

Submission  
No 40

## INQUIRY INTO COMMENCEMENT OF THE FISHERIES MANAGEMENT AMENDMENT ACT 2009

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**NSW Government Submission to the  
Legislative Council Committee on  
Regional New South Wales, Water  
and Agriculture**

**Inquiry into the commencement of the  
Fisheries Management Amendment  
Act 2009**

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PREPARED BY THE NSW GOVERNMENT

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## Executive summary

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The NSW Government supports the rights of Aboriginal cultural fishers and is actively working to support Aboriginal cultural fishing within a sustainable natural resource management framework.

In NSW, the sustainable use of fisheries is managed under *the Fisheries Management Act 1994* (the FM Act). The FM Act provides the framework to conserve, develop and share the fisheries resources of the State for the benefit of present and future generations.

The FM Act specifically aims to recognise, protect and promote Aboriginal people's cultural, spiritual, social and customary association with the State's fisheries resources. This is achieved through the Aboriginal Cultural Fishing Interim Access Arrangements (ACFIAA), which set extended take and possession limits for aquatic species. It is further delivered by approvals granted under the FM Act for cultural fishing beyond what the interim access arrangements allow for, marine park and aquatic reserve permits under the *Marine Estate Management Act 2014* (MEM Act), and grants and loans provided by the Aboriginal Fishing Trust Fund.

In 2009, the NSW Parliament passed the Fisheries Management Amendment Act 2009 (the FM Amendment Act). Section 21AA (s21AA) of the FM Amendment Act, a special provision for Aboriginal cultural fishing, sought to authorise an Aboriginal person to take or possess fish despite other limits, for cultural fishing purposes. This section is the only part of the FM Amendment Act which has not commenced. The intention of the FM Amendment Act was for s21AA to commence with a supporting regulation to support the conservation, development and sharing of fisheries resources.

Immediately after the passage of the FM Amendment Act, the NSW Government began working to implement arrangements to facilitate cultural fishing. From 2010, the Government commenced working with key stakeholders to develop draft regulations to give effect to s21AA. This included working with the Aboriginal Fishing Advisory Council (AFAC), State-wide Aboriginal community consultation, and further stakeholder consultation on a draft state-wide regulation.

Since 2016, when key stakeholders, including the NSW Aboriginal Land Council, NTSCORP and the AFAC, advised the NSW Government they no longer supported the Regulation, the Government has been engaging with these and other stakeholders to develop alternative arrangements – called Local Management Plans (LMPs). LMPs seek to facilitate Aboriginal cultural fishing preferences and achieve the same natural resource management outcomes originally intended to be achieved through a regulation.

The NSW Government 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 resource for the benefit of current and future generations.

This submission responds to the Inquiry's Terms of Reference and provides additional relevant information relating to the fisheries regulatory framework and other initiatives to support Aboriginal cultural fishing.

# Introduction

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There is an innate connection between waterways and the 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.

The NSW Government undertakes regular consultation to understand the views of Aboriginal communities and organisations in developing legislation, policy and plans of management to maintain and preserve the health of fisheries resources and understands that

*“Access to water gives us our quality of life – for the Aboriginal man, the community and the culture.” – Marine Estate Community Survey 2014*

The key Aboriginal advisory body to the Minister for Agriculture and Western NSW on fisheries matters, the Aboriginal Fishing Advisory Council, has also noted in the past that:

*“Aboriginal communities welcome strategies that aim to prevent overfishing and deliver sustainable fish populations from which a cultural catch can be maintained. Such an outcome goes a long way to ensuring that cultural fishing practices are preserved along with access to valuable food sources.”<sup>1</sup>*

However, attaining and reflecting the many, varied Aboriginal community and peak stakeholder views to inform legislation, policy and planning processes, which are respectful of place-based views of Aboriginal nations and traditional owners across NSW, to deliver sustainable fisheries management for all is challenging. Development of a ‘one size fits all’ or homogenous approach is often not appropriate at the statewide scale as it does not reflect variance in inland and coastal cultural fishing practices and the aspirations and needs of each community. A tailored approach through targeted community engagement and local management planning is favoured.

This submission sets out the range of actions that the NSW Government has taken, and continues to take, to ensure that NSW protects and promotes Aboriginal people's cultural, spiritual, social and customary association with the State's fisheries resources as part of a sustainable natural resource management framework. This includes the specific actions taken and next steps in relation to the commencement of Schedule 1 of the Fisheries Management Amendment Act 2009 concerning Aboriginal fishing.

This Submission responds to the terms of reference:

1. Historical reasons for not commencing Schedule 1 (section 21AA)
2. Present challenges to commencing Schedule 1 (section 21AA)
3. Impact of the non-commencement of Schedule 1 (section 21AA) on Aboriginal peoples and the practice of Aboriginal cultural fishing
4. Steps previously taken and proposed to be taken by the government to commence Schedule 1 (section 21AA)
5. Compliance measures undertaken by Fisheries NSW [DPI Fisheries] as it pertains to the non-compliance of Schedule 1
6. Other related matters

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<sup>1</sup> Fisheries Harvest Strategies in NSW, page 12

[https://www.dpi.nsw.gov.au/data/assets/pdf\\_file/0004/1270831/16558-DPI-Harvest-Strategy-v9.pdf](https://www.dpi.nsw.gov.au/data/assets/pdf_file/0004/1270831/16558-DPI-Harvest-Strategy-v9.pdf)

Accessed: 20/01/22

NSW Government Submission to the Legislative Council Committee on Portfolio Committee No. 4 – Regional New South Wales, Water and Agriculture Inquiry into the commencement of the Fisheries Management Amendment Act 2009 Summaries of the fisheries regulatory framework, and the rationale for access limits and rules within the regulatory framework, are presented at **Appendix A** and **Appendix B**, respectively. The draft regulation prepared under s21AA is presented at **Attachment A**.

