Caught, Hook Line & Sinker

Incorporating Aboriginal Fishing Rights into the Fisheries Management Act

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Contents

This paper has been developed to raise discussion and awareness concerning traditional Aboriginal fishing rights and practices, and the consequences and implications under the Fisheries Management Act 1994. Furthermore, the paper will provide recommendations, in particular law reform, policy and program direction.

Cover Art Supplied By Ms Brooke Sullivan of Dubbo NSW. Ms Sullivan is an 18-year-old Koori student currently completing her Higher School Certificate at Dubbo Senior College majoring in Art, Graphic Design and English. Brooke says that her art, and this design in particular, are inspired by both traditional Aboriginal styles from around Australia and the traditional tribal markings found in indigenous cultures such as the Maori of New Zealand and other pacific Island nations. In the cover itself can be seen representations of native fish species found within the inland river systems of New South Wales along with the streams and rivers that they inhabit.

1. Introduction

"Hunting, fishing and gathering are fundamental to our people's contemporary and traditional cultures, they help to define our identity and are at the root of our relationship to the land. Hunting, fishing and gathering continue to provide a significant part of the diet of many of our people, and also provide a range of raw materials. As cultural activities hunting, gathering and fishing are important vehicles for education, and help demonstrate to our succeeding generations our understandings of our place in the world" [1]

Aboriginal people in New South Wales have, and continue to, use a variety of methods to supplement food sources for themselves, their family and often for the communities in which they live. In many rural, remote and coastal communities this can be seen through the continuation of hunting and fishing practices, only some of which is already recognised and protected through legislation.

The purpose of continuing these practices is not only a practical answer to supplementing food and nutritional sources because of economic pressures or availability considerations, but also as a means of continuing traditional and cultural practices. These include communal sharing and trading for both subsistence and ceremonial and cultural purposes, as well as the passing on of knowledge and custom from one generation to the next through these activities. Fishing and its associated activities form a major part of many Aboriginal people's lives.

Aboriginal communities, whose traditional areas are located along Australian coastlines and inland river systems, also have strong spiritual connections with the water and Aboriginal fishing practices are an integral part of maintaining their culture and identity. In this sense, fishing practices for both coastal and inland Aboriginal communities is a strong continuing element of both community and family life, on a daily basis as well as during significant cultural and ceremonial activities.

However, since the time of the first fleet sailing through Sydney heads, Aboriginal people have had to share this resource not only with each other, but also with the new interests of the western world. Today, fisheries management is governed by these interests, with an aim of protecting and regulating mainly the recreational and commercial sectors, which produce income, profits and sport for their participants. The regulation of these industries is aimed at both the participants in those industries as well as those outside of it, for the purpose of maintaining what is seen as an increasingly limited and finite resource.

In NSW, unlike most other states and territories, there is no legislative recognition or protection for the maintenance of traditional Aboriginal fishing practices and the ongoing cultural, community and individual benefit that these practices provide to Aboriginal communities.

With the commercialisation of fishing resources, the difficulty that arises for Aboriginal people in engaging in these activities is that they are governed by the various state and federal regulations that place the emphasis on protecting and regulating fishing activities that are commercially based. These regulations require licences that govern the type of fishing activity they are engaged in, how they do it and what they are able to take.

However, in New South Wales at least, there is no definition of traditional Aboriginal fishing practices, meaning this type of fishing will be deemed as recreational or commercial, depending on a number of variables, including the size and type of the catch and the method used in acquiring it. Therefore unless the Aboriginal people who engage in these activities are licensed to do so, they will be prosecuted under the *Fisheries Management Act* 1994.

[1] Extract from *Aboriginal and Torres Strait Islander Commission Environmental Policy (1994:5)*, cited in West Australian Government's Aboriginal Fishing Strategy 'Recognising the Past, Fishing for the Future', May 2003 (p25)

Existing NSW Fisheries Legislation and its effect on Aboriginal Communities

As has previously been stated, the legislation that governs all fishing activities in New South Wales is the *Fisheries Management Act* 1994. The Act is designed to maintain and preserve fishing stocks in New South Wales through the regulation of both commercial and recreational fishing, with a system of criminal sanctions enforcing those regulations. While this legislation defines and codifies commercial and recreational fishing, presently, there is no recognition of traditional Aboriginal fishing practices.

This lack of recognition has created a fundamental problem for many Aboriginal people and their communities. For them to be able to continue the traditional practices of providing for extended families and communities, participating in cultural, community and family events as well as perpetuating the traditional beliefs and structures, the amount and types of fish they catch has the potential of bringing them under the licensing requirements for commercial fishing. This is particularly so in coastal areas where the vast majority of the commercial and recreational fishing industries are located and where most of the regulations are concerned.

As the commercial fishing industry generates income and profit for those involved in it and as it utilises a finite natural resource the emphasis of current regulation focuses on the management of stock and the continuation of the industry. As such the regulations carry serious criminal penalties for illegal commercial fishing activity including substantial fines, suspensions and terms of imprisonment. As the resource is depleted the interests that compete for it are becoming embroiled in battles over who not only has a right to it, but who is capable of managing to ensure its is there for future generations. It would appear, at the moment at least, that Aboriginal peoples stake in this resource is being ignored in favour of those with more economic power.

Also, while offences under the Act are punishable by hefty fines, terms of imprisonment as well as bonds and probation, there are little of the same protections afforded to Aboriginal people in the wider criminal justice system when they are suspected or convicted of an offence. These include diversions from the system through cautioning right through to sentencing with options such as circle sentencing.

The Fisheries Officers who administer the Act are also not required to take into account special considerations in dealing with Aboriginal people, as the police are in administering the wider criminal justice system. Anecdotal evidence supplied to AJAC from Aboriginal communities suggests that Aboriginal people are heavily prosecuted for fishing offences and receive substantial penalties for those offences under the *Fisheries Management Act*. Primarily they are prosecuted for what is perceived as unlicensed commercial fishing, or what may more generally be known as 'poaching'.

Individuals in many Aboriginal communities have reported to AJAC that they feel targeted by fisheries officers, and penalised for continuing what they see as a vital cultural tradition.

While there is limited recognition of Aboriginal people's hunting and fishing rights through the *Aboriginal Land Rights Act* 1983, this legislation is struck down by *The Fisheries Management Act*, meaning there is literally no recognition of traditional Aboriginal fishing practices in an New South Wales legislation.

Current problems with the management system

The lack of legislative recognition for traditional Aboriginal fishing rights has led AJAC to hold a number of concerns with the *Fisheries Management Act,* in particular the detrimental impact it has on Aboriginal people's ability to not only continue traditional cultural beliefs, but provide alternative sources of food for their family and communities and an increasing contact with the criminal justice system through offences under the Act. Additional concerns include:

- That there is no recognition of traditional Aboriginal fishing practices within the legislation;

- That Aboriginal people are being prosecuted for engaging in what amounts to unlicensed commercial fishing, essentially criminalising a non-commercial, cultural practice;

- That offences committed under the *Fisheries Management Act* are excluded from recent initiatives within the criminal justice system to divert Aboriginal people from that system, such as youth justice conferencing, circle sentencing and other diversionary programs;

- That the investigative powers of Fisheries Officers go beyond even that of the police service in some instances and there are no provisions for how Fisheries Officers should deal with Aboriginal people as a class of vulnerable people within society (defined under the Act);

- That the New South Wales *Fisheries Management Act* is not consistent with legislation in other jurisdictions. For example, many other states in Australia, including Tasmania, Western Australia, Northern Territory, Victoria and Queensland recognise that Indigenous fishing can live side by side with commercial and recreational interests without any detrimental impact upon those interests.

- That there is existing anomalies between activities that have legislative protections for Aboriginal people around hunting rights, compared to what is available in relation to fishing, particularly as it relates to salt water fishing.

