the above remarks have proved to be well-founded notwithstanding the enactment of NTA s.211.

19. In essence, NTA s.211 achieves the objective of ensuring (at least in theory if not, in New South Wales, in practice) by permitting native title holders to exercise rights such as a right to fish without a licence, permit or other authorization in instances where the activity concerned is capable of being made be permissible with a licence permit or other authorization issued under any State Territory or Commonwealth legislation. In this way where, for example the State Minister or DPI has power to issue licences or permits to permit the taking of Abalone, native title holders may do so (to the extent permitted by NTA s.211) without such a licence or permit.

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12 *Wik Peoples v Queensland* [1996] HCA 40, (1996) 187 CLR 1 at 214.

13 Senate, Official Hansard number 161, 1993 Tuesday, 21 December 1993 at p.5441.

20. It is uncontroversial that the State Minister administering the FMA has broad powers to issue licences or permits or to by instrument, permit dealings with fish.

21. We digress to observe that the enactment of FMAA 2009, seventeen years after the High Court had recognised native title and fifteen years after the Senate had exposed the deficiency in New South Wales legislation, could be taken to have been intended to belatedly neutralize the criticism of this State's laws and to put an stop to the concerns that a "*process of creeping dispossession as native title rights are regulated out of existence*". Such an intention is apparent from the language of the provision itself and is consistent with the recommendations and observations made to DPI in Palmer 2004[14] and Umwelt 2005.[15] Unhappily, as the Committee is aware, the one substantive provision that might have achieved that consequence, (FMAA 2009 Schedule 1[27] or FMA s.21AA) has still not commenced.

NTA s.211 confines the application of State legislation in certain circumstances.

22. The power of the State of New South Wales to suppress or regulate native title rights to fish (and certain other rights) has, since at least 1993 (on commencement of the NTA,) been qualified and constrained by NTA s. 211. When it applies, NTA s.211 exempts native title holders from laws and regulations which purport to prohibit or restrict the exercise of certain native title rights without a licence, permit or other authorising instrument.

23. For an activity to be protected under NTA s.211 the conditions of s.211(2) must be satisfied. Namely, the exercise or enjoyment of native title rights and interests must include rights within the classes of activity provided at s.211(3). These activities are hunting, fishing, gathering and cultural or spiritual activities. The exercise or enjoyment of native title rights and interests must also be "*for the purpose of satisfying personal, domestic, or non-commercial communal needs"* (NTA s.211(2)(a)).

24. The protection provided by s 211 of the NTA was described by the High Court in *Western Australia v The Commonwealth (Native Title Act Case);*[16]

> "Section 211(2) removes the requirement of a 'licence, permit or other instrument granted or issued ... under the law' referred to in s 211(1)(b) as a legal condition upon the exercise of the native title rights specified in sub-s (3).If the affected law be a law of a State, its validity is unimpaired, but its operation is suspended in order to allow the enjoyment of the native title rights and interests which, by s 211, are to be enjoyed without the necessity of first obtaining 'a licence, permit or other instrument."

25. By virtue of section 109 of the *Australian Constitution*, when it applies, NTA s.211 prevails over any and all State legislation which would otherwise require a native title holder to hold a licence, permit or other instrument under State law in order to

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14 Palmer 2004 recommendation iv (p.11).

15 Umwelt 2005, dotpoints in part 7.2 (pp.7.3 and 7.4).

16 *Western Australia v The Commonwealth (Native Title Act Case)* [1995] HCA 47 (1995) 183 CLR 373 at [474]; affirmed by the Court in *Karpany v Dietman* [2013] HCA 47 (2013) 252 CLR 507 at [45] the FMA "is not a law that confers rights or interests only on or for the benefit of Aboriginal peoples or Torres Strait Islanders."

lawfully engage in the activity of fishing. Whilst the proposition that Commonwealth legislation prevails over State legislation is beyond controversy FMA s. 287 explicitly confirms that the State statute does not affect the operation of the NTA.

Commencement of the NTA.

26. NTA s.211 commenced, along with most other provisions of the Act, on 1 January 1994.

27. Following the commencement of the NTA there appears to have been little or no attempt on the part of the agents of the New South Wales government responsible from time to time for the administration of the fisheries legislation to understand and give effect to NTA s.211. Rather, a practice of applying the *Fisheries and Oyster Farms Act 1935* and subsequently the FMA to Aboriginal people appears to have continued without regard to the possible existence of native title fishing rights. In some cases Aboriginal defendants have sought to rely on NTA s.211, but in most cases it is impractical to do so.