# 1. Historical reasons for not commencing Schedule 1 (section 21AA)

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The *Fisheries Management Act 1994* (the FM Act) was amended by the *Fisheries Management Amendment Act 2009* (the FM Amendment Act) to recognise Aboriginal cultural fishing and to support greater access to fisheries resources for Aboriginal cultural fishers (see **Appendix A**).

Upon passage of the FM Amendment Act by the NSW Parliament in 2009, the NSW Government took steps to commence Schedule 1 of the FM Amendment Act in its entirety. On 1 April 2010, Schedule 1 of the FM Amendment Act was commenced (see **Appendix A**) except for the special provision for Aboriginal cultural fishing (s21AA), due to s21AA(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.*

S21AA was not commenced on the same date as the rest of Schedule 1 as it required the establishment of the Aboriginal Fishing Advisory Council (AFAC), and for AFAC to be consulted on the development of the regulation. This, along with the simultaneous development and implementation of the Aboriginal Cultural Fishing Interim Access Arrangements (ACFIAA) as an interim measure, reflects the NSW Government's intention to commence s21AA with an accompanying regulation to set appropriate fishing limits for cultural fishers as part of the broader natural resource management approach for fisheries in NSW.

## **Development of a supporting draft regulation was completed with Aboriginal communities and peak bodies**

Between 2010 and 2014 work undertaken to commence s21AA with a supporting regulation included:

- The AFAC was established and met eight times
- Interim access arrangements for cultural fishers were developed, put in place and subsequently updated following broader consultation
- A regulation working group was established and met 6 times
- A further broader working group was established that assisted in the development of a draft cultural fishing regulation met 3 times.

State-wide Aboriginal community consultation was undertaken between 27 June 2014 and 15 September 2014, seeking input into developing the initial regulation. During the 90 day consultation period, 55 Aboriginal people attended community meetings across the state. Four submissions via a consultation paper were received, and two other written submissions were made (one by a university researcher on behalf of Aboriginal communities in the Tweed region, and the other from NSW Aboriginal Land Council).

Broadly the consultation found that regulation would be a welcome first step in catering for cultural fishing needs although there were some who believed Aboriginal fishing practices should not be regulated and no take limits should apply to certain species for cultural fishing purposes. Despite these concerns, community response to take and possession limits under the ACFIAA

NSW Government Submission to the Legislative Council Committee on Portfolio Committee No. 4 – Regional New South Wales, Water and Agriculture Inquiry into the commencement of the Fisheries Management Amendment Act 2009 arrangement indicated that the proposed limits for the majority of species were adequate in catering for cultural fishing needs although increased limits (in excess of double the recreational limits) were suggested for some culturally significant species and to possession limits when there are seasonal impacts and/or significant cultural periods connected with fish movements.

Following this consultation, a draft regulation (**Attachment A**) was developed based on the input of the AFAC working group. Further consultation was undertaken between 1 October 2015 and 9 November 2015.

## **A change in the preferred approach by Aboriginal peak bodies was articulated prior to the release of the draft regulation for public consultation**

In 2016, NSW Aboriginal Land Council, NTSCORP and the AFAC, advised the NSW Government of their opposition to a state-wide regulation, which would prescribe take and possession limits for cultural fishing purposes, in favour of exploring a local management plan (LMP) approach. This was despite having originally assisted with the development of the state-wide cultural fishing regulation.

The approach to the cultural fishing regulation was amended to reflect Aboriginal peak body preference for the LMP approach.

Based on feedback from NSW Aboriginal Land Council, NTSCORP and the AFAC, a LMP approach is currently being developed by the NSW Government. This was the preferred pathway to provide a management solution for Aboriginal cultural fishing, as LMPs are anticipated to address, in greater detail than s21AA may allow, the specific needs and aspirations of Aboriginal fishers at a community level. This is in recognition of the differences between Aboriginal communities' and their cultural activities.

A LMP is a collective of arrangements that provides access to fisheries resources for a local, place-based Aboriginal community in pursuit of their cultural practices. It also presents an opportunity for involvement in fisheries management decisions.

The LMP covers matters such as:

- Areas of fishing and fishing equipment to be used
- Species of fish, including those of particular cultural significance
- Take and possession limits
- Recognition of cultural fishing events
- Safe consumption of certain species of fish
- Community-based management of cultural fishing

A LMP will be given legal effect under a Ministerial Order made under s37(1)(d) of the FM Act. For LMP purposes, cultural fishing does not extend to commercial fishing activity, consistent with the FM Act and the *Commonwealth Native Title Act 1993* (NT Act (Cth)).

## **Development of LMPs has been an iterative process with Aboriginal communities in the Tweed and Hastings areas**

The NSW Government has been working closely with local communities on a LMP approach since 2016.

A LMP approach to protect and promote Aboriginal cultural fishing is being developed with engaged communities (Hastings and Tweed) to be trialed over two years, commencing in early 2022 with the Hastings LMP, to inform the best model to take forward including the potential



NSW Government Submission to the Legislative Council Committee on Portfolio Committee No. 4 – Regional New South Wales, Water and Agriculture Inquiry into the commencement of the Fisheries Management Amendment Act 2009 commencement of s21AA. The ACFIAA arrangements remain in place to ensure the access is continued across other parts of the state during the trial period.

Development of LMPs has been an extensive and iterative process of consultation with traditional owners. The trial of a LMP approach was originally intended to encompass two coastal areas and one inland area to provide a full understanding of the different fishing activities, needs and environments involved.

The inland trial site was deferred due to a lack of consensus from the community regarding how to develop and implement the trial. The two coastal trial sites have been well supported by communities and may inform an alternative inland trial area in the future.

LMPs have been developed through respectful and meaningful negotiations between Aboriginal communities and the NSW Government. An Engagement Protocol was developed early in the process to establish the agreed principles for developing LMPs and engaging with Aboriginal communities. The engaged communities, AFAC, NSW Aboriginal Land Council and NTSCORP collaborated in the development of the Engagement Protocol. There has been a sensitive and systematic approach taken due to the unique management arrangements involving a new methodology.