2. Fisheries Management Legislation – New South Wales

"Sharing of fish is important socially and communally. Catches of fish are shared among the family, extended family and others who are not able to fish for themselves, such as the elderly. Sharing often extends to barter and exchange of fish for other items and other food sources within Aboriginal communities.[2]"

The common element of the fisheries management legislation of the various states and territories of Australia is to regulate both recreational and commercial fishing activities. This is to ensure that the interests of both industries are served and that the resource is used sustain ably and equitably while protecting future interests. Significantly, most states and territories, except for New South Wales and South Australia, recognise and to varying degrees, protect the rights of Aboriginal people to practice traditional fishing methods without impacting on the other two major fishing interests, namely recreational and commercial.

These protections of traditional Aboriginal fishing practices extend to both freshwater and salt water fishing, and allow for traditional Aboriginal fishing practices that are limited not by what is taken or how it is taken, but whether or not the activity will have a detrimental impact on resources or other sectors of the industry. So long as this does not occur and it is in line with a traditional or cultural purpose, then these jurisdictions will allow it. The New South Wales fisheries legislation does not offer any of these protections.

The Legislation

In New South Wales fishing activities, both commercial and recreational, are governed by the *Fisheries Management Act* 1994 (the Act). The objectives of the Act include:

- Conserving fish stocks, habitats and threatened species;
- Promoting ecologically sustainable development, viable commercial fishing, quality recreational fishing opportunities;
- Appropriately sharing fisheries resources between the stakeholders; and
- Providing social and economic benefits for the wider community[3]

There is no mention of Aboriginal people or traditional Aboriginal fishing practices within this section.

Breaches of the Act can attract heavy penalties and in some instances, terms of imprisonment.

It is only at Section 34C (2) (f) that there is any meaningful mention of Aboriginal people within the legislation and this provides no protection for traditional Aboriginal fishing practices. In fact This section only excuses an Aboriginal person from having to pay the required fishing fee so long as they are fishing in fresh water or in salt water if they are fishing pursuant to a Native Title Claim.

Not only does the section not provide any protection for traditional Aboriginal fishing practices but also the difficulty for some Aboriginal people in relation to Native Title claims is that this right will be recognised only for people directly named in Native Title claims. The difficulty with this is that it has been shown that not all traditional owners have been named on claims but are still recognised within communities as either direct descendants of the claimants or as an Aboriginal person living within that

[2] West Australian Government's Aboriginal Fishing Strategy 'Recognising the Past, Fishing for the Future', May 2003 (p26)
[3] Section 3, Objects of the Act

community, whether they were born and raised there or had moved there from another area.

Such an exemption would also be reliant upon fisheries officers having an understanding and appreciation of the Native Title process and a recognition that traditional fishing practices exist. Fisheries have recently paved the way for their officers to receive cultural awareness training, if this could be combined with training in the native title process, then this may ensure that this exemption is allowed on the ground.

With There being no other exemptions to the provisions of the Act for Aboriginal individuals or communities the only alternative to continue traditional Aboriginal fishing practices may be to obtain a commercial fishing licence. The difficulty that arises here is that the cost of obtaining a commercial fishing licence would be out of the reach of many Aboriginal people and communities who are over represented in lower socio-economic groups Such fishing licences are obtained by writing to the Minister with the following fees attached to the application:

Section 144	Fee to Accompany Application:	$443
Section 147	Fee For Renewing Licence:	$221
Section 150	Annual contribution to Research:	$343
Section 151	Fishing boat Licence:	$155

These are only a sample of the possible fees that are attached to obtaining and keeping a commercial fishing licence. But even at this point the fees would be beyond many Aboriginal people, particularly if it is accepted that Aboriginal people are engaging in these fishing practices to supplement food sources for themselves, their families and communities due to economic considerations.

Impact on Aboriginal Fishing

As has already been stated there is no reference within the existing legislation that recognises Aboriginal community's reliance upon fishing practices as not only a means of continuing traditional cultural practices, but also of supplementing food sources.

This has resulted in an increased potential for Aboriginal people to be prosecuted for breaches of the Act for carrying out activities that are a traditional part of their cultural, community and family life but which have the potential of being defined as unlicensed commercial and prohibited fishing.

Examples under the legislation of where this can occur include:

> *Sections 17 & 18 - Bag Limits (taking and possessing), a*
> *Breach of which carries 100 penalty units, 3 months imprisonment or both;*
>
> *Section 20 - Fish and Waters Protected from Commercial Fishing, a breach of which carries 1,000 penalty units, 6 months imprisonment or both.*
>
> *Section 241 says that a person will be presumed to be engaged in commercial fishing activities if the quantity of fish that a person who is not a commercial fisher is entitled to be in possession of or if they possess fishing equipment that may only be lawfully used by a commercial fisher.*

So, if an Aboriginal person were to take fish beyond the bag limit allowed for a recreational fisher in waters protected from commercial fishing, they would be prosecuted for at least three offences under the *Fisheries Management Act* that carry both terms of imprisonment and heavy financial sanctions. All for what could be traditional, non-commercial fishing, but for which they could offer no defence, because there is no recognition of it within the legislation.

Existing Protection for Hunting & Fishing Rights

There does exist some legislative recognition of Aboriginal people's right to hunting and fishing. This can be seen in the NSW *Aboriginal Land Rights Act* 1983 at Section 47 which provides for agreements to be made with the owner, occupier or person in control of any land to permit Aboriginal people to have access to the land for the purpose of hunting, fishing or gathering on the land.

Also where such an agreement can not be made, Section 48 allows the Local Aboriginal Land Council to apply for a court order that will allow local Aboriginal people to use the land for hunting and fishing if deemed appropriate. This is presumably limited to fresh water and is also subservient to any other NSW legislation, so would be excluded by the requirements of the *Fisheries Management Act*, making it mostly irrelevant to the protection of traditional Aboriginal fishing rights in New South Wales.

There are however other initiatives under way to try for some form of recognition of traditional Aboriginal fishing rights in this state. To this end NSW Fisheries is currently developing an *Indigenous Fishing Strategy and Implementation Plan* (the Plan) in conjunction with the NSW Department of Aboriginal Affairs. *'The strategy seeks to ensure Aboriginal access for both cultural and economic activities, while acknowledging the broader community have ongoing access to fisheries resources.'* At the time of writing this report the strategy was still very much in the development stages.

3. Fisheries Management Legislation - State by State

As with New South Wales, all states and territories have regulations relating to fishing, both commercial and recreational, within their jurisdictions. The only real difference between most other states and New South Wales, is that there is a recognition and protection of traditional Aboriginal fishing practices.

Victoria

The Victorian government has provided a strong legislative protection for traditional Aboriginal fishing practices. In 2002 the Victorian government enacted the *FISHERIES (FURTHER AMENDMENT) ACT* 2002. This creates a new class of fishing permit that allows the non-commercial taking of fish by Aboriginal people beyond the recreational bag limits for cultural and ceremonial purposes (see SECT 5). The Victorian Minister for Aboriginal Affairs said at the time the amendment was introduced that:

The new permits are intended for use in relation to specified cultural or ceremonial events, enabling the holder to take fisheries resources beyond the normal bag limits for communal rather than personal use. This is in recognition of the strong cultural and spiritual connections Indigenous people have to the sea and inland waters, and the importance of maintaining those traditional links.

This legislation is somewhat limited by the protection only being available for specific cultural and ceremonial events. It may be argued that this is only a part protection, in that the tradition of providing for ones community and family on a regular basis is not protected. It is still more than is available in New South Wales.

Northern Territory

As with other states and territories the Northern Territory has regulations and penalties governing both recreational and commercial fishing activities. However, unlike New South Wales, it also has recognition and thus, protection for Aboriginal people engaging in traditional fishing practices. Section 53 of the *Fisheries Act* states that:

Nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.

The only limitation on this right is in relation to the exemption not being included for engaging in commercial fishing activities, entering areas used for aquaculture and interfering with other people's fishing gear and catch. It certainly goes further than the limited Victorian legislation in that it is not limited to specific cultural and ceremonial events. This is the clearest and strongest exemption for Aboriginal fishing interests in Australia.

