

26 October 2012

Mr David Borthwick
Commonwealth Fisheries Management Review
GPO BOX 858
CANBERRA ACT 2601

By Email: fisheries.review@daff.gov.au

Dear Mr Borthwick,

REVIEW OF COMMONWEALTH FISHERIES MANAGEMENT LEGISLATION

Thank you for the opportunity to provide comment on the Australian Government's review of the *Fisheries Management Act 1991* (Cth) ("**the Act**") and fisheries management system ("**the Review**").

NTSCORP Limited ("**NTSCORP**") is funded under section 203FE of the *Native Title Act 1993* (Cth) ("**NTA**") by the Commonwealth Government's Department of Families, Housing, Community Services and Indigenous Affairs, to carry out the functions of a native title representative body in NSW and the ACT. The functions, powers, roles, and responsibilities of NTSCORP are set out in sections 203B-BK of the NTA. The definitions and conditions affecting the performance of NTSCORP's functions are contained in Part 11 Divisions 1 to 7 (inclusive) of the NTA. In summary the functions and powers of NTSCORP as defined in section 203 of the NTA are:

- Facilitation and assistance;
- Dispute resolution;
- Notification;
- Agreement making;
- Internal review; and
- Other functions (see s203BJ in particular).

This submission has been prepared by NTSCORP in order to inform the Department of Agriculture, Fisheries and Forestry ("**the Department**") of issues and concerns of Aboriginal Traditional Owners ("**Traditional Owners**") in NSW and who will be affected by changes to the Commonwealth's fisheries management regime. We hope that this submission will assist the Department to implement changes to the governing legislation that are in line with the environmental protection and conservation values, economic and social aspirations held by Traditional Owners.

Executive Summary

The Review's terms of reference seek to focus on community views about fisheries management. NTSCORP makes the following recommendations:

1. NTSCORP strongly encourages the government to actively implement international laws and conventions that uphold and promote Aboriginal fishing rights in traditional country. International laws which promote the rights of Aboriginal People to participate in the management of traditional sea country should also be implemented in legislative changes to the Act;
2. NTSCORP recommends that any legislation enacted with regard to commonwealth fisheries complies with the *Native Title Act 1993* (Cth) and the *Native Title Act 1994* (NSW) and is in keeping with the spirit of the *Aboriginal Land Rights Act 1983* (NSW) and the amendments to the *Fisheries Management Act 1994* (NSW) which recognise Aboriginal cultural fishing and the right of Aboriginal People to be involved in the management of fisheries and its resources;
3. NTSCORP strongly suggests that section 3 of the Act be amended to include the protection of Aboriginal People's right to fish in traditional country and to participate in the management of traditional sea country;
4. NTSCORP suggests that section 17 of the Act should be amended to ensure that Traditional Owners are consulted in a constructive and culturally appropriate manner in relation to the development of fisheries management plans. It is imperative that Traditional Owners who hold knowledge about sea country and marine resource management are engaged at all stages of developing fisheries management plans;
5. NTSCORP urges the Department to ensure that the interests of Traditional Owners are adequately represented on each Management Advisory Committee formed under the Australian Fisheries Management Authority ("**AFMA**");
6. Any legislation enacted or policies and procedures developed in relation to compliance and penalty processes must be culturally appropriate and operate so as not to unnecessarily contribute to the ongoing high rates of incarceration of Aboriginal People;
7. Aboriginal community consultation by the State and Commonwealth Government in relation to fisheries management and proposed marine parks estates should be undertaken in a coordinated way; and
8. Aboriginal People who engage in cultural fishing should be compensated for any detrimental impact caused by changes to the Act.

Community Consultation

NTSCORP understands that key stakeholders have been invited to provide information and recommendations to Mr Borthwick ("**the Reviewer**"). It is disappointing to note that NTSCORP was not invited to make a submission on behalf of Traditional Owners who

are also key stakeholders in relation to fisheries management. NTSCORP urges the Department and the Reviewer to take this opportunity to recognise Traditional Owners as the primary stakeholder group in relation to water and fisheries management, and to consult with peak body organisations such as NTSCORP as a matter of course. If required, NTSCORP can assist in the facilitation of consultations with Traditional Owner groups to ensure that they are conducted in a culturally appropriate manner.

NTSCORP suggests that the Department convene a meeting with relevant Traditional Owner groups to provide comprehensive information about the Review, the Reviewer and the practical effects of any recommendations arising from the Review.

At the very least, the Department is obliged to consult and cooperate with Traditional Owners affected by the changes to ensure that their '*free, prior and informed consent*' is obtained before any legislative or administrative measures relating to the management of Commonwealth fisheries is adopted.¹ This obligation arises under article 19 of the United Nations Declaration on the Rights of Indigenous People which the Australian government officially endorsed on 3 April 2009.