The development of the LMPs has first and foremost been community-led and with some unforeseen delays particularly around periods of sorry business and, from early 2020, COVID-19 restrictions in travelling for place-based engagement. It has also required a period of relationship, knowledge and capacity building for the NSW Government and the engaged communities.

In summary, after receiving feedback from AFAC and key stakeholder groups, and confirming the approach to pursue a LMP approach in 2016, key developments included:

- **2016**
  - AFAC was consulted on proposed trial approach
  - Minister and Chair of AFAC met to discuss the LMPs
- **2017**
  - The Government's response to the report of the Standing Committee on State Development - Report on Economic Development in Aboriginal Communities (recommendation 39) - states that Government will investigate commencement of s21AA when outcomes of LMP trials are known
  - AFAC met twice including agenda items on LMP concept
  - Independent facilitator for LMP engagement contracted
  - Engagement protocols established
  - First Hastings LMP workshop with community conducted
- **2018**
  - AFAC met three times including agenda items on LMP model and progress
  - First Tweed LMP workshop with community conducted
  - First Moama/Cummergunja (inland) LMP workshop with community conducted
  - Second Moama/Cummergunja (inland) LMP workshop scheduled (nil attendance)
  - Inland trial deferred based on independent facilitator report
- **2019**
  - Draft Hastings LMP released for community review
  - Evaluation framework for LMPs finalised
- **2020**

- AFAC met three times including agenda items on LMP progress
- First COVID-19 lockdown commenced, impacting community review and engagement
- Draft Tweed LMP released for community review
- **2021**
  - AFAC met twice including agenda items on LMP progress
  - Review and finalisation of Tweed and Hastings LMPs, ahead of early 2022 trial commencement

## **The future statewide approach to LMPs will be based on the trial outcomes**

The future uptake and development of a potential state-wide approach to LMPs will be determined based on the outcomes of the two trials in the Hastings and Tweed areas on the North Coast. The NSW Government recognises that LMPs do not impact on native title holders' rights and interests to culturally fish.

The NSW Government is open to options that could be considered to use LMPs in other locations in the State. Further engagement with Aboriginal communities across the state and leveraging the AFAC's perspective will be needed.

## **2. Present challenges to commencing Schedule 1 (section 21AA)**

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There is no agreement between the NSW Government and Aboriginal peak bodies regarding what limits should be placed on Aboriginal people exercising cultural fishing activities through a Statewide regulation. This is preventing the commencement of s21AA.

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 (see **Appendix B**).

## **3. Impact of the non-commencement of Schedule 1 (section 21AA) on Aboriginal peoples and the practice of Aboriginal cultural fishing**

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The non-commencement of s21AA has not meant that Aboriginal people have been unable to undertake cultural fishing. Aboriginal fishing has, and continues to be, supported and promoted through the Cultural Fishing Interim Access Arrangements (ACFIAA) and the use of section 37 cultural fishing permits as further described below.

Native title rights and interests to culturally fish are also unaffected by the non-commencement of Schedule 1.

## **Cultural fishing has been supported without commencement of section 21AA using interim access arrangements and section 37 permits**

In 2010, during development of a regulation under s21AA, the NSW Government provided greater access for daily cultural fishing needs through extended take and possession limits. These limits were developed between the NSW Government, NSW Aboriginal Land Council and NTSCORP. This was referred to as the Interim Compliance Policy and later became the ACFIAA.

What the ACFIAA means in practice is that Aboriginal people undertaking cultural fishing have daily bag limits that are double or in some cases five times higher than limits that apply to recreational fishers.

There is also an opportunity to provide for cultural activities which are outside of what the rules prescribe, and beyond what the ACFIAA provides for, through section 37 permits or a Ministerial Order under the FM Act.

A total of 132 section 37 cultural fishing permits have been issued since the arrangements came into place (22 January 2010). Of those, 66 were issued in the South Coast (Wollongong to Eden) of NSW. Permit requests range from short periods of a number of days, to annual requests, for community events, birthdays, funerals and other family or community cultural celebrations to feed varying numbers of people up to several hundred.

Similarly, a marine park or aquatic reserve permit under the *Marine Estate Management Act 2014* (MEM Act) can also be issued. These permits have enabled cultural fishers to take up to several hundred species within a specified period of time (e.g. 1000 abalone over the course of two weeks) and have enabled the NSW Government to ensure all users of fisheries resources are included within the regulatory framework in order to appropriately manage the State's natural resources. This also aids the NSW Government to appropriately pursue Illegal, Unreported and Unregulated (IUU) fishing which can have detrimental impacts on the health of vulnerable, high value species and possible localised depletion.

Permits and orders under the FM Act or the MEM Act are not required for a person exercising a native title right [under section 211 of the NT Act (Cth)] to fish in that location.

## **Aboriginal commercial fishing and access to the commercial fishing industry is a priority development area**

Findings from the State-wide Aboriginal community consultation in 2014 on developing the initial cultural fishing regulation also found that cultural fishing is often intertwined with commercial fishing aspirations and there is a strong desire to establish a community-managed commercially viable Aboriginal fishing industry.

The NSW Government remains committed to Aboriginal people's ongoing and continued participation in the NSW commercial fisheries and broader fisheries resource related fields and will continue to work on maintaining that involvement.

With improved understanding of the issues faced by established Aboriginal commercial fishers, measures have been 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 management arrangements stemming from the Commercial Fisheries Business Adjustment Program.

Amendments to the FM Act passed by Parliament in 2014 included measures that provide potential for the reallocation of forfeited/surrendered shares to the Aboriginal community. Section 74 of the FM Act allows the Minister to retain or reissue shares that are surrendered by a shareholder (as an additional option to selling or cancelling the shares). To date this has not been used.

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Section 222B(1)(e) of the FM Act provides for the Fisheries Administration Ministerial Corporation to acquire and deal with fishing assets, and enter into contracts or other arrangements, in connection with Aboriginal fishing assistance programs. Simply, it allows for some fishing assets to be held centrally by the Minister and contracted to community for use.

