

PART VIII

Customary Hunting, Fishing and Gathering Rights

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Customary Hunting, Fishing and Gathering Rights

The ability to engage in customary harvesting of natural food resources is important to Aboriginal people in myriad respects. ATSIC has stressed that:

Hunting, fishing and gathering are fundamental to our peoples' contemporary and traditional cultures, help to define our identity, and are at the root of our relationship to the land. Hunting, fishing and gathering continue to provide a significant part of the diet of many of our people, and also provide a range of raw materials. As cultural activities hunting, gathering and fishing are important vehicles for education, and help demonstrate to our succeeding generations our understandings of our place in the world.¹

Over the past two decades a number of reports have been published on the subject of Aboriginal harvesting of natural food resources, many providing comprehensive recommendations to governments for the recognition of customary law rights of Aboriginal people. In particular, the past three years have seen some considerable focus in Western Australia on issues relating to Aboriginal hunting and fishing rights, conservation and land access. However, as EM Franklyn QC has observed in relation to fishing rights, 'there seems to have been few significant outcomes for Aboriginal people'.²

It has earlier been mentioned that despite numerous government consultative processes, reports and papers, the expectations of Aboriginal people (which are legitimately raised by this attention) are consistently dashed by ultimate inaction. The Commission recognises that the customary harvesting of natural food resources is an area where this is particularly prominent, yet there appears to be little justification for continued disregard

of the benefits of improved legislative recognition of customary law harvesting rights.

It should be noted that, in the following discussion of harvesting rights, the Commission does not attempt to provide a comprehensive review of the law in this area: other significant reviews have done that.³ Nor do we intend to usurp the recommendations of recent reports into these areas which provide dedicated, expert analysis of relevant issues. Rather, by the following examination and accompanying proposals, the Commission seeks to draw attention, once again, to the need for law reform in this area and, for the sake of completeness of this reference, to stress the significance, for the Aboriginal peoples of this state, of the connection to land forged by customary harvesting.

Principles of Traditional Aboriginal Harvesting of Natural Food Resources

Customary Law Entitlements to Hunt, Fish and Gather

Under customary law, a person's entitlement to fish, hunt animals, gather vegetable foods or exploit natural resources (such as water, firewood or minerals) is consequent upon their degree of connection to 'country'. Peter Sutton contends that there are two types of rights to country: core and contingent.⁴ Core rights include the right to speak (authoritatively) for country, the right to acquire and transmit interests over the area, as well as certain ceremonial rights. Core rights are exercised only by traditional owners.

1. ATSIC, *Aboriginal and Torres Strait Islander Commission Environmental Policy* (1994) 5, as cited in Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 25.

2. Franklyn, *ibid* 7.

3. See, in particular: Franklyn, *ibid*; ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Department of Conservation and Land Management, *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*, Consultation Paper (July 2003); Aboriginal Access And Living Areas Working Group, *Aboriginal Access And Living Areas Pastoral Industry Working Group* (Perth: Department of Planning and Infrastructure, September 2003); National Indigenous Fishing Technical Working Group, *Recommended Pathways Matrix* (National Native Title Tribunal, March 2004); National Indigenous Fishing Technical Working Group, *The Principles Communiqué* (National Native Title Tribunal, 2005); and Davies J, Higginbottom K, Noack D, Ross H & Young E (hereafter cited as Davies et al), *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999).

4. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 23.



Contingent rights are interests that flow from the core rights and are exercised, or bestowed on others, by traditional owners. These rights include the right to access country; the right to hunt, fish and exploit natural resources; the right to erect infrastructure or reside on the land; and the right to accumulate (and in certain circumstances, transmit) cultural and spiritual knowledge of country. Sutton explains:

[A] right to fish and hunt ... may be held under a standing licence on the grounds that one is married to a 'traditional owner', or is a long-term resident on the land, or on some other contractual or historical grounds. It might also flow from being a primary land-holder under customary law, that is, from being a holder of core rights. In all cases, however, the right to fish, or hunt, or live on the country, is a contingent one, because use rights are not self-sustaining.⁵

It will be clear from the above that entitlements to harvest natural food resources may be held as of right (as a traditional owner) or as a 'licence' (granted by a traditional owner) of a perpetual or periodic kind. Neighbouring clans might also exchange 'licences' to travel through and access certain resources on each other's land and sea territories, allowing for variation in diet and a means of survival if a clan's country was adversely affected by drought or other natural phenomena.⁶

Restrictions on entitlements

Sutton notes that restrictions would sometimes be placed on entitlements to harvest natural resources whether by licence or within the traditional owner group. According to Sutton restrictions would usually attach to immobile or non-renewable resources (such as stone and minerals), as well as resources with specific medicinal properties (such as naturally occurring narcotic plants) and resources of a 'precious or thinly distributed kind' (such as certain ground tubers and trees used for making spears or ceremonial items).⁷ Restrictions might also be enforced in respect of the persons permitted to harvest certain foods. Athol Chase reports that:

[I]n parts of Cape York dugongs could be approached, killed and eaten only by older initiated men. For women, youths and children even to be in contact with water which had dugong grease floating on it meant that they would become very ill. People in these categories could not even touch equipment to be used in hunting dugongs for fear that illness and misfortune would result.⁸

In some areas certain rituals had to be performed before the taking of natural resources, or the method of catching game or fish may be strictly prescribed.⁹ Certain restrictions might be placed on the time of day one

5. Ibid.

6. McKnight D, *People, Countries and the Rainbow Serpent: Systems of classification among the Lardil of Mornington Island* (Oxford: Oxford University Press, 1999) as cited in *Lardil Peoples v State of Queensland* [2004] FCA 298, [85]. Such permissions were subject to good relations between the tribes and may also be subject to certain conditions: see Sutton, *ibid* 4 & 26.

7. Sutton, *ibid* 33 and accompanying footnotes.

8. Chase A, 'Dugongs and Australian Indigenous Systems' cited in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [884].

9. For example, Sutton reports that in Wik country there was a place where spearing of fish was permitted 'but only if the man held a baler shell on his head and stood on one leg at the same time'. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 32.

Although traditional Aboriginal groups did not practise confined agriculture, certain methods of resource conservation were used which have parallels with colonial practices.

could collect water or there may be prohibitions against taking certain species at certain times of year.¹⁰ Hunting in places of sacred significance (such as in the vicinity of caves where ceremonial objects were stored or near burial grounds) was often forbidden. Indeed, it was not uncommon in Aboriginal society for entire sections of country to be closed to hunting or foraging activity for a substantial period following a death.¹¹

Restrictions on consumption

Restrictions or taboos would also attach to the consumption of certain foods by certain members of a tribe. For example, in some areas it is taboo for a person to consume food that is representative of that person's totem.¹² In others, a person's age, status, gender or health may dictate the types of foods permitted to be consumed.¹³ Food taboos also followed some deaths of tribal members. In particular, widows would be prohibited from consuming certain foods for long periods of time following the death of their husbands.¹⁴ Consumption of certain species may also be regulated by the species' maturation stage (or breeding status), indicating a keen sense of the need to conserve certain food resources.¹⁵

Harvesting Resources and Conserving Country

Entitlements to hunt, fish or forage are not completely untrammelled. Those who possess the right to harvest

resources are also vested with obligations toward the land.¹⁶ As Sutton says:

To forage as of right is also to forage 'properly'. Such rights carry responsibilities with them. To forage 'properly' is to carry out only what one has the right to do, something which arises from one's standing in relationship to the country and its owners. Foraging 'properly' is also partly a matter of how it is done, where it is done, at what time it is done, who is doing it, and with whom.¹⁷

Responsible harvesting of natural food resources often implies a conservation ethic for Aboriginal people.¹⁸ Many of the restrictions on harvesting mentioned above would likely have evolved from an intimate knowledge of the land and a realisation of the need to refrain from taxing certain resources to ensure regeneration and sustainability. Although traditional Aboriginal groups did not practise confined agriculture, certain methods of resource conservation were used which have parallels with colonial agricultural practices. In its report on the recognition of Aboriginal customary laws, the ALRC cited examples of practices such as the germination and transplanting of trees, the regeneration of tuber stock, the distribution of seeds, the rotation of fishing sites and the use of controlled burning.¹⁹

Along with their obligation to conserve country in a practical sense, Aboriginal people were required to perform complex rituals to enhance the reproduction of certain species,²⁰ to replenish or purify water supplies and to pay 'respect to the propagative powers of ancestral beings'.²¹ These ceremonial activities were

10. Ibid. See also Northern Territory Government, *Indigenous Fishing Status Report 2003*, Fishery Report No 78 (October 2004) 1 which states that 'Aboriginal customary fishing and hunting is done according to seasons, which allows some species to be targeted when they are in abundance and in prime condition'.