South Australia

There does not appear to be any specific provisions or exemptions relation to Aboriginal people or traditional fishing practices within any of South Australia's fisheries management legislation.

Western Australia

As with NSW, the only exemptions from the *Fisheries Management Act* 1994 in Western Australia is in relation to a recreational licence. Under Section 6 of the Act an Aboriginal person is not required to hold a recreational licence to the extent that they take fish from any waters in accordance with continuing Aboriginal traditional custom and not for commercial purposes.

The West Australian government is ahead of New South Wales in that it has released a Discussion Paper in relation to the proposed protection of Aboriginal Fishing Rights within its fisheries management legislation.

This paper has been released through the West Australian Department of Fisheries and is titled a 'Draft Aboriginal Fishing Strategy: Recognising the Past, Fishing for the Future', in May 2003.

Importantly, the recommendations that were produced by that report could be replicated to great effect in the New South Wales context. Included in those recommendations are:

- That customary fishing practices, including concepts of Barter, exchange and communal sharing, be excluded from fisheries legislation and the responsibility for deciding who can fish in accordance with the practices in certain areas should rest with the local Aboriginal community;

- That the fishing gear used and species taken not be measured by whether it is traditional but whether it has a detrimental impact on fish stocks or other fishing interests;

- That the *Fisheries Management Act* creates a separate reference to customary fishing and provide for it be a separate class of fishing activity;

- That sustainable customary fishing parameters be established to protect and promote the responsible use of fishing resources and that these parameters be developed at regional level;

At the fisheries management level it was recommended that:

- That Aboriginal people be recognised as a distinct fishing sector and as such be given the same level of engagement in fisheries consultative and management processes as the recreational and commercial fishing sectors, and that this consultation be undertaken using existing Aboriginal community and organisational networks.

- Cultural awareness training is made compulsory for all fisheries officers and managers.

The paper also makes a number of recommendations in relation to economic development, however while it is considered to be an important topic, is beyond the scope of the present paper.

Tasmania

Section 60 of the *Living Marine Resources Management Act 1995* requires that a fishing licence be obtained for any fishing that is not recreational or in accordance with a management plan. The possible penalty for not obtaining a licence is 5,000 penalty units, 2 years in gaol, or both.

Part 2C of the Section exempts Aboriginal people from the requirement of holding such a fishing licence when engaged in a cultural activity that is not likely to have a detrimental effect on living marine resources.

Section 215 also provides a possible defence to proceedings under the Act if the person is an Aborigine and at the time of the offence, were engaged in an Aboriginal cultural activity.

This would appear to be a similar, though slightly weaker protection, to that provided in the Northern territory, with the condition of 'detrimental effect on living marine resources' reducing the protection somewhat. It is still, however, a powerful protection of traditional fishing practices, and something that may be easier to get through in New South Wales.

Queensland

Section 14 of the *Fisheries Act 1994* states that Aboriginal and Torres Strait Islander people may take, use or keep fisheries resources, or use fish habitats in accordance with custom and tradition. This will be subject to a management plan that can only be developed and applied with the consultation of the local Aboriginal or Torres Strait Islander community with all attempts made to reach a reasonable agreement.

Summary

It can be seen that these state and territory based fisheries management legislations have found a way to protect the interests of a variety of people. They show that Aboriginal Fishing Rights can be incorporated into the management of commercial and recreational fishing interests and that this has indeed occurred in many states and territories in Australia, including the Northern Territory, Tasmania, Victoria and Queensland.

As with New South Wales all these states and territories have large commercial and recreational fishing industries. Given the similarity of industry, there would appear to be little reason for similar exemptions to the New South Wales Fisheries Management legislation that would allow Aboriginal people to continue traditional fishing practices without the fear of being prosecuted for it.

4. Fisheries Management - Internationally

Indigenous fishing rights and their protection, or lack there of, is not something that is unique to Australia. Internationally, Indigenous fishing rights has been fought for in a number of countries, with varying degrees of success. Countries where this right has been protected includes Canada and New Zealand.

Because of the commercial benefits relating to recreational and commercial fishing, Indigenous fishing rights is a very real and in many instances, a controversial, issue in most countries where there is the potential for this interest to clash with those interests.

It would seem that those Indigenous peoples who have negotiated treaties with national governments, either recently or historically, are in a far greater position to protect their interests than those Indigenous people whose rights have been stripped without engaging in this process. This can be seen in the comparison between the Indigenous people of Canada and New Zealand (nations where treaties have been negotiated) and those of Japan (a nation where no such process has been engaged in).

The treaty process is not something that any Australian government has entered into with any Indigenous people in this country. Therefore, the processes of protecting fishing rights in Australia will be different to those countries where this has been most successful. These countries do however provide an example on how Indigenous fishing rights can live side by side with other commercial and recreational fishing interests and provide examples of the principles that the governments of Australia can aspire to in the protection of these rights.

Canada

With fishing forming a large part of the cultural and daily lifestyles of many Indigenous people in Canada, there has been a concerted and organised lobbying history of groups who negotiate with provincial governments for the continuation of their fishing rights. This has been supported in no small part by the history of treaty negotiations between first nations people and the colonisers.

An example of the organised lobbying that has taken place can be seen with the "First Nations" people of British Colombia, who have established the *British Colombia Aboriginal Fisheries Commission*. 'The membership provide the mandate and direction' for lobbying government on the protection of Indigenous fishing rights.

Such groups have gained protection for Indigenous fishing rights based around exemptions to fisheries legislation through negotiated treaties and agreements (see R v Marshall [1999] 3 S.C.R.). However, even these rights will be at the discretion of the court and may be denied in the broader areas of stock management and environmental impact.

An example of legislative recognition can be in the Aboriginal *Communal Fishing Licences Regulations*. This acts as not only a protection of traditional fishing practices but also a limitation on those rights by restricting species and quantities of fish, the number of people fishing at any one time and the equipment used. This legislation is an example of how traditional Indigenous fishing rights will not be protected at the expense of other competing interests or fish stocks in general.

The protection obtained for Indigenous fishing rights in Canada will not be immediately transferable to the Australian context because of the recognition within Canadian law on the historical treaties that have been entered into with the first nations people. However, there is no reason why the same protections can not be afforded, merely that they will need to be attained through a different process and will rely more on the willingness of the state government to either enter into agreements and reform existing legislation.

The Canadian experience does show however, that Indigenous fishing rights can be protected through exemptions from commercial and recreational fishing regulations with limitations, allowing these interests to live side by side.

New Zealand

As with Canada, treaties that have been negotiated between governments and Indigenous people have formed the basis for the protection of Indigenous fishing rights through legislation.

In particular Section 5 (b) of the *Fisheries Act* 1996 (*Fisheries Act*) states that the Act shall be interpreted in a manner that is consistent with the provisions of the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 (*Fisheries Claims Act*).

The purpose of the *Fisheries Claims Act* is to give effect to the settlement claims relating to Maori fishing rights provided by the *Treaty of Waitangi* and to protect the non-commercial traditional and customary fishing rights of the Maori. Section 10 'Effect of Settlement on non-commercial fishing rights and interests' states that:

"The Minister shall recommend ... the making of regulations pursuant to section 89 of the Fisheries Act to recognise and provide for customary food gathering by Maori and the special relationship between tangata wheua and those places which are of customary food gathering importance ... to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade ..."

The limitation placed on this right is that it will not be enforceable in civil proceedings nor will it provide a defence against criminal or regulatory proceedings (except for those relating to the *Fisheries Act*). The compensation afforded to Maori people for the loss of commercial fishing rights is an explicit recognition of the important role that fishing plays within Maori society and the effect that colonisation has had on those interests.