## **New research projects are in-train to successfully establish and support Aboriginal-owned and operated commercial fishing, aquaculture and other related businesses**

The NSW Government has recently set up a collaborative project with the Fisheries Research and Development Corporation and the Indigenous Land and Sea Corporation to develop a series of case studies and ultimately business cases to establish Aboriginal community owned and operated fishing, aquaculture or other related businesses to increase opportunities for Aboriginal communities to participate in the NSW commercial fisheries and aquaculture industry.

It is anticipated that expressions of interest from engaged communities will be sought in early 2022 with business cases completed for three statewide pilots by mid-2022 and the establishment of the three trials by mid-2023.

## **The NSW Marine Estate Management Strategy (MEMS) aims to protect the Aboriginal cultural values of the marine estate**

Under the ten-year MEMS (2018-2028), DPI Fisheries is responsible for delivering Initiative 4 which aims to increase the broader community's understanding of Aboriginal Sea Country values. It also aims to increase the economic opportunities and employment for Aboriginal people, as well as increase their ownership and active involvement in managing the marine estate.

The Aboriginal community is becoming more involved in marine estate natural resource management, tourism and the aquaculture and fishing sectors. Eight Aboriginal staff are employed in DPI Fisheries under the Strategy, which will expedite many of the actions in Initiative 4, particularly in relation to research and monitoring programs and documentation of cultural values.

Through this initiative, there have been increased opportunities for Local Aboriginal Land Councils and other Aboriginal organisations in securing contracts and employment in the marine sector. The initiative objective is to “work with Aboriginal communities in the management of Sea Country to reduce threats and risks to Aboriginal cultural heritage.” The long-term outcomes of the initiative include:

- Improved Aboriginal satisfaction with Sea Country management
- Aboriginal people derive greater economic benefit from the marine estate
- The broader NSW community has a greater appreciation of the significance of Sea Country for Aboriginal people.

Since August 2018, under the MEMS (2018-2028) initiative 4, a number of Aboriginal communities have participated in general boat license, deckhand, coxswain and marine tour guide courses to support cultural tourism and employment in the marine estate. The training will help local Aboriginal community members find work within the marine tourism industry or establish their own businesses. Outcomes achieved thus far include:

- Supported the training of 120 Aboriginal people who have received their NSW general boat license and safety training.
- Supported 7 Aboriginal community members from the south coast to complete their Coxswains training with an additional 21 candidates engaged with completing their sea time associated with this training.
- Assisted 12 Aboriginal people on the South Coast to obtain their Certificate II in Tourism to enable them to work in tourism related industries.

- Supported more than 50 Aboriginal rangers to deliver on-ground habitat rehabilitation and wildlife management on Country.
- Directly investing just over \$60,000 in business support for 7 Aboriginal businesses or organisations
- Investing close to \$250,000 in business capacity training.
- Supporting opportunities for Aboriginal people to care for culture and reignite cultural practices. For example, a local men's group at Wallaga Lake re-introduced a boat building practice that had been dormant for almost 30 years. Participants built their own boat to fish in their traditional waters, following the cultural practice of their grandfathers. The group made their own fishing nets (via a DPI administered Aboriginal Fishing Trust Fund grant) and obtained a section 37 cultural fishing permit to supply local Elders with fresh fish.

Projects currently being implemented in 2021/22 are summarised here -

[https://www.marine.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0020/1255160/Marine-Estate-Management-Strategy-Implementation-Plan-2020-21.pdf](https://www.marine.nsw.gov.au/__data/assets/pdf_file/0020/1255160/Marine-Estate-Management-Strategy-Implementation-Plan-2020-21.pdf) (see pages 33-38).

The NSW Government has also initiated a project to support the development of an Aboriginal cultural fishing harvest strategy framework that can be adopted and adjusted to the needs of each individual fishery harvest strategy in NSW.

### **Using a representative Aboriginal body to provide advice on fisheries matters informs the regulatory approach**

The Aboriginal Fisheries Advisory Council (AFAC) was established in 2010 under the FM Act to provide strategic advice to the Minister on issues affecting Aboriginal fishing. AFAC was originally proposed as part of the 2009 Amendment to the FM Act to provide advice on the development of a cultural fishing regulation.

Since then, AFAC have been involved broadly in development of the Aboriginal Fishing Trust Fund (AFTF) and establishment of the Aboriginal Fishing Trust Expenditure Committee, input into policy development related to Aboriginal cultural fishing, review and development of submissions on various marine resource related topics such as the Independent Review of Commercial Fishing Arrangements in NSW, Marine Parks Audit and, Mulloway Recovery Program, progression of the LMP approach and, review and input into various Ministerial Orders and Species Impact Statements for threatened species and aquatic ecological communities.

In 2022 AFAC's membership will be renewed following their expiry in August 2021. The reappointment of the AFAC has been delayed due to Covid impacts on the general community, including Aboriginal communities as well as investigations into improvements for the Governance of the AFAC and Aboriginal Fishing Trust Fund, which are ongoing. The AFAC will continue to play an important role in the development of cultural fishing policy as well as exploring economic development opportunities for Aboriginal communities associated with fishing activities and development of a Statewide cultural fishing strategy.

