

## **10 INDIGENOUS PARTICIPATION IN THE NSW FISHING INDUSTRY**

### **10.1 Indigenous Ownership of Marine Resources**

Indigenous groups in many countries are now seeking greater influence in the ownership and management of marine resources. Policies which effectively recognise the rights of indigenous Australians are central to management which provides for equitable allocation of fisheries resources on a sustainable basis.

To be effective, sustainability policies must succeed socially by working to overcome inequities and ignorance concerning indigenous peoples interests and rights in fisheries and an array of coastal and aquatic systems.

....Perhaps the major obstacle to implementing ecologically sustainable development criteria in the context of indigenous sea resources is that the indigenous sector is not generally integrated in national fisheries administration, through conventional management channels, laws and so on. Lack of integration of the indigenous sector frustrates effort to achieve "closure" and is incompatible with expressly stated aims of including all relevant user groups in resource management under the principles of ecological sustainable development.<sup>1</sup>

### **10.2 Indigenous Participation in Fisheries Management**

#### **10.2.1 Commonwealth**

Limited recognition of indigenous rights in the management of marine resources have been formalised in the *Torres Strait Fisheries Act 1984* which provides statutory recognition for the traditional way of life of indigenous people, including the unrestricted use of regional fisheries for subsistence. The *Torres Strait Fisheries Act 1984* established a Protected Zone Joint Authority which is responsible for the

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<sup>1</sup> Ecologically Sustainable Development Working Groups (November 1991). *Final Report*, NSW Fisheries, p xlii

management of several fisheries including the dugong fishery. Torres Strait Islanders have indicated that they would like greater control over the management of the commercial fisheries in the area.

In Torres Strait a continuum exists between commercial and traditional fishing, as Torres Strait islanders may practice community fishing by registering with community councils and fish caught may be either used for subsistence purposes or sold. Although current mechanisms for formal involvement in coastal management by Torres Strait Islanders are more comprehensive than elsewhere, these arrangements do not recognise Islander interests. Islanders believe that the activities of commercial fishers adversely affect the subsistence resources of island communities.<sup>2</sup>

The rights and role of Australia's remaining indigenous population in the management of marine resources is contingent on the determination and implementation of the relevant Commonwealth State and Territory Acts.

### **10.2.2 Commonwealth *Native Title Act 1993***

The common law of Australia has recognised traditional land rights since the decision of the high court in *Mabo No.2* in 1993. The *Native Title Act 1993* and the subsequent Wik decision have focussed on pastoral leases and mining rights.

Under the *Native Title Act 1993* rights in land do not equate to rights to wildlife resources. It is possible for indigenous people to have native title rights over an area but limited resource rights... On the other hand under S. 211 of the *Native Title Act 1993* it is possible to have specific resource rights without full property rights in land.<sup>3</sup>

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<sup>2</sup> Mary Bomford and Judy Caughley (Eds) (1996). *Sustainable Use of Wildlife by Aboriginal Peoples and Torres Strait Islanders*, Bureau of Resource Sciences, Canberra, p 82

<sup>3</sup> Mary Bomford and Judy Caughley (Eds) (1996). *Sustainable Use of Wildlife by Aboriginal Peoples and Torres Strait Islanders*, Bureau of Resource Sciences, Canberra p 77 ,

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As Legislators and government struggle to come to terms with the impact of native title land claims new problems have emerged in determining the validity of sea claims.

The *Native Title Act 1993* referred only to native land title but does not preclude the possibility that rights in common law in relation to the sea and its resources may exist. Indigenous ownership of the sea and its resources have not yet been recognised in either common law or statutory law. The likelihood that native title can exist and has persisted in marine environments is supported by legal commentators including the office of general counsel of the Commonwealth Attorney - General's Department.<sup>4</sup>

The determination of what impact the *Native Title Act* has had in relation to indigenous participation in the management of Australia's marine resources is contingent on the High Court's decision in relation to existing land-sea claims. The first of these test cases is being put forward for 2000km<sup>2</sup> of sea by an Aboriginal Community living approximately 200km north of Darwin on remote Croker Island. In an attempt to clarify the governments position on native title issues in general, the Federal Government has presented a controversial ten point plan. Point 8 seeks to clarify the position of the Government in regards to native sea title.

