



Re: NSWALC Submission – NSW Government Draft Aboriginal Fishing Regulation

Thank you for the opportunity to provide feedback on the NSW Government's Draft Aboriginal Fishing Regulation (**the Regulation**).

The NSW Aboriginal Land Council (**NSWALC**) is the largest member-based Aboriginal organisation in Australia, representing over 30,000 members across a network of 121 Local Aboriginal Land Councils (**LALCs**). As the peak-elected Aboriginal community-controlled representative body for the more than 330,000 Aboriginal people in NSW, NSWALC has a critical role in advocating for Aboriginal rights, particularly in relation to land, sea, water, and fisheries resources.

Aboriginal peoples are not just one stakeholder among many. We hold inherent, pre-eminent rights to land and water, with Traditional Ecological Knowledge and Traditional Fishing Knowledge accumulated over millennia. Any regulation affecting these rights must be developed in genuine partnership with and supported by our communities.

NSWALC strongly opposes the introduction of the Regulation and instead calls for the **urgent and immediate commencement of section 21AA** of the *Fisheries Management Act 2009 (NSW)* (**FMA**) **without regulations**. Furthermore, we demand an immediate end to the unjust and harmful prosecutions of Aboriginal people for practicing their culture and providing for their communities.

The NSW Government's ongoing policing and control of Aboriginal cultural practices is both abhorrent and unacceptable. Aboriginal communities have successfully self-regulated our cultural practices for millennia, and we do not support the Government's imposition of unnecessary regulatory frameworks that undermine our rights.

NSWALC is deeply concerned that the NSW Government intends to legislate the Aboriginal Fishing Interim Access Arrangements (**AFIAA**) as the Regulation. The AFIAA has already caused significant harm to Aboriginal communities by enabling the continued prosecution of Aboriginal people for undertaking cultural fishing practices. We ask the Government: **How will legislating these arrangements change the status quo, other than to further entrench harm and injustice?**

Furthermore, the NSW Governments approach to consultation is extremely disappointing, especially on such a critical issue. Holding consultations over the Christmas and New Year period was entirely inappropriate and demonstrated a lack of respect for Aboriginal communities. NSWALC made this clear to the Department of Primary Industries and Regional Development (**DPIRD**), the Aboriginal Fishing Advisory Council (**AFAC**), and the Facilitator. These concerns were echoed by the consultation facilitator Grant Sarra, as well as LALC representatives and community participants.

This flawed process does not reflect genuine engagement or good-faith consultation. Aboriginal communities must be meaningfully included in decision-making that affects our rights and cultural practices. The NSW Government must engage with communities in a respectful, transparent, and culturally appropriate manner.

NSWALC urges the NSW Government to:

- **Change course and not implement flawed Regulations.** A new approach must be designed in partnership with us and Aboriginal communities.

- **Conduct in-person, on-Country consultations** that allow Aboriginal communities to lead discussions on our own cultural practices.
- **Listen to and act on community needs**, rather than imposing preconceived restrictive regulatory measures including as bag and possession limits.

The NSW Government must place trust in Aboriginal communities to govern our own cultural fishing practices, just as we have done for thousands of years. Any regulation must be developed with Aboriginal communities, not imposed upon us. Detailed comments and recommendations are provided below. Please contact us if you would like to discuss.