### **The Aboriginal Fishing Trust Fund continues to support cultural fishing in NSW**

The NSW Government, through the Fisheries Division in the Department of Primary Industries, administers the AFTF which provides grants and loans that enhance, protect or promote Aboriginal cultural fishing and provides fishing related economic opportunities for Aboriginal communities. The current balance of the AFTF is \$1,552,454.31

Twenty-four projects have been approved and supported under the AFTF since its inception. Projects are made public on the DPI website once all offers for that funding round have been resolved through the execution of funding deeds. Some examples include:

- Supporting a project to restore an inherited family oyster aquaculture business in Wonboyn Lake, with focus on long-term operational sustainability, and promoting employment opportunities for the local community. Supported through a grant of \$117,736, Wonboyn Lake, Eden - South Coast.
- Providing a grant for the development of a business and marketing plan, as well as purchasing of operational equipment needed for business to be viable and support Aboriginal people remaining engaged in the commercial fishing industry. Supported through a grant of \$55,000, Batemans Bay - South Coast.
- Supported local Aboriginal elders and community to access cultural fishing sites and practice cultural fishing whilst sharing this knowledge with broader community members. Supported through a grant of \$8,000, Narooma - South Coast.
- Supported community gatherings around fishing for mullet during their annual migration. Supported via a grant of \$5000, La Perouse – Sydney.
- Supported a research project to investigate garlaany (pipi) population structure, abundance and distribution including a reseeding trial which will include Aboriginal community engagement and involvement. Supported via a grant of \$70,244, Nambucca - North Coast.
- Supported a habitat works and cultural fishing education project to educate the community on cultural fishing practices and increase fish habitat at the Bulgandramine Mission site through planting native species and weed reduction. Supported via a grant of \$5000, Bulgandramine Mission, near Peak Hill, inland NSW.
- Supporting a cultural fishing project to provide a camping experience where Elders and community members can share cultural fishing, river and land management knowledge with Aboriginal youth. Supported via a grant of \$10,530, Wellington/Dubbo - inland NSW.

## **4. Steps previously taken and proposed to be taken by the government to commence Schedule 1 (section 21AA)**

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Section 1 of this submission details previous steps taken to commence s21AA with a supporting regulation for reasons relating to natural resource management outlined above. Section 1 also details the approach currently underway to trial LMPs with a view to informing how s21AA may commence soon.

## **5. Compliance measures undertaken by [DPI Fisheries] as it pertains to the non-compliance of Schedule 1**

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The NSW Government, through DPI Fisheries, has responsibility for administering and enforcing the laws governing the fisheries resources of the state. These laws include the *Fisheries Management Act 1994* (FM Act), *Marine Estate Management Act 2014* (MEM Act) and associated regulations.

Compliance and enforcement activities are undertaken through the Fisheries Compliance Unit and other authorised officers, including NSW Police. Fisheries Officers patrol, detect and prevent illegal fishing and damage to fish habitats in line with legislative requirements. Joint compliance patrols are conducted with local NSW Police.

## **Compliance and enforcement of Aboriginal Cultural Fishing is guided by specialised Work Instructions for Fisheries Officers**

Aboriginal cultural fishing is facilitated through the ACFIAA and section 37 permits (see Section 3 above), and through the *Commonwealth Native Title Act 1993* (NT Act (Cth)).

DPI Fisheries enforce cultural fishing limits under NSW regulations only using specialised Fisheries Officer Work Instructions, which set out detail of how Fisheries Officers will approach suspected breaches of cultural fishing rules to ensure a culturally sensitive, consistent and transparent enforcement process, and Fisheries Officer safety.

These work instructions outline the steps that need to be taken in order to assess if an offence has occurred and a reasonable and proportionate compliance action. They are consistent with approaches taken by other states and territories.

Work instructions include specific guidance on addressing a fisheries or marine estate enforcement issue where a defence is claimed or assumed under native title.

Fisheries Officers must be satisfied that the requisite elements of any offence have been proven before they issue a formal caution or a penalty notice to any person.

## **Compliance and enforcement efforts focus on commercial take and trafficking of high value species**

The DPI Fisheries approach to compliance and enforcement follows a risk based approach to prioritise activities and seeks to minimise cost and maximise outcomes for the government, business and community. In practice, this means that a large portion of fisheries compliance efforts are directed towards high-risk commercial take and trafficking of vulnerable fish stocks. A proportion of these compliance activities relate to abalone, a culturally significant and commercially valuable species. Generally, breaches that are low risk, minor or of a technical nature can be dealt with by way of a written caution or penalty notice.

Our data indicates Aboriginal people represent a low percentage of fisheries compliance related prosecutions. The proportion of finalised court charges under the Fisheries Management Act brought against Aboriginal people between 2016 to date is around 7% compared to 93% brought against non-Aboriginal people and companies.

The proportion of penalty notices (fines) issued to Aboriginal people under the Fisheries Management Act between 2016 to date is 1.5% compared to 98.5% brought against non-Aboriginal people and companies.

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. In total 11,462 abalone have been seized in connection with these 37 matters. A total of 11 matters involve the illegal selling of abalone (7609 fish), and others were caught in possession of significant numbers of abalone, which have caused fisheries officers to refer these matters to the courts.

Previous apprehensions and sentences that resulted in physical imprisonment have been as a result of recidivist offenders being found guilty of possessing indictable quantities of Abalone (some also included charges of threaten, abuse and obstruct Fisheries Officers), with quantities ranging from 51 to 736 Abalone. The bag limit for Abalone is 2 per person per day for recreational fishers and under the Aboriginal Cultural Fishing Interim Access Arrangement it is 10 per person per day.

## **The approach to fisheries prosecutions involves a rigorous assessment process before matters proceed to the courts**

The discretion to take proportionate and reasonable enforcement action against offenders who contravene provisions in the FM Act lies with the regulator.

Under the State Government's regulatory standards contained in the Quality Regulatory Services Initiative (QRSI), each regulator is to have a framework that is risk based and outcomes focused. It also requires that regulatory sanctions are applied through a compliance response matrix that considers a range of factors including the circumstances of the offence, offender behaviour, seriousness of the offence and any antecedence.

As part of the QRSI each NSW Government regulator must also have an Enforcement Policy that meets Attorney General's Guidelines for prosecutions and the issuing of Penalty Infringement Notices.

All prosecutions commenced by the NSW Government are assessed as part of a rigorous process that involves a Prosecutions Review Panel including senior compliance staff and senior legal staff and detailed prospects advice obtained from the Crown Solicitors Office on all matters, including those involving Aboriginal and non-Aboriginal persons. Where matters are assessed as being in the public interest and have good prospects of success they proceed to prosecution.

