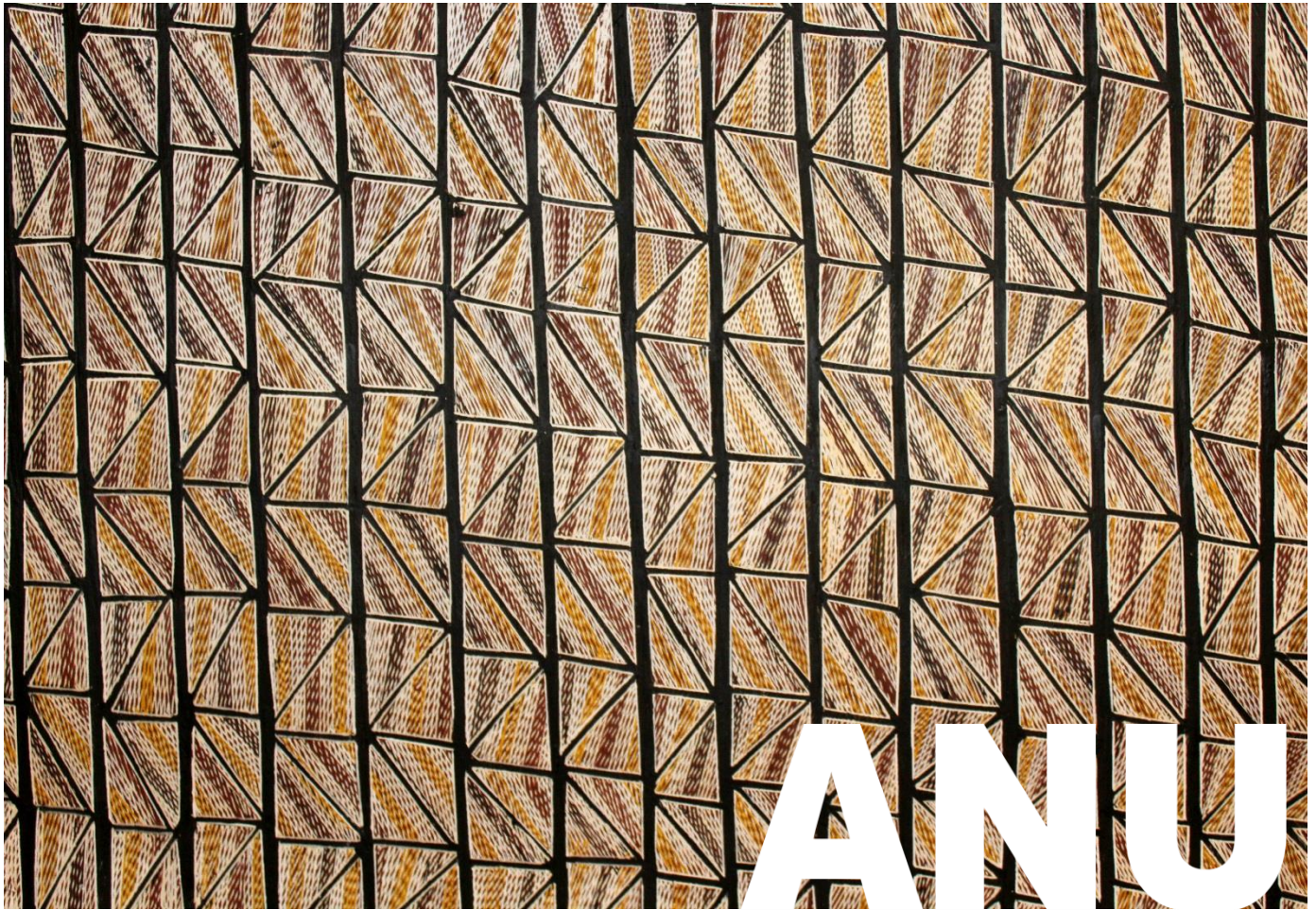




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WHAT'S THE CATCH? THE CRIMINALISATION OF ABORIGINAL FISHING IN NEW SOUTH WALES