28. As has already been noted it is well established that the existence of native title does not depend on or arise from a determination of the Federal Court, rather a determination of native title constitutes the recognition of existing rights which by definition have existed since sovereignty. Substantial practical difficulties arises however where a defendant asserts and relies on the existence of native title as an answer to, for example, a prosecutions under the fisheries legislation, prior to a determination having been made in the Federal Court.

29. In instances where the Federal Court of Australia has made a determination of native title as provided for by NTA s.225 the task of proving the existence of native title and the content of the particular rights will be simplified. In cases where there has not been a formal determination of native title under NTA s.225 by which the area, the relevant group and the particular rights are identified, it falls upon a defendant to convince a Local Court Magistrate as to the existence of native title, his or her inclusion in the group holding native title, and to meet all of the other detailed requirements which in Federal Court Proceedings typically require months of preparation and weeks of expert and non-expert evidence. Plainly prosecutors enjoyed a practical advantage in these circumstances, which applied in, in 1994 and for many years subsequently relation to the whole of coastal New South Wales. Prosecutions of Aboriginal defendants for breaches of the FMA continued without apparent regard to the possible existence of traditional rights.

30. Prosecutions seldom involve early admissions on the part of prosecutors as to matters such as ancestral connections to a group of native title holders and/or places with which the group and the individual are associated.

31. The end result of these practicalities is that, faced with a prosecution in relation to which the prosecuting authority puts the Aboriginal defendant to proof of the many and complex matters necessary to establish native title, many defendants plead guilty or are found guilty in circumstances where a viable, or at least arguable defence exists.

32. This pattern in the prosecuting Aboriginal fishers and leaving it to the Aboriginal defendant to prove all matters the existence of the rights that are relied upon appears to have remained the case notwithstanding the availability to the State's agency of the Palmer 2004 and Umwelt 2005 reports and in spite of the Federal Court, from 2007, with the consent of the State, making binding and final determinations of native title in respect of areas within New South Wales which recognized the existence of a native title right to fish.[17]

Commencement of the FMA

33. The FMA commenced in on 12 December 1994, when the Commonwealth's NTA and in particular s.211 had already come into force. Surprisingly, in light of the attention that had been given to native title rights and interests at the time, and given that the State's *Native Title (New South Wales) Act 1994* (NSW), legislation complimentary to the Commonwealth's NTA had made its way through the New South Wales Parliament and was assented to and commenced on the same day as the FMA, the objects FMA were expressed in terms that afforded no recognition to indigenous fishing, rather the objects were as follows:[18]

> "(1) 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.
>
> (2) In particular, this Act has the following objects:
> (a) to conserve fish stocks and protect key fish habitats;
> (b) to promote viable commercial fishing and aquaculture industries;
> (c) to provide quality recreational fishing opportunities;
> (d) to appropriately share fisheries resources between the users of those
> (e) to promote ecologically sustainable development.
>
> Note: At common law, the public has a right to fish in the sea, the arms of the sea and in the tidal reaches of all rivers and estuaries. The public has no common law right to fish in non-tidal waters—the right to fish in those waters belongs to the owner of the soil under those waters. However, the public may fish in non -tidal waters if the soil under those waters is Crown land. In the case of non -tidal waters in rivers and creeks, section 38 declares that the public has a right to fish despite the private ownership of the bed of the river or creek. However, the right to fish in tidal or non-tidal waters is subject to any restriction imposed by this Act."

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17 The first such determination was *Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847.

18 FMA (as enacted) s.3(1).

34. FMA ss.16 created offences in relation to prohibited size fish, s.17 created offences for exceeding daily bag limits and s.18 (read with s.21) operated to prohibit and restrict the possession of fish.

35. We note by way of a side that, where employed in the prosecution of an Aboriginal person exercising native title rights these provisions (and others) are plainly capable of affecting native title insofar as the application of those sections would be wholly or partly inconsistent with the continued enjoyment or exercise of native title rights. In the longer term prosecutions of this kind ("*future acts*" within the meaning of NTA s.233 (read with s.227) and penalties imposed - especially imprisonment - have the potential to give rise to substantial liability on the part of the State. We comment on this eventuality no further as it is beyond the scope of the present enquiry.