### **If criminal proceedings commence, defendants must satisfy the evidentiary burden to establish native title as a defence**

Section 211(2) of the NT Act (Cth) provides that a law will not prohibit or restrict a native title holder from carrying out a class of activity, such as fishing, for the purposes of satisfying their personal, domestic or non-commercial communal needs in the exercise or enjoyment of their native title rights and interests. Such rights can also be exercised by Aboriginal persons where a Native Title claim has not been determined and it is often very complex to determine who is and is not a native title holder.

Native title has been raised as a defence in several criminal cases involving fisheries offences. The courts will determine whether a person wishing to raise a Native Title defence under s211 of the NT Act (Cth) meets the definition of a native title holder under the NT Act (Cth).

The onus and burden of proof is placed on the person who is claiming to have a native title right. A defendant must provide relevant evidence around the particular fishing event and surrounding circumstances.

Given the complex process to identify native title holders, particularly when Fisheries Officers are in the field, it is not always possible to know if someone is a native title holder. However, certain steps still need to be taken by officers to gather the necessary evidence at or around the time that the activities are undertaken. These are described in DPI's Work Instructions for Fisheries Officers. Judgements will need to be made based on observations and whether there are reasonable grounds to suspect commercial involvement.

## **6. Other related matters**

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Nil.



## Conclusion

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Efforts to improve the interaction between management of the fisheries resource and Aboriginal communities will continue in support of commencing s21AA with a supporting regulation.

In 2022 the first two Local Management Plan trials will be implemented with the communities in Tweed and Hastings, and assist to inform the future approach to regulating place-based cultural fishing more broadly across NSW, led by engaged Aboriginal communities. Other projects underway (highlighted in this submission) that focus on the preservation of cultural fishing and which present economic development opportunities for Aboriginal fishers, will continue to be a priority for the NSW Government to deliver.

Consistent and ongoing engagement with Aboriginal peak organisations, communities and maintaining the role of the Aboriginal Fishing Advisory Council in fisheries management decision-making processes will be essential to the successful management of the fisheries resource and maintaining the relationship between Government and Aboriginal communities.

## Appendix A: The regulatory framework

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### The Fisheries Management Act 1994 and Aboriginal Cultural Fishing

The Fisheries Management Act 1994 (FM Act) regulates fisheries resources in NSW. Under section 3, objects of the FM Act:

*(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, the objects of this Act include—*

*(a) to conserve fish stocks and key fish habitats, and*

*(b) to conserve threatened species, populations and ecological communities of fish and marine vegetation, and*

*(c) to promote ecologically sustainable development, including the conservation of biological diversity,*

*and, consistently with those objects—*

*(d) to promote viable commercial fishing and aquaculture industries, and*

*(e) to promote quality recreational fishing opportunities, and*

*(f) to appropriately share fisheries resources between the users of those resources, and*

*(g) to provide social and economic benefits for the wider community of New South Wales, and*

*(h) 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.*

The FM Act defines “Aboriginal cultural fishing” as “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”.

In addition, the rights and interests of native title holders are governed by the Commonwealth Native Title Act 1993 (NT Act (Cth)). In particular, s211 of the NT Act (Cth) gives native title holders the right to engage in fishing, gathering and cultural or spiritual activities without the need to obtain approval from the government, native title rights and interests are not extinguished or affected by the creation of marine parks or aquatic reserves and the “future acts regime” ensures that compensation is paid to native title holders, when their native title rights and interests are affected by the government’s actions.

The NSW Government regulates cultural fishing through the following mechanisms:

1. Aboriginal Cultural Fishing Interim Access Arrangement (ACFIAA) (originally the Interim Compliance Policy) specifies the amount of fish that can be taken by an Aboriginal person fishing for the purpose of Aboriginal cultural needs where elders, the incapacitated or other community members are unable to or it is otherwise inappropriate for them to fish. The ACFIAA sets bag and possession limits – sometimes up to five times the limit allowed for non-Aboriginal recreational bag and possession limits. The ACFIAA also allows Aboriginal persons to engage in cultural activities that are otherwise prohibited under the FM Act.

2. Section 37(1)(d) of the FM Act enables approvals to be given to Aboriginal people who wish to fish for the purpose of cultural fishing beyond what the current rules allow for, including in excess of the limits established by the ACFIAA, either as a permit or an order. An approval may, under s37(2), 'authorise the taking of fish or marine vegetation by any method or by any specified method, from any waters or any specified waters or in any other specified way, despite any provision of ... this Act'. Under s37(5) an approval in force under s37 is a defence to a prosecution under the FM Act if a defendant satisfies the court that the act or omission giving rise to an offence was authorised by that approval.

Aboriginal people are exempted from the requirement to pay for a recreational fishing licence.

The Minister administering the FM Act seeks advice on matters affecting cultural fishing from the AFAC which was established under s229 of the FM Act and commenced in September 2010. Voting members of the AFAC include: Aboriginal persons appointed to represent different regions of NSW (10 maximum), one other Aboriginal person, a representative of NTSCORP Limited, the NSW Aboriginal Land Council. A senior officer of the Department is also a non-voting member of the AFAC.

Sustainable fisheries management is delivered across NSW through the FM Act and regulations and supporting policies and plans. All fisheries management arrangements that apply in NSW waters also apply to the waters of NSW marine parks and aquatic reserves: see s65 of the Marine Estate Management Act 2014 (MEM Act). Additional management arrangements apply in marine parks and aquatic reserves to achieve the objects of the MEM Act and purposes of marine parks and aquatic reserves, (including supporting Aboriginal cultural uses of parks) outlined in ss22 and 33.

## **Fisheries Management Act Amendment Act 2009**

In December 2009, the Fisheries Management Amendment Act 2009 (FM Amendment Act) was passed. Of relevance to this submission were proposed changes to formally recognise the cultural importance of fishing to Aboriginal people in NSW within the FM Act through:

- changes to the objects of the FM Act to recognise, protect and promote the Aboriginal people's cultural, spiritual, social and customary association with the State's fisheries resources;
- expressly providing that permits may be issued for the sole purpose of Aboriginal cultural fishing (s37 permits); and
- including a definition of Aboriginal cultural fishing.