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Centre for
Aboriginal Economic
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Sciences**

CAEPR TOPICAL ISSUE NO. 4/2022

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Topical Issue No. 4/2022

DOI XXXX

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Front cover image:
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Suggested citation:
Hunt, J. & Ridge, K. (2022), *What's the Catch? The criminalisation of Aboriginal fishing in New South Wales* (Topical Issue No. ##/2022), Centre for Aboriginal Economic Policy Research, Australian National University. <https://doi.org/#####>

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What's the catch? The criminalisation of Aboriginal fishing in New South Wales

J. Hunt & K. Ridge

Abstract

A recent Parliamentary Inquiry in NSW concerning the non-commencement of s21AA of the Fisheries Management Amendment Act 2009 (NSW) which would give First Nations fishers a state based statutory right to 'cultural fishing' has highlighted two key concerns about the way the Department of Primary Industries applies the law and management of the fisheries at the intersection of fundamental human rights. This leads to resource conflict, and significant impacts upon Aboriginal people, particularly with respect to their pre-existing rights in high commercial value fisheries such as abalone and lobster, which are also species of high cultural value to Aboriginal people.

The NSW government's failure to uphold and protect native title fishing in accordance with law and custom under section 211 of the *Native Title Act 1993* (Cwlth) matched by its failure to recognise and respect the First Nations fishers' marine governance system, or traditional lore, which has a focus on sustainability of the resource, impacts the rights of Aboriginal people, particularly the South Coast Peoples of NSW whose native title claim was registered in 2018.

The NSW Parliamentary Inquiry has also raised serious issues about principles of parliamentary sovereignty, and accountability of the elected government to the NSW Parliament. When the NSW Parliament has passed laws to address a public interest outcome, what rights do agencies or Ministers have to ignore the will of the Parliament by failing to have them proclaimed?

Acknowledgments

The authors thank three CAEPR referees for useful comments on an earlier draft of this paper. We also acknowledge the considerable efforts of the NSW Aboriginal Fishing Rights Group and other Aboriginal organisations in New South Wales to change the situation that this paper describes.

Kathryn Ridge has been instructed as a Defence lawyer for several of the Aboriginal men who have been charged for fishing related offences. All charges for her clients have been withdrawn or dismissed.

Acronyms

AFAC	Aboriginal Fishing Advisory Council (NSW)
ANU	Australian National University
CAEPR	Centre for Aboriginal Economic Policy Research
DPI	Department of Primary Industries (NSW)
FMA	<i>Fisheries Management Act 1994 (NSW)</i>
LMP	Local Management Plan
NSW	New South Wales
NSWALC	New South Wales Aboriginal Land Council
NTA	<i>Native Title Act 1993 (Cth)</i>
NTSCORP	NSW Native Title Representative Body
UTS	University of Technology Sydney

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Introduction

In 2009 the NSW Parliament passed a range of amendments to *the Fisheries Management Act 1994 (NSW)* (FMA) which included amendments to recognise and provide rights for Aboriginal fishers in line with their international human rights to retain their culture and traditional practices.¹ By late 2021, all the amendments in the *Fisheries Management Amendment Act 2009* had been proclaimed, except Schedule 1 (27) (Parliamentary Counsel's Office 2022) which would give effect to the insertion of s21AA – a key amendment which would prevent prosecution for what is termed in NSW 'cultural fishing'. The definition of cultural fishing under the Act is:

... 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. (NSW Government 2022, p.17)

The passage of the *Native Title Act 1993 (Cth)* (NTA) created a need to align State and Territory laws with this Commonwealth Act. Section 211 of the NTA exempts Aboriginal people from legal prohibitions on exercising their native title rights and interests — including customary fishing —and thus overrides any State or Territory legislation that imposes such restrictions. In 2004, the National Native Title Tribunal facilitated a nationwide process which led States and Territories to agree to voluntarily recognise native title rights and interests in fisheries without requiring native title claims to be in place or settled. They agreed a number of 'Indigenous Fishing Principles' (National Native Title Tribunal 2004) to guide their reforms, among them, that 'Customary fishing is to be defined and incorporated by Governments into fisheries management regimes, so as to afford it protection', and that the definition of customary fishing is 'fishing in accordance with relevant Indigenous laws and customs for the purpose of satisfying personal, domestic or non-commercial communal needs' Stakeholders agreed that 'the customary sector should be recognised as a sector in its own right, alongside recreational and commercial sectors, ideally within the context of future integrated fisheries management strategies' (National Native Title Tribunal 2004).

