Quandamooka Yoolooburrabee Aboriginal Corporation (QYAC)

Submission to the State Development, Natural Resources and Agricultural Industry Development Committee for the review of Fisheries (Sustainable Fisheries Strategy) Amendment Bill 2018.

This submission documents social, cultural, environmental, economic and legal aspects the Bill must consider so as to support the aspirations of the Quandamooka People and the government's commitment to the economic transition for North Stradbroke Island and surrounding waters.

The Quandamooka People

The Quandamooka People are the Traditional Owners of Moreton Bay and its Island landscapes and have been custodians of its marine resources since time immemorial. We sustainably managed the fishery resource for at least 22,000 years before white settlement.

The Quandamooka territory, known as "Country", comprises the waters and lands of and around Moorgumpin (Moreton Island), Minjerribah (North Stradbroke Island), the Southern Moreton Bay Islands and South Stradbroke Island. It includes the mainland from the mouth of the Brisbane River, Wynnum, Chandler, Lytton, Belmont, Tingalpa, south to Cleveland and the Logan River. Parts of Quandamooka Country exist in four Queensland local government areas – the Brisbane City Council, Redland City Council, Logan City Council and Gold Coast City Council. The Quandamooka People continue to operate under our own distinct system of laws and customs.

On 4 July 2011 the Federal Court of Australia granted the Quandamooka People native title over large sections of North Stradbroke Island and various nearby islands and waters.

The Quandamooka Yoolooburrabee Aboriginal Corporation (QYAC) is the body corporate established to manage these native title rights and interests for the benefit of the Quandamooka People.

The Quandamooka-State of Queensland ILUA was registered by the National Native Title Tribunal on 8 December 2011, which makes it enforceable in the Federal Court.

QYAC supports the establishment of better processes for future fisheries management that are developed in consultation with Quandamooka people who are committed to the long term stewardship of these natural and cultural resources.

Aspirations of the Quandamooka People

In a recent Business Opportunities Analysis, QYAC identified the following options for Quandamooka Country, including Minjerribah (North Stradbroke Island).

- 'Take tourists fishing' business - Fishing charters, education in Aboriginal fishing methods.
- Permitting process for access to native title sea areas for commercial fishing companies
- Aquaculture business activities relating to fish farming and oyster production.
- Other commercial fishing business opportunities - Aboriginal owned and run.
- Seafood processing business for local seafood production, servicing wholesale/retail food-based businesses on and off the island.

It is clear from this small excerpt from an extensive list of business opportunities that there is the potential for a significant return on investment to the State Government in assisting the Quandamooka People to achieve their economic aspirations in relation to sea country.

QYAC is assessing a number of fisheries and aquaculture opportunities in Quandamooka country including their feasibility, potential economic return, ecological risks, and capacity needs etc.

Given the financial aspirations and legal commitments to the economic transition of Minjerribah and the self determination of the Quandamooka People, QYAC have a major interest in the proposed amendments to the Fisheries Act.

Native Title Rights and State Regulation of access to a Natural Resource

The States' regulation of access to a natural resource, such as water or fish, as repeatedly held by the High Court, does not extinguish native title rights or interests. Nor is native title a common law right, although it is recognised and protected at common law.[1]

The High Court has analysed these regimes and determined in *Akiba,* Finn J (at first instance) that the previous fisheries regimes which applied in Queensland had not extinguished the non-exclusive Applicant's native title rights because:

[44] *Mabo v Queensland (No 2)* ("Mabo case") [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) at 43,52 and 68; O'Bryan, K (2016) "*More Aqua Nullius? The Traditional Owner Settlement Act 2010 and the neglect of Indigenous rights to manage Inland Water resources*" MULR Vol 40 page 547 at 567–568.

1. *The legislature had not evidenced a clear and plain intention to do so;*[2]

2. *The common law public right to take fish from tidal waters for commercial purposes had been affected by licensing regimes;*

3. *The native title right is a private right, rather than the common law public right which was more amenable to extinguishment;*

4. *A legislative measure which merely regulates the exercise of a native title right does not evidence an intention by the legislature to extinguish the Native Title right;*

5. *The licensing regimes do no more than regulate the exercise of the native title rights to take fish for commercial purposes.*[3]

In *Ward v West Australia (2002)*[4] the High Court held that the West Australian Water legislation did not extinguish native title rights and interests, but was inconsistent with exclusive rights being recognized in water.

Accordingly, Native Title rights in water are likely to be non-exclusive in regimes where access to water has been regulated and accessed. Native title rights are likely to include the right to take, including for commercial purposes.