During the debate, the government made several amendments, namely:

1. establishing an advisory group to consider Aboriginal fishing issues (the AFAC);
2. making a special provision for Aboriginal cultural fishing to set prescribed limits developed in consultation with Aboriginal and other stakeholders (s21AA); and
3. waiving recreational fishing licence fees for Aboriginal people.

Of the amendments proposed in Schedule 1, all but one have commenced, namely, s21AA:

### **Schedule 1 Amendment of Fisheries Management Act 1994 No 38 in 2009**

#### *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 of 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).*

Under s21AA of the FM Act an Aboriginal person is authorised to take or possess fish for the purpose of Aboriginal cultural fishing despite sections 17 and 18 the FM Act (which specify offences for taking and possessing more than the maximum quantity of fish) subject to the making of regulations.

The regulations may prescribe the manner of taking fish by Aboriginal persons for the purpose of cultural fishing and specify restrictions on the quantity of fish of a specified species or class. Such regulations cannot be made unless the AFAC has been consulted on the proposed regulations.

The Parliament's intention at the time of the introduction of s21AA was that regulations would be made to restrict the quantities of fish that could be taken or possessed under s21AA to be consistent with the primary object of the FM Act to "*conserve, develop and share the fishery resources of the State for the benefit of present and future generations*". For example:

- The Hon Tony Kelly, Minister for Primary Industries and Minister for Lands (LC 2 December 2009 p20386) when introducing the government amendments including s21AA said "*Aboriginal people will no longer need a permit or to pay any kind of fee to fish culturally subject to prescribed conditions*".
- The Hon. Ian West (LC 2 December 2009 p20363) stated "*It was originally intended that once the bill had passed through both houses of Parliament, amendments to the regulations and to administrative processes would be made to enhance access arrangements for Aboriginal cultural fishing...*".
- The Hon. Ian Cohen (LC 2 December 2009 p20388) stated in relation to s21AA that it "*...provides the Minister with regulation-making powers to outline restrictions on quantity...*" and that "*the [AFAC] must be consulted, before any regulation is made, to outline circumstances and restrictions on Aboriginal cultural fishing rights*".

During second reading of the Fisheries Management Amendment (Aboriginal Fishing) Bill 2017 (18 October 2017) to establish the Aboriginal Fishing Trust Fund, the Greens raised the non-commencement of s21AA in relation to the development of supporting regulation. In reply, the Hon Niall Blair MLC, Minister for Primary Industries (18 October 2017) remarked that:

*“the intention has long been that s21AA would commence in conjunction with a cultural fishing regulation” and that “the NSW Government continues to investigate whether a state-wide regulation is the best approach” and “local management plans are being trialled as part of these investigations” and that “these trials will guide how and when s21AA should apply”.*

Summarising that:

*“Given the shared nature of our precious fisheries resources, the Government believes a measured approach is most prudent. In the meantime, there are measures that provide additional access to fisheries resources through the Aboriginal Fishing Interim Access Arrangement and permits issued under section 37 of the Act. We remain committed to working with Aboriginal communities so they can exercise their cultural fishing rights.”*

## **Appendix B: The rationale for limits within the regulatory framework**

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Access rights, limits and rules are provided for all user groups and to help ensure fisheries resources are managed sustainably for the current and future needs of the NSW community. The benefits of these rules include:

- conserving fish stocks and aquatic habitats
- sharing the catch between users
- recognising and supporting Aboriginal persons to continue to culturally fish
- 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.

### **Limits are in place for all fishing sectors in NSW**

The access and harvesting of marine resources are managed through the FM Act and associated regulations. The regulations place restrictions on the various fishing and aquaculture sectors to ensure sustainable stock and healthy marine ecosystems are maintained. The restrictions also manage access to share the resource between each fishing sector to ensure equitable access to the resource.

### **Regulation of fishers in the recreational and charter sector**

Recreational fishing regulations (including Charter boat operators) primarily use daily bag and size limits to manage harvest levels. Size limits allow a certain portion of fish to reach maturity and complete their breeding cycle. Commercial fisheries are also subject to size limits. Bag limits are set to manage the volume harvested and to provide for equitable access within and between fishing sectors.

Other rules that apply to recreational fishing include fishing fee arrangements, permitted and prohibited methods and activities, which cover types and use of gear and fishing practices, which can apply to species or spatially.

Charter boat operators who provide fishing trips for recreational fishers in NSW are required to be licensed. This ensures there is no uncontrolled increases in charter fishing boat pressures on fish stocks.

### **Regulation of fishers in the commercial wild caught and aquaculture sectors**

Commercial fisheries are managed through limited entry arrangements (licensing requirements), input quotas (total allowable effort), output quotas (total allowable catch) and other input controls such as fishing gear restrictions, area closures, seasonal closures and limitations on how many crew members can assist fishing activities.

The development of catch limits for quota managed species in NSW involve an annual scientific stock assessment process coordinated by the NSW Government. This involves collation and consideration of available information from a number of sources including independent scientific monitoring programs, the commercial, Aboriginal cultural and recreational fishing sectors, as well as social, economic and environmental information (e.g. weather, seasonal conditions and natural events such as floods and cyclones), research, scientific observer work, stakeholder views, and data from other jurisdictions (where fish stocks are shared).

This information is then used to inform decision making, including the independent NSW Total Allowable Fishing Committee (TAFC) or the delegate of the Secretary of the Department of Regional NSW, to consider and provide a determination to the Minister on a total allowable commercial catch (TACC) or total allowable commercial effort (TACE) for each quota managed species. Among other species, lobster, abalone and Red sea urchin quotas are set by the TAFC.

The TAFC has statutory responsibilities set out in Part 2A of the FM Act to determine the TACC or TACE by NSW fishers holding the relevant shareholding or endorsement in some commercial fisheries. Various fishing regulations under the FM Act also contain provisions requiring the making of fishery determinations.