11. Sutton, *ibid.*

12. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [884], referring to the Lardil peoples of Mornington Island.

13. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 32.

14. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 389; Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 85.

15. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 32.

16. Ibid 31–32.

17. Ibid 32.

18. Ibid.

19. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [883].

20. See Altman JC, *Hunter-Gatherers and the State*, as cited in ALRC, *ibid* [882].

21. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development (1999) 15.

considered an integral part of the responsibility of the traditional owners to care for the land.²² The act of foraging itself was also ‘an overt part of caring for country’.²³ It embodied an intimate relationship with the land and facilitated the transmission of traditional ecological knowledge and land management practices to children.²⁴

The Role of Hunting, Fishing and Gathering in Contemporary Aboriginal Society

Although few Aboriginal people today would depend exclusively on hunting and gathering of natural food resources for subsistence, these activities continue to define Aboriginal peoples’ fundamental connection to the land.²⁵ Davies *et al* have noted that harvesting ‘expresses the vital linkage of [Aboriginal] people to their country, reinforces their spiritual beliefs governing their existence and responsibility for their land and provides a means for passing on social and cultural knowledge to their children’.²⁶ Harvesting can also be seen as a manifestation of self-determination²⁷ and importantly, in relation to the current reference, harvesting has a strong connection with the maintenance of Aboriginal customary law in contemporary society:

Hunting ties the past to the present, but it is not simply the survival of some prior subsistence gambit ... it is an aspect of the law ... Just like ritual, hunting affords men the opportunity of making claims regarding their position and right to authority in the group ... To hunt, then, is, as with ritual participation, to follow the law, demonstrate its great potency, and guarantee its continuance.²⁸

As was seen earlier in the context of discussion of Indigenous cultural and intellectual property,²⁹ harvesting of natural resources also has economic significance to Aboriginal peoples. This significance may be found in the provision of an economic base for a community by exploitation of traditional plant or mineral knowledge or in relation to day-to-day subsistence. Regrettably, there is little data to enable quantification of the economic significance of subsistence harvesting to Western Australian Aboriginal peoples,³⁰ or indeed of the extent to which harvesting of bush foods occurs today.³¹ However, studies undertaken in some discrete Aboriginal groups in Northern Australia, Cape York and the Torres Strait indicate that subsistence harvesting contributes significantly to the diets of some Indigenous people and that this has a correlative positive economic impact on incomes.³² Small-scale bartering or exchange of harvested foods can also add to the local economy, as well as introduce some variety to the diets of Aboriginal people.

But perhaps the most important consequence of subsistence harvesting is its direct health benefits for Aboriginal people. The consumption of fish, wildlife and other bush foods can enhance the nutritional values of diets that might otherwise consist of processed store-bought foods with high fat, sugar and sodium contents. The act of harvesting also encourages physical exercise that can be undertaken in a social way, enhancing social and cultural wellbeing. It has been noted that many of the diseases prevalent in the Aboriginal population—such as heart disease, diabetes and obesity—would benefit from a more varied and nutritionally sound dietary intake and increased exercise.³³ For these reasons alone, the rights of Aboriginal people to subsistence harvest (where there are no competing conservation priorities) should be recognised and encouraged.

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22. Vaarzon-Morel P, *Warlpiri Women's Voices: Our lives our history* (Alice Springs: IAD Press, 1995) 6.
 23. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 14.
 24. *Ibid* 14–15.
 25. See *ibid* 19 & 37.
 26. *Ibid* 38.
 27. English AJ, ‘Terrestrial Hunting and Gathering by Aboriginal People in New South Wales’ (1998) 14 *Environmental and Planning Law Journal* 437, 439.
 28. Sackett L, ‘The Pursuit of Prominence: Hunting in an Australian Aboriginal community’ (1979) as cited in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [882].
 29. For instance in relation to the significant economic opportunities attaching to ‘bioprospecting’ of plants and natural materials on the basis of traditional Indigenous medicinal knowledge. See Part VI, ‘Biotechnological Research and Indigenous Intellectual Property in the Regulation of Resources’, above pp 325–28.
 30. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38; English AJ, ‘Terrestrial Hunting and Gathering by Aboriginal People in New South Wales’ (1998) 14 *Environmental and Planning Law Journal* 437, 440.
 31. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [887].
 32. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38–39.
 33. *Ibid* 39.

Recognising Aboriginal Customary Laws in Relation to Harvesting of Natural Food Resources

The call for recognition of Aboriginal customary law rights to hunt, fish and gather is clearly grounded in the status of Aboriginal people as 'first Australians'. The continuing existence of these rights has been recognised at common law as an incident of native title; although there has been little success in gaining common law recognition of hunting and fishing rights as usufructuary rights distinct from any recognised title in land.³⁴ The primary reason for this is the existence of legislation covering most areas where Aboriginal custom might otherwise be relied upon to found a common law right.³⁵ In these circumstances it is desirable that recognition of customary law harvesting rights include legislative recognition.



Issues Raised in Relation to Legislative Recognition of Aboriginal Harvesting Rights

Purpose of harvesting

Subsistence use

Because of the difficulty of preserving and storing foods under bush conditions, traditional Aboriginal people would usually harvest only the food that they required for their subsistence.³⁶ However, with the development of refrigeration and preservation techniques, contemporary Aboriginal people have the capacity to harvest more food than is required for their immediate consumption. An issue commonly raised in relation to legislative recognition of Aboriginal harvesting rights is whether such recognition should be restricted to subsistence harvesting alone.

Davies *et al* suggest that most contemporary Indigenous hunting, fishing and foraging activity is for

subsistence use of food but that this also includes food that is traded or gifted 'according to [the person's] social and spiritual rights and responsibilities'.³⁷ These responsibilities to kin and obligations under Aboriginal customary law in relation to harvesting food for ceremonial purposes prompted the ALRC's recommendation that recognition involve a 'broad notion of subsistence'.³⁸ The ALRC argued that Aboriginal people were sustained by the land in ways other than simple nutrition and that these other traditional uses of natural food resources should be taken into account in recognition of Aboriginal customary law in this area.³⁹ The Commission agrees with this conclusion.

Commercial use

Traditional harvesting included elements of barter and exchange within an Aboriginal group and, in some cases, between groups. For example, an intended husband would gift food to his promised bride's family (usually in a different group) in exchange for the agreement to marry. Food would also be exchanged for services (such as the manufacture of a spear or canoe to order, or assistance in hunting), goods (such as objects or other types of food) and rights (such as access to waterholes or mineral deposits).⁴⁰ Although, as mentioned above, this trade in food was usually bound up in kinship obligations or in the Aboriginal culture of reciprocity,⁴¹

34. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [62].

35. *Ibid.*

36. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 99. Some foods, such as wild plums, were able to be dried and stored in holes for periods of weeks.

37. Davies *et al*, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38.

38. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [975] & [1001].

39. *Ibid* [975].

40. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 110–11.

41. For further discussion on this aspect of Aboriginal culture see Part VI, 'The existence of Aboriginal contractual arrangements', above p 274; and Peterson N, 'Demand Sharing: Reciprocity and the pressure for generosity among foragers' (1993) 95 *American Anthropologist* 860.

the Commission recognises that in the contemporary context such trade might be considered to be evidence of commercial application of natural food resources.

