

Submission
No 39

INQUIRY INTO COMMENCEMENT OF THE FISHERIES MANAGEMENT AMENDMENT ACT 2009

Organisation: South Coast Aboriginal Fishing Rights Group (SCAFRG)
Date Received: 28 February 2022

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

28 February 2022

Dear Committee,

On behalf of South Coast Aboriginal Fishing Rights Group (**SCAFRG**), I write in response to the Terms of Reference, specifically paragraph (c) the impact of the non-commencement of Section 21AA contained within the *Fisheries Management Amendment Act 2009* on Aboriginal Peoples and the practice of Aboriginal cultural fishing.

SCAFRG represent the interests of South Coast Aboriginal people who wish to freely practice their culture unencumbered by the threat of harassment, prosecution, or conviction, as is protected by international human rights law, the Constitution, the Native Title Act 1993 (Cth) and Fisheries Management Act 1994 (NSW).

Commencement of Section 21AA is more for the Fisheries Officers, and Department who fail to uphold and recognise our law and custom, are not properly educated on how our rights are protected, and despite many internal reports stating that we probably do have the right to fish, and the registration of that right to fish without opposition from NSW in our South Coast People claim, they are prosecuting more of our people than ever.

Commencing section s21AA without regulation will put the question of prosecution out of the question unequivocally. It is a legal right for inland Aboriginal communities, and a right for Arakwal, and Yaegl peoples already, and there is no evidence it has led to any concerns about the state of fishery resources.

If the Minister sent the provision for assent, no fishery would collapse, and our community would be able to feed themselves, and provide for their Elders, and grandchildren, and teach and pass on knowledge without fear of intimidation, harassment, prosecution and criminal consequences for practicing our culture.

We trust you will listen to us, as all attempts to be treated fairly within the system have failed.

Continual Cultural Connection requires sustainable fishing

On any day of the week, John Brierley, Kevin Mason, and many more South Coast Aboriginal men, are watching the rivers, and the nearshore, following the movements of the eagles, wind and waves for the conditions to be right to fish. Women take children and grandchildren to the rock platforms, and estuaries. There are rules about who can fish, and where, what to take, and what to leave. You will see them preparing their catch on the shore, nothing is wasted as shells and guts are all returned to the sea; and the fresh seafood is carefully shared among family, elders and community.

The cultural fishing has stood the test of time, the laws and custom sustaining the fishery, promoting recovery and replenishment of fish stocks in balance with the ecosystem. This approach is in contrast with every commercial fishery developed in NSW. As detailed as early as 1880, the practice of opening a fishery was soon followed by overfishing, and then either depletion of a resource beyond commercial fishing returns or by an infectious virus, or other predatory vector.¹

Stretching along a near 500 kilometres of rugged coastline, dotted with small townships, the connections amongst South Coast People' to their sea country and Country are well documented and this detailed knowledge was relied upon heavily by early settlers and businesses to survive, and yet despite the official records through time it is not incorporated, or protected by and law, or fishery management plan. It remains poorly recognised and respected. SCAFRG are of the view that this is stark evidence of institutional and structural racism by the current department.

Right to fish Recognition

The strongest recognition of South Coast Peoples fishing rights by the State of NSW dates back to the earliest days of colonisation, as evidenced in the following extract of Governor Phillip's letter to Nepean, dated 10 July 1788,

*"Yesterday twenty of the natives came down to the beach, each armed with a number of spears, and seized on a good part of the fish caught in the seine. The coxswain had been ordered, however small the quantity he caught, always to give them a part whenever any of them came when he was fishing, and this was the first time they ever attempted to take any by force ... the coxswain very prudently permitted them to take what they chose and parted good friends. They, at present find it very difficult to support themselves."*²

¹ Fisheries Inquiry Commission (1880). *Report of the Royal Commission 13 May 1880*, NSW Legislative Assembly, Sydney, p 23, Lorimer (1984), *The Technology and Practices of the New South Wales Fishing Industry*, p 104

² Governor Phillip letter to Nepean (10 July 1788) *Historical records of Australia series I vol I*, pp 66 – 67.