Japan

The Indigenous peoples of Japan, known as the *Ainu*, like Aboriginal people in New South Wales and the indigenous peoples of Canada and New Zealand, have a long and important association with the oceans and aquatic life that surround their lands. Fishing and the protection of those fishing rights form an important part of their struggle for recognition from the Japanese government of their place within that society.

In what can be seen as a direct correlation with the history of dispossession in Australia, laws passed by successive Japanese governments over the course of centuries have been aimed at removing the Ainu from their land, culture and recognition within Japanese society as a means of securing the resources that they occupy.

Fish and fishing form not only an important part of Ainu culture, but it was traditionally one of their primary sources of nutrition. As with all and Indigenous people this right has been significantly eroded in favour of commercial fishing interests. This can particularly be seen in relation to the commercial fishing of salmon, something which is of great importance to the Ainu diet and culture, but which is also a major part of the commercial fishing industry.

Recent reforms have seen the Ainu gain a limited right to fish commercial species, such as salmon, based upon their cultural practices. However, of the millions of Salmon caught each year by commercial fishing, the Ainu are allowed a total catch of just 400, and this must be for ceremonial and educational purposes only.[4]

The only thing that might be taken from this example in the context of the present paper is that even where the Indigenous people of a land have had their hunting and fishing rights completely removed over

[4] 'Indigenous Japanese Suffer From Racism, Discrimination', NATIVE-L (June 1994), author's name not provided

centuries, and commercial interests out weigh everything else, present day law makers have been able to find some form of protection in modern society for traditional fishing practices.

Implications for Indigenous Fishing Rights in NSW

The strong protection afforded to the Indigenous fishing rights of the First Nations people of Canada and the Maori of New Zealand through negotiated treaties with their governments is not found in Australia. Unlike these two countries, the Australian government has not engaged Indigenous people in treaty negotiations, either historically or in the modern context.

This does not, however, mean that the protections that have been afforded to the Indigenous peoples of those countries, cannot find their way into Australian or New South Wales legislation. The principles that have been arrived at through these negotiations are as relevant in the Australian context as they are in other jurisdictions because they are a recognition of fundamental human rights. Indeed, even the example of the indigenous people of Japan shows that nations that have historically stripped indigenous people of their traditional rights to hunt and fish as part of their culture, are now enacting legislation that protects this right.

5. South Coast Consultations

Between 7 & 10 October 2003 representatives from the Aboriginal Justice Advisory Council travelled to communities along the South Coast of New South Wales to establish the kinds of fishing that Aboriginal people were participating in, how they fished, what it meant to them, and the nature of their contact with the *Fisheries Management Act*.

While it is recognised that traditional Aboriginal fishing practices is wide spread in all coastal and inland communities, the South Coast was chosen as there has been reported a high incidence of prosecutions from the NSW Fisheries Department of Aboriginal people for breaches under the Act. It was also from this area, that the Council had initially received complaints regarding the operation of the *Fisheries Management Act* and its effect on traditional Aboriginal fishing rights.

Communities Visited

The South Coast communities attended were at:

Nowra
Bombaderry
Jerrinja
Wreck Bay
Bateman's Bay

There was present in these communities, people engaged in fishing may variously be described as recreational (in the absence of a distinct traditional Aboriginal fishing definition within the Act) and commercial.

Also consulted were representatives involved in the local criminal justice system, including Nowra Local Court and the South East Aboriginal Legal Service. In all over thirty individuals participated in these discussions, with a variety of issues and themes arising in relation to traditional Aboriginal fishing, particularly in relation to both commercial and recreational fishing.

Arising Issues and Themes from Consultations

While there were varying issues and themes from community to community there was one issue that was prevalent in all communities and which everyone who was spoken with had an opinion. This was in relation the Abalone industry, and its effects on people's ability to access this traditional resource.

The Abalone and Commercial Fishing Industries

The importance of Abalone to the people in these communities is something that goes back generations and can be seen through the fact that they have their own unique term for it, which is 'mutton fish'. This term was used in every community that was visited.

It became apparent that Aboriginal people along the South Coast feel that they have been locked out of what is seen as a multi-million dollar Abalone industry by the *Fisheries Management Act*'s protection of those already involved in the industry. People also felt that this resource was initially theirs and so should have some form of access to it.

Some people stated that if this was going to happen then the Aboriginal communities whose traditional grounds were now commercial fishing areas, should be compensated for the value of that fishing industry so that projects that were beneficial to that community could be established or they should have licences

granted to them that would allow them to overcome the prohibitive cost of becoming involved in the industry.

Many people stated that they felt they had been 'robbed' of something that is not only important to their daily and cultural lives, but something that many of them had grown up making a living from. They felt that they and their families had been encouraged to make a living from fishing, only for regulations to be introduced later on that prevented them from doing it.

One person suggested that each community be given what could be called a 'community fishing licence' which would allow them to participate in the commercial fishing industry for the economic and cultural well being of that community. The local community could then decide who fished, when they fished and how they did it with the guidelines based on community control and traditional laws for the preservation of fishing stocks. Families and communities could then establish quotas to ensure that species were not fished out and industries could be created around these licences.

The Role of Traditional Aboriginal Fishing Practices in the Community and Family

It became apparent that the Aboriginal people of the South Coast possessed a large amount of knowledge in relation to fishing practices that had been handed down from generation to generation. This included:

The catch size. One person told of how they knew what size Abalone it was appropriate to take by measuring it against the palm of their hand, a technique that had been handed down from generation to generation. This ensured that no immature Abalone was ever taken so that the breeding cycle was not interrupted.

Many people also had stories about the amount of fish, oysters, mutton fish or other species that it was appropriate to take at any one time and how what was being taken was always in consideration of what would be available the following season.

But people felt that the restriction of 10 Mutton Fish per day could be unfair because part of the culture around traditional fishing practices was camping out while fishing. If people were out for more than one day, they could still not get more than 10 Mutton Fish in total even though they may have been fishing over a period of days.

This included that when getting oysters that you could only take as much as you needed for a feed, and that you had to clean, shuck and eat them near to the water, something that limited the amount that could be taken.

The only time that you were allowed to take more than you wanted for a single feed was when you were getting fish for other people in the community, particularly those who were unable to fish such as the elderly, or for cultural and ceremonial events. This is something that is not possible because of the limit on catch size and bag limits for recreational fishers, which most Aboriginal people are classified as because there is no recognition of traditional Aboriginal fishing within the *Fisheries Management Act* and most cannot afford a commercial fishing licence or they are simply not available. As one person said 'there was no bag limits before white people came here and we never over fished anywhere.'

When and Where to fish. Many people spoke of how they had learnt that they should only fish at certain times of the year – in most cases this entailed a fishing season of 6 to 7 months, and never in waters or times of the year that were identified as being part of the breeding cycle.

Many people were also concerned about being locked out of certain fishing grounds because of the establishment of marine parks. These areas were seen as many people's ancestral grounds and they stated that they can not fish at certain areas that they had been shown by their parents and grandparents, or camp in the same areas as they had as children and adults with their families and communities because it was no longer allowed.

Cultural, Economic and Recreational Significance. Others felt that if the government was serious about diverting Aboriginal people away from the criminal justice system, then they needed to support initiatives that provided Aboriginal people with a sustainable economic base as well as cultural and recreational activities. As many of them had grown up with fishing, they felt that aquaculture would be an ideal way of achieving a sustainable economic base, but at present they are locked out of the industry because of the costs involved.

One person stated that they were always being asked to show children – both and Aboriginal and non Aboriginal – the culture and practices around traditional fishing but they were unable to. This was purely because there is no recognition of traditional Aboriginal fishing practices in the *Fisheries Management Act*, so they risked being fined by the Department of Fisheries for what amounts to unlicensed activity. They were also concerned that if they did show children these practices, that not only could they be taken to court themselves, but so could the young people if they attempted to practice what they were learning.

People also felt that preventing individuals and communities in engaging in traditional activities such as fishing was a cause of drug and alcohol abuse, family break down and crime. They felt that these activities had been taken away from them and people were left with nothing to do so fell into these activities. Not being able to eat food they had grown up with was unhealthy in itself, but when this was combined with the fast food that was being eaten instead, then it had a cumulative effect and led to people being generally unhealthy.