The combination of subsistence and trade use of harvested foods, fauna and flora in traditional Aboriginal societies makes the legislative recognition of customary harvesting rights particularly difficult. A submission to the ALRC's 1986 inquiry by the then Western Australian Director of Fisheries and Wildlife gave voice to concerns relating to the potential of commercial exploitation of legislative recognition of traditional harvesting rights.

The care that has been taken in Western Australia in consideration of Aboriginal hunting rights stems from the dual need to recognise traditional and customary practices and at the same time to ensure that people of Aboriginal descent who have adopted European values do not abuse their privileges to the detriment of the overriding interests of conservation. There are cases on record of Aboriginal people involved in extensive parrot nest-robbing, of being exploited by aviculturalists to catch birds on the aviculturalist's behalf and of claiming exclusive rights to take flora, clearly for commercial purposes. The realities of the situation of the tribal and semi-tribal Aboriginal people have nearly total freedom to take wildlife for traditional purposes in this State ... The basic problems concern neither philosophy nor the wording of legislation. They centre on the problem of distinguishing between Aboriginals acting from traditional motives and those who use [legislation] to 'legitimise' clearly illegal activities.⁴²



Taking these concerns into account, the ALRC concluded that a distinction should be drawn between hunting, fishing and foraging for consumption within 'local family or clan groups (which should be regarded as traditional even though elements of barter and exchange are present) and trade, exchange or sale outside the local community, which should be treated in the same way as other commercial dealings with the species in question'.⁴³

Methods of harvesting

Traditional Aboriginal people employed myriad tools and techniques for the harvesting of food. For example, spears or lines with bone or wooden hooks were used for river-fishing; poison (extracted from noxious plants) was sometimes used for billabong fishing; while harpoons and rafts or canoes would be used for open sea fishing.⁴⁴ In some areas Aboriginal people would build stone barriers into the sea to trap fish with the receding tide.⁴⁵ Large game was mostly hunted with spears and, less frequently, with boomerangs or the use of camouflaged pits.⁴⁶ Reptiles and small marsupials were hunted with the use of clubs or sticks, while stone axes were used to chop wood and to extract honeycomb from hollow trees.⁴⁷ Vegetable foods were collected in dilly bags woven from grasses or pandanus fibre, and digging sticks were used to unearth yams and edible roots.⁴⁸

Although there are probably still some Aboriginal people that employ entirely traditional hunting and fishing methods, most have adopted more efficient contemporary tools such as firearms, nylon fishing lines, nets, boats and vehicles. In many cases, and as a direct result of colonialism, the knowledge of how to manufacture and use traditional hunting tools has been irrevocably lost. In these circumstances to insist on the exercise of Aboriginal harvesting rights only by use of traditional methods means effectively to deny Aboriginal people their customary rights to harvest natural food resources.⁴⁹ For this reason the ALRC recommended that 'in determining whether an activity is "traditional", attention should be focused on the *purpose* of the activity rather than the method'.⁵⁰ The appropriate

42. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [976].

43. *Ibid.*

44. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 100–101.

45. *Ibid.* 101.

46. *Ibid.* 100.

47. *Ibid.*

48. *Ibid.* 100–101.

49. See discussion in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [977].

50. *Ibid.*

To insist on the exercise of Aboriginal harvesting rights only by use of traditional methods means effectively to deny Aboriginal people their customary rights to harvest natural food resources.

issues are, therefore, whether the harvesting was undertaken for local consumption or ceremonial purposes and whether the person was genuinely exercising his or her rights under Aboriginal customary law.

Proof of traditional harvesting rights at common law

The question whether a person is genuinely exercising an Aboriginal customary right to harvest natural food resources is dependent at law upon proof of those rights. As mentioned earlier, the customary right to fish, hunt or gather has never been accepted in Australia as a distinct usufructuary right divorced from a full determination of native title at common law.⁵¹ In *Mason v Tritton*⁵² the question of the burden of proof of a native title right to fish was examined. In that case, an Aboriginal man had been charged with taking more than the permitted quantity of abalone in breach of fisheries regulations. In his defence against those charges the man argued that he was exercising a traditional customary right to fish that had been exercised by his Aboriginal ancestors 'since time immemorial' without interruption.⁵³

Kirby P (as he then was) set out the 'exacting nature of the evidential burden'⁵⁴ required by the High Court's decision in *Mabo v Queensland [No 2]*⁵⁵ to prove such a claim for common law native title:

- that traditional laws and customs extending to the 'right to fish' were exercised by an Aboriginal

community [in the relevant locality] immediately before the Crown claimed sovereignty over the territory;

- that the [person exercising the rights] is an Indigenous person and is a biological descendant of that original Aboriginal community;
- that the [person exercising the rights] and the intermediate descendants had, subject to [proof of a substantially maintained connection with the land], continued, uninterrupted, to observe the relevant traditional laws and customs; and
- that the appellant's activity or conduct in fishing ... was an exercise of those traditional laws and customs.⁵⁶

Kirby P stressed that evidence of alteration or change to traditional ways was not necessarily fatal to the claim for native title rights;⁵⁷ however, he noted that the claimant would only enjoy native title to the extent that the traditional customs and laws are 'currently acknowledged and observed'.⁵⁸

The difficulty of a person (or, more likely, an Aboriginal group) being able to fulfil the very onerous requirements for proof of a common law customary usufructuary right was also noted by Priestly JA in the same case.⁵⁹ He suggested that the best way to pursue claims to customary law rights was not through the common law, but by virtue of a full determination of native title under the *Native Title Act 1993* (Cth) which, by s 223(2), 'puts beyond doubt the inclusion of native title hunting, gathering or fishing rights and interests within the meaning of native title'.⁶⁰

51. *Mason v Tritton* (1994) 34 NSWLR 572, 597 & 600 (per Priestly JA). However, customary rights independent of title to land or sea have been recognised at common law by courts in Canada. See for instance: *R v Isaac* (1975) 13 NSR (2d) 460 where a right to use reserve land and exploit its resources was recognised; and *R v Taylor* (1982) 62 CCC (2d) 227 where continuing customary hunting and fishing rights were found to exist over land previously ceded to the colonists by treaty. It is perhaps important to note that Aboriginal rights were given constitutional protection in 1982 by s 35(1) of the *Constitution Act 1982* (Canada). Recently the Supreme Court of Canada confirmed that these constitutionally protected rights included traditional hunting, fishing and gathering rights: *R v Powley* [2003] SCC 43.

52. (1994) 34 NSWLR 572.

53. *Ibid* 595–96.

54. *Ibid* 584 (per Kirby P).

55. (1992) 175 CLR 1.

56. *Mason v Tritton* (1994) 34 NSWLR 572, 584 (per Kirby P).

57. Victoria Williams notes that the 'courts have accepted the changing nature of Aboriginal traditional laws by allowing defendants to rely upon a native title defence [existing in legislation] even where the activity had not been undertaken strictly in the traditional manner. In *Campbell v Arnold* (1982) 56 FLR 382 the fact that the defendant had used a firearm to hunt was not fatal to his claim that he was acting [in] a traditional manner'. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 1 (December 2003) 63.

58. *Mason v Tritton* (1994) 34 NSWLR 572, 583 (per Kirby P).

59. *Ibid* 600 (per Priestly JA).

60. *Ibid*.

In *Derschaw v Sutton*⁶¹ the Western Australian Court of Criminal Appeal relied upon the reasoning of Kirby P in *Mason v Tritton* in relation to the extent of evidence required to prove a native title right at common law. In *Derschaw* the Aboriginal appellants were charged with contravening fishing regulations, having taken by a prohibited means (nets) a large number of fish to feed those attending the funeral of an important community member. The appellants argued that once a claim to a customary right to fish had been raised, 'the onus was on the prosecution to negative the claim, there being no obligation on the defendant [appellant] to raise a reasonable doubt'.⁶² The Court held that the appellants had adduced insufficient evidence to support the establishment of the right as a native title right pursuant to the decision of the High Court in *Mabo* and as such the evidence was not enough to raise a reasonable doubt as to their guilt.

