

Chapter Eight

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. The Aboriginal and Torres Strait Islander Commission 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

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'.² Those who possess the right to harvest resources are also vested with obligations to conserve resources and respect the land.³ For this reason (and others), restrictions will sometimes be placed on entitlements to harvest natural resources. As explained more fully in the Commission's Discussion Paper, these restrictions define such matters as:

- whether permission must be obtained in order to hunt or gather on certain land;
- who may harvest certain resources, in particular plants with medicinal properties or those used for making ceremonial items;
- how much of a resource (especially a non-renewable resource) may be taken;

- whether a resource may only be taken at a certain time or day or a certain time of year;
- whether hunting or gathering on certain land is forbidden;
- whether rituals are required to be performed prior to harvesting certain resources; and
- whether a person may consume certain harvested foods.⁴

The Continuing Significance of Customary Harvesting Activities

It was observed in the Commission's Discussion Paper that, 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.⁵ It has been 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'.⁶ Harvesting can also be seen as a manifestation of self-determination and importantly, in relation to the current reference, harvesting has a strong connection with the maintenance of Aboriginal customary law in contemporary society.⁷

As was seen earlier in the context of discussion of Indigenous cultural and intellectual property,⁸ harvesting of natural resources also has economic significance to

1. ATASIC, *Aboriginal and Torres Strait Islander Commission Environmental Policy* (1994) 5, as cited in Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) 25.

2. See 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).

3. *Ibid* 31–32.

4. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 365–67.

5. Davies J, Higginbottom K, Noack D, Ross H & Young E, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 19 & 37.

6. *Ibid* 38.

7. 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].

8. 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 'Indigenous intellectual property in the regulation of resources', Chapter Six, above pp 266–67; see also LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 325–27.

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,⁹ or indeed of the extent to which harvesting of bush foods occurs today.¹⁰ 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 Aboriginal people and that this has a correlative positive economic impact on incomes.¹¹ 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 Indigenous society—such as heart disease, diabetes and obesity—would benefit from a more varied and nutritionally sound dietary intake and increased exercise.¹² For these reasons alone, the rights of Aboriginal people to subsistence harvest (where there are no competing conservation priorities) should be recognised and encouraged.

Recognising Aboriginal Customary Laws in Harvesting 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 rights distinct from any recognised title in land.¹³ Indeed, as highlighted in the Discussion Paper, the very onerous requirements for proof of a common law customary harvesting right means that very few

Aboriginal people would be able to successfully rely on such rights in defence of a charge of illegal harvesting.¹⁴ In these circumstances the Commission determined that it was desirable that any recognition of customary law harvesting rights should include legislative recognition.

As noted in the Discussion Paper, Aboriginal rights to hunt, fish and forage have been recognised by statute since the early days of colonial government in Western Australia.¹⁵ Currently, the statutes that govern wildlife conservation¹⁶ (including hunting of animals and taking of bush flora) and the management of fish resources¹⁷ provide exemptions

9. 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.
10. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [887].
11. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38–39.
12. *Ibid* 39.
13. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 369.
14. *Ibid* 371–72.
15. See, for example, *Preservation of Game Act 1874* (WA) s 13; *Fisheries Act 1899* (WA) s 11 (which permitted subsistence fishing by traditional Aboriginal methods); and *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; *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 *Land Act 1933* (WA) s 106(2) (which permitted customary subsistence harvesting of resources on unenclosed, unimproved parts of pastoral leases).
16. *Wildlife Conservation Act 1950* (WA) s 23.
17. *Fish Resources Management Act 1994* (WA) s 6.

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.

to Aboriginal people in regard to customary harvesting activities that might otherwise constitute an offence. The Commission has examined the nature and operation of these exemptions in considering whether there is a need for further recognition of Aboriginal customary rights in these areas.¹⁸

The Commission has also considered a number of issues typically raised in relation to the legislative recognition of Aboriginal customary harvesting rights including whether foods harvested by Aboriginal people under a legislative exemption are used for subsistence or for commercial purposes and whether recognition of customary harvesting should be restricted to traditional methods.¹⁹ The Commission's examination of these issues has informed its conclusions in relation to improving recognition of Aboriginal customary harvesting rights in Western Australia.

Improving Recognition of Aboriginal Customary Harvesting Rights in WA

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. Further, as shown in Part IV of the Discussion Paper, 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, including customary use of land and resources. Nonetheless, with encroaching threats to

Australia's biodiverse regions, the conservation of native species and habitats must now be regarded as having priority over all other interests in land, including the interests of Aboriginal people. In its 1986 report *The Recognition of Aboriginal Customary Laws*, the Australian Law Reform Commission considered the following hierarchy of priorities as justified:

- conservation and other identifiable overriding interests (such as safety, rights of innocent passage, shelter and safety at sea);
- traditional hunting and fishing; and
- commercial and recreational hunting and fishing.²⁰

In its Discussion Paper the Commission expressed support for this hierarchy of priorities. It proposed 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.²¹

The Commission received four submissions that commented directly on this proposal²² and one submission that indirectly commented.²³ The Australian Property Institute indicated concern that placing conservation above existing Aboriginal rights and interests may 'unwittingly' expose the state to compensation liability – presumably under the *Native Title Act 1993* (Cth).²⁴ Although it is not necessary to go into detail here, the Commission has considered this submission with careful regard to the future act provisions of the *Native Title Act*.²⁵ Under the *Native Title Act* a 'future act' includes the making, amendment

18. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 372–74.

19. *Ibid* 369–71.

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

21. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 374, Proposal 72.

22. Australian Property Institute, Submission 11 (21 April 2006); Gascoyne Development Commission, Submission No. 38 (11 May 2006); Pilbara Development Commission, Submission No. 39 (19 May 2006); Department of Fisheries, Submission No. 42 (25 May 2006).

