



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IIC:CBvk020823

2 August 2023

The Hon Tara Moriarty MLC
Minister for Agriculture
52 Martin Place
SYDNEY NSW 2000

By online form

Dear Minister,

Commencement of Schedule 1 of the *Fisheries Management Amendment Act 2009*

The Law Society of NSW writes to raise our ongoing concerns in respect of the non-commencement of Schedule 1 [27] of the *Fisheries Management Amendment Act 2009* (NSW) (**2009 Act**), and to urge the Government to commence Schedule 1 without further delay.

By way of background, we note that the 2009 Act created a new objective that “recognises the spiritual, social and customary significance to Aboriginal people of fisheries resources and protects and promotes the continuation of Aboriginal cultural fishing...The changes proposed in this bill mean that for the first time Aboriginal people’s customary association with the fisheries resource is formally recognised in the *Fisheries Management Act*”.¹

We also note that every clause in the 2009 Act, including those pertaining to greater enforcement and penalties, with the exception of clause 27 (containing s 21AA), commenced on 1 April 2010.²

This issue is not an insignificant one, that continues to impact on the ability of Aboriginal people to exercise cultural and native title rights, in a way that is inconsistent with Closing the Gap. We note reports that while Aboriginal people make up 4 per cent of people living on the South Coast, they account for 80 per cent of jail terms for fisheries offences since 2009.³ We also note that, as recently as May 2023, Aboriginal people continue to be subject to prosecution and conviction under the *Fisheries Management Act 1994* (NSW).⁴

¹ Fisheries Management Amendment Bill 2009; New South Wales, Parliamentary Debates, Legislative Assembly, 26 June 2009 (Lylea McMahon).

² *Fisheries Management Amendment Act 2009 (No 114)* (NSW); Professor Marie Bashir AC, *Commencement Proclamation under the Fisheries Management Amendment Act 2009 No 114* (No 2010-112, 1 April 2010).

³ NSW Council for Civil Liberties, Nature Conservancy Council and Oxfam Australia, “NSW Government must suspend prosecutions of Aboriginal cultural fishers,” joint media release, 20 October 2021, online [here](#).

⁴ H Tregenza, “Court rejects native title defence for NSW Aboriginal man over illegal abalone haul,” *ABC News*, 16 May 2023, online [here](#).

These matters have been canvassed fully in the NSW Parliamentary *Inquiry into the Commencement of the Fisheries Management Amendment Act 2009*. The ongoing unreasonable burden on Aboriginal individuals and communities caused by the non-commencement of Schedule 1 are detailed in the inquiry report, and in the submissions and other evidence presented to the Legislative Council Portfolio Committee No 4.

The inquiry report tabled in November 2022⁵ made the following four findings:

Finding 1

That the NSW Government has failed to effect the will of the Parliament by not commencing Schedule 1 of the *Fisheries Management Amendment Act 2009* to make special provision for cultural fishing.

Finding 2

That the NSW Government's implementation of a local management approach to make provision for cultural fishing has been too slow and lacks the full support of stakeholders.

Finding 3

That the regulatory and policy settings applied by the NSW Department of Primary Industries Fisheries mean it is unable to differentiate between trade and barter, as part of cultural fishing practice, and being in possession of fish for the purpose of a commercial activity without a licence.

Finding 4

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.

The inquiry report went on to make a number of recommendations, most relevantly recommendation 4.

Recommendation 4

That the NSW Government commence Schedule 1 of the *Fisheries Management Amendment Act 2009* by 30 June 2023, and take immediate steps to develop a supporting regulation in consultation with Aboriginal communities and peak bodies, and other stakeholders.

Recommendation 4 was supported not only by all members, Government and non-Government, of Portfolio Committee No.4, which conducted the inquiry, but also by the Government in its tabled response to the inquiry report in February 2023. The Government response noted, among other things, that work was underway in an effort to have section 21AA and supporting regulations commence by 30 June 2023.⁶

Now that 30 June 2023 has passed without the commencement of Schedule 1, we would be grateful for any information on any further work undertaken to support a commencement, and whether a commencement date has been set. Notwithstanding the stated aim of the then

⁵ Report No 55 - PC 4 - Customer Service and Natural Resources - Commencement of the Fisheries Management Amendment Act 2009, 7 November 2022, online [here](#).

⁶ *Government response – Report No 55 – PC 4 – Customer Service and Natural Resources – Commencement of the Fisheries Management Amendment Act 2009*, 7 February 2023, online [here](#).

Government to support the commencement of Schedule 1 of the 2009 Act with regulations, the Law Society is of the view that there is no barrier in the legislation to its immediate commencement.

Thank you for your attention. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'CBanks', written in a cursive style.

Cassandra Banks
President