The NSW Government subsequently moved to incorporate these National Indigenous Fishing Principles into law and policy. When the NSW Parliament passed the *Fisheries Management Amendment Act 2009 No 114*, this included section 21AA which provided a process for recognising Aboriginal cultural fishing. Passage of this amendment should have implemented the National Indigenous Fishing Principles, at least to the extent of recognising (non-commercial) customary take.

However, the *Fisheries Management Amendment Act 2009 (NSW)* only commenced after proclamation. Twelve years on, although most of the Act has been proclaimed, Schedule 1 (27) which would implement s 21AA, has not been proclaimed.. The non-commencement of s21AA up till today means that the FMA is not working to *protect* cultural fishing. Instead, the Department of Primary Industries (DPI) has been implementing the legislation in a manner which *criminalises* cultural fishing

At the current time, the NSW Government states that,

...access for Aboriginal fishers continues to be supported through the Aboriginal Cultural Fishing Interim Access arrangement, which allows for extended take and possession limits. For example, for culturally

¹ These are set out in the United Nations Declaration on the Rights of Indigenous Peoples and the Convention on Biological Diversity (CBD), particularly Article 8(j) which commits parties to the Convention to respect, preserve and maintain Indigenous knowledge, innovations, and practices with respect to biodiversity; and Article 10(c) which commits support to the continuation of customary use of biodiversity by Indigenous peoples.

important species such as abalone, cultural fishers can take 10 abalone, which is five times higher than the recreational bag limit. Since January 2010 DPI has also issued over 140 cultural fishing permits, which have allowed Aboriginal fishers to take significantly higher catches of culturally important species within a set period using various fishing techniques, including haul nets for the annual mullet run (Sloan, S. DPI, Sydney Hearing Report p .47).

The problem with the Interim Access Agreement (NSW Government 2020) is that with large and extended families, those capable of diving for abalone need to take more than 10 abalone at a time to feed all members of their family and particularly Elders. Abalone are an important dietary source, and it is particularly good food for elderly diabetics. Such limits on take appear to contravene the rights of native title holders recognised under s211 of the NTA.

Aboriginal fishers in NSW are also not allowed to 'shuck' the abalone more than 100 metres from the high-water mark, which they traditionally do, unless the shucked abalone is consumed in that area. Aboriginal fishers point out that many Elders and others with disabilities, or simply without transport, cannot get to the shore to consume the abalone. Many also resent the paperwork required to gain a permit under section 37 of the *Fisheries Management Act 2009* (NSW) when they believe they already have a native title right to fish for large cultural gatherings or funerals.

The effect is that, over the last 15 years, numerous Aboriginal people have been faced with charges for FMA offences. At least 561 Local Court criminal charges (NSW Criminal Court 2021) have been laid against Aboriginal people, the most serious regulatory option open to Fishery Compliance Officers. While over this period Aboriginal people have represented only 3.4% to 4.2% of the NSW population (Aboriginal Affairs 2020, Australian Bureau of Statistics 2022), this figure represents almost 50% of prosecutions where the Aboriginality of the offender is known. Aboriginal people are being charged far more than non-Indigenous fishers; in the last year it was closer to 66% (NSW Criminal Court 2021). The available statistics for the years 1996 to 2021 show that over representation in incarceration is also a significant issue; two thirds (66%) of the people incarcerated for fishery offences have been Aboriginal; even allowing for the fact that Aboriginal people now make up nearly 5% of the South Coast population (ABS 2022a), these rates of incarceration are 13-fold those for other fishers. Since the 1992 Mabo judgement and the protection that section 211 of the NTA should offer to native title holders, 30 Aboriginal people have been incarcerated for fishing in NSW.