These cases outline the difficulty of proving a common law case for recognition of traditional harvesting rights, whether as a defence to a criminal charge or otherwise.⁶³ In the Commission's opinion these decisions serve to underline the need for adequate legislative protection of those rights.

Current Legislative Recognition of Aboriginal Harvesting Rights in Western Australia

Aboriginal rights to hunt, fish and forage have been recognised by statute since the early days of colonial government in Western Australia.⁶⁴ The following sets

out the current statutory provisions that have direct relevance to the customary usufructuary rights of Western Australian Aboriginal people. None of these statutes limit or extinguish the usufructuary rights established by s 211 of the *Native Title Act 1993* (Cth) in relation to land that is the subject of a native title determination.⁶⁵

Hunting and Gathering

Under the *Wildlife Conservation Act 1950* (WA) it is an offence to take protected fauna (whether from private land or Crown land) without a licence. It is also an offence to take protected flora from Crown land without a licence or from private land without the permission of the occupier. A fine of \$4,000 applies for any breach of the Act and that fine is increased to \$10,000 for the taking of protected fauna⁶⁶ and for the taking of rare flora.⁶⁷

Section 23 of the *Wildlife Conservation Act 1950* (WA) permits persons of Aboriginal descent to engage in hunting and foraging (of fauna and flora) on Crown land or any other land that is not a nature reserve or wildlife sanctuary⁶⁸ for the purposes of providing food for that person and his or her family, but not for sale.⁶⁹ This exemption is subject to certain restrictions such as the need to gain consent from the occupier of occupied lands, including private land. It is also subject to qualification, or even indefinite suspension, where the Governor considers that any species of flora or fauna taken under the authority of this section are in danger of becoming unduly depleted or that the rights protected by the section are otherwise being abused.⁷⁰

61. (1996) 17 WAR 419.

62. *Ibid.*

63. It is worth noting here that the right of indigenous peoples to practise their culture and customs under Article 27 of the *International Covenant on Civil and Political Rights*, was raised in argument as a defence to an offence against Tasmanian fisheries regulations in *Dillon v Davies* (1998) 156 ALR 142. However the applicant conceded that he could not succeed with this defence unless he also proved native title rights and interests under the *Native Title Act 1993* (Cth) or alternatively, a common law customary right. Accordingly, the court did not consider this defence.

64. See, for example, the *Preservation of Game Act 1874* (WA) s 13; the *Fisheries Act 1899* (WA) s 11 (which permitted subsistence fishing by traditional Aboriginal methods); and the *Land Act 1898* (WA) s 106 (which permitted customary subsistence harvesting upon and access to all unimproved parts of pastoral leases, whether enclosed or otherwise). More recently Aboriginal hunting and fishing rights have been governed by the *Fauna Protection Act 1950* (WA) s 23; the *Fisheries Act 1905* (WA) s 56(1) (which permitted subsistence fishing by Aboriginal people subject to certain gazetted restrictions including the size and species of catch and the use of certain devices); and the *Land Act 1933* (WA) s 106(2) (which permitted customary subsistence harvesting of resources on unenclosed, unimproved parts of pastoral leases).

65. Section 109 of the *Australia Constitution* would operate to invalidate any state law to the extent of any inconsistency between restrictions imposed by a state law and the provisions of the *Native Title Act 1993* (Cth). It is important to note, however, that while s 211 of the *Native Title Act 1993* (Cth) permits the exercise of certain rights or interests in circumstances where a native title holder would otherwise require a licence for such activity, they are nonetheless subject to laws of general application including laws that prohibit the activity for all persons or laws that only allow the activity under licence for research, environmental protection, public health or public safety purposes. Thus, the conservation ethic in the protection of fauna and flora is able to be preserved even where native title is granted over land.

66. *Wildlife Conservation Act 1950* (WA) ss 16 & 16A.

67. *Wildlife Conservation Act 1950* (WA) s 23F.

68. Nature reserves and marine parks are governed by the *Conservation and Land Management Act 1984* (WA).

69. According to the *Wildlife Conservation Act 1950* (WA) s 23(2) 'the Executive Director may issue a certificate to any person authorising him to sell the skins of kangaroos which he has lawfully taken for food' pursuant to the exemption. It is noted that s 27C places the burden of proving that an exemption applies upon the person claiming the exemption under the Act.

70. In his background paper to this reference, Phillip Vincent notes that 'by regulations made on 14 August 2001 the government indefinitely suspended Aboriginal people's right to hunt dugong, six varieties of turtles, and saltwater and fresh water crocodiles, and to take all flora declared "rare"'. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 13.

However, Aboriginal persons exercising their rights under s 23 are not restricted to the use of traditional hunting methods and, further, are not subject to regulations restricting the use of firearms, snares, nets, traps, poisons and explosives in the taking of fauna.⁷¹

The *Conservation and Land Management Act 1984* (WA) (the CALM Act) prohibits the taking of flora and fauna from nature reserves, state forests or other land designated under the CALM Act,⁷² and from marine parks⁷³ without lawful authority. Currently there is nothing in the CALM Act that exempts Aboriginal people from its provisions or recognises Aboriginal interests in relation to the harvesting of natural resources on CALM Act land.

Fishing

Section 6 of the *Fish Resources Management Act 1994* (WA) provides that:

An Aboriginal person is not required to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of his or her family and not for a commercial purpose.

‘Commercial purpose’ is defined in s 4 of the Act to mean ‘the purpose of sale or any other purpose that is directed to gain or reward’. This would appear to preclude the type of trade or barter within and between Aboriginal communities that is typically associated with the exercise of customary fishing rights.

It is important to note that the exemption expressed in s 6 only applies to the need to obtain a recreational fishing licence. Aboriginal people are still subject to the normal fishing rules and regulations—such as restrictions in regard to the size

of fish taken, bag limits, protected species, conservation areas and seasonal closures of fishing areas—unless there is a contrary determination of native title rights in relation to the area.⁷⁴ Whilst Aboriginal people are not restricted to use of traditional fishing methods under s 6, they are subject to the normal rules that apply to recreational fishing which may preclude the use of traps and nets in certain circumstances.

Access to Land for Customary Harvesting Purposes

As discussed earlier, s 23 of the *Wildlife Conservation Act 1950* (WA) permits access to Crown land for customary harvesting purposes. Section 104 of the *Land Administration Act 1997* (WA) permits access to unenclosed, unimproved parts of pastoral leases for seeking of sustenance by Aboriginal people ‘in their accustomed manner’, whilst the *Aboriginal Affairs Planning Authority Act 1972* (WA) s 32 allows Aboriginal people the exclusive use and enjoyment of Aboriginal land, which includes the right to hunt, fish and forage on that land. There is currently no provision in the *Conservation and Land Management Act 1984* (WA) that recognises Aboriginal interests in harvesting resources on land designated under that Act, including nature and conservation reserves and marine parks.



71. *Wildlife Conservation Regulations 1970* (WA) reg 54 ‘Illegal means and devices’.

72. *Conservation and Land Management Regulations 2002* (WA) reg 8. The penalty applied to breach of this provision is a fine of \$2,000.

73. Marine fauna include dolphin, dugong, whale, sealion, seal, manta ray, sea turtle and whale sharks: *Conservation and Land Management Act 1984* (WA) s 101C. The penalty applied to breach of this provision is \$10,000 or one year imprisonment.

74. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 25. It is noted that the decision of the Western Australian Court of Criminal Appeal in *Wilkes v Johnsen* [1999] WASCA 74 would apply in relation to activities performed in relation to rights and interests granted to native title holders pursuant to s 211 of the *Native Title Act 1993* (WA). For further discussion of the decision in this case see Part V, ‘Native Title Defence’, above pp 178–79.