Environmental Protection Many people also stated that they were denied fishing in areas where it was shown that damage had occurred to the environment, such as sea grasses from fishing activity. But they stated that recreational and commercial fishermen had caused this damage, and that the Aboriginal people had always known how and when to fish in those areas without causing damage.

This effectively meant they were being locked out of areas they had grown up fishing and camping in as part of family and community life, because of the activity of others. Families and communities would go fishing together as part of cultural practice, but this could no longer happen as often as previously, because of the constant harassment by Fisheries Officers in relation to these activities.

They felt that a better method of maintaining the environment and stocks would be to buy back commercial fishing licences, because it was this activity that was detrimental to these resources.

Other activities that had been engaged in over generations and was seen as important to maintaining fish stocks and the environment are now being stopped by Fisheries Officers. This includes the activity of cleaning, shucking and eating oysters and other shellfish near the water.

Many people stated that they had been taught to do this for preservation purposes, as people only took as much as they were going to eat for that particular meal and cultural, with the establishment of 'middens' in certain areas. People were not sure why fisheries prevented this, but believed it was based on environmental considerations.

Commercial Aboriginal Fishermen An interesting point in relation to this is that even those Aboriginal people who possessed commercial fishing licences maintained that they adhered to traditional Aboriginal fishing principles, unlike other commercial fishermen who fished year round. These fishermen also stated that they used only methods that did not damage the environment, such as with sea grass beds. As one commercial fisherman stated 'if you look after that area, it will look after you.'

Also many felt that they were being denied an occupation they had spent all their lives learning. They stated that their fathers had been encouraged to make a living from the ocean and they in turn had learned from their fathers. But now that it was a multi-million dollar industry they had been locked out of making the only living they knew how to, this led to the system creating criminals out of people who had grown up doing something that was legitimate.

Aboriginal fishermen generally also stated that they were prevented from using traditional methods of fishing because they were now seen as potentially depleting fishing stocks. This included the use of nets, which many people stated had been taught from generation to generation. But as with other traditional fishing methods, nets were only used in a manner that did not affect stocks or the environment.

To this end they were only used to either obtain bait and when there were large amounts of a species present at the right time of the season. Many people felt they were once again being penalised for the activities of non Aboriginal fishermen who did not use the nets in this method.

Poaching There was a mixed response in relation to 'poaching'. Some people state that they were 'dead against' poachers and that this attitude had been passed down from generation to generation because it went against traditional beliefs of over fishing. People felt that the authorities had the attitude that if they catch one 'black poacher' then all the Aboriginal people who are fishing must be poachers as well. They were punishing everyone for the activities of a few.

Others, who did not necessarily support the activity itself, felt that it was the government regulations that had locked Aboriginal people out of the industries that forced Aboriginal people to engage in 'poaching'. They stated that no one was making a fortune out of it, as were the licensed commercial fishermen, but were merely doing it to make a reasonable living.

Aboriginal people and Department of Fisheries Officers Relationship

Many people stated that the Department of Fisheries Officers did not respect or acknowledge traditional Aboriginal fishing practices, or indeed that Aboriginal people engaged in them.

They said that the Fisheries Officers saw Aboriginal people as 'poachers' who needed to be under constant surveillance and harassment to ensure that they were not breaching the *Fisheries Management Act*. Many people claimed that they were photographed and monitored by Fisheries Officers constantly and the general public because of the rewards that were attached to catching 'poachers'.

Some people stated they had tried to convey their traditional knowledge of stock and environment preservation but that this had been ignored, in some cases to the detriment of the local environment. Fisheries Officers had also ignored traditional knowledge regarding the size of certain Mutton Fish. They stated they had told the Fisheries Officers that there species of Mutton Fish in a certain area that did not grow to the legal size, so they were prevented from taking them even though they were mature and would otherwise be legal. One person stated 'if they want an act to preserve fishing stocks and the environment they should listen to us, our people were doing it for thousands of years.'

Summary

It can be seen that traditional Aboriginal Fishing practices play an enormous part in the individual, family and community lives of the Aboriginal people of the South Coast of New South Wales. It is believed that this importance is representative of all coastal and inland communities where it would have formed a natural component for hunting, gathering and cultural activities pre European contact and an important means of continuing people's culture and providing a nutritional alternative food resource post European contact.

It has been shown that a separate recognition of these practices is essential to the *Fisheries Management Act* because the practices do not fit into either recreational or commercial fishing licences even though they are very distinct and have such a large impact on Aboriginal people's lives.

Aboriginal people have their own unique methods of fishing that have ensured the protection of fish stocks and the environment for thousands of years. These practices are based on such preservation and are intrinsic to the culture of Aboriginal communities.

The denial of these practices has had a detrimental impact on the Aboriginal people of the South Coast

through a denial of cultural practice that has impacted not only on health but also on educational and employment issues as well as bringing Aboriginal people into contact with the criminal justice system through the *Fisheries Management Act*.

6. New South Wales Case Studies

Case Study 1

The Carwoola Council of Elders in South Western Sydney approached NSW fisheries earlier this year in relation to an Elders gathering that was being organised for later this year.

The purpose of this approach was to gain special permission from NSW Fisheries to allow seafood to be collected for the Elders. The reason for the submission was that the quantity and type of seafood that was to be collected would normally be in breach of certain sections of the Act as they relate to licences, quantity and type of sea life to be taken as well as method of collection.

NSW Fisheries response to this request was to not provide the group with the necessary exemptions to undertake this activity. This decision was based on the fact that net fishing is deemed a commercial activity and as such is not permitted in the nominated areas.

Based upon this refusal and the fact that the traditional fishing practices would have been deemed as commercial fishing, participants could have been prosecuted for the following breaches of the *Fisheries Management Act* 1994:

> *Sections 17 & 18 Bag Limits (taking and possessing), a*
> *Breach of which carries 100 penalty units, 3 months imprisonment or both.*
>
> *Section 24 (1) Unlawful use of nets/traps*
>
> *Section 25(1) Possess Illegal fishing gear – gear prohibited*
>
> *Section 25(1) Possess Illegal fishing gear – fishing prohibited*
>
> *S35(1) Possess fish taken illegally*

If any of the participants were to take the view that they were practicing their cultural rights and obstructed fisheries officers in the course of their duties in policing the *Fisheries Management Act,* then they would have been open to further prosecution (see the below section in relation to policing the *Fisheries Management Act*).

Case Study 2

National Recreational and Indigenous Fishing Survey[5]

This survey was conducted throughout northern Australia during 2000 to 2001 in an attempt to quantify the impact of recreational and Indigenous fishing on resources. The report acknowledges the importance of fishing to Aboriginal communities and notes the observations of military officers with the first fleet providing accounts of Aboriginal people fishing in the Sydney area using methods such as line, net and spear fishing[6].

The report also recognises the interest Aboriginal communities and individuals have shown in fisheries resource management due to its dietary and cultural importance to communities for ceremonial,

[5] Edited by Gary W. Henry, New South Wales Fisheries & Jeremy M. Lyle, Tasmanian Aquaculture & Fisheries Institute, University of Tasmania, published by Fishing Research & Development Corporation, Project Number 99/158
[6] ibid, p98

exchange, trade and barter purposes[7]. There is no indication that fishing serves an measurable commercial purpose for Aboriginal people. The report states:

> *"For centuries, indigenous peoples have managed their fisheries by looking after their country. They followed laws about who could fish where, which fish to take at different times of the year, and how many to take in different seasons. Indigenous fishing activities are the distillation of thousands of years of experience and are a unique mixture of experimentation, mythology and concentrated lore[8]."*

The report estimates that approximately 37,300 indigenous people participated in fishing during the survey year for an estimated 671,000 fishing events[9]. A figure that represents 91.7% of the surveyed population throughout North Queensland, Northern Territory and Northern Western Australia[10].