This criminalisation of what is most likely to be lawful fishing in exercise of native title rights, has led to what a previous NSW Attorney General Hazzard called 'misguided prosecutions' (Macey 2015). It certainly runs counter to the Indigenous rights outlined in the UN Declaration on the Rights of Indigenous People, where the right to practice culture is clear in Article 11. Furthermore, under Native Title law, cases such as *Commonwealth v Akiba* indicate that native title rights may include fishing 'for any purpose', which may include not simply fishing for personal or communal use, but also for bartering and trading (NTSCORP 2022).² This is the right which was

²Native title rights to fish are recognised in a number of other southern states. In Victoria, the Aboriginal Fishing Strategy recognises native title rights to some degree, stating 'Members of Traditional Owner groups and Aboriginal Victorians have legal rights to access fish for personal, communal and cultural purposes. These rights are established under Victoria's Traditional Owner Settlement Agreement Act 2010 and the Fisheries Act 1995 and the Commonwealth's Native Title Act 1993..... Traditional owners taking fish under their native title rights are not constrained by recreational fishing rules (e.g. size and bag limits, methods and season dates), but must comply with laws of general application (e.g. members can't take prohibited species or fish in areas where fishing is prohibited) and must not use the fish for commercial purposes. See: <https://vfa.vic.gov.au/aboriginal-fishing>. The Western Australian Government states that the NTA 'recognises that states and territories are free to make their own laws that regulate customary fishing, so long as these laws are not in conflict with the fishing rights provided for in the Native Title Act.' in South Australia an ILUA has been signed under the NTA with the Narungga people in relation to their waters. See: https://pir.sa.gov.au/__data/assets/pdf_file/0004/382675/DPIR_Narungga_Nation_Traditional_Fishing_Agreement.pdf.

registered for South Coast people on 31 December 2018 by Registrar Hanf of the National Native Title Tribunal.³

Failure to protect and uphold Aboriginal rights to fish

The way that DPI applies the law and its management of fisheries is contributing to this resource conflict, with significant impacts upon Aboriginal people, particularly with respect to their pre-existing rights in high value fisheries such as abalone and lobster. The Department has long been aware of the need to protect and provide clear pathways for Aboriginal cultural fishing but to date no process has successfully delivered any outcomes to share access to the resource, meanwhile the prosecutions continue.

The first Indigenous Fishing Policy under the new *Fisheries Management Act 1994* (NSW) was adopted in 1997. In 2002 the Department published the adopted Indigenous Fisheries Strategy and Implementation Plan (NSW Government DPI 2002). The plan stated that it 'seeks to protect and enhance the traditional cultural fishing activities of Aboriginal communities, and ensure Aboriginal involvement in the stewardship of fisheries resources.' However, it also referred to how this intersects with other users and sustainability of the resource (NSW Government DPI 2002). Among many actions in the plan, the Department agreed to 'Negotiate, agree and maintain a system which allows ongoing access to the fisheries resource for Aboriginal people for traditional cultural activities' (NSW Government DPI 2002).

In 2005, as part of the environmental impact assessment of the Abalone Fisheries Share Management Plan, a report was commissioned on the social and heritage impacts of the fishery (Umwelt 2005). This report clearly documented the impact the emergence of the commercial industry had on the traditional cultural fishing rights of Aboriginal People. It clearly supported recommendations which were carried forward into the Fishery Management Plan.

By 2009 the NSW Government introduced amendments to the Fisheries Management Act in part to better recognise Aboriginal fishing in line with commitments it made at the NNTT meeting in 2004 to align NSW legislation with the Commonwealth's NTA. The *Fisheries Management Amendment Bill 2009 Schedule 1* added a new objective to the *Fisheries Management Act 1994*, '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' and defined Aboriginal cultural fishing. This amendment Bill was passed by the Parliament in 2009, and yet these key provisions in it languished uncommenced, while the prosecutions worsened. Other provisions in the Bill, mostly relating to penalties and licensing, were commenced.