Improving Recognition of Aboriginal Harvesting Rights in Western Australia

Priorities of Recognition

There is no doubt that customary harvesting activities remain important to Aboriginal people and in many cases would be considered vital to the maintenance of Aboriginal culture.⁷⁵ Further, as discussed in Part IV, there are international conventions that support the recognition of the rights of indigenous peoples to be free to enjoy their culture and practise their customs,⁷⁶ including customary use of land and resources.⁷⁷ Nonetheless, with encroaching threats to Australia's biodiverse regions,⁷⁸ the conservation of native species and habitats must now be regarded as having priority over all other interests in land, including the interests of indigenous peoples. In its 1986 report *The Recognition of Aboriginal Customary Laws*, the ALRC considered the following hierarchy of priorities as justified:

1. conservation and other identifiable overriding interests (such as safety, rights of innocent passage, shelter and safety at sea);
2. traditional hunting and fishing; and
3. commercial and recreational hunting and fishing.⁷⁹

The ALRC observed that conservation principles 'may require restrictions on traditional hunting and fishing interests', even when Aboriginal people are given control over resources on Aboriginal land.⁸⁰ It is unlikely, however, that Aboriginal people would object to the prioritisation of conservation in regard to land and natural resources. It is noted above that Aboriginal people employed traditional methods to conserve species and resources, thereby managing the continent in a sustainable way. In this regard it has been observed:

While it is important to not take a romantic view of Aboriginal-nature relationships, it is clearly the case that Indigenous Australians have acted and still act with intent in relations with their environment, that their concerns go beyond mere consumption, and that the outcomes of their actions which have the effect of conserving species are not merely incidental.⁸¹

Principle 22 of the *Rio Declaration* (developed at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992) recognised that indigenous peoples 'have a vital role in environmental management and development because of their knowledge and traditional practices'.⁸² UNCED urged participating countries to recognise and support the identity, culture and interests of indigenous peoples and 'enable their effective participation in the achievement of sustainable development'.⁸³

With these observations in mind, the Commission asserts its support for the above hierarchy of priorities, which places conservation above Aboriginal customary interests; however, the Commission urges government and its conservation bodies to actively consult, engage with and involve Aboriginal people in decision-making and program application in respect of conservation of land and resources in Western Australia.

Proposal 72

That the recognition of Aboriginal customary laws relating to hunting, fishing and gathering be subject to the genuine interests of conservation of Western Australia's diverse biological resources, but that they take a higher priority than commercial and recreational interests in the same resources.

That, in the application of conservation programs and decision-making in respect of conservation of land and resources in Western Australia, the Western Australian government and its conservation bodies actively consult, engage with and involve Aboriginal people.

75. English AJ, 'Terrestrial Hunting and Gathering by Aboriginal People in New South Wales' (1998) 14 *Environmental and Planning Law Journal* 437, 438.

76. Such as, for example, the *International Covenant on Civil and Political Rights*, Article 27.

77. *Convention on Biological Diversity 1992*, Article 8(j).

78. Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002) 'Why we Need New Biodiversity Conservation Legislation' <http://www.naturebase.net/biocon_act_consult_text.html>.

79. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [1001].

80. *Ibid.*

81. Worboys G, Lockwood M & De Lacy T, *Protected Area Management: Principles and Practice* (Sth Melbourne: Oxford University Press, 2001) ch 15, 'Indigenous people and protected areas'. The authors cite Langton M, *Burning Questions: Emerging environmental issues for Indigenous peoples in northern Australia* (Darwin: Centre for Indigenous Natural and Cultural Resource Management, Northern Territory University, 1998) in support of this proposition.

82. United Nations Conference on Environment and Development (UNCED), *Rio Declaration*, principle 22.

83. *Ibid.*

The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights

In his background paper to this reference Phillip Vincent recommended that 'protection for Aboriginal people against prosecution for hunting, gathering and fishing pursuant to Aboriginal law and custom needs to be strengthened to ensure that the protection is granted absolutely by Parliament and not merely discretionary to the government of the day'.⁸⁴ In support of this recommendation Vincent drew attention to the government's capacity to suspend or restrict the rights of Aboriginal people under s 23 of the *Wildlife Conservation Act 1950 (WA)* in the event that the Governor considers that the rights are being abused or that certain species of fauna or flora are being unduly depleted.

In light of the discussion above, the Commission accepts that limitations on Aboriginal customary harvesting rights are justified for conservation purposes and that the qualification on the exemption provided by s 23 is intended to protect and conserve species that are at risk of extinction or are otherwise threatened. However, the Commission is genuinely concerned about the burden placed on Aboriginal people to discover the state of the law in regard to restrictions placed from time-to-time upon the s 23 exemption.⁸⁵

During the Commission's consultations it became clear that many Aboriginal people were unaware of the nature and extent of statutory exemptions in relation to the customary harvesting of fish, fauna and bush foods. Some perhaps believe erroneously that, as Aboriginal people, they possess the absolute right to hunt, fish and gather as long as they do so in a traditional manner.⁸⁶ Others might be aware of, for example, the exemption from the statutory requirement to obtain a recreational fishing licence, but be ignorant of the need to comply with rules regarding

size of catch, bag limits, etc. Indeed in many cases the extent of the exemptions for Aboriginal people exercising customary harvesting rights is not clear on the face of the legislation and may be hidden in a maze of rules and regulations that are not readily accessible. Moreover, the rules and regulations are often subject to change by mere declaration in the *Government Gazette*, such that it may be acceptable for Aboriginal people to harvest one species of fish or fauna on one day but illegal the next.

Presumably wildlife and fisheries officers do their best to advise Aboriginal people of restrictions on the exemptions that otherwise protect them from prosecution, but it is conceivable that these officers may themselves be unaware of changes to restrictions. The recent High Court judgment in the Western Australian case *Ostrowski v Palmer*⁸⁷ highlights the fact that the public, including Aboriginal people, cannot rely in good faith upon information given by fisheries officers (and by extension, wildlife or CALM officers) as to the relevant prohibitions attaching to harvesting activities, whether by licence or otherwise. In *Palmer* the fact that the fisherman had been given erroneous written material by a fisheries officer about prohibited fishing areas was not enough to establish a defence under s 24 of the *Criminal Code (WA)* as to 'an honest and



84. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 14.

85. The Commission notes that currently there are 246 taxa of rare flora, six varieties of turtle, two types of crocodile and one species of marine fauna that Aboriginal people are forbidden to take under s 23. See *Wildlife Conservation Notice 2004* and *Wildlife Conservation Regulations 2003 (WA)* reg 63.

86. See, for example the summary of the Commission's consultations in Bunbury where at least one respondent believed that an Aboriginal acquaintance was charged with contravention of fisheries legislation for failing to take marron in a traditional manner. LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 11.

87. (2004) 206 ALR 422; [2004] HCA 30 (16 June 2004).

reasonable, but mistaken, belief in the existence of any state of things' when he fished in a prohibited area. The High Court held that this was not a mistake of fact, but one of law: he had erroneously believed that no law prohibited him from fishing in the relevant area.⁸⁸ As s 22 of the *Criminal Code* (WA) makes clear, unless knowledge of the law is expressly declared to be an element of the offence, ignorance of the law is no excuse.

The authorities further suggest that Aboriginal persons harvesting fauna, flora and fish under the belief that they have an honest claim of right under customary law would be unlikely to establish a defence to prosecution⁸⁹ in the absence of a native title determination.⁹⁰ (Although, as discussed above in Part V,⁹¹ there may be a case for establishing a defence in relation to a restriction to a statutory exemption recognising customary harvesting rights, such as that found in s 23 of the *Wildlife Conservation Act*.) In these circumstances—and recognising the difficulty of remote Aboriginal people, in particular, to establish the currency of regulations or notices restricting the operation of the exemption in s 23 of the *Wildlife Conservation Act*—the Commission believes that all reasonable steps should be made by government to communicate to Aboriginal people the extent of harvesting exemptions in respect of Aboriginal people and any restrictions placed from time-to-time upon those exemptions. The Commission suggests that communication of these matters might be best achieved by establishing a dedicated section on the DIA, CALM and Department of Fisheries websites, as well as providing notices and information to Aboriginal communities through the vehicle of Aboriginal community councils, Aboriginal land councils, Aboriginal radio stations, Aboriginal cultural organisations, native title working groups and, when established, the community justice groups proposed in Part V of this paper.