23. The Aboriginal Legal Service (ALS) made general comments about customary hunting, fishing and gathering rights in its submission. From its comments in opposition to 'extensive harvesting' it can be inferred that those consulted by the ALS were concerned about conservation of natural resources: Aboriginal Legal Service, Submission No. 35 (12 May 2006) 12.

24. Australian Property Institute, Submission No. 11 (21 April 2006) 1–2.

25. *Native Title Act 1993* (Cth) Division 3, Part 2.

or repeal of legislation (after 1 July 1993) which affects native title by extinguishing native title rights or by being inconsistent with their continued existence, enjoyment or exercise.²⁶ In the Commission's opinion, because the prioritisation of conservation over traditional Aboriginal harvesting interests reflects the conservation priority of current²⁷ (and indeed previous)²⁸ Western Australian legislation relevant to use of natural resources, the Commission's recommendation, if implemented, would not be likely to impair existing native title rights in breach of the *Native Title Act*. Nonetheless, the Commission acknowledges that any changes to current legislation in this area and, in particular, any enactment of new legislation (such as the proposed Biodiversity Conservation Act)²⁹ must be done with careful regard to the maintenance and protection of existing native title rights and interests.

Significantly, the Commission received no submissions opposing the prioritisation of Aboriginal customary harvesting interests above recreational and commercial interests in the same biological resources.³⁰ The Department of Fisheries noted that the Commission's proposal reflected the priority shown in the Department's own Aboriginal Fishing Strategy, which seeks to recognise customary fishing as a distinct fishing sector with priority over all other fishing access, including commercial and recreational fishing.³¹ It is the Commission's opinion that the prioritisation of Aboriginal interests over commercial and recreational interests in biological resources, subject to the interests of conservation and sustainability of those resources, represents an ethical balancing of interests in this area.

Recommendation 96

Conservation to remain a priority in statutory recognition of customary harvesting

That the statutory recognition of Aboriginal customary laws relating to hunting, fishing and gathering remain subject to the 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.

Aboriginal involvement in conservation of land and biological resources

In its Discussion Paper the Commission noted that, given Aboriginal peoples' long history of managing their lands in a sustainable way, it would be unlikely that Aboriginal people would object to the prioritisation of conservation in regard to land and natural resources.³² The Commission considered that Western Australia could learn from its Aboriginal people in this regard. It is also the Commission's opinion that Aboriginal people should be involved in decision-making that may affect their rights and interests.³³ The application of conservation programs to land and natural resources is clearly a matter that affects Aboriginal rights and interests, in particular those Aboriginal people recognised as traditional owners. To that end, the Commission proposed that in the development and application of conservation programs and decision-making in respect of conservation of land and resources in Western Australia, the government and its conservation bodies actively consult, engage with and involve Aboriginal people.³⁴

26. *Native Title Act 1993* (Cth) s 227.

27. For example, as pointed out in the Commission's Discussion Paper, s 23 of the *Wildlife Conservation Act 1950* (WA) empowers the Governor to impose restrictions on, or even to indefinitely suspend, the Aboriginal customary harvesting exemption where it is considered that certain species of flora or fauna are in danger of becoming unduly depleted. Further, in relation to fish resources, the exemption given to Aboriginal people under s 6 of the *Fish Resources Management Act 1994* (WA) only applies to the need to obtain a recreational fishing licence. Aboriginal people operating under this exemption are still subject to the fishing regulations regarding such matters as bag limit, size of catch, protected species and conservation areas which are intended to conserve fish, protect their environment and ensure that exploitation of fish resources is carried out in a sustainable manner. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 372–73.

28. Conservation and protection of fauna, flora and fish have also been priorities of previous state legislation where customary harvesting under certain conditions has been recognised. See, for instance, *Preservation of Game Act 1874* (WA); *Fisheries Act 1899* (WA); *Land Act 1898* (WA); *Fauna Protection Act 1950* (WA); and *Fisheries Act 1905* (WA).

29. See Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002), <http://www.naturebase.net/biocon_act_consult_text.html>.

30. The Pilbara Development Commission supported a higher priority of Aboriginal interests in principle, but indicated that it would welcome a framework where all interests could be balanced: Pilbara Development Commission, Submission No. 39 (19 May 2006) 3.

31. Department of Fisheries, Submission No. 42 (25 May 2006) 2. See also Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006).

32. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 374. Indeed conservation and protection of the environment and the productive capacity of lands and biological resources is a right protected under the revised draft of the *Declaration of the Rights of Indigenous Peoples* (Article 28) which is currently being considered for resolution by the United Nations General Assembly. For further information see 'Recognition and the relevance of international law', Chapter Four, above pp 67–69.

33. This right is also protected by the revised draft of the *Declaration of the Rights of Indigenous Peoples* Articles 18 & 19. See *ibid*.

34. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 374, Proposal 72. It is noted by the Commission that there will be a role for Aboriginal language interpreters in this area. The Kimberley Interpreting Service has observed that: 'The use of interpreters

Submissions were strongly supportive of this proposal and the Commission therefore confirms this recommendation.³⁵

Recommendation 97

Government to consult, engage with and involve Aboriginal people in relation to conservation programs

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

The need for clarity in the legislative recognition of customary harvesting

As mentioned earlier, Aboriginal people can rely on customary harvesting exemptions under the statutes controlling hunting, gathering and fishing in Western Australia. These exemptions (described in more detail below) are limited and may be subject to restriction by relevant authorities. 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 customary harvesting and that some Aboriginal people believed that they had an absolute right to hunt, fish and gather.³⁶ The Commission proposed in its Discussion Paper that relevant government authorities enhance communication of harvesting exemptions available to

Aboriginal people and of any restrictions placed from time-to-time upon those exemptions.³⁷