Recommendation 1

NTSCORP strongly encourages the government to actively implement international laws and conventions that uphold and promote Aboriginal fishing rights in their traditional country. International laws which promote the rights of Aboriginal People to participate in the management of traditional sea country should also be implemented in legislative changes to the Act.

NTSCORP is concerned that the government should be proactively legislating to implement conservation and protection principals upheld under international law; many of which complement and recognise Aboriginal Peoples' right to fish and participate in marine sea country management.

Aboriginal People in NSW have been successfully managing the marine environment and its resources for thousands of years through the ongoing transmission and practice of traditional knowledge relating to the protection and preservation of biodiversity. Traditional fishing practices contain a stewardship ethic which is core to modern methods of sustainable management and responsible fishing practices. The symbiotic relationship between traditional fishing practices and the protection of biodiversity is recognised in articles 8(j) and 10 of the Convention on Biological Diversity. Article 8(j) requires States to:

Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge,

¹ *United Nations Declaration on the Rights of Indigenous People*, opened for signature on 13 September 2007 UNDoc61/295, art 19.

innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.²

Article 10 of the convention highlights the unique opportunity that exists in pursuing the objective of sustainable management of fisheries through regulatory models which encourage Aboriginal customary use. Under article 10, States are obliged to *‘protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.’*

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides a mechanism for Australia to meet its international obligations with respect to the conservation of marine biodiversity including the ability to make regulations giving effect to the Convention on Biological Diversity.³

NTSCORP submits that the government must do more to recognise and adopt articles 8(j) and 10(c) which acknowledge the crucial role that Traditional Owner knowledge plays in environmental conservation and protection. Traditional Owners have spiritual, social and customary associations with their traditional sea country and it is crucial to Aboriginal culture that this connection be protected and recognised by the government. Not only does practicing culture contribute to the spiritual, mental and physical well-being of Traditional Owners, the recognition of the right to do so complies with international legal norms requiring States to uphold Aboriginal rights to fish. Those international obligations are as follows:

Principle	Instrument	Article
Right to manifest, practice, develop and teach traditions and customs.	United Nations Declaration on the Rights of Indigenous People	12
Right to engage freely in all traditional activities.	United Nations Declaration on the Rights of Indigenous People	25
Right to own, use, develop and control the land and territories and resource that possess by reasons of traditional ownership.	United Nations Declaration on the Rights of Indigenous People	26.2
Right to the conservation and protection of the environment and the productive capacity of lands, territories and resources.	United Nations Declaration on the Rights of Indigenous People	29.1
Right to maintain, control, protect and develop... cultural heritage,	United Nations Declaration on the Rights of Indigenous People	31.1

² *Convention on Biological Diversity*, opened for signature 5 June 1992, 1706 UNTS 79, (entered into force 29 December 1993), art 8.

³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s520.

traditional knowledge and traditional cultural expressions.		
Right to enjoy and practice culture	International Covenant on Civil and Political Rights	27
Right to cultural activity	International Covenant on the Elimination of Racial Discrimination	5(e)(vi)

Recommendation 2

NTSCORP recommends that any legislation enacted with regard to the marine estate complies with the *Native Title Act 1993* (Cth) and the *Native Title Act 1994* (NSW) and is in keeping with the spirit of the *Aboriginal Land Rights Act 1983* (NSW) and the amendments to the *Fisheries Management Act 1994* (NSW) to recognize Aboriginal Cultural Fishing and the right of Aboriginal People to be involved in the management of the Fisheries resources.

NTSCORP notes that Aboriginal Peoples' right to fish is protected under both Commonwealth and NSW State legislation.

Section 211 of the NTA provides that laws of the Commonwealth should not prohibit or restrict native title holders from '*hunting, fishing, gathering, cultural or spiritual activity... in exercise of their native title rights and interests*'.

Section 104A of the *Native Title Act 1994* (NSW) confirms that native title rights and interests, including the right to fish, cannot be extinguished by the operation of a range of State legislation including the *Fisheries Management Act 1994* (NSW) and the *Marine Parks Act 1997* (NSW).

Section 48 of the *Aboriginal Land Rights Act 1983* (NSW) acknowledges the cultural importance of hunting, fishing and gathering to Aboriginal People in NSW.⁴ Furthermore, the amendments to the *Fisheries Management Act 1994* (NSW) which were introduced in 2009 recognised Aboriginal Cultural Fishing in NSW, being 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.

NTSCORP recommends that any legislative changes to the Act should be made in line with pre-existing State and Commonwealth regimes that protect Aboriginal fishing rights.

Recommendation 3

NTSCORP strongly suggests that section 3 of the Act be amended to include the protection of Aboriginal rights to fish in traditional country and participate in the management of traditional sea country.