Sincerely,



Heidi Hardy
A/CEO
NSW Aboriginal Land Council

NSWALC Submission

DPIRD – Draft Aboriginal Fishing Regulation

Summary of recommendations

1. Given NSWALC's legislative functions relating to Aboriginal culture and heritage, and to represent Aboriginal people in NSW, the NSW Government must listen, partner, appropriately, transparently and in good faith, with NSWALC and Aboriginal peoples of NSW, to support the implementation of s.21AA and all policy, programs or activities relating to Aboriginal cultural fishing.
2. NSWALC calls for the NSW Government to immediately commence s.21AA of the FMA without regulations.
3. NSWALC calls for the NSW Government to recognise Aboriginal peoples history of and ability to self-regulate fishing resources as has been done for thousands of years and allow them to do so.
4. The NSW Government must recognise and support Aboriginal people's cultural connection to fisheries resources and our inherent rights to practice cultural fishing.
5. The NSW Government must honour its commitment to the National Agreement for Closing the Gap including delivering social, cultural and economic outcomes for Aboriginal people, which includes the commencement of s.21AA without regulations. By failing to commence s.21AA, and while prosecutions continue, the NSW Government is not making good on commitments to closing the gap.
6. The NSW Government must embed the principles of the United Nations Declaration on the Rights of Indigenous Peoples (Article 25 and 32.2) in its approach to the management of fisheries resources.

7. The NSW Government must retract and apologise for divisive, unsubstantiated, misleading and defamatory statements and approaches.
8. NSWALC does not support the indefinite legislation of the Aboriginal Fishing Interim Access arrangement which inappropriately sets take and possession limits, does not support Aboriginal cultural fishing and has resulted in Aboriginal cultural fishers continuing to be prosecuted.
9. NSWALC maintains that s.21AA should be immediately commenced, without regulations. Regulations that set take and possession limits are not necessary, are inappropriate and are inflexible.
10. The LMP program and approach must urgently be redesigned in partnership with NSWALC, and an independent agency should oversee this.
11. The NSW Government must urgently clarify the efficiency and effectiveness of LMPs and their relationship to s.21AA.

Introduction

1. **The NSW Aboriginal Land Council:** NSWALC is the peak body representing Aboriginal peoples in NSW and, is the largest Aboriginal member-based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*, NSWALC is an independent, self-funded non-government organisation that has an elected governing council and the objective of fostering the aspirations and improving the lives of the Aboriginal peoples of NSW.
2. Under the ALRA, NSWALC has the following functions in relation to Aboriginal culture and heritage:
 - a) *To take action to protect the culture and heritage of Aboriginal persons in NSW, subject to any other law,*
 - b) *To promote awareness in the community of the culture and heritage of Aboriginal persons in NSW.*¹
3. NSWALC provides support to the network of 121 autonomous LALCs. As elected bodies, LALCs represent not only the interests of their members, but of the wider Aboriginal community.
4. NSWALC is committed to advocating for the protection of Aboriginal peoples' cultural rights. NSWALC has advocated tirelessly that a key amendment to the FMA, passed by the NSW Parliament in 2009 to recognise and provide for Aboriginal cultural fishers, is urgently commenced.

Given NSWALC's legislative functions relating to Aboriginal culture and heritage, and to represent Aboriginal people in NSW, the NSW Government must listen, partner, appropriately, transparently and in good faith, with NSWALC and Aboriginal peoples of NSW, to support the implementation of s.21AA and all policy, programs or activities relating to Aboriginal cultural fishing.

The Fisheries Management Act 2009

5. **Amendments to the FMA:** On 3 December 2009 amendments to the FMA which

¹ S.106(7) of the ALRA

acknowledged Aboriginal cultural fishing were passed by the NSW Parliament. The amendments included:

- a) A new **objective** of the FMA to recognise Aboriginal cultural fishing,
 - b) A new **definition** of Aboriginal cultural fishing,
 - c) A **general exemption for Aboriginal people from paying a fee** for recreational fishing,
 - d) The inclusion of Aboriginal cultural fishing as a new ground for obtaining a **section 37 permit** that authorises the person or group to take and possess fish or marine vegetation that would otherwise be unlawful,
 - e) A new provision **authorising Aboriginal people to take and possess fish** for cultural fishing purposes – section 21AA (**This amendment is not yet in force**), and
 - f) The establishment of the Aboriginal Fisheries Advisory Council (**AFAC**), to play a key role in advising the Minister on all Aboriginal fishing issues.
6. Overall, the FMA was amended to recognise and protect the spiritual, social and customary significance of fisheries resources to Aboriginal persons and to protect and promote the continuation of Aboriginal cultural fishing.²
 7. NSWALC supported these amendments, including section 21AA, relating to protections against prosecution for Aboriginal cultural fishers, as a first step to achieving positive reforms that would improve the rights of Aboriginal fishers in NSW.
 8. Most of the amendments came into effect on 1 April 2010. However, after more than a decade, s.21AA remains uncommenced.
 9. This has resulted in the ongoing prosecution of Aboriginal cultural fishers, delayed recognition of rights for Aboriginal people, and a lack of certainty regarding the compliance regime.