Proposal 73

That relevant Western Australian government authorities take all reasonable steps to enhance communication of harvesting exemptions available to Aboriginal people and of any restrictions placed from time-to-time upon those exemptions.

Improving Recognition – Hunting and Gathering

As mentioned above, the *Wildlife Conservation Act 1950* (WA) allows Aboriginal people to hunt fauna and gather flora on Crown land and other land (with the occupier's consent) for the purposes of food. Currently the Act does not provide exemption for fauna, flora or natural products taken for therapeutic, artistic, cultural or ceremonial purposes. However, as discussed in an earlier section dealing with the bioprospecting of native flora,⁹² the Western Australian government is presently undertaking a detailed consultative review of the *Wildlife Conservation Act* and is in the process of drafting replacement legislation (the *Biodiversity Conservation Act*) and updating the state's conservation strategy. The 2002 consultation paper for the new Act states that:

The Act will respect native title and protect customary use of biological resources that takes place in accordance with traditional cultural practices. To this end, the existing rights of Aboriginal people to take animals and plants for food will be extended to guarantee the right of Aboriginal people to use biological resources for any customary purpose.⁹³

Such development would appear to implement the ALRC's recommendation that legislative recognition of Aboriginal customary law rights to hunt and gather reflect a 'broad notion of subsistence' which includes ceremonial and other non-commercial purposes. The

88. Ibid.

89. The High Court's decision in *Walden v Hensler* (1987) 75 ALR 173—in relation to Queensland fauna conservation legislation which does not provide for an Aboriginal harvesting exemption—suggests that the defence of honest claim of right will not be available where an activity is prohibited as a matter of general application. To the Commission's knowledge this defence is untested in relation to restrictions placed upon the Aboriginal customary harvesting exemption in s 23 of the *Wildlife Conservation Act 1950* (WA). It should also be noted that the Commission could not locate any cases where a defendant has relied on the defence of honest claim of right in relation to a charge of prohibited taking of flora, fauna or fish since the High Court's decision in *Mabo*. It is clear that most defendants will now seek to rely upon a defence of native title at common law: see, for example, *Wilkes v Johnsen* [1999] WASCA 74.

90. The High Court's decision in *Yanner v Eaton* [1999] HCA 53 (7 October 1999) makes clear that the vesting in the Crown of property in natural resources (as is found in the *Wildlife Conservation Act 1950* (WA) s 22) cannot be assumed to extinguish native title. There must be clear and plain legislative intention to extinguish the native title rights of Aboriginal peoples.

91. See Part V, 'Honest Claim of Right', above p 175.

92. See Part VI, 'Biotechnological Research and Indigenous Intellectual Property in the Regulation of Resources', above pp 325–28.

93. Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002) 'Use of Biological Resources by Indigenous people', <http://www.naturebase.net/biocon_act_consult_text.html>.

Commission also understands that the government may be considering the extension of rights of Aboriginal people to subsistence hunt and gather to land (and presumably marine parks) designated under the *Conservation and Land Management Act 1984* (WA), subject to the existence of contrary conservation management plans.⁹⁴ The Commission strongly supports this development.

Proposal 74

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be subsumed into future wildlife and biological resource conservation legislation and be expanded to include the taking of flora and fauna (subject to conservation restrictions placed on certain species from time-to-time) for non-commercial purposes including for food, artistic, cultural, therapeutic and ceremonial purposes according to Aboriginal customary law.

That the exemption described above also apply to land designated under the *Conservation and Land Management Act 1984* (WA) subject to the provisions of conservation management plans over such land.

Feral animals

Despite its clear foundation in traditional harvesting rights, Aboriginal people are not restricted to the taking of native fauna under the s 23 exemption. Aboriginal people are known to harvest introduced feral animals such as rabbits, pigs, buffalo, donkeys and camels for subsistence purposes.⁹⁵ In some cases these introduced species have almost completely replaced indigenous species in Aboriginal peoples' diets. This may be because the indigenous species traditionally hunted has now died out or because the introduced species are more numerous and perhaps easier to hunt.⁹⁶ The Commission sees no reason why recognition of customary harvesting rights should be limited to native animals and acknowledges that Aboriginal hunters may

have an important role in reducing the number of feral animals in Western Australia.⁹⁷

Proposal 75

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA)—and its successor in future conservation legislation—remain applicable to all fauna and flora (subject to conservation restrictions), including introduced species.

Barter and exchange

The nature of barter and exchange of food items within Aboriginal communities is dealt with above under the heading 'Purpose of harvesting'.⁹⁸ It was noted there that the ALRC recommended that the elements of barter and exchange within clan groups be recognised as integral to Aboriginal customary law, but that 'trade, exchange or sale outside the local community should be treated in the same way as other commercial dealings with the species in question'.⁹⁹ Currently s 23 permits harvesting for the purpose of providing 'sufficient' food for 'family', but not for sale. 'Family' is not defined in the *Wildlife Conservation Act 1950* (WA) but, in the context of Aboriginal persons, should be more broadly defined than a person's immediate 'nuclear' family.

It is the Commission's tentative view that the taking of fauna and flora for non-commercial purposes under the Aboriginal exemption should include taking sufficient for the purpose of satisfying kin obligations *within, but not outside, the local community*. However, the Commission notes a recent review into fisheries management in Western Australia which recommends that an exemption for Aboriginal customary fishing encompass 'the elements of barter or exchange of fish so long as it occurs *within or between Aboriginal communities*, is for other food or for non-edible items other than money, and if the exchange is of a limited and non-commercial nature'.¹⁰⁰ The Commission accepts

94. Currently there is nothing in the *Conservation and Land Management Act 1984* (WA) that exempts Aboriginal people from its provisions or recognises Aboriginal interests in relation to harvesting of natural resources on CALM Act land.

95. Davies *et al*, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 45.

96. *Ibid* 38.

97. The Commission notes that the ALRC made a similar recommendation in its 1986 study.

98. See above pp 369–70.

99. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [1001].

100. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 31.

that there may be legitimate reasons for accepting a different regime in relation to fauna and flora than in relation to fish. In particular, the Commission notes that fish stocks may renew more quickly and have a higher reproduction rate than fauna such as the Western Grey Kangaroo¹⁰¹ and other species popular with Aboriginal hunters. In these circumstances the Commission seeks submissions regarding the potential of permitting non-commercial barter or exchange under the Aboriginal exemption and the restrictions, if any, that should be placed upon such exchange.

Invitation to Submit 16

The Commission invites submissions as to whether the non-commercial barter or exchange of fauna or flora taken by Aboriginal persons pursuant to the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950 (WA)* be permitted and, if so, what, if any, restrictions should be placed upon such exchange.

Commercial harvesting

Currently, any person may apply for a licence under s 23C of the *Wildlife Conservation Act* to harvest flora¹⁰² from Crown land for commercial purposes, including for such things as perfume production, bush food, floristry and therapeutic use. Typically conservation considerations will inform the grant of such licences and their conditions. A recent article in the *Weekend Australian Magazine* highlighted the significant economic benefits that commercial harvesting of flora can provide for Aboriginal people in Western Australia, particularly for those in remote areas that have little to no viable alternative industry.¹⁰³ However, the writer also warned of the vulnerability of some communities to exploitation by commercial harvesters that use Aboriginal traditional knowledge, expertise and labour for minimal return to the community.¹⁰⁴

The Commission believes that Aboriginal people should be encouraged to commercially exploit their traditional knowledge of the land and its natural resources by undertaking commercial harvesting of fauna and flora in their traditional lands. However, taking conservation as its priority, it is the Commission's view that any commercial harvesting of natural resources (whether for food or other purposes) by Aboriginal people must be subject to government-controlled licensing. Of course, there may well be arguments for licensing conditions to be relaxed, for fees to be waived and for a certain number of licences (particularly in competitive industries such as sandalwood harvesting) to be set aside exclusively for Aboriginal communities. The review of the *Wildlife Conservation Act* and its replacement with new biodiversity conservation legislation offers an excellent opportunity for the state to explore its current licensing regime and investigate ways that it can be improved to assist Aboriginal people to develop commercial harvesting opportunities in Western Australia.