As early as a few months into what became a permanent settlement, the fishing stocks were already compromised by the toll of many more mouths to feed resulting in loss of food and starvation for local Aboriginal people in first winter with the settlers, in 1788. This reality has been pointed to as a basis for Governor Phillips order that a portion of each catch be shared.³

As settlement expanded beyond the garrison colony the South Coast people were crucial to the settler economy. Tathra, Broulee and the Five Island community were noted for their cooperative and collaborative relationships with early settlers⁴. In these locations, when it was just a small number of non-Aboriginal people, mutually beneficial accommodations were reached, and Aboriginal People incorporated non Aboriginal people into the edges of their economy, and the settlers seemed to reciprocate, at least initially.

More intensive settlement and impact on resources, especially with the whalers and sealers by 1805 more amicable relations between South Coast People and the settlers were fracturing, particularly around Twofold Bay and Jervis Bay.⁵ On 15 March 1806, Governor King wrote to the Colonial Office⁶, noting:

However much the white men may be justified on the principle of self-defence, yet I have cause to think the natives have suffered some wrong from the worthless characters who are passing and repassing different places on the coast, nor would they escape the punishment such conduct deserves if it could be proved."

Michael Bennett notes in his analysis of the economics of fishing, that the relationships between South Coast People and various economies such as logging, whaling, fishing, the relationships were "two sided". South Coast People maintained their agency, and in Bennett's opinion remained economically independent throughout the 19th century⁷.

Bennett notes the way in which the lobbying for boats (many boats and nets were given to South Coast Aboriginal communities from 1868) to maintain a cultural practice was a two sided response to the cultural skills of South Coast Aboriginal fishers. He described the provision of fish to the Cooalongatta estate in 1837 in exchange for three pounds of flour⁸ as one of the first documented economic transactions as evidence for the superior skills of Aboriginal fishers. The records of Aboriginal fishers not only continuing this practice, but being better at it than other commercial fishers is documented through to the end of the century⁹. He notes several court and church records points to Aboriginal men identifying their profession as "fishermen"¹⁰.

Even today, the cultural dimension of this "two sided" commercial fishing is well documented. Over 90% of Aboriginal commercial fishers maintain law and custom by sharing fish with their community¹¹, and accordingly suffer an economic penalty for this practice, as they are charged

³ NSW Fisheries (1997), *Heritage and Conservation Register*, p 15

⁴ Matthew Flinders Manuscript, near Hill 60 guided to Lake ILLAWARRA, William Clarke (1897) *Voyage of the Sydney Cove's Longboat from Preservation Island to Port Jackson HRNSW 1897 Vol III pp 760 -768*, 5 May 1805, Sydney Gazette - Nancy built in Hawkesbury, owned by Messrs Kable and Company went down with 3187 'skins' (sealers)

⁵ Sydney Gazette, 27 October 1805, 8 December 1805, January 1806, 15 May 1808

⁶ HRNSW Sydney 1902 vol 3 p 42

⁷ Bennett, M (2007) *"Economics of fishing: sustainable living in colonial NSW"* Aboriginal History Vol 31 pp 87 - 102

⁸ Ibid at 92, Appendix 3

⁹ Ibid at 96

¹⁰ Ibid at 95

¹¹ Ibid at 3

for it, even though that take is technically outside of the *Fisheries Management Act 1994 (NSW)*.

From 1788 to 31 January 2018, when the right to fish for any purpose was registered by the National Native Title Tribunal unopposed by the State of NSW¹², some 250 years later Aboriginal peoples right to fish in accordance with their customary law has not been respected and upheld by State commercial or recreational law.

This is despite years of advocacy, and recognition in public signage, as if the State did respect and protect Aboriginal people's rights to fish, but it is only for show, for the tourists.