8. The ability of governments to regulate and manage surface and subsurface water, offshore resources and airspace, and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.

The commercial fishing industry is aware of the potential impact that native title claims could have on the industry and are involved in lobbying government to protect the industry. The Australian Seafood Industry Council (ASIC) has elevated its lobbying efforts to get these principles (particularly point 8) into a legislative form acceptable to the industry.

... Specifically, ASIC wants to see:

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<sup>4</sup> Mary Bomford and Judy Caughley (Eds) (1996). *Sustainable Use of Wildlife by Aboriginal Peoples and Torres Strait Islanders*, Bureau of Resource Sciences, Canberra p 82

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- confirmation of the validity of existing statutory schemes governing commercial fishing rights and aquaculture, including renewals and restrictions on native title rights developing into competing commercial rights;
- clarification and improvement of compensation provisions if native title rights involve some impairment; and
- improvement of the position in relation to onshore/offshore boundaries.<sup>5</sup>

### 10.2.3 Northern Territory

The Northern Territory and Queensland have the most formal legislation in relation to indigenous subsistence use of marine resources. The Northern Territory legislation provides Aboriginal people with the greatest options.<sup>6</sup> The 15 per cent of Australia's indigenous population that resides in the Northern Territory holds 67 per cent of Australian land under Aboriginal freehold title.<sup>7</sup> Section 53 of the *Northern Territory Fisheries Act 1995* makes provision for Aboriginal fishing stating:

Unless and to the extent to which it is expressed to do so but without derogating from any other law in force in the Territory, nothing in the 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.

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<sup>5</sup> *ASIC Bulletin*, official newsletter of the Australian Seafood Industry Council volume 3 No 2, June 1997, p 1

<sup>6</sup> Mary Bomford and Judy Caughley (Eds) (1996). *Sustainable Use of Wildlife by Aboriginal Peoples and Torres Strait Islanders*, Bureau of Resource Sciences, Canberra, p 82

<sup>7</sup> Mary Bomford and Judy Caughley (Eds) (1996). *Sustainable Use of Wildlife by Aboriginal Peoples and Torres Strait Islanders*, Bureau of Resource Sciences, Canberra, p 78

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Licensing arrangements accommodate community needs with a special category of commercial license. Technical and business assistance is provided for Aborigines wishing to engage in commercial fishing.

#### **10.2.4 Queensland**

Indigenous interests are represented under s.26.(1) of the *Queensland Fisheries Management Act 1994*, under which the Queensland Fisheries Management Authority is:

to ensure the fair division of access to fisheries resources for commercial recreational and indigenous use.

The involvement in the management process of indigenous users is also recognised through their representation on Management Advisory and Zonal Committees (MACs and ZACs). QFMA has identified four main types of indigenous interest or user groups. These are:

- 1) indigenous persons or communities who fish for traditional or customary purposes;
- 2) indigenous persons or communities who fish for recreational purposes;
- 3) indigenous community which has a nominated community resident who fishes for the whole community and supplies their non market fish needs; and
- 4) indigenous commercial fishers.

#### **10.2.5 Victoria**

Amendments to the *Victorian Fisheries Act 1995* in 1996 and 1997 resulted in the formation of the Fisheries Co - Management Council and the appointment of Fishery Committees. Victorian Fisheries has provided for Aboriginal representation on the Fisheries Co-Management Council. Consultation between the Co-Management Council, Aboriginal Affairs Victoria and regional meetings with Community Elders resulted in the following principles or guidelines for traditional use:

- the recognition of legitimate stake holding of indigenous users of coastal resources;
- that conservation and sustainability, and public safety, should be overriding planning and management considerations and may require some restriction of traditional uses;
- all resource users should have equal opportunity in consultation and involvement in coastal resource management;
- coastal resources should be generally managed for multiple uses, conflicts should be minimised and the need for priority setting between traditional and nontraditional uses should be avoided;
- laws and policies should not unnecessarily restrict or inhibit traditional uses; and
- there should be legislative exemptions where possible for traditional cultural purposes.

#### **10.2.6 South Australia**

South Australia has no formal policy or provisions under the *Fisheries Act 1982* to address indigenous interests in relation to fisheries. Aboriginal fishing interests are handled on a case by case basis through the existing management and advisory bodies structures.