NTSCORP notes that the primary objective of Act is to implement efficient and cost-effective fisheries management and maximise the net economic returns to the Australian community from the management of fisheries.⁵ The secondary aim of the Act is to ensure proper conservation and management of Commonwealth fisheries.⁶

While NTSCORP supports these objectives we suggest that the protection of the right of Aboriginal People to protect, maintain and manage their traditional sea country should also be noted as one of the Act's primary objectives under section 3 of the Act.

Recommendation 4

NTSCORP suggests that section 17 of the Act should be amended to ensure that Traditional Owners are consulted in a constructive and culturally appropriate manner in relation to the development of fisheries management plans. It is imperative that Traditional Owners who hold knowledge about sea country and marine resource management are engaged at all stages of developing future plans of management.

When considering matters which have the potential to impact on the traditional culture, heritage and resource use of Traditional Owners, NTSCORP strongly encourages the government, its departments and agencies to consult with Traditional Owners. Given the breadth of knowledge held by Traditional Owners in relation to marine resources, NTSCORP submits that the Department and AFMA must conduct constructive consultations with Traditional Owner groups affected by the implementation of plans of management.

As stated above Traditional Owners have been successfully managing marine resources for generations. The utility of traditional knowledge and methods for resource and environmental management is recognised in the concept of 'Traditional Ecological Knowledge' ("TEK"). TEK is defined by Berkes et al. as '*a cumulative body of knowledge, practice and belief evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.*'⁷ Contemporary resource and environmental management has widely recognised that the inclusion of TEK is needed for more resilient and equitable resource management outcomes.⁸

Marine conservation programs incorporating TEK in the Pacific Islands have shown considerable potential.⁹ Strengths of TEK-based management include the improvement of data collection and monitoring through increased location-specific management, improved knowledge of environmental linkages and local capacity building and power sharing. As highlighted by Drew, '*community support for conservation plans consistently*

⁵ Fisheries Management Act 1991 (NSW) section 3(1).

⁶ Fisheries Management Act 1991 (NSW) section 3(2).

⁷ Berkes, F., J. Colding, and C. Folke, 'Rediscovery of traditional ecological knowledge as adaptive management' (2000), *Ecological Applications*, 10:1251–1262 at 1252.

⁸ Prober, M. Suzanne, 'Australian Aboriginal Peoples' Seasonal Knowledge: a Potential Basis for Shared Understanding in Environmental Management,' (2011) *Ecology and Society*, Vol 16. No 2. Art 12.

⁹ Drew, A. Joshua, 'Use of Traditional Ecological Knowledge in Marine Conservation,' (2005) *Conservation Biology*, Vol 19, Issue 4, pages 1286-1293.

*emerges as one of the most important factors in maintaining the plans' long-term efficacy, and programs that incorporate customary ecological management practices in their design draw more support from local peoples.*¹⁰ The inclusion of TEK should thus be seen as an asset and an opportunity in developing plans of management for Commonwealth fisheries.

NTSCORP recommends that it be mandatory for all future plans of management to identify strategies and opportunities for participation by Traditional Owners in the management of marine resources. The government must commit to supporting Traditional Owners to engage in sea country planning at a local, state and national level. Supporting and assisting sea country planning at a local level would likely lead to the development of strong working partnerships between Traditional Owners and the government which would also likely increase levels of compliance.

Supporting sea country planning recognises the importance of Traditional Owners' responsibilities and interests in ocean environments and shows a commitment to involve Traditional Owners in the economic use, conservation and management of the ocean by involving them in marine resource co-management regimes. Sea country planning has been described as a '*vehicle for Indigenous involvement in natural resource management process*' by the former National Oceans Office and should be conducted in a collaborative fashion with Traditional Owners, the government and other non-Aboriginal stakeholder groups at the table.¹¹ The government should consider elements of the Thuwathu / Bujimulla Sea Country Plan of the Lardil, Yangkaal, Kaiadilt and Gangalidda Peoples by way of example. This sea country plan provides for:

1. The implementation of a sea ranger service to enhance capacity to address contemporary land and sea management issues. This includes building a patrol vessel, providing training to the vessel's crew and negotiating with the local council for administrative support;
2. A new system of sea country zoning that adequately takes into account cultural and economic values of the Indigenous groups, including potential new protected areas;
3. Monitoring of sea country in collaboration with Customs, Quarantine, Immigration, Coastwatch, Commonwealth and QLD fisheries agencies;
4. Managing dugong and turtles for sustainable use, developing detailed mapping of sea grass beds, protected nesting sites and the production of an educational video; and
5. Benefit sharing, cultural heritage management and development of fisheries and aquaculture.