NSWALC calls for the NSW Government to immediately commence s.21AA of the FMA without regulations.

Aboriginal Cultural Fishing Rights, more than just fishing

10. **Traditional Ecological Knowledge and Traditional Fishing Knowledge:** Aboriginal peoples in NSW, particularly LALCs, are holders of specific Traditional Ecological Knowledge and Traditional Fishing Knowledge accumulated over millennia.
11. Since time immemorial the seas surrounding this land and its rivers, billabongs and groundwaters have provided Aboriginal peoples with cultural, spiritual, physical and economic nourishment. Dispossession and degradation of these cultural water assets have had significant negative impacts on Aboriginal people and our cultural landscapes.
12. Aboriginal fishers have a long and ongoing presence in NSW waters and since time immemorial we have fished in accordance with our laws and customs. Aboriginal fishers provided resources used for sustenance, barter, trade and meaning. Through Aboriginal people's connection to fisheries resources, Aboriginal communities built up extensive knowledge systems which were used to aid in the management of these resources.
13. Since European settlement our connection to fisheries resources has been greatly impacted by changing non-Aboriginal governance structures and exploitation patterns. Today, Aboriginal peoples require more to be done to ensure that we have adequate access to fisheries resources in order to maintain our cultural fishing practices.

² [https://legislation.nsw.gov.au/view/html/inforce/current/act-1994-038_S3.2\(h\)](https://legislation.nsw.gov.au/view/html/inforce/current/act-1994-038_S3.2(h))

14. It is important to note that self-regulation occurs through Aboriginal law and custom which imposes a range of restrictions on community members including ensuring there is no waste in relation to catch, seasonal fishing, having regard to the gender of the species caught and spawning, and size limits. Self-regulation, which has been occurring for thousands of years, is a key tool in managing fisheries resources.
15. It should be recognized that Aboriginal peoples make up just over 3.4 per cent of the population³, with only a small part of that comprising of fishers. By comparison there are around 1 million recreational fishers in NSW, not including people under the age of 18 or pensioners, and a sizeable commercial fishing industry.
16. **Health and wellbeing:** Cultural fishing practices are an integral part of Aboriginal cultural, spiritual, mental and physical wellbeing. Connection to Country strengthens self-worth, cultural and spiritual connections and positive states of wellbeing.⁴ There is strong international support for the protection of Aboriginal people's rights to a customary harvest of biological resources as well as traditional knowledge associated with these resources.⁵
17. Fishing for Aboriginal people is about more than just 'the catch', it is a cultural practice, it impacts on the health and wellbeing of our people and our communities.⁶ The inability to participate in, or practice cultural fishing, without the concern of being punished, impacts on the health of our peoples and our communities.

NSWALC calls for the NSW Government to recognise Aboriginal peoples history of and ability to self-regulate fishing resources as has been done for thousands of years and allow them to do so.

The NSW Government must recognise and support Aboriginal people's cultural connection to fisheries resources and our inherent rights to practice cultural fishing.