#### **10.2.7 Western Australia**

Fisheries in Western Australia are managed under the *Fish Resources Management Act 1994* and the *Pearling Act 1990*. The *Fish Resources Management Act* exempts Aboriginal fishers from the licence fee required for recreational fisheries. Although the Department of Fisheries has no formal policy, it does accommodate for the interests of indigenous fishers in particular areas and for particular species. Community licenses can be applied for by recognised and established groups through submissions to fisheries. The recreational fishing advisory council has an

Aboriginal community representative to explain indigenous interests relating to recreational fishing.

### **10.2.8 Tasmania**

The *Living Marine Resources Management Act 1996* has specific provisions for Aboriginal fishing interests. The implementation of these provisions is dependent on defining what constitutes Aboriginality and Aboriginal cultural activity.

Aborigine is defined under s. 3 as;

The definition of “Aborigine” is restricted to those of Aboriginal descent who have “always been known as Aborigines”.

Aboriginal cultural activity is also defined under s. 3 as;

“Aboriginal cultural activity” as for personal use only (ie includes simple sharing but absolutely excludes sale, including barter), and as “based upon Aboriginal custom of Tasmania as passed down to” the Aborigine concerned.

Aborigines undertaking cultural activities are able to do so without a licence provided it is not detrimental to the resource and subject to the Act.

### **10.2.9 NSW: indigenous fishing rights and the *Fisheries Management Act***

The *Fisheries Management Act* does specifically recognise indigenous fishing interests and states in s(287):

This Act does not affect the operation of the *Native Title Act 1993* of the Commonwealth or the *Native Title (New South Wales) Act 1994* in respect of the recognition of native title rights and interests with respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect.

Aboriginal fishers feel that present management strategies should be modified to better accommodate the activities of indigenous fishers. Mr Butler, a South Coast beach haul fisher, described the development of Aboriginal involvement in the South

Coast beach haul fishery and the conflicts created between the present management system and indigenous practices:

The main thing that I would like to bring up is the plight of the Aboriginal people involved in the New South Wales fishing industry. Several generations back the Aboriginal people were forced by the government of the day into the beach haul fishery. It was at a time when the Aboriginal people could either pick crops by hand or go into the beach haul fisheries. No other jobs on the coast were for the Aboriginals.

At that time the reservations or missions were set up along the coast and there were boats and nets provided to the Aboriginal people in these settlements to work in the beach haul fishery. From that time the business has been handed down from father to son. The Aboriginal people who are still in this beach haul fishery have not done anything else. They have got no experience in anything else. In some cases they have got a little bit of experience doing other jobs, but, as for making a living and providing for our families, we have had no other interests.

We come to the point now where, not knowing anything else other than the beach haul fishery, we are squeezed right out of existence. We have a situation at the moment with the closure of weekend and public holiday fishing. We cannot handle this as other people in the beach haul fishery may do because, of the New South Wales beach haulers, the only people who work all year round and almost totally dependent on the beach haul fishery are on the south coast.<sup>8</sup>

Indigenous commercial and community fishers do not feel that the Act in its current form can accommodate the specialised nature of indigenous fishing practices. Mr Chapman, representing the NSW Aboriginal Land Council (South East Coast Branch), commented on the sustainability of indigenous fishing methods and the failure of management to accommodate these practices:

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<sup>8</sup> Evidence of Mr Butler, 30 Jan 1997, p 47

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Commercial fishing typically involves hauling whatever fish are there and keeping the most commercially valuable species. The immediate demands of the market do not necessarily encourage consideration of factors such as the continued existence of any species.

By contrast Aboriginal people employ a “circular” method of fishing where we fish for whatever is in season at the time. For example there are specific times of the year when prawns are plentiful and at that time of year we target prawns. It is the same with other species of fish such as mullet and so on. This method ensures sustainability of fish resources because by catching the species that are most plentiful at any given time, no species can become endangered.