Improving Recognition – Fishing

In May 2003 the Aboriginal Fishing Strategy Working Group released its draft report on the establishment of an Aboriginal fishing strategy in Western Australia (the draft AFSWG report).¹⁰⁵ The report was comprehensively researched and included significant consultation with Aboriginal people and key stakeholders across the state. The draft AFSWG report listed a total of 39 recommendations for change to fisheries management and regulations to effect recognition of customary fishing practices in Western Australia. The Commission is aware that a final report including recommendations has now been drafted, although it is yet to be publicly released. At the time of writing this Discussion Paper, the Commission was unable to obtain a copy of this final report;¹⁰⁶ the information contained in this section therefore relies

101. The Western Grey Kangaroo generally reproduces at the rate of a single offspring on a seasonal basis with a gestation period of approximately 35 days and with their young spending up to 298 days in the pouch. The reproduction rate of the Western Grey Kangaroo and of other marsupials and land mammals are also subject to environmental stressors such as drought. See <<http://www.australianwildlife.com.au/features/kangaroo.htm#Reproduction>>.

102. Licences may also be obtained under s 17 of the *Wildlife Conservation Act 1950 (WA)* for the taking of fauna. However, Aboriginal persons taking fauna under licence for commercial purposes must abide by the restrictions on the means of taking that apply to the rest of the community under the *Wildlife Conservation Regulations*.

103. Laurie V, 'Bush Bounty', *The Weekend Australian Magazine*, 20–21 August 2005, 30–31.

104. Ibid. The article mentions the case of a very small community at Ullula, southwest of Wiluna, where Aboriginal women had been hired by 'city-based' commercial harvesters to collect seed for a fraction of its commercial value. The Office of Aboriginal Economic Development apparently assisted the community to negotiate a direct contract with a local mine that required native seeds for rehabilitation of the land.

105. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003).

106. However, should the AFSWG final report be available before the Commission publishes its own Final Report on the Aboriginal customary laws reference, the recommendations will be taken into account.

on the material and recommendations contained in the draft AFSWG report, in addition to other relevant reports and documents.

Recognition of customary fishing

The draft AFSWG report found that there was a need for a discrete Aboriginal fishing strategy in Western Australia that recognises customary fishing as a practice 'clearly separated from other forms of fishing in fisheries legislation and policy'.¹⁰⁷ It was acknowledged that the current exemption provided by s 6 of the *Fish Resources Management Act 1994 (WA)* was not enough to discharge the obligations placed on governments by the various international conventions, discussed earlier, that assert the rights of indigenous people to be free to practise and enjoy their own culture. It was also acknowledged that the state government's commitment to the Aboriginal peoples of Western Australia in its document *A New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians*

recognises that Aboriginal people have continuing rights and responsibilities as the first peoples of Western Australia, including traditional ownership and connection to land and waters. These rights inherently incorporate the right of Aboriginal people to continue to fish in a manner customary to them.¹⁰⁸

It was noted in the draft AFSWG report that '[r]ecognising customary fishing within fisheries management does not create a new form of fishing, but identifies an existing fishing practice and purpose. Aboriginal people consulted were generally very candid about the fact that they do not presently fish in accordance with the existing recreational fishing rules if those rules are inconsistent with customary fishing needs'.¹⁰⁹ It was considered that the recognition of customary fishing practices and the involvement of Aboriginal people in fisheries resource management would be beneficial both to fishing authorities and to Aboriginal people.

The draft AFSWG report defines customary fishing in the following way:



Customary fishing:

- (a) applies to persons of Aboriginal descent; and
- (b) who are fishing for the purposes of satisfying personal, domestic, ceremonial, educational, or non-commercial communal needs; and
- (c) who are accepted by the Aboriginal community in the area being fished as having a right to fish in accordance with Aboriginal tradition.¹¹⁰

In respect of (c), the draft AFSWG report recommended that the question of who is accepted under customary law as possessing a right to fish in a certain area be solely a matter for the Aboriginal community concerned. This accords with the Commission's view expressed throughout this paper in regard to establishing the content and extent of Aboriginal customary law in Western Australia.

Other recommendations relating to the recognition of customary fishing in Western Australia are that the elements of barter and trade within and between communities be accepted as part of customary fishing rights (see above) and that customary fishing not be limited to the use of traditional fishing methods or the taking of particular species.¹¹¹ However, in harmony with the views expressed by this Commission and by the ALRC, the draft AFSWG report held that conservation, sustainability and biodiversity objectives are paramount and that the 'recognition of Aboriginal fishing rights and practices [should] not exceed the obligation to protect fish for future generations'.¹¹² For that reason,

107. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 35.

108. *Ibid* 33.

109. *Ibid* 34.

110. *Ibid* 30.

111. *Ibid* 31–32.

112. *Ibid* 21.

recommendation 8 of the draft AFSWG report sets out customary fishing parameters which allow the Minister to regulate, within a strict framework established by consultation with Aboriginal fishing interests, 'any customary fishing activities that threaten sustainability or are inconsistent with Aboriginal tradition'.¹¹³

Importantly, Aboriginal customary fishing will not be regulated by inappropriate recreational fishing rules under the draft AFSWG strategy. Customary fishing is recognised as a positive, existing right¹¹⁴ and as a distinct fishing sector to 'be given the same level of engagement in consultative and management processes as the recreational and commercial fishing sectors'.¹¹⁵

National Indigenous Fishing Technical Working Group

In March 2004 the National Indigenous Fishing Technical Working Group (NIFTWG), which includes representatives of Indigenous bodies, most state and territory governments,¹¹⁶ and national commercial and recreational fishing interests, endorsed the *Principles Communiqué on Indigenous Fishing* which provides that:

1. Indigenous people were the first custodians of Australia's marine and freshwater environments: Australia's fisheries and aquatic environment management strategies should respect and accommodate this.
2. Customary fishing is to be defined and incorporated by governments into fisheries management regimes, so as to afford it protection.
3. Customary fishing is fishing in accordance with relevant Indigenous laws and customs for the purpose of satisfying personal, domestic or non-commercial communal needs. Specific frameworks for customary fishing may vary throughout Australia by reference, for example, to marine zones, fish species, Indigenous community locations and traditions or their access to land and water.

4. Recognition of customary fishing will translate, wherever possible, into a share in the overall allocation of sustainable managed fisheries.
5. In the allocation of marine and freshwater resources, the customary sector should be recognised as a sector in its own right, alongside recreational and commercial sectors, ideally within the context of future integrated fisheries management strategies.
6. Governments and other stakeholders will work together to, at minimum, implement assistance strategies to increase Indigenous participation in fisheries-related businesses, including the recreational and charter sectors.
7. Increased participation of Indigenous people in fisheries related businesses and fisheries management, together with related vocational development, must be expedited.¹¹⁷

The draft AFSWG report appears to apply each of the above principles in its recognition of customary fishing. The strategy recommended by the draft AFSWG report also meets the 'Recommended Pathways Matrix: Pathway 2' of the NIFTWG,¹¹⁸ which encourages the development of government policy based on the recognition of defined, non-commercial customary fishing rights and processes that increase Aboriginal involvement and economic opportunities in marine and fisheries related businesses.¹¹⁹

Aboriginal involvement in fisheries management and economic development

The draft AFSWG report made a number of recommendations to enhance Aboriginal involvement in fisheries resource management in Western Australia. In addition to improving consultation processes and establishing 'joint management or cooperative decision-making processes between the Department of Fisheries and Aboriginal interests', the report recommended that the Department develop an Aboriginal employment policy and identify and establish opportunities for joint research programs and initiatives.¹²⁰

113. Ibid 44–46, recommendation 8.

114. Ibid 38, recommendation 5.

115. Ibid 56, recommendation 12.

116. The communiqué has been endorsed by the governments of New South Wales, Western Australia, South Australia, Victoria, Tasmania and the Northern Territory. The Commonwealth government has assisted the NIFTWG process.