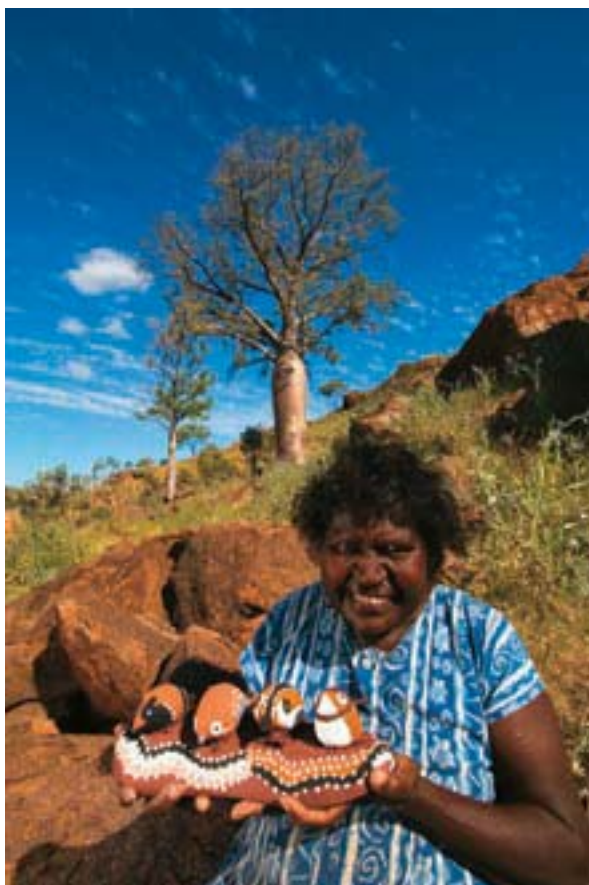
Submissions were strongly supportive of this proposal.³⁸ The Australian Property Institute considered that the communication of restrictions to Aboriginal harvesting exemptions would also assist in raising awareness of the existence of Aboriginal exemptions among non-Aboriginal people involved in recreational or commercial harvesting activities.³⁹ The need for all parties to be aware of harvesting activities was also raised by the Gascoyne Development Commission.⁴⁰ In the interests of minimising interference with Aboriginal people in the act of customary harvesting, the Commission agrees that it is important that other parties engaging in relevant harvesting activities also be made aware that Aboriginal people have a right to harvest biological resources in certain areas without a licence. The Commission has therefore added to its recommendation that the government consider means of raising awareness of Aboriginal harvesting rights among non-Aboriginal people.⁴¹



contributes to the sustainability of Australia's cultural and natural heritage, through language maintenance and preservation of ecological knowledge. This in turn assists natural resource managers and ensures Indigenous people remain involved in the management of the country: Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 3. A statewide Aboriginal language interpreting service is proposed by the Commission: see Recommendation 117, below p 337.

35. Australian Property Institute, Submission No. 11 (21 April 2006); Gascoyne Development Commission, Submission No. 38 (11 May 2006); Pilbara Development Commission, Submission No. 39 (19 May 2006); Department of Fisheries, Submission No. 42 (25 May 2006). It is also noted that the Western Australian government's draft biodiversity strategy recognises that 'Indigenous knowledge is important to complement conservation programs. It is also important to maintain this knowledge in order to help reconnect indigenous people with their country'. See Department of Conservation and Land Management (WA), 'Towards a Biodiversity Conservation Strategy for Western Australia' (2004), <http://www.naturebase.net/haveyoursay/pdf_files/biodiversity_draft_lores.pdf> 30.
36. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 375.
37. Ibid 376, Proposal 73.
38. The Department of Fisheries drew the Commission's attention to the fact that under its proposed Aboriginal Fishing Strategy, customary fishing is a distinct right and a separate fishing activity, rather than an exemption as currently provided for under s 6 of the *Fish Resources Management Act 1994* (WA). The Commission has therefore expanded its recommendation to include 'rights' as well as exemptions. Department of Fisheries, Submission No. 42 (25 May 2006) 2.
39. Australian Property Institute, Submission No. 11 (21 April 2006) 2.
40. Gascoyne Development Commission, Submission No. 38 (11 May 2006) 4. The Gascoyne Development Commission suggested that there be continuous review of all harvesting activities in consultation with Aboriginal and non-Aboriginal harvesters.
41. In relation to fishing, for example, this might be achieved by notation on commercial and recreational fishing licences or by signage in popular fishing areas.

In its Discussion Paper the Commission suggested that communication of these matters might be best achieved by establishing a dedicated section on relevant departmental websites,⁴² as well as providing notices and information to Aboriginal communities through Aboriginal community councils, Aboriginal land councils, Aboriginal radio stations, Aboriginal cultural organisations, native title working groups and community justice groups.⁴³ While the Commission believes that these bodies will be well-placed to disseminate information, it is of the opinion that government should consult with local Aboriginal people and relevant community groups and organisations to determine the best and most culturally appropriate means of raising awareness of harvesting exemptions and restrictions within Aboriginal communities.



Recommendation 98

Enhancing communication of Aboriginal customary harvesting exemptions and restrictions

1. That the Department of Fisheries and the Department of Environment and Conservation, in collaboration and consultation with the Department of Indigenous Affairs, take all reasonable steps to enhance communication of harvesting exemptions or rights of Aboriginal people and of any restrictions placed from time-to-time upon those exemptions or rights.
2. That these authorities consult with local Aboriginal people, groups and organisations to establish culturally and regionally appropriate methods and means of communicating this information to Aboriginal people.
3. That these authorities also consider means of raising awareness of Aboriginal harvesting exemptions and rights among non-Aboriginal people, particularly those engaging in similar harvesting activities under recreational or commercial licences.