...The communal and supposedly “irregular” (which we dispute) way Aboriginal people generally conduct fishing does not necessarily fit in well with a licensing scheme based on the allocation of fish quotas to individuals. The general fishing licence limitation scheme has failed to prevent the serious depletion of some species of fish.<sup>9</sup>

The multi-species, multi-method approach employed by many indigenous fisherman has made it difficult for indigenous fishers to gain the required catch history to enter restricted fisheries. Mr McAvoy, Manager of the Heritage and Natural Resources Division, Department of Aboriginal Affairs, explained the problems encountered by fishermen on the south coast of NSW with specific reference to the abalone and beach haul fisheries:

My role has been mainly prompted by concerns of Aboriginal commercial fishermen and Aboriginal people, including the Aboriginal Land Council, who are concerned regarding fisheries policies and administration in respect of abalone. The commercial fishermen's problems are that under the previous Act there were provisions for a general purpose licence.

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<sup>9</sup> D Chapman (1996). “Importance of Fish and Fisheries to Aboriginal Communities”, *Developing and Sustaining World Fisheries Resources*, 2nd World Fisheries Conference, Hancock, D A, Smith, D C, Grant, A, Beumer, J P (Eds), p 317

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The fishermen of the south coast, who are the main people affected or the people who have been communicating with me in the main, all had general purpose licences, which would allow them to go and fish in a manner which was more akin to the traditional use of the ocean.

What has happened is that, as a result, they did not have large enough catches to find a measurable quantity that would be sufficient for their catch history to allow them to participate in the new regime. These people, who have effectively been practising an extension of the traditional fisheries practices, have now been excluded from the industry and they have seen this coming as the implementation of the Act has come on.

There have been representations through Government on an agency to agency basis, requesting that some assurance be given to the Aboriginal people that provision would be available for them to participate in the industry.

There was a meeting in March 1996 between the Director of Fisheries, myself, and the south coast Aboriginal fishermen at Batemans Bay. Apart from some general discussion, the most recent contact I have had in relation to this matter was a call from an Aboriginal fisherman, commercial fisherman on the south coast, approximately three weeks to a month ago, to the effect that he had now lost his ability to participate in beach hauling, or was about to, and he had lost his ability to fish for abalone and rock lobster. Beach hauling is the main source of income for those commercial fishermen.<sup>10</sup>

Conflict between the Department and indigenous fishers has been particularly evident in the abalone industry. The high price and the full participation in the industry has led to conflicts between indigenous fishers, who regard fishing for abalone as part of their right, and commercial abalone fishers, who regard this activity as poaching. Mr Chapman, commented on the perceived inequities in the current management of the south coast abalone fishery:

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<sup>10</sup> Evidence of Mr McAvoy, 12 May 1997, pp 66-67

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In the space of approximately 15 years, Aboriginal abalone divers went from a situation where we were the only people fishing for abalone to having our traditional practices outlawed. Our current status under the current regulatory scheme is the same as any other recreational diver. We are limited to 10 abalone per diver per day while the average license holder is entitled to 9t per diver per year.<sup>11</sup>

In the absence of any formal legislative mechanism to reconcile disputes over the validity of native fishing rights, Indigenous claimants have turned to litigation rather than mediation in order to solve disputes. Justice Kirby in his judgment on the NSW court of appeal case in *Masson v. Tritton* ((1994) 34 NSWLR 572), stated that he believed that the law in Australia recognises some form of native title or traditional right of indigenous peoples in fish. The claim for native title in this case failed however because the standard of proof was not satisfied. There are at least two other cases in NSW, at Wellington and Byron Bay, in which the native title of waters is being contested. George Kailis, as Vice Chairman of the West Australian Fishing Industry Council, currently Chairman of the Native Title Committee, indicated that the legal avenues of settling resource access issues can create division and are not the ideal way to achieve a mutual recognition of the rights to marine resources.