The report found that line fishing was the common method followed by hand, then nets and spear with diving and traps forming a small negligible percentage[11]. While Indigenous fishing methods were found to be similar to those of recreational fishers, Indigenous fishers used the methods of hand collection and spearing far more often and the use of nets was more common for Indigenous fishers in Western Australia than those in the Northern Territory and Queensland.

The most common species to be harvested were, Indigenous fishers in the study region harvested mullet, catfish, perch/snappers, bream and barramundi with 50,000 fish of each species/group[12].

The report concludes that Indigenous fishers harvested more than 3 million aquatic animals from the waters of northern Australia. This compared to a recreational fishing harvest of approximately 30 million aquatic animals[13].

These figures represent interesting arguments for the present paper. It may be safely estimated that the Indigenous fishing catch would represent a smaller percentage in New South Wales than it would in any of the areas where this survey was conducted. This could be based on the general population, with the Western Australia, Northern Territory and Queensland all having much smaller populations than New South Wales.

Yet both the Northern Territory and Queensland have some of the strongest protections for Indigenous fishers of anywhere in Australia and the West Australian government has released a discussion paper that recommends the same protections for Indigenous fishers in that state. With these precedents set in other states and territories it has to imagine why such legislative protections could not be afforded to Aboriginal people in New South Wales.

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[7] ibid
[8] ibid, p99
[9] fishing 'event' being each time the person goes out fishing
[10] ibid, p110
[11] p115
[12] p117
[13] p88

7. Comparative Criminal Sanctions and Policing Powers and Responsibilities

Moving away from the specific protection of traditional Aboriginal fishing rights through legislative reform, there is also an argument for reform of the enforcement aspects of the *Fisheries Management Act* 1994.

As prosecutions and policing of the fishing industry are carried out under the *Fisheries Management Act* 1994, there is potential for conflict with existing criminal justice system legislation in NSW.

This can particularly be seen not only with the *Crimes Act* 1900 in relation to the offences themselves, but also in relation to the policing of industry which as carried out by Fisheries Officers and the policing carried out by the NSW Police Force in relation to the *Crimes Act*.

The Fisheries Management Act 1994 v the Crimes Act 1900

The prosecutions of Aboriginal people in relation to the *Fisheries Management Act* 1994 may be essentially described as being for larceny. It may be described as this because Aboriginal people are being prosecuted for taking what is the property of those who are licensed to engage in commercial fishing activities.

So what are the penalties for larceny within the criminal justice system of New South Wales?

In relation to the charge of larceny, the *Crimes Act* 1990 provides for up to 5 years imprisonment at section 117. On the surface this would appear to compare favourably with common offences under the *Fisheries Management Act* which can attract smaller terms of imprisonment at six months, but which can also attract heavy financial penalties.

The question of intent may also be bought into question when an Aboriginal person is prosecuted for what they may view as the continuation of a cultural practice. While larceny can clearly be defined as criminal activity, in this sense the activity being engaged in under the *Fisheries Management Act* is not so clear-cut.

The question of the powers and role of Fisheries Officers is also something that needs to be addressed. In enforcing the provisions of the Fisheries Management Act 1994, Officers of NSW Fisheries have similar duties of NSW Police Officers in bringing prosecutions for offences before courts and in issuing non-court punishments such as penalty notices (which can be appealed in court if the person receiving the notice wants to defend it). However, in many respects they do not have the same responsibilities or requirements of duty of care to offenders as NSW Police Officers do, particularly in relation to their interaction with Aboriginal people.

Powers of NSW Fisheries Officers

Powers of Arrest

The powers of police in relation to arrest or approaching potential suspects is not contained in any one piece of legislation but is shared among a number of statutory instruments. However a summary of police powers provided by the Legal Aid Commission of NSW demonstrates the limit of these powers. They include that:

- When approached by the police always ask why they

want to talk to you. The police cannot take you anywhere without charging you;

- If the police arrest you, they must tell you that you are under arrest, why you are being arrested, the officer's name or badge number and where they are stationed;

- You don't have to answer police questions whether they ask you to go to the station, or question you on the spot or whether they do or don't arrest you.

Investigative Powers

Fisheries officers have similar investigative powers to that of police and other government agencies. Indeed, for the purposes of the Act police officers may be deemed to be fisheries officers.

This includes access to information regarding people who they have reason to believe has contravened the *Fisheries Management Act* or *Regulations*.

Power to Seize Property

Section 242 of the Fisheries Management Act provides for powers of seizure and under Section 242A of the Act the Roads and Traffic Authority are authorised and required to provide fisheries officers with the address, details of any licences and vehicle registration of such a person.

Fisheries officers also have almost unlimited power to search and detain fishing boats with the ability to impose a relatively heavy sanction on those who fail to comply. These same powers apply to the search of vehicles where the officer has reason to believe that the vehicle is being used in connection with an offence under the *Fisheries Act*.

Police have only recently gained similar powers to this in relation to the search of motor vehicles. This is found in the *Police Powers (Vehicles) Act* 1998. Under this Act a police officer that reasonably suspects that a vehicle was or may have been used in or in connection with the commission of an indictable offence may request the driver to disclose their identity. However the important restriction placed on this power is that there is a reasonable belief that an indictable offence may have been perpetrated.

There is no such limitation placed on the similar power of Fisheries Officers to search and detain fishing boats. Police officers are also required to provide evidence that they are a police officer, provide their name and place of duty and inform the person of the reason for the direction.

Power to Enter Premises

Fisheries Officers can also enter and search premises of a person they have reason to believe has committed an offence against the *Fisheries Act* (Section 250) with the only conditions being that it be done at a reasonable time and that notice is given (something that is not required in all circumstances). Fisheries Officers may also use reasonable force to enter if authorised by the Director NSW Fisheries. This authority is not provided for Residential premises. In this instance Fisheries Officers are excluded, as are the police, without the consent of the occupier or the authority of a search warrant (Section 254).

Section 258 of the *Fisheries Act* provides Fisheries Officers with the power to require any person on a boat, in a vehicle or on a premises where an offence is suspected of occurring to state their name, address and information relating to the fishing gear or records found. A person who without reasonable excuse, fails to comply with this requirement is guilty of an offence and faces a fine of 50 penalty units. As has previously been stated, an individual is not required to provide these details to police unless they are charged with a criminal offence.

With offences under *Fisheries Management Act* attracting serious criminal sanctions such as terms of imprisonment and substantial fines, it is hard to understand why Fisheries Officers would have powers to

require the provision of information before charging, that is not even afforded to the police service in all but the most serious of offences.

Finally, under Section 262 of the *Fisheries Act*, Fisheries Officers have the power to arrest, without warrant, any person who is found committing a fisheries offence, or who the Fisheries Officer has reason to believe has committed a fisheries offence.

How the Powers of Fisheries Officers Compare with the Police

The investigative powers conferred on Fisheries Officers provide them with the same authority of police in compelling individuals to provide information for investigation and possible prosecution.

However, these powers do not appear to be limited by the protection of individual civil rights, including considerations of due process and personal liberty restrictions that have been incorporated into the common investigative powers of the police.

Indeed the power conferred by Section 258 that compels an individual to provide personal information without charge would appear to parallel the power conferred on police for only the most serious of offences, namely those of indictable nature.

Compelling an individual to provide information that could lead to a criminal prosecution without that individual having been charged with an offence is something that is not accepted throughout most parts of the criminal justice system for the very reason of its potential to infringe on every citizens right to due process before the law.

Aboriginal people as a 'Vulnerable' Class of People

NSW Police have a number of requirements placed on them when dealing with Aboriginal people. A Clear example of this are the provisions contained in the Crime (Detention After Arrest) Regulation 1998. Aboriginal and Torres Strait Islander people are perceived by this legislative regulation, as a vulnerable group, and are therefore provided extra protections in their contact with the police.