NSW Government's commitments

18. **Closing the Gap:** The NSW Government has an obligation to meet its commitments outlined in the National Agreement on Closing the Gap.⁷ The National Agreement provides an important framework for governments to work in partnership with Aboriginal people to ensure we maintain distinctive cultural, spiritual, physical and economic relationships with water, and advance our rights and interests in water including fisheries resources.
19. The National Agreement includes four priority reforms which aim to change the way in which governments work with Aboriginal people, these are:
1. Shared decision making
 2. Building the Aboriginal community sector
 3. Transforming government organisations
 4. Data sharing⁸
20. Under Closing the Gap, the NSW Government has committed to the outcome, 'People maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters' and target, 'by 2030, a 15 per cent increase in areas covered by Aboriginal and Torres Strait Islander people's legal rights or interests in the sea'.⁹

³NSW population data 2021

⁴ [Australian Indigenous Health Bulletin : Developing an exploratory framework linking Australian Aboriginal peoples' connection to country and concepts of wellbeing](#)

⁵ Article 8(j) of the United Nations Convention on Biological Diversity

⁶ [NACCHO - definition of Aboriginal Health.](#)

⁷ <https://www.closingthegap.gov.au/national-agreement>

⁸ [People maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters | Closing The Gap](#)

⁹ <https://www.closingthegap.gov.au/national-agreement/targets>

21. The NSW Government is also committed under the National Agreement on Closing the Gap to 'reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15 per cent.'¹⁰ NSW Government representatives have noted that 'The overrepresentation of Aboriginal people in the justice system remains a true source of shame for this country'.¹¹
22. Additionally, Priority Reform 3 of the National Agreement on Closing the Gap focuses on transforming government organisations. The object of the Priority Reform Area is to make key government organisations accountable to Closing the Gap, and to make sure that government organisations and their services are culturally safe and responsive of the needs of Aboriginal people.¹² The NSW Government has committed to elements of transformation including embedding and practicing meaningful cultural safety, supporting Aboriginal cultures and eliminating racism.¹³
23. Nevertheless, despite the NSW Government's commitments to reduce incarceration rates of Aboriginal peoples, to recognise Aboriginal people's rights and interests in the sea, and despite commitments to transform the way government and its agencies work, the NSW Government continues the criminalisation of Aboriginal cultural practices.
24. By failing to commence s.21AA without regulations, the NSW Government is not making good on commitments to closing the gap. The NSW Government remains complicit in the ongoing persecution of Aboriginal people who seek to maintain our culture and cultural rights as fishers.

The NSW Government must honour its commitment to the National Agreement for Closing the Gap including delivering social, cultural and economic outcomes for Aboriginal people, which includes the commencement of s.21AA without regulations. By failing to commence s.21AA, and while prosecutions continue, the NSW Government is not making good on commitments to closing the gap.

25. **International obligations:** In 2009 Australia became a signatory to the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)¹⁴. In doing so the Australian Government has adopted the following Articles:
- Article 25: 'Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard'.*
- Article 32.2: 'states shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources'.*
26. It is a reasonable expectation that the NSW Government embeds the principles of the UNDRIP in its approach to the management of fisheries resources.

¹⁰ [National Agreement on Closing the Gap](#) (pg 31)

¹¹ <https://www.nsw.gov.au/media-releases/closing-gap-for-aboriginal-people-custody>, the Hon. Don Harwin, former Minister for Aboriginal Affairs.

¹² <https://www.closingthegap.gov.au/national-agreement/priority-reforms>

¹³ <https://www.closingthegap.gov.au/national-agreement/priority-reforms>

¹⁴ [United Nations Declaration on the Rights of Indigenous Peoples](#).

The NSW Government must embed the principles of the United Nations Declaration on the Rights of Indigenous Peoples (Article 25 and 32.2) in its approach to the management of fisheries resources.

Non- commencement of s.21AA of the FMA and the ‘intent’ of a supporting regulation