Improving recognition – hunting and gathering

Expanding the current customary harvesting exemption for fauna and flora

Section 23 of the *Wildlife Conservation Act 1950* (WA) permits persons of Aboriginal descent to hunt fauna and gather flora on Crown land and other land (with the occupier's consent) for the purposes of food.⁴⁴ Currently the Act does not provide exemption for fauna, flora or natural products taken for other customary purposes. The Commission therefore proposed that the exemption be expanded to include the taking of

42. That is, the Department of Indigenous Affairs, the Department of Environment and Conservation and the Department of Fisheries.
 43. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 376. The Pilbara Development Commission endorsed the Commission's proposal and agreed that changes to legislation or subordinate legislation relating to the suspension of rights or restrictions placed on Aboriginal customary harvesting should be published and promoted prominently in all Indigenous media so as to increase awareness of restrictions at the community level: Pilbara Development Commission, Submission No. 39 (19 May 2006) 3.
 44. As explained in the Commission's Discussion Paper, 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. On 14 August 2001 the government indefinitely suspended Aboriginal people's rights to hunt dugong, six varieties of turtles, and saltwater and fresh water crocodiles, and to take all flora declared 'rare'. As at 23 June 2006, 246 species of flora were declared 'rare' under the *Wildlife Conservation Regulations 1950*.

fauna and flora (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.⁴⁵

As noted in the Commission's Discussion Paper, a similar expansion of the current Aboriginal customary harvesting exemption has already been mooted by the Western Australian government in its 2002 consultation paper for a new Biodiversity Conservation Act.⁴⁶ Submissions to the Commission's Discussion Paper indicated support for a more liberal designation of customary uses of flora and fauna harvested pursuant to Aboriginal customary harvesting exemptions.⁴⁷ The Commission notes that the Aboriginal Fishing Strategy has recommended a definition of customary fishing that refers to educational, ceremonial, personal, domestic and non-commercial purposes.⁴⁸ These purposes closely align with the Commission's own recommendation. The Commission suggests that there may be some utility in harmonising the permitted purposes in Aboriginal customary fishing and hunting provisions in the future.

Recommendation 99

Aboriginal customary harvesting exemption expanded to include taking of flora and fauna for other customary purposes

That the Aboriginal customary harvesting 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.

The *Conservation and Land Management Act 1984* (WA) (CALM Act) prohibits the taking of flora and fauna from nature reserves, state forests or other land designated under the CALM Act, and from marine parks without lawful authority.⁴⁹ 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. The Commission examined this issue in its Discussion Paper and proposed that the above expanded exemption also apply to CALM Act land, subject to the provisions of conservation management plans over such land.⁵⁰ This proposal received no opposition from respondents to the Discussion Paper.

Recommendation 100

Aboriginal customary harvesting exemption to apply to land designated under the *Conservation and Land Management Act 1984* (WA)

That the Aboriginal customary harvesting exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA), and its successor in any future wildlife and biological resource conservation legislation, also apply to land designated under the *Conservation and Land Management Act 1984* (WA), but that such exemption be 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.⁵¹ In some cases these introduced

45. For a fuller discussion of these matters, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 372–73 & 376–77 and Proposal 74.

46. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 376–77.

47. See, for instance, Australian Property Institute, Submission No. 11 (21 April 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12. In its submission the ALS stated that Aboriginal people consulted by them desired a customary law defence to taking fauna and flora for customary purposes. The Commission has considered a similar argument in relation to extraordinary drivers licences and has rejected the idea of a customary law defence. For the reasons stated in that section (see discussion under 'Traffic offences', Chapter Five, above pp 116–17) and because an exemption provides an explicit right to Aboriginal people to harvest fauna and flora, whereas a defence would necessitate proving customary law purpose in court, the Commission considers that the current exemption scheme, as expanded by the Commission's recommendations, provides better outcomes for Aboriginal people.

48. It is noted that a new exemption of fishing for customary purposes was issued by the Minister for Fisheries pursuant to s 7(2) of the *Fish Resources Management Act 1994* (WA) on 31 March 2006 in relation to the taking of bluenose salmon. This would indicate that this definition of customary fishing will be pursued in future amendments to the Act.

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

50. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 377, Proposal 74.

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



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.⁵² The Commission sees no reason why recognition of customary harvesting rights should be limited to native animals and acknowledges that Indigenous hunters may have an important role in reducing the number of feral animals in Western Australia. The Commission therefore proposed that the exemption (and any successor in future legislation) remain applicable to all flora and fauna, including introduced species.⁵³ This is clearly a non-controversial recommendation and received no comment from respondents to the Commission's Discussion Paper. The Commission therefore confirms this proposal as a recommendation.

Recommendation 101

Aboriginal customary harvesting exemptions and rights to remain applicable to introduced species of fauna and flora

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

Barter and exchange

Currently s 23 of the *Wildlife Conservation Act* permits harvesting for the purpose of providing sufficient food for family, but not for sale. 'Family' is not defined in the Act, but in the context of Aboriginal persons it should be more broadly defined than a person's immediate 'nuclear' family. In its Discussion Paper the Commission expressed the tentative view that the taking of fauna and flora for non-commercial purposes under the customary harvesting exemption should include taking sufficient for the purpose of satisfying kin obligations within, but not outside, the local community. The Commission acknowledged, however, the potential for a broader view of 'non-commercial' trade permitting barter or exchange between Aboriginal communities.⁵⁴ The Commission invited submissions on whether the non-commercial barter or exchange of fauna or flora harvested under the s 23 exemption should be permitted and, if so, whether any restrictions should be placed upon such exchange.⁵⁵

All submissions that commented on this invitation were in favour of expanding the exemption to allow for non-commercial exchange or barter within and between Aboriginal communities so long as it is not for financial gain.⁵⁶ Indeed the Pilbara Development Commission stated that the non-commercial barter or exchange of fauna and flora is an integral component of community subsistence and, in some instances, of adherence to Aboriginal customary law. The Commission agrees. As shown in Part VI of the Commission's Discussion Paper,⁵⁷

52. Ibid 38.

53. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 377, Proposal 75.