Any impact upon native title rights and interests from various State statutory regimes granting licences to take and use fish has been validated by operation of the *Native*

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[2]*Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No.2)* at [768]; *Ward HC at [78]; either by express provision in the statute or by necessary implication: Wik Peoples HC, at 247. As was said by Brennan J in Mabo [No 2] at [64]:*

> *This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealings with the extinguishing of the native title of Indian bands in North America. ... [R]eference to the leading cases in [Canada and the United States] reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so. That approach has been followed in New Zealand. It is patently the right rule.*
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> *....*

At [770] "*Given the contemporary significance now attributed to "context" in statutory interpretation: CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCATrans 242; (1997) 187 CLR 384 at 408; where the extinguishment is said to have resulted directly from legislation itself without, for example, the conferral of inconsistent rights on a third party: cfFejo at 126; the absence in contextual material of any indication of a purpose to override native title rights, could, I would respectfully suggest, be of some significance in the interpretation of a statute enacted after the decision in Mabo [No 2]; cf the comments of Gummow J in WikPeoples HC at 184-185; see also by way of contrast, Haida Nation v British Columbia (Minister of Forests) (2004) 245 DLR (4th) 33 at [25], [27], [32].*

[3]*Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No.2)* (2010) 270 ALR 564; 2010 FCR 643 at [763 – 861], *Karpany v Dietman* [2013] HCA 47; 88 ALJR 90; 303 ALR 216, per JJ Full Court at [23] for where SA Fisheries Act regime was determined.

[4]Ward v West Australia (2002) 213 CLR 1 at 151 – 152, at [263]

Title Act 1993 (Cth) as a past or intermediate period act,[5] but it does give rise to both compensation[6] and is subject to the non-extinguishment principle.[7]

Paragraph 8 of the Quandamooka Determination provides that the "*native title rights and interests referred to in paragraph.... 3(c)….do not confer possession, occupation, use or enjoyment to the exclusion of all others*."

Paragraph 3(c)(ii) provides relevantly that the non-exclusive rights indentified in Schedule 6 to the Quandamooka Determination includes the right for the Quandamooka People to "*take, use, share and exchange Traditional Natural Resources"* for any non-commercial purpose.

The Federal Court defined "Traditional Natural Resources" at paragraph [13] to include:

"(i) 'animals' as defined in the Nature Conservation Act 1992 (Qld);

The Schedule to the *Nature Conservation Act1992 (Qld)*defines "animal" to mean:

"any member of the animal kingdom (other than human), (whether alive or dead), and includes—

any—

....

(v) invertebrate; ….

The Quandamooka People's native title rights include the right to take and use traditional natural resources in accordance with Quandamooka People's laws and customs.

The Quandamooka People's native title rights and interests are, according to paragraph [7] of the Determination, subject to and exercisable in accordance with:

"(*a) the Laws of the State and the Commonwealth; and the traditional laws acknowledged and traditional customs observed by the native title holders*."

Integration of Law and Custom into Fisheries Management Regimes

QYAC submits that the integration of Quandamooka Law and Custom and the statutory frameworks regulating fisheries is not only possible, but desirable as Quandamooka law and custom is based on observational science over many

[5] Native Title Act 1993 (Cth), s 22F, s 228, s 232A- 232E
[6]Ibid at s 22G
[7]Ibid at s 238, it means that once the inconsistent right is abolished, terminated, or lapses, then the underlying native title rights are fully restored

thousands of years, rather than the limited data set of 100 plus years that is currently available to modern fisheries scientists.

Quandamooka People have a range of traditional law and customs which are relevant to increasing abundance of marine resources such as eugaries (pippies), oysters, mullet, flathead, bream, razor shells and beche de mer. Quandamooka People's law and custom, if applied within the statutory framework should allow fisheries resources within Moreton Bay to recover and become more resilient to environmental factors such as water pollution, sedimentation and habitat loss.

Quandamooka People would like fisheries management plans to expressly recognize the impact of "pollution and habitat degradation" on fish resource stocks, as much of the decline in fish stocks is driven by these factors, rather than commercial or recreational take. Further Fisheries regulation, and in particular, minimum lengths, in a number of recreationally and commercially important fish promote the take of the very fish required to restock the fisheries resource stocks. Under Quandamooka law and custom, these very large fish are protected to enable them to breed and return fish to the waters of Moreton Bay.

QYAC would be very interested in piloting a program to review current fisheries management regulation against Quandamooka Law and custom and developing an integrated approach for Moreton Bay fisheries management.

National Indigenous Fishing Principles

In 2004 the National Native Title Tribunal and the National Indigenous Fishing Technical Working Group developed a set of National Indigenous Fishing Principles (Annexure A).