In 2012 and 2014, two sets of proceedings were commenced by and subsequently withdrawn by the NSW Government against South Coast Aboriginal People, Ardler and Brown, and Carberry and Stewart. Each of the defendants were connected into the South Coast Aboriginal People through parents and grandparents, affecting virtually every member of the community. This practice of charging fishers and then dropping prosecutions at the very last minute has persisted until today, placing stress and costs on those charged, without giving them the opportunity to test their native title right defence in the court.⁴

Aboriginal Community Response

In 2015, after two Aboriginal Community meetings, one at Broulee, and another at Bingie, Aboriginal fishers at the NSW South Coast formed the South Coast Aboriginal Fishing Rights Group to campaign for a change in this

³ Registrar Hanf dated 31 December 2018 NSD1331/2017 NNTT No.NC2017/003,

⁴ This point was made by Danny Chapman on ABC TV, 7.30 Report Thursday, 6 October 2022.

situation (see Figure 1). They met with the Police Commissioner, Geoff McKechnie, and NSW Police stopped all their fishery prosecutions. They wrote to two successive Attorney Generals of NSW, Brad Hazzard, and Gabrielle Upton, who both assured them that the prosecutions process would avoid prosecuting people for exceeding bag limits in circumstances which did not involve sale. Prosecutions of Aboriginal people, which had been between 26 and 100 per year between 2005 and 2014, almost dried up, reducing to only two prosecutions in 2015.

However, after the lodgement of the South Coast People's native title claim in 2017, and its registration on 31 January 2018, prosecutions of Aboriginal people ballooned again from 10 in 2017 to over 50 in 2020, and 63 in 2021.

By late 2021 the South Coast Aboriginal Fishing Rights Group had persuaded some members of the NSW Legislative Council to conduct a Parliamentary Inquiry into why the s21AA amendment had not been commenced over the intervening 12 years. The Inquiry was announced on 25 November 2021, and two hearings were held – one in Narooma for fishers to share their stories, the other in Sydney.



Figure 1 South Coast Aboriginal Fishing Rights meeting at Bingie 2015.

Source: Photograph by Kathryn Ridge, used with the permission of the South Coast Aboriginal Fishing Rights Group.

At the Inquiry hearing in Sydney, the NSW DPI argued that it was now waiting on trials of Local Fishing Management Plans before s21AA could be commenced. Stating that it was a natural resources management agency that works within an ecologically sustainable management framework, the Department argued in its submission that limits must be placed on all fishers to avoid 'detrimental ecological impacts'. It seemed to ignore the fact that the NTA section 211 would prevail over any conflict with native title holder rights.⁵ The Department stated that it supported cultural fishing and that from 2010–16 it had consulted widely and developed a draft state-wide regulation to give effect to s21AA. The Department reported that in 2016, the New South Wales Aboriginal Land Council (NSWALC), NTSCORP (the Native Title service provider for NSW) and the Aboriginal Fishing Advisory Council (AFAC) favoured a Local Management Plan (LMP) approach. In 2017 the Department had said it would investigate commencement of s21AA when results of LMP trials were known, but two small two-year trials only began five years later, in June 2022. These trials give limited cultural fishing rights to the relevant Indigenous custodians in the Tweed and Hastings rivers, who at the Inquiry made clear they had only

⁵ Section 109 of the Constitution of Australia.

agreed to LMPs because s21AA had not been commenced, and that they would prefer that to happen. The peak NSW Aboriginal organisations argued that any regulation, including an LMP for a particular area or species negotiated with local Aboriginal people, would be inconsistent with the exercise of their rights and interests under the *Native Title Act*.

The NSWALC, NTSCORP, and the former Chair of the AFAC all deny that they have ever accepted that a regulation was necessary or that they preferred a LMP approach. As the NSWALC said in its submission to the Inquiry:

LMPs were originally proposed as a separate, but complementary mechanism to promote engagement between Government and Aboriginal communities about local fishing issues, and address local management issues. The LMP proposal was put forward on the basis that s.21AA was immediately commenced, with the development of LMPs to follow. (NSWALC 2022).