36. Consistent with the observations made in the Senate concerning prior State fisheries legislation, the only indirect reference to Aboriginal people contained in the FMA appeared at s.287, which provided however that the Act does not affect the operation of the NTA and the State or Commonwealth Native Title Acts in respect to the recognition of native title rights and interests.[19] In relation to an identical provision considered in the New South Wales Parliament, Parliamentary Counsel provided this explanatory note:

> *"a provision making it clear that native title rights and interests are not affected by the operation of the proposed Act"*[20]

37. Following the commencement of the FMA there appears to have been little or no attempt on the part of the agents of the New South Wales government responsible from time to time for the administration of the fisheries legislation to understand and give effect to the Act or to how it might work in light of NTA s.211.

Enactment of the *Fisheries Management Amendment Act 2009 No 114.*

38. FMAA 2009*,* as originally enacted on 14 December 2009 contained, in its 67 pages, many amendments to the principal Act. Many of the provisions created new offences, increased penalties and expanded the regulation of activities associated fishing. To the extent that those provisions might have been intended to apply to Aboriginal people engaged in traditional cultural fishing, FMAA 2009 would have represented a hardening of the barriers and obstacles facing Aboriginal people continuing traditional fishing practices.

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19 FMA s.287, see *Yanner v Eaton* 1999] HCA 53 {1999) 201 CLR 351 at [39].

20 Part 5 (60) of the Game Bill (2005)Explanatory Note.

39. For many Aboriginal people however, particularly those of the south coast of New South Wales, Schedule 1 [27] (the amendment that on commencement will become FMA *s.21AA - Special provision for Aboriginal cultural fishing*) created the prospect of a State law which relieved Aboriginal people engaged in Aboriginal cultural fishing from the reach of FMA s.17 and 18. This, upon taking effect might have rendered the FMA complimentary to the and reinforcing of NTA s.211 (but nonetheless the FMA would, in any case of inconsistency, be subject to the Commonwealth law). The proposed amendment was capable of being seen as creating a departure from the conditions that had attracted the comments noted above during the passage of the *Native Title Act 1993* (Cth) through the Senate and which had been allowed to prevail for the subsequent 15 years in spite of the operation of the NTA. The Bill introduced into the New South Whilst Parliament which ultimately became FMAA 2009 records among the objects of the Bill amendment of the FMA:

> "to recognise protect and promote Aboriginal cultural fishing activities and practices."[21]

40. The same lofty ideal was incorporated in the objects of the FMA by FMAA 2009 schedule 1 [1] which has now commenced as FMA s.3(2)(h)).

41. The provision of the FMAA 2009 also introducing a definition of "Aboriginal cultural fishing" to the FMA has also commenced. The definition is:

> *"Aboriginal cultural fishing"* means 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.

42. Ironically and tragically the amendments recording the noble object of the act and the defined activities that were to be recognised protected and promoted were allowed to commence without significant delay along with all other amendments except for the critical s.21AA - the core provision that might have gone some way towards achieving the object of recognizing, protecting and promoting Aboriginal cultural activities and practices. In the result, the stated aspiration of recognizing, protecting and promoting Aboriginal cultural fishing has been stripped of all substance.

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21 Fisheries Management Amendment Bill 2009 Explanatory Note p.1 at (f).

43. FMA s.21AA would expressly provide a defence to many of the offences created by FMAA 2009 in instances of Aboriginal cultural fishing if it had commenced at the same time as the remainder of FMAA 2009 or at any time since then.[22]

44. As is apparent, s.21AA has features in common with NTA s.211. Whilst the definition uses language different to that of NTA s.211 what is important and potentially beneficial to Aboriginal fishers is first, that the definition does not include a requirement that native title be established by a defendant relying on the provision, and secondly, that if included in the State Act the provision may well be given effect in the administration of the Act.

45. Without the commencement of FMA s.21AA the only possible benefit conferred on Aboriginal fishers by FMAA 2009 is an amendment made to FMA s.37 to empower the Minister to issue permits or make orders permitting Aboriginal cultural fishing. Whilst at face value this may seem to be somewhat meaningful, in the context of NTA s.211, which, where applicable, relieves native title holders of any obligation to obtain a licence permit or other instrument, the benefit is redundant and illusory. It certainly does not achieve the object of recognising and protecting, let alone promoting Aboriginal cultural fishing. And, of course, the practicalities of securing a permit or order under FMA s.37 might be expected to regulate and confine the exercise of rights.