117. National Indigenous Fishing Technical Working Group, 'The Principles Communiqué on Indigenous Fishing' (National Native Title Tribunal, 2004) <<http://www.nntt.gov.au/publications/data/files/The%20Principles%20Communique.pdf>>.

118. National Indigenous Fishing Technical Working Group, 'Recommended Pathways Matrix' (National Native Title Tribunal, 2004) <<http://www.nntt.gov.au/publications/data/files/Recommended%20Pathways%20Matrix.pdf>>.

119. Ibid.

120. See Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) recommendations 12–27.

The draft AFSWG report also made a series of recommendations relating to the economic development of the Aboriginal fishing sector including the establishment of an Indigenous Fishing Fund 'to be created by the state government to assist in the purchase of tradeable fishing authorisations on the open market for the benefit of Indigenous Western Australians'.¹²¹ In accordance with Principle 6, set out above, the draft AFSWG report also examined and made recommendations in respect of Aboriginal involvement in the commercial aquaculture and aquatic charter industries in Western Australia.¹²²



The Commission's view

The Commission supports the recommendations of the draft AFSWG report in relation to the recognition of customary fishing in Western Australia and the enhanced involvement of Aboriginal people in fisheries resource management, including in the research and commercial sectors. The draft AFSWG report appears to be a thoroughly researched document which is clearly receptive to the views and interests of all fishing sectors in Western Australia: its recommendations reflect the Commission's hierarchy of priorities in the recognition of customary harvesting rights, as well as provide the Aboriginal fishing sector with legislative clarity. Importantly, the recommendations appear to positively answer the concerns raised by Aboriginal people during the Commission's consultations. The Commission has nothing useful to add to these recommendations and encourages the Western Australian government to implement the recognition strategies contained in the draft AFSWG report forthwith.

Improving Recognition – Access to Land for Customary Harvesting Purposes

In its 1986 report on the recognition of Aboriginal customary laws the ALRC asserted that '[i]t is reasonable that Aborigines be accorded access to traditional lands

for the purposes of hunting, fishing and gathering, whether these lands are unalienated Crown lands or subject to leasehold or other interests'.¹²³ As mentioned above, s 23 of the *Wildlife Conservation Act 1950* (WA) permits access to unalienated Crown land and, with the permission of the occupier, to private land for the purposes of customary harvesting activities. The Commission has proposed that this access and harvesting exemption be extended to nature reserves and other land designated under the CALM Act.

Access to pastoral lease land for the purposes of customary harvesting is governed by s 104 of the *Land Administration Act 1997* (WA) which provides:

Reservation in favour of Aboriginal persons

Aboriginal persons may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner.

In Western Australia 36 per cent of the state's land area is covered by pastoral leases, the leaseholds of which expire in 2015.¹²⁴ The Aboriginal Access and Living Areas Working Group (AALAWG) was established to inform government of the interests and aspirations of Aboriginal people in relation to gaining access and tenure over pastoral lands prior to leasehold renewal.¹²⁵ In particular, the AALAWG was asked to consider the terms of the reservation for Aboriginal people contained in s 104 of the *Land Administration Act*.

121. Ibid 90, recommendation 31.

122. Ibid 97–98, recommendations 38 & 39.

123. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [989].

124. Aboriginal Access and Living Areas Working Group (AALAWG), 'Aboriginal Access and Living Areas Pastoral Industry Working Group Final Report' (September 2003) <<http://www.dpi.wa.gov.au/pastoral/documents/aboriginalaccess.rtf>> 9. It is noted that there are presently six pastoral leases held by the Aboriginal Lands Trust and nine held by other entities (such as the Indigenous Land Corporation) for the benefit of Aboriginal interests. See Western Australia, *Parliamentary Debates*, Legislative Council, 4 December 2003, 14214 (Mr Ken Travers).

125. Ibid.

Section 104 access

The terms of the reservation for Aboriginal access to pastoral leases contained in s 104 have not changed since 1934.¹²⁶ The AALAWG has observed that:

[Section 104] has never been effective in its apparent objective of guaranteeing Aboriginal access to pastoral lease land. This has been a source of concern to the main Aboriginal and pastoral stakeholders; to the former because reportedly significant numbers of Aboriginal people remain unable to access lands to which they have a traditional and/or historical connection, and to pastoralists because the general nature of the access reservation appears to suggest a right of untrammelled access to all pastoral leases by any of the State's Aboriginal groups.¹²⁷

In particular, the AALAWG found that the generic application of s 104 to all Aboriginal persons and all pastoral leases, and the undefined terms such as 'accustomed manner', 'sustenance' and 'unenclosed and unimproved' created problems for both pastoral and Indigenous interests which sought clarification of the rights guaranteed under the section.¹²⁸ It was recommended that s 104 be amended to provide that access to land be limited to those Aboriginal people with a traditional and/or historical association with the relevant land and that, in future, all pastoral leases include conditions requiring the leaseholder to reach an access agreement with traditional owners.¹²⁹ Access agreements would feature such things as codes of conduct for both parties, joint responsibilities in conservation and land management, and dispute resolution procedures.¹³⁰ In the event that an access agreement could not be reached, it was recommended that one be arbitrated between the parties to ensure that Aboriginal rights of access are protected.¹³¹

The Commission supports amendment to s 104 to clarify the rights and responsibilities of traditional owners and leaseholders in relation to land, the subject of a pastoral lease; however, it notes that at the time of writing no changes had been made to s 104 of the *Land Administration Act* to reflect the recommendations of the AALAWG.

Use of Firearms for Customary Harvesting

In its report the AALAWG made the pertinent observation that, although the use of firearms may be accepted as coming within the definition of 'accustomed manner' in s 104, their use on Crown land is tightly controlled by the *Land Administration Act*.¹³² Under s 267 of the Act it is an offence to discharge a firearm on Crown land without the permission of the Minister or 'reasonable excuse'. The penalty for this offence is a \$10,000 fine. The AALAWG recommended that, in relation to pastoral leases, the use of firearms by Aboriginal hunters be included as part of the 'code of conduct' in the relevant access agreement.¹³³

Of course, the prohibition against discharging firearms on Crown land extends to the exercise of customary harvesting rights on Crown land under exemptions provided by other Western Australian statutes, such as the *Wildlife Conservation Act 1950 (WA)*. It was mentioned earlier that the regulations regarding methods of taking fauna under that Act did not apply to Aboriginal people exercising their rights under s 23.¹³⁴ However, it appears that Aboriginal people may nevertheless be subject to prosecution under s 267 of the *Land Administration Act* if they employ firearms in their customary hunting activities on Crown land.¹³⁵ Although the Commission is not aware of any cases coming before the courts on this matter it considers that the issue would benefit from legislative clarification.

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That s 267 of the *Land Administration Act 1997 (WA)* be amended to make clear the legislative intention in relation to the use of firearms for customary hunting on Crown land pursuant to exemptions contained in s 104 of the *Land Administration Act 1997 (WA)* and s 23 of the *Wildlife Conservation Act 1950 (WA)*.

126. *Ibid* 11.

127. *Ibid* 10.

128. *Ibid* 11.

129. *Ibid* 4. The working group also recommended that a facility for the registration of land access agreements be established but that working informal 'handshake' agreements between pastoral leaseholders and Aboriginal people be respected.

130. *Ibid* 5.

131. *Ibid* 13.

132. *Ibid*.

133. *Ibid*.

134. Although there are legitimate arguments for prescribing restrictions on unacceptable means of taking fauna by Aboriginal hunters, including that the use of certain snares and traps (which are otherwise illegal) may cause the animal unnecessary distress and pain.

135. It was considered by the AALAWG that Aboriginal people may have a case for arguing reasonable excuse in defence of a charge under s 267 if they have a determination of native title which protects their customary harvesting rights. AALAWG, 'Aboriginal Access and Living Areas Pastoral Industry Working Group Final Report' (September 2003) <<http://www.dpi.wa.gov.au/pastoral/documents/aboriginalaccess.rtf>> 13.