Mr Kailis stated:

A litigious approach to discussions on the context of indigenous fishing rights has not advanced the mutual understanding. To many commercial fishers the proliferation of massive exclusive possession claims by indigenous groups with the express aim of overriding established commercial rights and activities of fishers gives rise to concern.<sup>12</sup>

The Department's submission assess the present strategy for dealing with indigenous issues and comments on areas that can be improved:

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<sup>11</sup> D Chapman (1996). "Importance of Fish and Fisheries to Aboriginal Communities", *Developing and Sustaining World Fisheries Resources*, 2nd World Fisheries Conference, Hancock, D A, Smith, D C, Grant, A, Beumer, J P (Eds), p 318

<sup>12</sup> G Kailis, (1996). *Sea Changes*, Article by George Kailis, Vice Chairman West Australian Fishing Industry Council, p 4

....the Department has generally treated all fishers equally, and no special consideration has been given to indigenous groups. While equitable this approach has had mixed results, and as a result NSW fisheries has recently internally reviewed its approach to indigenous issues. This review has identified a range of ideas for improving the way NSW Fisheries addresses indigenous concerns, and suggests in particular an approach based on improved understanding, consultation and communication between user groups. Such an approach could include opportunities for dialogue, conflict resolution, and the development of partnerships between all users about resource allocation issues.<sup>13</sup>

Indigenous representatives have indicated that they would like to play a more integral role in the management of fisheries and shift away from the perception that the interests of indigenous people and others are in conflict over resources. Mr McAvoy explained:

What needs to happen in terms of fisheries is that there needs to be perhaps an attitudinal change both in recognition of the changed circumstances within which we are operating, but secondly, I would like to get away from this idea that to do it would be good for Aboriginal people and maybe to the detriment of the Department or the industry.

The place that I would like to get to is where the Department and industry sees the involvement of Aboriginal people and participation in management as a positive thing that contributes substantially to an ecologically sustainable industry, that the experimental knowledge that Aboriginal people have, the nature of their relationship to the ocean and seas and rivers and natural landscape, is such that they can bring a perspective to the management structures that is lacking and is valuable, generally speaking.<sup>14</sup>

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<sup>13</sup> Submission 42, NSW Fisheries, p 34

<sup>14</sup> Evidence of Mr McAvoy, 12 May 1997, p 72

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### 10.3 NSW Indigenous Fishing Strategy

Steps taken by NSW Fisheries to provide a greater level of indigenous participation in fisheries management include the call for Aboriginal representation on several of the Management Advisory Committees and the employment of two Aboriginal fisheries officers and a further two Aboriginal liaison officers. In order to improve the recognition of indigenous rights, interests and needs, NSW Fisheries has created an Indigenous Policy Unit headed by an Indigenous Policy Officer:

The indigenous policy officer is responsible for ensuring improved understanding of indigenous rights needs and interests in relation to fisheries, improved accommodation of these needs in management, and coordination of sectional approaches to indigenous concerns.

The ultimate goal is the development of a policy which addresses indigenous issues consistently and sensitively.<sup>15</sup>

In 1996, the Commonwealth Department of Primary Industries and Energy invited submissions from each State and Territory for the development of an Aboriginal and Torres Strait Islander Fishing Strategy. NSW Fisheries submitted an indigenous Fisheries Strategy as a draft proposal. Subsequent to this, a refined proposal is in the process of being developed through a series of workshops. As funding becomes available it is expected that a steering committee will be established to provide a forum for discussions with the Department of Aboriginal Affairs, the NSW State Aboriginal Land Council and the State Office of the Aboriginal and Torres Strait Islander Commission.

The indigenous Fisheries Strategy proposed for NSW Fisheries emphasises community involvement and responsibility and the transfer of management skills. The strategy will be directed by a Steering Committee responsible to NSW Fisheries and will be managed internally by the NSW Fisheries' Indigenous Policy Team composed of representatives from policy, management, legal and field services. The implementation of the strategy will be dependent on a community based management structure.

The Community Management Committee will act as a locally based structure for overseeing the process on that level, and

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<sup>15</sup> *The NSW Fisherman* 1997 vol 3 No 4, p 28

for creating a local management plan outlining community aims resources and preferred strategies. This approach aims to facilitate community responsibility and control, and to encourage community commitment to the process. NSW Fisheries staff will play an important role in providing expert advice on management mechanisms.