54. Ibid 377–78.

55. Ibid 378, Invitation to Submit 16.

56. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 12; Pilbara Development Commission, Submission No. 39 (19 May 2006) 6; Department of Fisheries, Submission No. 42 (25 May 2006) 3.

57. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 274–76.

Aboriginal people should be encouraged to make use of their traditional knowledge of the land and its natural resources by undertaking commercial harvesting of flora on Crown land.

anthropological research indicates that barter and exchange between different tribal groups was commonplace in traditional Aboriginal societies. The discussion also described instances of reciprocity of gifts and services demanded under customary law.⁵⁸ The Commission noted in its Discussion Paper that the Aboriginal Fishing Strategy had recommended a broader exemption in line with that discussed above and that barter and exchange between communities was an existing activity for customary fishing.

Apart from conservation interests of fauna and flora that may renew less rapidly than fish stocks, the Commission can see no reason not to recognise the customary practice of barter and exchange between communities so long as such barter and exchange is not for financial gain and is done in accordance with the Aboriginal customary laws of the relevant communities. The Commission therefore makes the following recommendation.

Recommendation 102

Recognition of non-commercial barter and exchange of harvested fauna and flora pursuant to Aboriginal customary law

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) and its successor in any future wildlife and biological resource conservation legislation be amended to permit the non-commercial barter and exchange of fauna and flora harvested pursuant to the exemption within and between Aboriginal communities so long as such barter or exchange is not for financial gain and is in accordance with the customary laws of the relevant communities.

Commercial exploitation of customary harvesting knowledge

Currently, any person may apply for a licence under s 23C of the *Wildlife Conservation Act* to harvest flora⁵⁹ on 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 (including quota of flora, place of harvesting, etc). An 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 living in remote areas that have little to no viable alternative industry.⁶⁰ However, the article 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.⁶¹

The Commission believes that Aboriginal people should be encouraged to make use of their traditional knowledge of the land and its natural resources by undertaking commercial harvesting of flora on Crown land. Taking conservation as its priority, it is the Commission's view that commercial harvesting of natural resources should remain subject to government-controlled licensing. However, in relation to harvesting by Aboriginal people, strong arguments can be made for the relaxation of licensing conditions, for the waiver of fees (including royalty payments) and for a certain number of licences (particularly in competitive industries such as sandalwood harvesting) to be set aside exclusively for Aboriginal communities.

The Commission is of the opinion that the new biodiversity conservation legislation offers an excellent

58. Ibid 275–76.

59. 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*.

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

61. 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.

opportunity for the Department of Environment and Conservation to review the licensing regime for the commercial harvesting of flora to investigate ways that it can be improved to encourage and assist Aboriginal people to develop commercial harvesting opportunities in Western Australia. Such review should be undertaken in consultation with Aboriginal people and in conjunction with the Office of Aboriginal Economic Development (Department of Industry and Resources) as the office responsible for increasing the economic independence of Aboriginal people in Western Australia.

Recommendation 103

Review of commercial harvesting licensing regime under the *Wildlife Conservation Act 1950* (WA)

1. That, in conjunction with the Office of Aboriginal Economic Development, the Department of Environment and Conservation review the current commercial licensing regime under the *Wildlife Conservation Act 1950* (WA) (and in any other relevant wildlife and biological resource conservation legislation) to investigate ways that it can be improved to encourage and assist Aboriginal people to develop commercial harvesting opportunities in Western Australia.
2. That such review be undertaken in consultation with, and with the involvement of, Aboriginal people.

Methods of customary harvesting

In its Discussion Paper the Commission described the various methods of harvesting foods used by Aboriginal people in traditional societies. It noted that, 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, the Commission noted that to

insist on the exercise of Aboriginal harvesting rights only by use of traditional methods would effectively deny Aboriginal people their customary rights to harvest natural food resources.⁶²

Perhaps for this reason, the Aboriginal customary harvesting exemption under s 23 of the *Wildlife Conservation Act 1950* (WA) does not restrict Aboriginal harvesters to the use of traditional hunting methods. However, as the Commission's Discussion Paper also made clear, Aboriginal people hunting under the s 23 exemption are also not subject to regulations which restrict the use of firearms, snares, nets, traps, poisons and explosives in the taking of fauna.⁶³ In its submission, the Pilbara Development Commission argued that this created an inequity in the application of wildlife conservation provisions to members of the hunting community.⁶⁴

Clearly, under current provisions Aboriginal hunters may use means that are not available to other hunters. However, there are good reasons for this. Leaving aside, for the moment, the use of firearms (which is dealt with below) most of the other means identified under the *Wildlife Conservation Regulations* as 'illegal means and devices' were in fact traditionally used by Aboriginal hunters. As the Commission's Discussion Paper explained:

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; whilst harpoons and rafts or canoes would be used for open sea fishing. In some areas Aboriginal people would build stone barriers into the sea to trap fish with the receding tide. Large game was mostly hunted with spears and, less frequently, with boomerangs or the use of camouflaged pits. Reptiles and small marsupials were hunted with the use of clubs or sticks, whilst stone axes were used to chop wood and to extract honeycomb from hollow trees. Vegetable foods were collected in dilly bags woven from grasses or pandanus fibre, and digging sticks were used to unearth yams and edible roots.⁶⁵

The Commission notes that while there does appear to be some inequity in the operation of the 'illegal means and devices' provisions, any amendment to the *Wildlife Conservation Act* to restrict Aboriginal hunters

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

63. *Wildlife Conservation Regulations 1970* (WA) reg 54 'Illegal means and devices'.