46. Worse still, it must be noted that provisions of FMAA 2009 which commenced soon after the (whole) Act received assent have introduced offences and penalties applicable to possession of fish in "*circumstances of aggravation*",[23] in respect of "*priority species*" [24] and notions of "*commercial quantities*",[25] "*indictable quantities*", and "i*ndictable species*",[26] "*trafficking in fish*"[27] and "*additional monetary penalties*" amounting to 10 times the value of the fish taken.[28]

22 See FMA s.21AA(1) and (6) and also 21B (3).

23 FMA ss.16(2)(4) and (5), 17(2A) and (2B), 18 (2A) and (2B).

24 FMA ss.14A (1), 16(5)(a) 17(2B)(a), 18(2B)(a) 18A, Schedule 1B.

25 FMA ss.14A (1), 16(5)(b), 17(2B)(b), 18(2B)(b) Schedule 1B.

26 FMA Part 2 Division 2A.

27 FMA Part 2 Division 2A.

28 FMA ss. 18A 21C

47. These defined terms evoke notions of serious criminality, but in the context of Aboriginal fishing, in which fishers might cater for elders, family and community members or others,[29] the characterisation of possession of more than 10 abalone as a "*commercial quantity*" of a "*priority species"* and thus constituting "*circumstances of aggravation*" suggests disproportionate culpability. FMAA 2009 also introduced escalating penalties for a second or subsequent offences and created new requirements such as a requirement to provide information to fisheries officers and created new offences for breaches of such requirements.[30] These provisions have since 2010 been the foundation for many charges against Aboriginal fishers. So far from recognizing, protecting and promoting Aboriginal cultural fishing, the parts of FMAA 2009 that have commenced have significantly disadvantaged those who undertake Aboriginal cultural fishing.

48. The severing of commencement of the provisions of FMAA 2009 creating new offences and penalties from the critical provision creating a defence in the instances of Aboriginal cultural fishing (made possible by Parliament's inclusion of FMA s.21AA in the legislation it passed), has had a practical effect not of "recognising protecting and promoting" Aboriginal cultural fishing, but rather of punishing it by denying Aboriginal fishers defences to charges which Parliament plainly intended them to enjoy and subjecting them to increased penalties from which s21AA was plainly intended to give relieve.

The historical reasons for not commencing Schedule 1[27] (FMA s.21AA) for 11 years

49. As to the first of the matters noted in the Committees terms of reference, we can think of no legitimate reason for the delay that has occurred.

50. No doubt submissions of other interested parties will be directed to the historical reasons for not commencing Schedule 1[27] (FMA s.21AA) for 11 years.

51. Anecdotal accounts indicate that a possible, but unconvincing, excuse for delay may arise from an inclination on the part of those administering the FMA or those with practical control over the nomination of a commencement date, to postpone commencement until regulations of the kind permitted (but not required) by FMA s21AA(3)-(5) are ready to take concurrent effect. If this is the case, in circumstances where such a precondition has not been stipulated by the legislature it is not immediately apparent who might presume to stall Parliament's intention by emasculating a key objective of the legislation, let alone to have allowed such a state of affairs to continue for eleven years, we query by what authority or for what purpose the intention of the legislature has, throughout that period, been suspended and why Aboriginal peoples should continue to be denied the benefit of the provision and to face prosecutions in which a defence Parliament has seen fit to afford them to them has, for 11 years, been denied to them.

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29 Well recognised traditional practices, referred to for example in Umwelt 2005 at 5.2 (p. 5.1) and 6.2.1 (p.6.5-6.6).