The end result of these efforts will be, firstly a local strategy that can be used as a model for other areas and fisheries and secondly an outline of issues to be addressed in a State wide policy.<sup>16</sup>

Other initiatives being pursued by NSW Fisheries include:

1. Indigenous Employment
  - Employment of an Indigenous Community Consultant (to assist with the development of the Indigenous Fisheries strategy)
  - Employment of an Aboriginal Liaison Officer at Jervis Bay Marine Park
  - Employment of an Aboriginal Liaison Officer at Solitary Islands Marine Park
  - Employment of additional indigenous persons as fisheries officers (there are currently three Aboriginal officers)
  - Development of an indigenous employment strategy for the Department.
2. Representative and Advisory Bodies
  - Appointment of an indigenous representative to the Saltwater recreational fishing review committee
  - Aboriginal representatives on Management advisory Committees for commercial fisheries.

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<sup>16</sup> NSW Fisheries (20/3/97), *Draft Indigenous Fisheries Project Proposal*, NSW Fisheries.

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3. Research

- The relevance of indigenous traditional ecological knowledge to fisheries research is being recognised by the Department. Mechanisms for the collection and integration of this knowledge into fisheries research will be explored as part of the indigenous fisheries strategy.
- Consideration is also being given to the collection of data on the indigenous and ethnic background of NSW fisheries clients with the aim of improving the cultural sensitivity of service positions.

Indigenous groups have indicated that, as an outcome of the review process, they would like to see a management system which recognises the contribution that the indigenous communities can make to the sustainable management of stocks. To effect a management regime which provides equity to indigenous users within a sustainable framework, fisheries management must focus on the benefits that can be derived from incorporating indigenous practices with current management strategies.

George Kailis, former Vice Chairman of the West Australian Fishing Industry Council and present Chairman of the Native Title Committee stated:

There are commonalities of interest between commercial fishers and indigenous groups. Both groups have an interest in the further development of Australian law to recognise private interest and property rights in fisheries, whether these are held by individuals or communities. Where these rights are lost to third parties through government intervention fair compensation should ensue. In relation to resource management both groups have an interest in convincing government to move away from heavy handed command and control bureaucratic systems to those allowing a greater degree of local management. At times it appears that government has a stake in conflict between user groups as it justifies extensive intervention of the state.<sup>17</sup>

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<sup>17</sup> G Kailis (1996). *Sea Changes*, Article written by the Vice Chairman of the Western Australian Fishing Industry Council, p 6

Mr McAvoy indicated that community licenses would provide a means of regulating existing practices that are causing conflict between indigenous communities and NSW Fisheries:

In other States there is provision for Aboriginal community licences, which I think would be a fairly basic first step. The form that they may take would vary from what is going on in other States, but it is a form of licensing which allows people to fish outside the recreational bag limits in a manner that would provide for community sustenance, and some barter and trade, without going into sale. I think that is what is happening anyway. That is what has happened since time immemorial.<sup>18</sup>

The Standing Committee recognises the special needs of indigenous fishers and the social and environmental benefits to be derived through providing for traditional “circular” multi-species fishing methods. The Standing Committee considers that laws and policies should not unnecessarily restrict or inhibit traditional indigenous fishing, including seasonal, geographic or species-specific practices. This will require the *Fisheries Management Act 1994* to be amended to accommodate the following activities:

- recreational fishing by indigenous persons;
- non-commercial / traditional fishing on behalf of a whole indigenous community; and
- commercial fishing by indigenous persons.

Accordingly, the Standing Committee recommends:

### **Recommendation 29**

**That Aboriginal community licences be introduced and that “general purpose licences” be developed to accommodate the indigenous fishing methods of the Aboriginal commercial fishers in the assessment of catch history.**

**NSW Fisheries should review catch history requirements for indigenous fishers who have been excluded under current restricted fisheries regulations.**

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<sup>18</sup> Evidence of Mr McAvoy, 12 May 1997, p 72

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**Recommendation 30**

**That NSW Fisheries establish an Indigenous Resource Management Committee as a priority. This committee should be constituted under the *Fisheries Management Act 1994*. The Indigenous Resource Management Committee should have representation from the following stakeholders:**

- **NSW Aboriginal Land Council;**
- **Department of Aboriginal Affairs;**
- **Aboriginal and Torres Strait Islander Commission (NSW);**
- **Indigenous commercial fishers;**
- **Indigenous recreational fishers;**
- **NSW Fisheries; and**
- **Nature Conservation Council.**

**The Committee should aim to progress indigenous access to fisheries and provide representation to RACAC (see Recommendations 31 and 32).**