The TAFC is an independent statutory body established under Schedule 2 of the FM Act. In making a determination on catch or effort in a commercial fishery, the TAFC must consider the ecological, economic and social issues associated with each fishery and make determinations that 'on balance' pursue the objectives of the FM Act. The TAFC is not subject to the control or direction of the Minister as to any determination made. However, the Minister may direct the TAFC on the procedures to be followed and the matters to be taken into account in making a fishing determination.

Species that are not quota managed are regulated by effort controls such as limits on the gear type and quantity, boat size and restrictions on assistance by persons other than the commercial fisher and spatially from areas that have been allocated to the recreational fishing sector or to conservation.

## **Fisheries are managed to mitigate the risk of over-fishing and to ensure sustainable fish stocks**

The current regulatory framework for NSW fisheries seeks to strike a balance between all sectors accessing NSW's fisheries resources and to ensure the long term sustainability of fish stocks.

If that balance was to be changed, for example by removing any catch or possession limits for 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 (although, a direct 1:1 balance is unlikely if increased catches were concentrated in local areas and not spread across relevant habitats and ecosystems).

### **Case study: Abalone**

#### **Biological characteristics make it susceptible to local depletion**

There are many culturally significant species to Aboriginal communities:

- For coastal communities – Abalone, lobster, mullet, pipis, cockle, mulloway, crabs and some shark species
- For inland communities - Murray Cod, Golden Perch, freshwater crayfish, freshwater mussels

Abalone is a culturally significant species to Aboriginal communities, particularly on the NSW south coast. Maintaining access to this resource has important implications for practicing culture and feeding communities. The NSW abalone fishery harvests the Blacklip Abalone (*Haliotis rubra*). Larvae of this abalone are planktonic for the first week or so after spawning and may be distributed some distance from the spawning adults by ocean and tidal currents. However, once settled, abalone are highly resident, forming non-migratory aggregations on suitable reef habitat. Blacklip Abalone are slow growing, taking five years to reach maturity and attaining a maximum age of 20 to 50 years. Without migration of adults to replace those taken by fishing, and coupled with slow growth, aggregations can be rapidly fished down. Abalone are therefore susceptible to serial localised depletion under heavy fishing pressure, with depleted areas potentially taking decades to

NSW Government Submission to the Legislative Council Committee on Portfolio Committee No. 4 – Regional New South Wales, Water and Agriculture Inquiry into the commencement of the Fisheries Management Amendment Act 2009 re-populate. Abalone aggregations exhibit the same dynamics as separate stocks when fished and, for this reason, are spatially managed in many parts of the world, with relatively small areas being managed as separate management units.

Abalone is a high value species susceptible to illegal trafficking due to its market value (up to \$170/kg). A minimum legal size limit of 11.7cm applies to all fishing sectors in NSW, to ensure each individual is able to reach a size of sexual maturity to enable successful spawning to occur to replenish stocks.

The adult biomass of Abalone populations needs to be carefully managed through minimum legal size limits, total catch quotas, and daily take and possession limits across all fishing sectors to ensure there is enough adult biomass to replenish the stock every year. Without sufficient densities of adult abalone on a reef system, localised depletion can and does occur.

The biology of abalone increases its vulnerability to over-fishing, including its limited capacity for larval dispersal, resulting in the need to maintain local self-sustaining populations (Babcock and Keesing 2011 (DOI: 10.1139/f99-106) and citations thereof).

Harvesting limits are necessary to manage the following risks to the abalone fishery in NSW:

- Localised depletion of abalone populations to a level where they are not self-sustaining resulting in local functional extinction. This would be more likely in easily accessible areas and closer to larger populations of people harvesting abalone i.e. regional towns.
- Persistent depletion of local populations resulting in functional losses of abalone populations across large areas of the NSW coast.
- Change in ecological balance of dominant herbivores and likely habitat changes (abalone exclude sea urchins from niche habitats. The loss of abalone from niche habitats would allow sea urchins to colonise those areas and may result in changes in sub-tidal habitat from foliose algal forest to barrens habitat – low or no large foliose algae).
- Local loss or significant change of biological diversity (extreme possibility including that of large scale habitat change)

Abalone is a quota managed species regulated for the commercial sector by the *Fisheries Management (Abalone Share Management Plan) Regulation 2000*, and for the recreational sector by the *Fisheries Management (General) Regulation 2019* using take, possession, bag and size limits. The current commercial quota is set by the T AFC at 100 tonnes.

Estimates of total annual abalone harvest are informed by DPI Fisheries Scientific, Management and Compliance reports submitted to the independent NSW T AFC. These include scientific assessments, commercial catch statistics, commercial quota documentation, recreational fishing survey reports, details of harvesting under specific section 37 permits, and any other reported cultural fishing activities.

The T AFC Determination report for 2021/22 estimated the illegal catch of Abalone in NSW to be around 20 tonnes per annum and provided the following recommendations to improve the management of the Abalone Fishery:

1. The T AFC recommends that the Abalone Industry and Department complete the development of a NSW Abalone Fishery Harvest Strategy with the aim of implementing it no later than 1 July 2023.
2. In the absence of formal area-based catch limits, legal minimum lengths at current sizes are the most important measure preventing over-fishing of spawning adult abalone. These should be retained at current levels.
3. Options should be explored for gathering information on current densities and size-frequency distributions of abalone underwater, including sub-legal sized abalone. This is



important to updating the information gathered during the 2013 fishery independent survey on spatial stock distribution and densities, to ensure that scaled estimates of population density, biomass and harvest fraction by area are reliable. Data on abalone population size-frequency distribution could be cost-effectively collected through use of industry divers to ii gather random size-frequency data during a small number of dives each year in each area, as part of a scientifically designed, industry run survey program.

4. Consideration be given to scaling fines for illegal fishing from the current flat \$500 to up to \$10,000 commensurate with the value of the abalone that is stolen. This would be a greater and more immediate deterrent to reoffending. Abalone special penalties in other jurisdictions can provide guidance in this respect.