64. Pilbara Development Commission, Submission No. 39 (19 May 2006) 3.

65. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 370 (footnotes omitted).

from use of methods—such as spears, traps, snares, nets and poisons—may have the consequence of impairing native title rights. Given that there has been no restriction on the means used by Aboriginal hunters under wildlife conservation legislation to date, an amendment that may affect native title rights may be held invalid under the future act provisions of the *Native Title Act 1993* (WA).

Although the Commission does not consider it feasible to recommend amendment of the *Wildlife Conservation Act* to allow for equitable application of ‘illegal means and devices’ regulations, it is concerned about animal welfare and notes that the primary purpose of the regulations is to restrict the use of hunting methods that may cause an animal to suffer unnecessarily. It has been forcefully argued by certain commentators⁶⁶ that customary harvesting exemptions and traditional hunting rights should be subject to animal welfare and protection legislation. Most traditional hunting practices that would be considered cruel have probably now been replaced by the use of tools, such as firearms, that generally afford an animal a less painful death. However, certain cruel practices in the killing of marine fauna such as dugong and turtle are still apparently common.⁶⁷ There are also reported methods of food preservation employed by some Indigenous hunters—such as tethering goannas by the neck or breaking kangaroos’ legs to prevent escape until required for food—that would be considered cruel to animals.⁶⁸

In Western Australia, the prevention of cruelty to animals is governed by the *Animal Welfare Act 2002* (WA). While there is a defence in the Act to cover acts authorised by law—which would include killing of animals under the customary harvesting exemption—this defence only applies if the authorised act is performed in a humane manner.⁶⁹ There is therefore scope for an Aboriginal hunter to be charged under the *Animal Welfare Act* if he or she participated in inhumane hunting practices, although there is no precedent for this in Western Australian case law.⁷⁰ Currently the Department of Environment and

Conservation takes the position of encouraging Aboriginal people to modify their means of traditional hunting if it involves acts of cruelty.⁷¹ The Commission commends this approach and recommends that education of Aboriginal hunters to avoid cruel practices be formalised by the institution of programs or information services to raise awareness among Aboriginal hunters of humane practices for taking of fauna under the s 23 exemption.

Recommendation 104

Education to avoid cruelty to animals taken under Aboriginal customary harvesting exemptions

1. That the Department of Environment and Conservation institute programs or information services to raise awareness among Aboriginal hunters of means of avoiding cruelty to animals in the taking of fauna under the exemption provided by s 23 of the *Wildlife Conservation Act 1950* (WA) and its successor in any future wildlife and biological resource conservation legislation.
2. That the Department of Environment and Conservation consult with local Aboriginal people, groups and organisations to establish culturally and regionally appropriate methods and means of communicating this information to Aboriginal people.

Use of firearms for customary harvesting

In its Discussion Paper the Commission observed that the legality of the use of firearms by Aboriginal people for hunting on Crown land was unclear. Under s 267 of the *Land Administration 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. Although Aboriginal people exercising their customary harvesting rights under the *Wildlife Conservation Act* are exempted from the

66. See in particular, Dominique Thiriet, ‘Tradition and Change – Avenues for Improving Animal Welfare in Indigenous Hunting’ (2004) 11 *James Cook University Law Review* 159; Dominique Thiriet, ‘Traditional hunting: Cultural rights v animal welfare’ (2006) 31(2) *Alternative Law Journal* 63.

67. In Western Australia the taking of these marine fauna is prohibited, even by Aboriginal hunters under the s 23 exemption. For numerous examples of cruel practices of killing marine fauna by Indigenous hunters, including in Western Australia: see Thiriet, ‘Tradition and Change’, *ibid* 164–66. See also ABC News Online, ‘Council Looks to Tackle Inefficient Traditional Hunting Methods’ (17 May 2005), <http://abc.net.au/message/news/stories/ms_news_1369943.htm>.

68. Thiriet, *ibid* 166.

69. *Animal Welfare Act 2002* (WA) s 22.

70. The Commission notes that in the Northern Territory s 79(2) of the *Animal Welfare Act 1999* (NT) specifically excludes the possibility of using cultural, religious or traditional practices as a defence to an act of cruelty against an animal. The Commission believes that such a provision could usefully be considered in Western Australia; however, since it impacts upon practices such as halal and kosher butchering, the Commission feels that it may require a greater review than is within the scope of the current reference.

71. Simon Hancocks, Senior Policy Officer, Department of Environment and Conservation, email (1 August 2006).

regulations regarding methods of taking fauna (which prohibit use of firearms), they may nevertheless theoretically be subject to prosecution under s 267 if they employ firearms in their customary hunting activities on Crown land. The Commission noted that s 104 of the *Land Administration Act 1997* (WA) which gives authority to Aboriginal people to hunt 'in their accustomed manner', coupled with the exemption under s 23 of the *Wildlife Conservation Act 1950* (WA), would provide a reasonable excuse and constitute a defence to a charge under s 267; however, this remains untested at law. In these circumstances the Commission considered that the issue would benefit from legislative clarification and made a proposal to that effect in its Discussion Paper.⁷²

The Commission received three submissions on this proposal, all of which supported the need for legislative clarification.⁷³ Two of these submissions merit special mention here. The Department of Fisheries noted that the definition of 'land' in the *Land Administration Act* includes coastal waters up to three nautical miles⁷⁴ and that this must be taken into account (and the Department of Fisheries consulted) in any amendment to the legislation.⁷⁵ The submission of the Western Australia Police noted that any legislative change must complement the *Firearms Act 1973* (WA)⁷⁶ and that any exemption for Aboriginal people should be made explicit in the *Firearms Act* so that police officers are aware of it in the event that they are called upon to resolve a complaint for actions contravening the Act.⁷⁷ The Commission agrees with the observations made by the Police and the Department of Fisheries and recommends that these matters be taken into account in the clarification of relevant legislation regarding use of firearms by Aboriginal people in the act of customary harvesting. The Commission also notes that, in view of its recommendation above that the Aboriginal customary harvesting exemption be extended to apply to land designated under the *Conservation and Land Management Act 1984* (WA),⁷⁸ the use of firearms for customary harvesting on such land will also need to be considered.