27. **Barriers to commencing s.21AA:** The NSW Government has not provided reasoning or advice for the non-commencement of s.21AA and there appears to be no reasonable barrier to the immediate commencement. The intention of the Parliament in 2009 was to ensure the Act was brought into line with other State and national fisheries legislation by recognising Aboriginal cultural fishing and that Aboriginal cultural fishing rights were recognised, protected and integrated into current and future management frameworks.¹⁵
28. During the most recent (and only) consultation in almost 10 years on this matter, DPIRD staff stated that a restrictive regulation “will protect cultural fishing”. There has been no explanation or relevant evidence to support such claims. Prosecuting a cultural practice does not support or protect cultural practices.
29. DPIRD have not been able to provide data or evidence to support the claim that fish stock will be depleted or in jeopardy, or cultural practices will be endangered if a regulation is not enforced.
30. NSWALC has consistently advocated for the recognition and provision of Aboriginal cultural fishing right including through law reform processes, inquiries and formal submission processes and in correspondence over many years.
31. In addition to the ongoing advocacy from NSWALC, AFAC was appointed under the provisions of the FMA. The AFAC is responsible for providing strategic level advice to the Minister administering the FMA on issues affecting Aboriginal fishing.¹⁶ NSWALC is represented on AFAC.
32. NSWALC has continuously advocated for the commencement of s.21AA, without regulations through our involvement in AFAC.
33. Additionally, NSWALC has over many years supported AFAC’s previous position that s.21AA be proclaimed without further delay and also without the introduction of accompanying regulations prescribing take and possession limits. In addition to this, NSWALC has supported AFAC’s position regarding the need to introduce regulations and/or amendments to the FMA which specifically exempt Aboriginal cultural fishers from all fishing related restrictions that could apply to cultural fishing activity including for example regulations relating to size, gear, method and closure.

Ongoing divisive and antagonistic approach

34. NSWALC is deeply concerned about the government’s antagonistic approach to this issue which has sought pit Aboriginal communities against each other. Rather than fostering collaboration, the government’s approach is intentionally divisive by inappropriately promoting competition over cultural rights, funding, and decision-making authority. This approach is extremely harmful and undermines self-determination and weakens collective efforts to secure land justice, cultural preservation, and economic development. True reconciliation and progress require a commitment to inclusive and transparent engagement that respects all

¹⁵ Hansard, Fisheries Management Amendment Bill, The Hon. Tony Kelly, Second Reading Speech, Fisheries Management Amendment Bill 2009

¹⁶ <https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/afac>

Aboriginal peoples and stakeholder groups, ensuring that communities are not forced into conflict but are instead supported in working together for shared outcomes.

35. During this consultation the NSW Government through the 'independent' facilitator, has made comments insinuating there are instances of Aboriginal community members overfishing, or not fishing to cultural lore off Country. These claims unsupported, defamatory and detrimental to Nation by Nation relationships. When asked about whether this is an ongoing or reported issue, it was advised it was not. NSWALC requested specific data or case evidence of this occurring and has not received a response.
36. Aboriginal peoples in NSW have continuously engaged in complex systems of cultural trade and barter that spanned across different Nations and territories. This trade network facilitated the exchange of resources, cultural knowledge, and goods such as ochre, food, tools, and ceremonial objects. These exchanges were not solely based on material goods; they also involved the sharing of spiritual and ceremonial practices, language, and traditions, which played an important role in maintaining social and kinship ties between different Aboriginal groups.¹⁷
37. The trade routes and practices were deeply intertwined with the land and its seasons, with different groups engaging in exchange depending on the availability of certain resources. For instance, coastal groups would trade fish and shells with inland groups in exchange for food, tools, or ceremonial items, such as ochre, which was vital for rituals and art. This sharing of resources and knowledge helped strengthen inter-tribal relationships and fostered cooperation among the Aboriginal peoples.¹⁸

The NSW Government must retract and apologise for divisive, unsubstantiated, misleading and defamatory statements and approaches.

Inadequacy of the Aboriginal Fishing Interim Access arrangement as a means of regulation

38. The AFIAA has been in place for more than a decade. It does not adequately provide for or protect Aboriginal cultural fishing and was only ever intended as a temporary measure.
39. It is important to note that while the AFIAA has been in place, there has been continued and increased prosecution of Aboriginal fishers.
40. NSWALC is aware of unfounded concerns raised by some non-Aboriginal stakeholders across the fishing community in relation to the supposed need for take and possession limits for Aboriginal cultural fishers.
41. NSWALC has advocated for, and has supported AFAC's recommendation, that an education and communication strategy be developed which would be based on the self-regulation of fishing activity amongst Aboriginal communities through the application of aspects of traditional law and custom and which explains that such traditional law and custom imposes a range of restrictions on community members.
42. NSWALC does not support the indefinite legislation of AFIAA which inappropriately sets take and possession limits, and which is applied in an inconsistent manner.

