



NATSILS

National Aboriginal and
Torres Strait Islander Legal Services

TRUE JUSTICE FOR OUR PEOPLE

ADDENDUM

**Submission to the Independent Review of the
National Legal Assistance Partnership 2020-25**

Defending Native Title and cultural rights

In some jurisdictions across Australia, Aboriginal and Torres Strait Islander people are over-represented in prosecutions in matters related to cultural fishing and hunting.¹ The impact of these prosecutions is wide-ranging.² Within current funding quantum, many ATSILSs don't have capacity to appear in defending these prosecutions.

Some communities are asserting their cultural, native title rights to fish. Section 211 of the *Native Title Act 1993* (Cth) (the NTA) exempts Aboriginal and Torres Strait Islander people from legal prohibitions on exercising their native title rights and interests — including customary fishing.³ 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. This involved agreeing to a number of 'Indigenous Fishing Principles' to guide their reforms and included that 'customary fishing is to be defined and incorporated by Governments into fisheries management regimes, so as to afford it protection' with a definition of customary fishing as 'fishing in accordance with relevant Indigenous laws and customs for the purpose of satisfying personal, domestic or non-commercial communal needs'⁴

By way of example, in 2009, the NSW Government moved to incorporate the Indigenous Fishing Principles into law and policy through s21AA of the *Fisheries Management Amendment Act 2009* (the FMAA) which provided a process for recognising Aboriginal cultural fishing (at least to the extent of recognising non-commercial customary take). After 14 years, however, this provision has yet to be proclaimed, and in the interim, fishing-related prosecutions of Aboriginal and Torres Strait Islander people in NSW continued at alarming rates. A 2022 Parliamentary Inquiry into the delayed implementation of the relevant provisions of the FMAA in NSW found that "the compliance activity and prosecutions against Aboriginal people for practising cultural fishing, particularly on the South Coast of NSW, **are unacceptable and creating perverse outcomes inconsistent with the NSW Government's commitments to the Closing the Gap Agreement.**"⁵ (emphasis added). It recommended, amongst other things, that the Department of Primary Industries immediately cease all surveillance, compliance actions and prosecutions against Aboriginal cultural fishers, and review and withdraw any penalty notices issued, and implement the relevant protective provisions by June 2023. This has still not occurred.

¹ For example, between 1996 and 2020, Aboriginal people in NSW were subject to fisheries prosecutions that resulted in 30 custodial sentences, 23 custodial alternatives, 93 community-based orders, 279 fines – see NSW Bureau of Crime Statistics and Research.

² See evidence before the NSW Parliamentary Inquiry, Portfolio Committee No 3, *Parliamentary Inquiry into the Commencement of the Fisheries Management Amendment Act 2009*

<https://www.parliament.nsw.gov.au/lcdocs/transcripts/2963/Transcript%20-%20CORRECTED%20-%20Commencement%20of%20the%20Fisheries%20Management%20Amendment%20Act%202009%20-%2019%20August.pdf>

³ See, J Hunt and K Ridge (2022), *What's the Catch? The criminalisation of Aboriginal fishing in New South Wales* (Topical Issue No. 4/2022), Centre for Aboriginal Economic Policy Research, Australian National University at https://caep.cass.anu.edu.au/sites/default/files/docs/2022/11/TI_4_2022_Hunt_and_Ridge_The_Criminalisation_of_Aboriginal_fishing_in_NSW.pdf

⁴ See National Native Title Tribunal at < http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Fishing_principles_to_guide_Indigenous_i.aspx>

⁵ See <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2850/Report%20no.%2055%20-%20PC%204%20-%20Commencement%20of%20the%20Fisheries%20Management%20Amendment%20Act%202009.pdf> at p ix.

Evidence heard at the Inquiry raised contentions of systemic and structural discrimination in the failure to commence the relevant provisions of the FMAA which would cure the non-alignment with the NTA, and pointed to other legislative reforms across various legislative instruments that would protect Aboriginal cultural and cultural heritage rights that have also been similarly unproclaimed and delayed.⁶

Governments in other jurisdictions are also actively prosecuting Aboriginal and Torres Strait Islander people for exercising their cultural fishing rights, notably in South Australia.

Asserting native title rights and interests in defence of criminal prosecutions is not straightforward, sometimes raising complex issues in relation to adducing evidence about customary law. Historically, Courts have denied standing to Aboriginal and Torres Strait Islander people as “experts” about the nature and content of their own customary law, instead preferring evidence of anthropologists. Some jurisdictions⁷ have amended their Evidence Acts to allow an exception to the hearsay rule that would allow Aboriginal people to give testimony on traditional and customary law. Other states have not enacted this, including South Australia, where prosecutions continue. Much of the fishing rights jurisprudence also raises complex evidentiary issues in relation to the appropriate evidentiary burdens.⁸

Addressing and overcoming the problems with asserting native title rights and advocating for legislative reform will likely involve both strategic litigation and advocacy. It may also involve legal assistance to Aboriginal and Torres Strait Islander communities in relation to negotiating local Fishing Management Plans with State and Territory governments. ATSILSs don’t have current capacity to assist in these matters to the extent they would like.

For Governments to adequately meet their commitments under the National Agreement on Closing the Gap, ATSILSs must be appropriately resourced to provide culturally safe representation to Aboriginal and Torres Strait Islander people to protect and defend their cultural rights.

⁶ See evidence of Tony McAvoy SC at Portfolio Committee No 3, *Parliamentary Inquiry into the Commencement of the Fisheries Management Amendment Act 2009* <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2963/Transcript%20-%20CORRECTED%20-%20Commencement%20of%20the%20Fisheries%20Management%20Amendment%20Act%202009%20-%202019%20August.pdf> at p 32-33.

⁷ That is, Commonwealth, NSW, Victoria, Northern Territory and the ACT.

⁸ See, for example, the recent SA Court of Appeal case of *Dietman v Karpany* [2023] SASCA 52.