Recommendation 105

Clarification of permissible use of firearms by Aboriginal people in customary harvesting

1. 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 and pastoral leasehold 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).
2. That the definition of 'land' in the *Land Administration Act 1997* (WA), which includes land seaward to three nautical miles, and its impact on fisheries interests and protection of marine fauna be considered in determining the permissible use of firearms under the *Land Administration Act 1997* (WA).
3. That the responsible Ministers institute a collaborative review of relevant legislation, including the *Firearms Act 1973* (WA), the *Land Administration Act 1997* (WA), the *Wildlife Conservation Act 1950* (WA) and the *Conservation and Land Management Act 1984* (WA) to ensure that permissible use of firearms in customary harvesting activity is clearly noted.

Improving recognition – fishing

Section 6 of the *Fish Resources Management Act 1994* (WA) exempts Aboriginal people from the need to obtain a recreational fishing licence when fishing for a non-commercial purpose and in accordance with 'continuing Aboriginal tradition'. However, Aboriginal people remain subject to the normal fishing rules and regulations regarding such things as size restrictions, bag limits, protected species, conservation areas and seasonal closure of fishing areas.⁷⁹

72. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 382, Proposal 76.

73. Australian Property Institute, Submission No. 11 (21 April 2006); Department of Fisheries, Submission No. 42 (25 May 2006); Office of Commissioner of Police, Submission No. 46 (7 June 2006).

74. As defined in the *Land Administration Act 1997* (WA) s 3 which states that 'land' includes 'all coastal waters of the State as defined by section 3(1) of the *Coastal Waters (State Powers) Act 1980* of the Commonwealth'.

75. Department of Fisheries, Submission No. 42 (25 May 2006) 2–3.

76. In particular ss 11A(1), 11A(2)(c), 23(10) & 23(10a).

77. Office of Commissioner of Police, Submission No. 46 (7 June 2006) 12–13.

78. See Recommendation 100, above p 307.

79. For more detailed exposition, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 373.



A recent report into the development of an Aboriginal Fishing Strategy in Western Australia found that there were a number of ways in which the recognition of Aboriginal customary fishing rights could be improved in Western Australia.⁸⁰ These are examined in the Commission's Discussion Paper.⁸¹ The Aboriginal Fishing Strategy Working Group (ASFWG) report made a number of recommendations which reflect the Commission's hierarchy of priorities—that is, placing Aboriginal customary interests above recreational and commercial interests but below the interests of conservation—and answered the Commission's concerns about limitations placed upon the s 6 exemption that are intended for recreational, rather than customary subsistence, fishers. The AFSWG report defined 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.⁸²

In respect of (c), the 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 and that, for this reason, (c) would not be incorporated into the legal definition of customary fishing.⁸³ The Commission noted in its Discussion Paper that this accorded with its own view in regard to establishing the content of Aboriginal customary law and who is bound by it. The Commission encouraged the Western Australian government to implement the recognition strategies contained in the report of the AFSWG.⁸⁴

Since the release of the Commission's Discussion Paper a further paper (Paper No. 208) has been published by the Department of Fisheries.⁸⁵ Paper No. 208 indicates that the Department has accepted the broad thrust of the AFSWG's recommendations. It proposes amendments to the *Fish Resources Management Act 1994 (WA)* to introduce a new sector of customary fishing that reflects customary fishing activity as a discrete right rather than an exemption to recreational fishing activity. The paper recommends that customary fishing become a sector within the government's Integrated Fisheries Management policy (therefore making it subject to fisheries management plans based on sustainability) and that it 'be given priority over all other fishing access'.⁸⁶

However, the Commission notes that the definition of customary fishing currently being piloted in exemptions under s 7(2) of the *Fish Resources Management Act* is

80. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003).
 81. For more detailed exposition, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 378–81.
 82. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) 30.
 83. *Ibid* 31.
 84. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 381.
 85. Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006).
 86. *Ibid* 27.

different to that proposed by the AFSWG in that it applies to persons of Aboriginal descent who are fishing for educational, ceremonial, personal, domestic and non-commercial communal purposes *and* who are 'fishing in accordance with traditional law and custom'.⁸⁷ The wording 'in accordance with traditional law and custom' is seemingly aligned to the decision of Kirby P in *Mason v Tritton*⁸⁸ which, as the Commission's Discussion Paper explains, describes the 'exacting nature of the evidential burden'⁸⁹ required to prove a native title right to fish at common law.⁹⁰

The Commission believes that the definition of 'customary fishing' currently being piloted by the Department of Fisheries may require a higher form of evidence or qualification than the definition recommended by the AFSWG, which did not reference traditional law and custom but which required, in practice, acceptance by the Aboriginal community in the area being fished as having a right to fish there in accordance with Aboriginal tradition.⁹¹ The Commission also notes that this new definition potentially removes the right of the Aboriginal community to determine who has permission to fish the area in accordance with Aboriginal tradition. As noted above, this was a major factor in the Commission's support for the Aboriginal Fishing Strategy and, in the absence of any explanation for the new definition, the Commission finds it very difficult to assess the potential impact of this change. The Commission does note that while 'customary fishing' is repeatedly referred to in Paper No. 208, it does not in any place offer a definition of that term. The Commission strongly recommends that in any amendments to the *Fish Resources Management Act 1994* (WA) the Department of Fisheries revert to the definition of the term 'customary fishing' as set out in recommendation 1 of the AFSWG report.⁹²

Recommendation 106

Adoption of the Aboriginal Fishing Strategy Working Group's definition of 'customary fishing'

That, in proposed amendments to the *Fish Resources Management Act 1994* (WA), the definition of the term 'customary fishing' be as defined by the Aboriginal Fishing Strategy Working Group in recommendation 1 of Fisheries Management Paper No. 168.