¹⁰ Ibid.

¹¹ Wylie and others, 'Sea Country Planning' (presented at AIATSIS Native Title Conference) <http://www.aiatsis.gov.au/ntru/native-title-conference/conf2004/papers/pdfs/RowanWylieSeaCountryPlanning.pdf>.

The government should also consider sea country planning mechanisms used extensively along the Great Barrier Reef, known as Traditional Use of Marine Resource Agreements (“TUMRAs”) as one particular model for incorporating Traditional Owner knowledge into sea country planning and management. Traditional Owner groups located in the Great Barrier Reef region have been supported by the Great Barrier Marine Park Authority to negotiate and develop TUMRAs with the support of the following infrastructure:

1. The establishment of an Indigenous Reef Advisory Committee which provides strategic guidance in relating to Indigenous partnerships and the application of best practice sea country planning and implementation. This committee also recommends how to facilitate partnerships and capacity building with Indigenous communities;
2. The provision of science and management workshops to Aboriginal communities;
3. The provision of compliance and monitoring training; and
4. The implementation of traditional ecological knowledge projects.

Recommendation 5

NTSCORP urges the Department to ensure that Traditional Owner interests are adequately represented on each Management Advisory Committee formed under the AFMA.

Traditional Owner knowledge and expertise of land and sea management must be explicitly incorporated into the ongoing management of Commonwealth fisheries through the on-going participation and inclusion of Traditional Owner interests on AFMA Management Advisory Committees.

Recommendation 6

Any legislation enacted or policies and procedures developed in relation to compliance and penalty processes must be culturally appropriate and operate so as to not unnecessarily contribute to the ongoing high rates of incarceration for Aboriginal People.

NTSCORP advocates that compliance processes should be introduced to enable offences by Aboriginal People to be referred to circle sentencing or youth justice conferencing and for penalties to include community based penalties such as good behavior bonds with conditions that relate to improving the marine environment.

We specifically note that we are committed to ensuring that Aboriginal People are not prosecuted for exercising their right to fish in accordance with their traditional law and custom. Compliance officers should not have authority to carry any intimidating paraphernalia.

Recommendation 7

Aboriginal community consultation by the State and Commonwealth Governments in relation to fisheries management and proposed marine parks estate and should be undertaken in a coordinated way.

NTSCORP notes the proposals announced by the Commonwealth Government in June 2012 regarding a new Commonwealth Marine Parks Reserve Network. It is intended that this Network will complement existing NSW marine parks through the seaward extension of coastal NSW and Commonwealth reserves, and the creation of new non-coastal reserves, and will have a positive impact on the protection of the environment and the promotion of biodiversity.

We would welcome initiatives by both the NSW and Commonwealth Governments to implement ongoing Traditional Owner consultation in relation to the management of Commonwealth fisheries and the Commonwealth and State marine park estate, to ensure integration between all schemes.

Recommendation 8

Aboriginal Cultural Fishers should be compensated for any detrimental impact caused by changes to the Act.

NTSCORP notes that the Commonwealth intends to implement a compensation package in order to assist commercial fishers and fishing-communities who are detrimentally affected by the proposed Commonwealth marine park network. We believe this sets an important precedent that should also be followed where Traditional Owners and their communities are detrimentally affected by changes to the Act and the future management of Commonwealth fisheries.

Notification under the NTA

The NTA sets out a regime under which Aboriginal parties, including native title representative bodies and registered native title claimants and holders, are entitled to be notified of acts, including legislative changes which may affect native title (these acts are known as 'future acts.'). The form of that notice is also prescribed under the NTA.

Section 6 of the NTA provides that the NTA extends to each external territory, to the coastal sea of Australia and of each external territory and to any water over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* (Cth).

Section 10 of the *Seas and Submerged Lands Act 1973* (Cth) provides that Australia asserts sovereignty to waters on the landward side of the baseline of the Territorial Seas, defined by the UN Convention on the Law of the Sea as being to a limit but not exceeding 12 nautical miles from the baseline, with the baseline being the low water mark.

As such, in NTSCORP's view any legislative changes made to the Act constitute a future act under the NTA and are required to be notified as such. Further, registered native title claimants must be afforded their legal procedural rights under the NTA. Depending on

the provision relied on by the government party, procedural rights for Traditional Owners may include the right to comment, to be consulted, to negotiate or to be compensated for the impact of the act on native title. Failure to comply with notification requirements can result in the act being invalid and create a compensation liability for the Commonwealth.

We thank you again for this opportunity to provide comment and we look forward to working with you in the future. Should you wish to discuss these matters further, please do not hesitate to contact . NTSCORP Solicitor on

Yours Sincerely,

Natalie Rotumah

Chief Executive Officer (Acting)
NTSCORP Limited