They also make the point that native title rights to fish ‘for any purpose’ override the NSW legislation (NTSCORP 2022). In fact, as Mishka Holt from NTSCORP told the Sydney hearing, the NSW FMA itself, in s287, makes clear that it ‘cannot affect or regulate the exercise and enjoyment of native title rights’; similarly, she explained, ‘s211 of the *Native Title Act* exempts native title holders from the operation of the FMA in certain circumstances’ (Holt, M. Sydney Hearing Report, p.33). Ms Holt stated that

NTSCORP has experienced that there has been a substantial failure by NSW Fisheries to recognise and administer the FMA in a way that provides traditional owners with the protection afforded by section 211 of the NTA or section 287 of the FMA. (Holt, M. Sydney Hearing Report, p.33)

As she pointed out, local management plans have no legal force, and cannot regulate traditional custodians exercising their native title rights, so their value is dubious. Furthermore, she added that in two locations in NSW where native title rights to fish in the sea have been recognised, ‘there has been no demonstrated evidence of any negative impacts on the fishing resource’ (Holt, M. Sydney Hearing Report p.36).

The reason for this may be that there is an Indigenous marine governance system in place which the DPI fails to recognise or accept as an adequate system to maintain ecologically sustainable development. Yet Aboriginal fishers have a clear governance system to manage their own fishing take – it just doesn’t look the same as the DPI one, so they fail to see it. For example, until the late 1960s, when the commercial abalone industry began in NSW, there was an abundance of abalone, which is the focus of many of the Aboriginal prosecutions today. This indicates that Aboriginal people, who until then were the main consumers of abalone, knew how to steward the resource to maintain its sustainability over thousands of years of occupation. The resource only became scarce when the commercial industry began taking vast quantities of abalone (Cruse et al. 2005).

Research for AIATSIS conducted at the south coast of NSW in 2018 made a number of observations about the Aboriginal marine governance system there:

Most participants talked about the cultural laws and rules that they follow when they go fishing. Most learnt these from their older relatives, and were often about making sure their take is sustainable. Some of these cultural laws were similar everywhere, and included:

- *only taking as much as you need*
- *not taking any individuals that are too small or too large*
- *taking species in their season*

- *making sure you don't overfish or 'clean out' an area*

Not taking large individuals applied to a number of species, like abalone, lobsters, and some finfish. Partly this is out of respect for the fact that many species can take years or decades to grow to a large size. A number of participants said they were taught that large individuals were 'breeders', and that it is important to leave them to help maintain stocks. (Smyth et al. 2018, p.22).

Seasonality in the take was also important,

People know when different species are coming into season from environmental cues. One of the most commonly mentioned was that the flowering of certain plants indicated the beginning of the seasons for different finfish species... There were numerous other environmental cues which people used to identify when and where to fish on a more day-to-day basis, including the tides, winds, and weather. (Smyth et al. 2018, p.22).

The researchers stated, *'participants said that most people follow these laws. If they don't, they might face opprobrium from the community in general, and Elders in particular'* (Smyth et al. 2018, p.22).

However, NSW DPI does not appear to accept that such a governance system operates to regulate Aboriginal fishers; rather the colonial mindset of control of Aboriginal people seems alive and well in their treatment of Aboriginal fishing. As NSWALC Chair Danny Chapman also pointed out, Aboriginal people make up 3% of the state's population, and they don't all fish. Apart from the commercial fishing industry, there are a million recreational fishers in NSW, who, while regulated, also have a cumulative impact on fisheries. Yet the small number of Aboriginal fishers are the focus of the DPI's and the abalone industry's concerns about sustainability of the resource. They seem to be the scapegoats for over-exploitation of the marine environment by non-Aboriginal people.