NSWALC does not support the indefinite legislation of the Aboriginal Fishing Interim Access arrangement which inappropriately sets take and possession limits, does not support Aboriginal cultural fishing and has resulted in Aboriginal cultural fishers continuing to be prosecuted.

¹⁷ D. Kerwin *Aboriginal Dreaming Paths and Trading Routes: The Colonisation of the Australian Economic Landscape* (2011)

¹⁸ W H. H. Barlow, in *Aboriginal Trade and Barter in New South Wales* (1906)

Proposals for the development of regulations

43. On 1 October 2015 a draft regulation was released by the Department of Primary Industries outlining daily bag/possession limits for Aboriginal cultural fishers. The NSW Government proposed regulations as a condition to commence s.21AA.
44. NSWALC submitted that a regulation was not necessary in order for s.21AA to be commenced. There is no need for concurrent commencement of s.21AA and regulation, particularly if a regulation restricts the exercise of Aboriginal cultural fishing.
45. In particular, NSWALC submitted that the draft regulation:
 - i. **Increased costs of monitoring and compliance:** Will lead to poorly targeted increased monitoring and compliance.
 - ii. **Unnecessary:** Section 21AA can be commenced without a regulation.
 - iii. **Inappropriate:** Aboriginal peoples have sustainably managed fish stocks for millennia without Government regulation. The onus will be on Aboriginal people to put forward evidence of personal, cultural and community matters to support cultural fishing.
 - iv. **Inadequate:** Limits are individual limits. This does not recognise that cultural fishing can take place for Elders, the incapacitated, and other community members, and catch sizes would need to be increased. In addition, proposed catch limits are the same as recreational fishers except for a few species.
 - v. **Inflexible:** Does not allow for variations in catch needed for customary reasons.
 - vi. **Failed to recognise** Aboriginal people's spiritual, social, cultural and economic relationship with traditional lands and waters as outlined in the *Constitution Act 1902 (NSW)*.
46. NSWALC sought a commitment from the NSW Government that:
 - i. Aboriginal cultural fishers could fish without additional restrictions,
 - ii. That Aboriginal cultural fishers would be protected from prosecution,
 - iii. That the NSW Government would work with Aboriginal people to develop alternative management options rather than imposing regulations on our cultural fishing activities, and
 - iv. That s.21AA of the FMA be commenced immediately without the introduction of regulations.

NSWALC maintains that s.21AA should be immediately commenced, without regulations. Regulations that set take and possession limits are not necessary, are inappropriate and are inflexible.

Local Management Plans

47. NSWALC's long standing position is that Local Management Plans (**LMP**) are not a substitute for commencing s.21AA, and commencing s.21AA must not be contingent upon LMPs. The Government's approach to LMPs is not accordance with NSWALC's advice and should not have any bearing on the commencement of s.21AA.
48. It is evident through the Regulations consultations that Local Management Planning is the NSW Government preferred response to cultural fishing in NSW. NSWALC is concerned regarding the slow implementation of LMPs with only two being implemented in over 20 years and an evaluation yet to be completed. NSWALC questions the effectiveness, timeliness and cost of the further roll out of LMPs. Additionally, LMPs should require a genuine partnership and recognition of self-determination and self-regulation. While the prosecution of Aboriginal cultural fisher continues, NSWALC questions how genuine partnerships and trust can be developed.

The LMP program and approach must urgently be redesigned in partnership with NSWALC, and an independent agency should oversight this.

The NSW Government must urgently clarify the efficiency and effectiveness of LMPs and their relationship to s.21AA.