The Commission further notes that Paper No. 208 speaks of including a provision in the amendments to the *Fish Resources Management Act* that 'allows the Executive Director to issue authorisations for the purpose of managing customary fishing'.⁹³ The nature of these 'authorisations' in relation to customary fishing is uncertain; however, it would appear that customary fishing activity may be subject to authorisation (and suspension of authorisation)⁹⁴ rather than simply conservation management by the authorities. This is contrary to recommendation 5 of the AFSWG report which states that 'customary fishing be recognised and managed as a positive, existing right and not a right to be conditionally granted'.⁹⁵

Although it is not openly stated in Paper No. 208, it would appear that, as a 'managed fishery', customary fishing may also be subject to the allocation of permits which are not 'granted as of right [and] would be valid only for limited and fixed periods with no right of renewal'.⁹⁶ The Commission finds that such a permit system is contrary to recommendation 1 of the AFSWG report which makes clear that:

87. See, for example, the new exemption of fishing for customary purposes issued by the Minister for Fisheries on 31 March 2006 pursuant to s 7(2) of the *Fish Resources Management Act 1994* (WA) in relation to the taking of bluenose salmon.

88. (1994) 34 NSWLR 572.

89. Ibid 584 (Kirby P).

90. See LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 371–72.

91. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) 30–31.

92. Ibid, recommendation 1.

93. Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006) 29.

94. Paper No. 208 makes clear that authorisations will be subject to mandatory suspension for a period of up to five years if the authorisation 'accumulates three prescribed offences in a ten-year period': ibid 14. It should be noted that offences, including contravention of a management plan (which will apply to the new customary fishing sector), also attract penalties such as fines. It is not clear whether an authorisation would apply to an individual or to a community in relation to customary fishing.

95. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) Recommendation 5.

96. Department of Fisheries, *Proposed Amendments to the Fish Resources Management Act 1994: Discussion Paper*, Fisheries Management Paper No. 208 (April 2006) 13.

Establishing who can fish in accordance with Aboriginal tradition in specific areas is the responsibility of the Aboriginal community and Government *should not play a role in legislating or enforcing this practice.*⁹⁷

If a permit system were applied to customary fishing under the proposed amendments detailed in Paper No. 208, then Aboriginal people will possibly be in a worse position than under the current exemption scheme. The exemption scheme applies to all Aboriginal people regardless of customary right and does not require any form of permit or licence. While the establishment of a customary fishing sector as described by the AFSWG report has important benefits, the potential of suspension of authorisations and a permit system applying to that sector under the current proposed amendments significantly detracts from the AFSWG's recommendations.

Without further information regarding the nature of authorisations, the definition of customary fishing and the potential application of a permit system, the Commission does not support the amendments proposed by the Department of Fisheries in Paper No. 208. Instead the Commission recommends the implementation of the Aboriginal Fishing Strategy proposed by the AFSWG in Paper No. 168. The Commission further reiterates the need for consultation with, and involvement of, Aboriginal people throughout the amendment process, particularly if proposed amendments stray from the recommendations of the AFSWG.



Recommendation 107

Implementation of the Aboriginal Fishing Strategy Working Group's recommendations

1. That the Western Australian government implement the recommendations of the Aboriginal Fishing Strategy Working Group as reported in Fisheries Management Paper No. 168.
2. That any amendments to the *Fish Resources Management Act 1994* (WA) that stray from the recommendations of the Aboriginal Fishing Strategy Working Group as reported in Fisheries Management Paper No. 168 be undertaken in consultation with, and with the involvement of, Aboriginal people.

Improving recognition – access to land for customary harvesting

In its 1986 report on the recognition of Aboriginal customary laws the Australian Law Reform Commission 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'.⁹⁸ 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 *Conservation and Land Management Act 1984* (WA).⁹⁹

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.

97. Department of Fisheries, *Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon EM Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group*, Fisheries Management Paper No. 168 (May 2003) Recommendation 1 (emphasis added).

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

99. Recommendation 100, above p 307.

In Western Australia 36 per cent of the state's land area is covered by pastoral leases; the leaseholds of which expire in 2015.¹⁰⁰ 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.¹⁰¹ 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*.

Section 104 access

The terms of the reservation for Aboriginal access to pastoral leases contained in s 104 have not changed since 1934.¹⁰² 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.¹⁰³

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 Aboriginal interests which sought clarification of the rights guaranteed under the section.¹⁰⁴ 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.¹⁰⁵ Access agreements would feature such things as codes of conduct for both parties, joint responsibilities in conservation and land management, and dispute resolution procedures.¹⁰⁶ 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.¹⁰⁷

In its Discussion Paper the Commission noted its support for 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.¹⁰⁸ The Commission observes that amendments to s 104 of the *Land Administration Act* to reflect the recommendations of the AALAWG remain outstanding; it therefore makes the following recommendation.

Recommendation 108

Clarification of access by Aboriginal people to pastoral leasehold land for customary purposes

That the recommendation of the Aboriginal Access and Living Areas Working Group final report regarding clarification of pastoral lease land access and rights and responsibilities of traditional owners and leaseholders under s 104 of the *Land Administration Act 1997* (WA) be implemented.

100. 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).

101. AALAWG, *ibid*.

102. *Ibid* 11.

103. *Ibid* 10.

104. *Ibid* 11.

105. *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.

106. *Ibid* 5.

107. *Ibid* 13.

108. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 382.