30 FMA ss.14, 16(1)-(4), 17(2), and (2A), 18 (2) and (2A), 19, 20(3) and (5), 20A (3), 24(1), 25(1), 35.

52. The need for concurrent commencement of the statute and regulations is particularly unconvincing if it is proposed that regulations would restrict or curtail the exercise of Aboriginal cultural fishing activities and/or native title rights by reference to bag limits, registration or licensing requirements possession limits or any other criteria already identified in the FMA. Regulations of this kind would effectively undo the benefit of an entitlement to engage in Aboriginal cultural fishing and substitute new limitations for those already to be found in the FMA. Moreover, where the comparable basis for resistance of prosecutions made available under NTA s.211, is not qualified explained or restricted by regulation the effectiveness of any legislation, but especially subordinate legislation, which purports to limit the rights of aboriginals to fish is likely to be open to doubt.

The present challenges to commencing Schedule 1

53. As to the second matter noted in the Committees terms of reference, there is in our respectful opinion no challenge to the immediate commencement of FMAs.21AA.

54. To the extent that fears of a depletion of stocks might be a matter raised by other interests we asked the committee to carefully scrutinise the foundation for any such concerns. In the case of abalone, the fishery has expanded in recent years and at the same time commercial abalone industry has shifted substantial reliance on farmed abalone, rather than wild catch. Aboriginal cultural fishing typically takes place close to the shoreline with the diving taking place without artificial breathing apparatus.[31] Commercial harvesting of wild abalone on the other hand typically involves extended submersion of divers using artificial breathing apparatus in areas further offshore than those used by Aboriginal divers.

Conclusion

55. We are concerned that in the circumstances where, the existence and continuity of fishing practices amongst coastal aboriginal people of New South Wales is beyond the dispute, where the State of NSW has previously consented to native title determinations in coastal NSW which recognize the right to fish, and the where the State's Attorney General did not object to the registration of a native title claim to land on the state's South Coast in terms which include a right to take and use resources (including fish) for any purpose, the putting of individual Aboriginal People to proof of such matters risks a further serious injustice, and is counter to the intent of Closing the Gap, and restorative justice investment by the State of NSW.

56. A further unfortunate feature of practices which operates to the disadvantage of Aboriginal fishers referred to opaquely in Parmer 2004,[32] is a "reward system" by which informers are reporting with for reporting activities. The existence at any time of such a system, and its content, particularly safeguards which might prevent its use for the pursuit of racist or commercial agendas, is a matter of concern.

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31 Umwelt 2005 at 4.1 (p.4.3).

32 Palmer 2004 at recommendation xxii 16 (p.16) and [139] (p.46). See also Umwelt 2005 at 5.4 (first dot-point on p.5.3)

57. We submit that the current practices of NSW Fisheries where they conflate the fishing in accordance with law and custom with commercial and/or recreational fishing and prosecute accordingly is truly misconceived and risks serious injustice to Aboriginal People. This is specifically recognised in Palmer 2004.[33]

58. We respectfully adopt the recommendation to DPI referred to Umwelt 2005[34] based on Palmer 2004 that:

> "the present situation on the South Coast is socially damaging to Aboriginal people periods in accordance with the IFDS [indigenous Fishing Strategy], the protection of traditional aboriginal fishing rights should underpin all aspects of DPI policy, and not be treated as a separate issue."

59. We are troubled by the actions of previous Departments, Ministers and Governments which have failed to commence schedule 1[27] of the FMAA 2009.

60. We would encourage the NSW Parliament to seek the Minister's commitment to:

    a. Commencing section of the *Fisheries Management Amendment Act 2009* (as Parliament intended) forthwith*;*

    b. Educating authorized officers in valid exercise of native title rights and interests given the effect of NTA s.211;

    c. Providing transparent, open and accountable support of native title rights, as is given to other fishing sectors in NSW;

    d. by the above means moving to repair the strained relationship between Aboriginal fishers and the agents of government administering fisheries legislation; and

We thank you for the opportunity to contribute and I reach available to expand or assist further if the Committee or members require.

John Waters SC Tony McAvoy SC

Attachments

"*Report on Illegal fishing for commercial gain or profit in NSW*", Mick Palmer, May 2004" ("Palmer 2004"),

NSW Commercial Abalone Draft Fishery Management Strategy: Assessment of Impacts on Heritage and Indigenous Issues" Umwelt Environmental Consultants, August 2005 ("Umwelt 2005").

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33 Palmer 2004 at recommendation iv 1 and 2 (p.11) and [78] (p33). See also Umwelt at 5.5 (fourth dot-point on p.5.4) and 6.2 (pp.6.3-6.4).

34 Umwelt at 7.2 (first dot-point on p.7.3).