Again SCAFRG is of the view that this is again evidence of structural racism.

Advocacy

At no point did our South Coast People stop fighting for their right to fish, or stop fishing.

On 23 June 1978, our Yuin tribal elders of Wallaga Lake, Edwin Thomas "Guboo", A J Campbell, and Percy Mumbler wrote to the NSW Premier Neville Wran seeking acknowledgement of their prior ownership of their Country and the return of the reserves, including Wallaga Lake. They also sought compensation for lands recently sold from the Crown estate. Further they were writing to protect Gulaga Mountain, and Biamanga from the timber industry which was logging the South Coast forests. Their letter was representative and included the names of 52 other Aboriginal people, from many of the prominent South Coast families.

That letter led to the formation of the Select Committee of the Legislative Assembly on Aboriginal Land Rights and sacred and significant sites, and after hearing from Aboriginal people from all of over the State raising similar issues the Select committee report led to the development of the Aboriginal Land Rights Act 1983 (NSW).

On 7 February 1979, Percy Mumbler gave the following evidence to the Select Committee:

"Fishing is a big industry and we want the full rights to fish anywhere in the whole of this country, in any waters of Australia. We do not want someone coming along and telling us that we cannot fish here because we do not have a licence.

Why do you have to have a licence to go and kill a few little fish[;] How are we going to catch the fish if someone says he will take us to court and put us in gaol for trespassing on our own waters? We do not want that at all. If there is anything to get out of that water we want to get it, and if we want to sell it we should be able to sell it. We do not want anyone coming here to say that we cannot do that because we are trespassing. Why should the white man come down here to fish? He does not own the fish."

On the same day, addressing the government, Gubbo Thomas pointedly noted the key flaw in the Crowns assumption of land rights in Australian colonies:

"When white people first came to Australia they took all the land, with dreadful consequences for our people. Even though there was plenty of land for everyone, they took the lot. They did so without attempting to make any treaties with our people. In this respect the Australian Aborigines are unique. They are the only indigenous people

¹² South Coast People application NSD 1331/2017; NC 2017/003 [11 – 13]

*in any part of the world with whom the colonizing power has made no treaty. It is our hope that we can get back just a little of what was taken from us.*¹³

Aunty Beryl Cruse and Liddy Stewart co-authored Mutton fish with Sue Norman. This book documents clearly the importance of fishing, and in particular Abalone fishing to the South Coast People.

Good faith negotiations always lead to bad outcomes

Notwithstanding the NSW Government's continued failure to protect or uphold our rights to fish, South Coast Aboriginal people have continued to contribute to planning, and structural adjustment processes, and for many years, the Aboriginal Fishing Advisory Council.

Marine Park planning consultation has resulted in zones for sanctuary, and habitat, recreational and commercial fishing, but not one cultural fishing areas, despite the string assertions of South Coast people, and signage at specific cultural fishing locations such as Bingie Point.

The SCAFRG notes that many of the locations well documented as Aboriginal fishing areas of significance were designated as sanctuary or special habitat zones which prohibit the take of culturally important species such as abalone and lobster.

Failure to respect Parliament

South Coast Aboriginal People note that they are not the only ones who have failed to have their rights respected by NSW Fisheries, they appear to also ignore National and State processes which have noted the practices should improve, or previous Committee recommendations to commence section 21AA.

In 1994, the *Fisheries Management Act 1994 (NSW) (Fisheries Act)* was passed, and section 287 of the Fisheries Act provides that the Fisheries Act does not affect the operation of the Native Title Act, or the *Native Title (NSW) Act 1994*. The Act did not purport to regulate native title rights or interests and was not the subject of any future act approval. The proposals for section 37 Aboriginal Cultural Permits were introduced later.