To this end, Section 28 of the regulation states that:

> *If a detained person is an Aboriginal person, then, unless the custody manager is aware that the person has arranged for a legal practitioner to be present during the questioning of the person, the custody manager must inform the person that a representative from an Aboriginal legal aid organisation will be notified that the person is being detained in respect of an offence … and notify such a representative accordingly.*

These amendments have been included to ensure that the requirements of due process that are afforded to the general public are enforced for those who are perceived to be particularly vulnerable members of society.

There is no such protection afforded to Aboriginal people in their contact with Fisheries Officers under the *Fisheries Management Act*. This is a less than ideal situation considering the potential for the large amount of interaction between Fisheries Officers and Aboriginal people, and the serious consequences that can flow from a prosecution under the *Fisheries Management Act* such heavy financial sanctions and terms of imprisonment. As a result It is arguable that the protections afforded to Aboriginal people in relation to the their contact with the police, need to be extended to their contact with Fisheries Officers.

Cultural Awareness Training

New South Wales police officers have been receiving limited cultural awareness training for some years. A similar initiative has recently been established within fisheries with the employment of a cultural awareness training officer. This is seen as an important aspect of Fisheries Officers positions when it is

considered that many NSW Fisheries Officers come will into regular contact with Aboriginal people. It is hoped that unlike the police service, that NSW Fisheries incorporates a structured competency based cultural awareness training program both at the general and local levels to ensure that the cultural diversity present across Aboriginal communities is catered for.

This type of professional training would also provide officers with an understanding of the cultural significance of fishing to Aboriginal people and the communal, non-profit aspects of this tradition, which may lead to a reduction in potential conflicts between Aboriginal communities and fisheries officers as well in prosecutions under the *Fisheries Management Act*.

Lack of Diversions from the Criminal Justice System

As has already been stated; when people have contact with the NSW police there are strict guidelines for the conduct of those police. These guidelines are in place to not only protect the civil rights of the potential offender, but as a means of providing a mechanism for the police, as the 'gate keepers' of the criminal justice system with the opportunity of diverting people away from the system.

It has been shown in recent times an initial diversion from the criminal justice system can provide a far better outcome for both the individual and society then a progression through the system.

Juveniles

One example of a diversionary program can be seen with the Young *Offenders Act* 1997. The Young Offenders Act established a structured method of dealing with juvenile offenders in the Criminal Justice System. The system provides for a hierarchy of diversion, comprising of a system of warnings, cautions and family group conferences. This allows young people to be diverted from the traditional criminal justice practices in the first instance with their being a stronger likelihood that they will not re offend.

Section 8 of the Young Offenders Act states that the only offences that will be covered by this system are summary offences and indictable offences that may be dealt with summarily under chapter 5 of the *Criminal Procedures Act 198.*

This means that offences under the *Fisheries Act* do not have the opportunity of being dealt with through the alternate processes established by the Young Offenders Act and diverting them away from the criminal justice system.

Adults

Provisions for diversion that exist under the *Young Offenders Act* do not exist for the diversion of adults. However there are a number of pre-arrest diversionary programs that police use for minor Adult offenders. There is potential however for Fisheries Officers to divert some adult offenders to community based or other diversionary programs or initiatives. One possibility may exist through a greater use of Aboriginal Community Justice Groups.

Possible Role for Community Justice Groups and Circle Sentencing

Aboriginal Community justice groups are representative groups of local Aboriginal people who come together to examine crime and offending problems in their communities and develop ways to solve those problems. They also work with different parts of the criminal justice system to make sure they work better for people in their communities. It has been shown that these groups can have a major impact in reducing the rate of offending.

One of the functions of Aboriginal Community Justice Groups is working with police to establish diversionary programs for both juveniles and adults. In relation to offences under the *Fisheries Management Act* 1994, this would mean that instead of just working with the police, the Community Justice Group could work with Fisheries Officers in the same manner.

Similarly, an amendment to the *Fisheries Management Act* that recognised traditional fishing could mean that further options for sentencing would be available under *Circle Sentencing*. An incident occurred earlier this year where circle recommended that an offender participate in traditional fishing with local elders because the offender was seen to have taken so much from the community, that he should be given a sentence which allowed him to give something back.

Unfortunately the New South Wales Probation & Parole Service correctly rejected this sentence, because as they said, there was potential for the sentence to actually encourage the offender to breach existing legislation and perpetrate a criminal offence. In this instance that legislation was the *Fisheries Management Act* 1994, which it was noted, does not recognise traditional fishing, and therefore if the offender was to catch more fish then allowed for as a recreational fisher, they would be deemed to be engaged in commercial fishing and in breach of the Act.

Table of Recorded Sentences

The below table indicates the sentences being handed down by magistrates in relation to charges bought to the local court in relation the *Fisheries Management Act* 1994. Presently, the Department of Fisheries, who bring prosecutions to the courts for offences under the *Fisheries Management Act* do not indicate whether the alleged offender is Aboriginal or non-Aboriginal. This is in direct contrast to the police department who are unable to proceed with a matter without first establishing this. While this means that the in the data provided below that there can be no indication as to whether any of the offenders were Aboriginal, it does provide an indication of the type of sentence that is being provided for the offence[14].

Fisheries Management Act 1994		
Offence	Cases	Sentence
S17(2) Take More than Daily Limit	11	10 Fine 1 Gaol
S16(1) Possess Prohibited Size Fish	155	4 Dismissed 7 Bond,138 Fine,1 CSO,3 Susp. Sent.,1 Per. Det.,1 Gaol
S247(2)Assault, Threaten or Intimidate Fisheries Officer	15	2 Dismissed 13 Fine
S258(2) Fail to comply with requirement to provide information	4	4 Fine
S259 Provide False or misleading information	8	1 Dismissed 7 Fine
S14(1) Fish taken in contravention of a fishing enclosure	28	5 Dismissed 23 Fine
S24(1) Unlawful use of nets/traps	71	11 Dismissed 1 Bond 59 Fine
S25(1) Possess illegal fishing gear – gear prohibited	34	8 Dismissed 1 Bond 25 Fine
S25(1) Possess illegal fishing gear – fishing prohibited	16	6 Dismissed 10 Fine
S247(1) Obstruct Fisheries officer	20	1 Dismissed 2 Bond 17 Fine

[14] Statistics obtained through the NSW Judicial Commission's Judicial Information Research System and covers the years 1999 to 2002

S14(2) Possess fish taken in contravent. of a fish closure	2	2 fines
S35(1) Possess fish taken illegally	14	3 Dismissed 11 Fine

8. Conclusion

Fishing practices in both coastal and inland areas of New South Wales remain an important component of Aboriginal people's way of life. It is both a means of continuing cultural practice and passing it from generation to generation, as well as providing an important alternate source of many peoples nutritional intake.

For many Aboriginal people and communities one of the most important aspects of this practice is it's communal nature. This means that when Aboriginal people fish, they may be doing it not only for themselves and their family, but also for their extended family and communities. This is not done for profit or any other commercial means. Nor does it damage the environment or impact on the growth and regeneration of species or other sectors of industry, including recreational and commercial fishing interests.

However, it is this aspect of Aboriginal fishing that brings it into conflict with current New South Wales law. As the current legislative regime does not provide for recognition of traditional Aboriginal fishing practices it creates conflict with current fisheries management practices.

Within the context of the NSW Fisheries Management Act Aboriginal fishing falls within the parameters of its definition of commercial fishing because of the size of the catch, the species that are being taken and in some instances the manner in which they are caught. Too many fish is deemed to be a commercial quantity.

What results is the prosecution of Aboriginal people for engaging in what is essentially a long held cultural practice. It criminalises cultural belief, which then prevents people from continuing the traditions of that belief, and thus contributes to the destruction of that culture.

It has been shown in most of the states and territories of Australia, as well as internationally, that the recognition and exemption of traditional fishing practices from fisheries management legislation is achievable while respecting other interests in the same resource. It is also further recognised that Aboriginal fishing practices have no measurable impact on current levels of fish stocks and therefore provide no impact on other recreational or commercial aspects of the fishing industry.