Today, the total allowable commercial catch is 100 tonnes, which is estimated to be sustainable and allows for other users (NSW Total Allowable Fishing Committee 2022). As recognised by the NSW Total Allowable Fishing Committee,

In addition to the commercial sector, abalone is caught by recreational fishers with the catch estimated at no more than 10 t p.a (with a possession limit of two per person) and the permitted Aboriginal catch estimated at less than 1 t p.a. There is, in addition, an estimated illegal catch of 20 t p.a. (2022, p.9).

While not all the illegal catch is taken by Aboriginal fishers, it is just one fifth of the commercial take, and the estimated Aboriginal legal take is just 1% of the commercial catch.

It is interesting that even the NSW Total Allowable Fishing Committee now recognises that,

The Aboriginal harvest of abalone remains to be resolved and the courts are the primary means through which arguments about it are made. Resolving what is largely a resource ownership issue through compliance actions is unlikely to be successful and an alternative pathway needs to be found. (2022, p.9)

Systemic racism in public administration?

The NSW Parliamentary Inquiry has also raised serious issues about principles of parliamentary sovereignty, particularly the power of the Parliament over the Executive Government (Parliament of Australia 2019). When the NSW Parliament has passed laws to address a public interest outcome, what rights do agencies or Ministers

have to ignore the will of the Parliament? Tony McAvoy SC challenged the Committee to step back and ask itself why reforms relating to Aboriginal people in NSW take so long to be implemented – citing the 40,000 land rights claims still outstanding under the NSW ALRA 1983, the slow return of National Parks agreed in 1996 to be returned to Aboriginal ownership, the non-implementation of 2001 amendments to the National Parks and Wildlife Act in relation to Aboriginal cultural heritage and now the non-commencement of s21AA of the FMA. As he said,

It is proper for this Committee to ask the question, 'What is going on in the administration of this Government that matters done for the benefit of Aboriginal people are routinely overlooked by the administration?' Because it looks and smells like systemic and structural discrimination against Aboriginal people, and is certainly being experienced by Aboriginal People as discrimination. And you need to ask yourself, if this Parliament is a parliament for all people in New South Wales, how is it that, when the Parliament decides that things ought to be done to alleviate the disadvantage that has been caused by the occupation of their lands, the administration doesn't carry out Parliament's will? (McAvoy, T. Sydney Hearing Report, p.33)

Furthermore the current Parliamentary Inquiry is not the first to investigate this issue. In 2016, the NSW Legislative Council Standing Committee on State Development's *Inquiry into economic development in Aboriginal communities* heard evidence about the problem and its recommendation 39 was, 'That the NSW Government proclaim section 21AA of the Fisheries Management Act 1994.' Yet this recommendation was also ignored by the NSW Government and DPI. In certain other states, laws passed by their parliament commence automatically after a certain time has passed, but this is not the case in NSW (Stedman 2013).

The way the NSW government fails to uphold and protect the rights of Aboriginal fishers in NSW, as they do other non-Aboriginal people's rights such as commercial and recreational fishers, further perpetuates the harms and the dispossession of the colonial settlers on the first peoples of NSW. It is one of the clearest examples of racially discriminatory regulation in Australia. The Supplementary work Instructions on Native Title issued to Fishery Compliance Officers (Department of Planning, Industry and Environment 2014) instructs them that in circumstances where they do not believe there is a native title defence to take the fish, to confiscate the gear and brief up for further regulatory action, and to do the same if they believe there may be a native title defence — in short to treat rightful lawful native title fishing as if it is criminal.

As Danny Chapman stated at a Narooma hearing of the Inquiry,

...our people have never ceded this country. We have never entered into a treaty; we have never entered into any other negotiations... to cede this country. Over many years, government actions have slowly eroded and taken away our culture and our reliability on our culture. The only thing that remains at the moment is our fishing rights, and we will not give them up. We will not take one more backward step in this. (Chapman, D. Narooma Hearing Report pp. 4-5)

The Parliamentary Inquiry is certainly a welcome development for Aboriginal people in NSW, but it remains to be seen whether the Parliament will choose to exert its power over a government which appears not to respect the rights of Indigenous people as the traditional custodians of the marine environment.

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