In 2004, the National Native Title Tribunal facilitated a nationwide alternative dispute resolution process through the National Indigenous Fishing Principles which provided States would recognise voluntarily Native Title rights and interests in fisheries without requiring claims (Annexure A). NSW agreed to implement the National Indigenous Fishing Principles.

In 2009, the NSW Parliament finally passed the *Fisheries Management Amendment Act 2009 No 114* including section 21AA which provided a process for recognising Aboriginal cultural fishing (Annexure B). This would have implemented the National Indigenous Fishing Principles to the extent of recognising non-commercial take.

On 2 November 2010, Bev Manton Chair of NSWALC wrote a response to questions asked by the Recreational Fishing Inquiry, undertaken by the Select Committee on Recreational Fishing. In it NSWALC supported the *Fisheries Management Amendment Act 2009 No 114* including section 21AA and called for its commencement, and further measures to increase compliance with international human rights law.

¹³ Select Committee of the Legislative Assembly "Aboriginal Land Rights and Sacred and significant sites", Part II Report, Minutes of Evidence, 13 August 1980, p14, paragraph 25

On 15 October 2015, the NSW Government proposed *Fisheries Management (General) Amendment (Aboriginal Cultural Fishing) Regulation 2015* which further reduced the bag limits agreed to in the Interim Access Policy. It was opposed by NSWALC and NTSCorp.

On 8 November 2016, a number of Legislative Council members noted recommendation 39 of the Standing Committee on State Development report into Economic Development in Aboriginal Communities, and the failure to commence section 21 AA. They called on the Minister to commence the Act, notwithstanding complexity challenges.

On 8 December 2016, NSWALC wrote to the Inquiry into Commercial Fishing undertaken by the NSW parliament noting that it had been a long time and section 21AA had not yet commenced, and sought its commencement.

On 24 October 2017, the NSW Parliament passed the Fisheries Management Amendment (Aboriginal Fishing) Bill 2017 which the Minister Blair noted that while NSWALC would prefer a quicker timelines and a statewide regulation had not yet been possible to develop and proposed to develop local Aboriginal Cultural Fishing Management Plan for each area of coastline¹⁴.

On 16 October 2018, Minister Blair again noted in response to a question from Mr Shoebridge that the Department was preparing local Aboriginal Cultural Fishing Management Plans. Not one has been commenced.

South Coast People meeting at Broulee 2014



¹⁴ Niall Blair 18 October 2017 Second reading speech, Hansard, Legislative Council NSW

Red herrings, empty promises

Every time the South Coast People sought commencement of section 21AA, the NSW Government would deflect their calls by promising to deliver regulations or area specific plans. This has occurred on 3 separate occasions since 2009.

SCAFRG notes that it has kept AFAC busy, but has not resulted in any rights recognition or commencement of section 21AA, contained within schedule 21AA of the Fisheries Management Act 2009.

Each time the process ground to a halt without implementation.

South Coast People ask the NSW Parliament not to get distracted anymore and ensure that section 21AA is commenced immediately, without regulation.

We would welcome the Committee to the South Coast, so you can share our knowledge of our coast and estuaries, our sea country, and its relationships to our Country and experience first hand how our people understand their cultural obligations, and how terrible the impact of this structural racism is on our community.

Recommendations

1. Introduce Section 21AA immediately.
2. Train authorised officers in native title rights and interests, Aboriginal culture, and the international human rights of Aboriginal people
3. Amend the Fisheries Act to provide for a community-held commercial licence which would operate within the commercial quotas for various fisheries
4. Require DPI to immediately involve Aboriginal people in all decision-making bodies that deal with fisheries management, including the resource assessment committees
5. Commit to fund \$10 million over four years to establish an 'Marine NSW Aboriginal economic development and training fund' to enable Aboriginal organisations and fishers to participate in the management and exploitation of resources, for both cultural and commercial purposes
6. Develop a 10-year strategy to transfer the management of all marine resources in NSW to accredited Aboriginal organisations.

Kind Regards

Wally Stewart