Indeed the *Fisheries Management Act*, with its guiding principles of sustainability of fishing resources, could benefit from the knowledge that has been passed down from generation to generation of Aboriginal people in regard to this. Traditional Aboriginal fishing practices are based on the preservation of the resource for the generations to come, and is a practice that has been successful in both coastal and inland communities for many thousands of years. With the increasing controversy surrounding the depletion of this resource, it may be an ideal opportunity for the Department of Fisheries to accept the knowledge and experience of a people who successfully managed fishing resources long before protective measures such as the *fisheries Management Act* was even contemplated.

Commercial, recreational and other aquaculture interests have not been affected by the recognition of traditional Aboriginal fishing practices in other states and there appears to be no potential for them to be affected in NSW.

What is needed is an amendment of the NSW Fisheries Management Act 1994 to allow Aboriginal people to continue this non-commercial practice, and to bring NSW legislation into accord with that of other state and territory jurisdictions.

A greater level of protection also needs to be afforded to Aboriginal people in relation to their contact with Fisheries Officers, who at present, have powers beyond that of even the NSW Police Service. These Officers are not guided by the same principles in dealing with Aboriginal people as the NSW Police at

either the individual or community level, nor do they have the same opportunities to divert people away from the criminal justice system, nor are they subject to the same level of external scrutiny.

Fisheries officers also need to undertake cultural awareness training at both a local and general level that will assist them in their interaction with Aboriginal people. If fisheries officers can understand the cultural and community imperatives that are behind traditional fishing practices, then confrontation and prosecution may be avoided. This would also assist in the utilization of diversionary programs, such as the Community Justice Groups that have been established in many areas of the state.

With these changes it would be envisaged that Aboriginal people's right to continue traditional fishing practices would be protected and the possibility of further contact with the criminal justice system would be reduced.

9. Possible Recommended Actions

Below are a list of possible recommended actions for reform of the *NSW Fisheries Management Act* based on the information contained in this report. As the paper has been developed to raise discussion and awareness concerning traditional Aboriginal fishing rights and practices it is hoped that once the report has been released these 'possible' recommendations can be built on through the submissions of interested parties to become final recommendations.

1. That the *Fisheries Management Act* 1994 be amended to create a separate reference to customary fishing and provide for it to be a separate class of fishing activity.

   Within this reference it is recommended that sustainable customary fishing parameters be established to protect and promote the responsible use of fishing resources and that these parameters be developed at a regional level with Aboriginal communities

   It is further recommended that Aboriginal people be recognised as a distinct fishing sector and as such be given the same level of engagement in fisheries consultative and management processes as the recreational and commercial fishing sectors, and that this consultation be undertaken using existing Aboriginal community and organisational networks as well as those individuals and communities who are immediately affected by any management plan or consultation process that may be undertaken.

2. That the legislation recognise the continuation of Traditional Aboriginal Fishing Practices, including concepts of barter, exchange and communal sharing by exempting these activities from legislation.

   It is recommended that this amendment adopt the form used at Section 53 of the Northern Territory's *Fisheries Act* that states that:

   Nothing in a provision of this Act or an instrument of a judicial or administrative character made under it shall limit the right of Aboriginals who have traditionally used the resources of an area of land or water in a traditional manner from continuing to use those resources in that area in that manner.

   With the only limitation on this right being that it does not include a right or licence to engage in commercial fishing, entering areas used for aquaculture and interfering with other people's fishing gear and catch (as stated in the Northern Territory legislation).

3. That the fishing gear used and species taken not be measured by whether it is traditional, but its association and history of use and whether it has a detrimental impact on fish stocks and other fishing interests.

   The amendments should not consign Aboriginal fishing practices to only those practices that occurred before European exposure. As with other facets of Aboriginal culture, these practices have developed, been improved upon and incorporated techniques introduced over this period.

   To deny Aboriginal people the right to use these techniques would be to only partly recognise their rights to practice this cultural tradition. Or it may be said that it would give Aboriginal people the

right to practice this custom without the means of performing it.

4. That the *Fisheries Management Act* be amended to bring the Investigative Powers of Fisheries Officers in line with the NSW Police Service

- Presently Fisheries Officers can require personal information without charging an individual with an offence. If an individual is approached by a police officer, they don't have to answer police questions whether they ask you to go to the station, or question you on the spot or whether they do or don't arrest you, except if it is in relation to serious indictable offences.

  There is no reason why Fisheries Officers should have powers that are not even afforded to the NSW Police Force and that seriously inhibit an individual's personal and civil rights. With the serious penalties that can flow from a conviction, including heavy fines and imprisonment, this violation of civil liberties is something that should not be allowed to continue.

5. That the Same Protections Afforded to Aboriginal People in their contact with Police under the *Crime Amendment (Detention After Arrest) Act* 1997 and the *Crimes (Detention After Arrest) Regulation* 1998.

- Under the *Crime Amendment (Detention After Arrest) Act* 1997 and the *Crimes (Detention After Arrest) Regulation* 1998, Aboriginal people are considered a vulnerable group within society and are therefore afforded added protections in relation to their interaction with the police.

  As Fisheries Officers have the same powers as the police in relation to arrest, the same protections should be afforded in relation to their interaction with Fisheries Officers considering the serious consequences that can follow a proven breach of the *Fisheries Management Act*.

6. That the Cultural Awareness initiatives currently being established by NSW Fisheries be made compulsory for all employees and that it be competency based and allow for localised training to cater for the cultural diversity across Aboriginal communities.

- Considering the serious impact that Fisheries Officers can have on Aboriginal cultural practice, by pursuing Aboriginal people for breaches of the *Fisheries Management Act*, this form of cultural awareness training is seen as critical in Fisheries Officers interaction with Aboriginal people.

- It is recommend that the model adopted should allow for not only an initial centralised cultural awareness training at the commencement of employment, but something which also offers cultural awareness training that is specific to the area covered by a fisheries officer. Any such training should be conducted by or in conjunction with local Aboriginal people.

7. That Section 8 of the *Young Offenders Act* 1997 which states that the only offences that will be covered by the *Young Offenders Act* will be summary offences and indictable offences that may be dealt with summarily under chapter 5 of the *Criminal Procedures Act 1986*, be amended to include offences under the *Fisheries Management Act* 1994, so that fisheries officers will have the same diversionary options available to them as the police.

It has been recognised that the diversion of juveniles from the criminal justice system can have a positive result for both the offender and the society in general. With the powers of Fisheries Officers in bringing criminal charges against Aboriginal people being similar to that of police,

this same opportunity to divert juveniles from the system should be available and utilized.

8. That the same pre court diversionary programs used by police be utilised by Fisheries Officers. This includes the diversion to Community Justice Groups.

Community Justice Groups, where established, have been able to work collaboratively with government agencies such police, courts, probation and parole services, to develop strategies of reducing offending in their areas and providing effective alternative programs for Aboriginal people involved in the criminal justice system.

It is believed that providing fisheries Officers with the opportunity of working with these groups in relation to offences committed under the *Fisheries Act* would provide them with not only options in dealing with Aboriginal people, but provide them with cultural awareness in relation to the importance of fishing to Aboriginal people and its non-commercial nature.

The community justice group could also be an important resource in relation to cautioning by an acceptable person under the *Young Offenders Act* with the required legislative reform, and for circle sentencing, if deemed appropriate, for adults.

9. That Fisheries Officers identify whether alleged offenders are Aboriginal at the point of charging.

NSW police are already required to identify whether a person is Aboriginal or non-Aboriginal at this point. This would help provide data that could be used to show numbers of Aboriginal people being prosecuted for offences under the *Fisheries Management Act*, as well as the types of offences that are being alleged. This in turn could be used to help establish strategies to diverting Aboriginal people away from the criminal justice system.

Submissions Received

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