Whilst these principles are not legally binding they have been voluntarily adopted by various State governments, however the implementation of the Indigenous Fishing Principles seems to have slowed after the introduction of cultural fishing rights in the statutory regimes.

In particular QYAC would like to work with the government on a pilot of communally held commercial fishing licences (more consistent with Native title rights), and a review of the current community fishing permits.

International Conventions

We also refer to the number of international conventions ratified by Australia, which have been introduced into various pieces of domestic legislation such as:

1. International Convention on Biological Diversity[8] (CBD), in particular Articles 8 (j) and 10 (c) and the international benchmark for implementation the Akwe: Kon guidelines[9] and Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable sharing of benefits arising from their utilisation[10];

    a. International Covenant on Civil and Political Rights (ICCPR)[11], particularly Article 1 the right to self-determination;

    b. International Covenant on Economic Social and Cultural Rights (ICESR), and in particular Article 1 right to self-determination, and Article 15 (1)(a) right to a cultural life; and

    c. Declaration on the Rights of Indigenous People (DRIP).

The International Convention on Biological Diversity ('CBD')[12] importantly provides at Article 8(j) a requirement to:

> "*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*

1. Article 10 (c) of the CBD requires Australia to:
   "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements"

2. Each state in Australia is committed to implementing Ecologically Sustainable Development, a key platform of the CBD, including importantly the principle of Intergenerational Equity on 1 May 1992[13].

3. Australian has endorsed the Declaration on the Rights of Indigenous People (DRIP)[14]. Articles 20, 25, 26 (2) and 28 are the most substantive and provide relevantly:

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[8] Rio de Janeiro 5 June 1992
[9] [redacted]
[10] [redacted]
[11] [redacted]
[12] Rio de Janeiro 5 June 1992
[13] [redacted] at clause 3.5.2
[14] [redacted]

"Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress

….

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

> *1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*
>
> *2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources*

4. There are concomitant procedural rights provided by DRIP which are best summarised as a requirement that Indigenous People's provide the free, prior and informed consent to any act which abrogates or purports to give effect to the above substantive rights.

Fisheries (Sustainable Fisheries Strategy) Amendment Bill 2018

QYAC welcomes the following aspects of the Sustainable Fisheries Strategy and the Bill:

- Explicit acknowledgement of the cultural and economic importance of fisheries resources to Aboriginal and Torres Strait Islander communities in Queensland.
- The commitment to a new engagement process highlighting the importance of engaging with Traditional Owners to oversee the implementation of the Sustainable Fisheries Strategy.
- The establishment of fishery working groups to develop harvest strategies and encourage a greater stakeholder role in providing advice on management options specific to local areas.
- The commitment to work with Indigenous groups and communities through various forums to ensure they are engaged in fisheries management processes, such as fishery-specific harvest strategies.
- The commitment to the employment of cultural liaison officers to assist in this new engagement process.

The examples of working groups cited in the briefing notes including a Moreton Bay working group (with QYAC involvement) and an Indigenous working group is encouraged. This would complement the government's commitment to the investment in the North Stradbroke Island ETS and the aspirations of the Quandamooka People.

QYAC support the following actions from the Fisheries Strategy as a strategic and timely promotion and implementation activity for the amended Act:

- Action 7.5 Pilot regional management in a key location (e.g. Moreton Bay) to assess the benefits and limitations of regionally specific management arrangements.
- Action 7.6 Develop a traditional fishing policy to clarify arrangements and an Indigenous commercial fishing development policy to support Indigenous economic development in a way that supports sustainable fishing.

These actions must be delivered in close consultation with Traditional Owners and ensure alignment with Native Title legislation and remove conflicts where they exist.

QYAC seeks involvement in the Moreton Bay working group as part of a pilot regional management project to assess the benefits and limitations of regionally specific management arrangements. This would assist in enabling the integration of law and custom into fisheries management regimes and the recognition of international conventions ratified by Australia.

Consistency with fundamental legislative principles

QYAC supports the need to strengthen compliance powers to better align Queensland with other Australian jurisdictions.

The Bill when establishing the necessary powers, functions and tools for fisheries management must be cognisant of the new management regimes under the Native Title Act to enhance compliance and the smooth introduction and operation of the amended Act. Any other changes to implement the Strategy that are progressed as part of a review of the Fisheries Regulation 2008 in 2019 must also consider these new and emerging legal and administrative arrangements.

Estimated cost for government implementation

QYAC understand that the changes to the Fisheries Act outlined in this Bill will not impact upon recreational, commercial, charter or indigenous fisher's access to Queensland's fisheries. This will not affect the majority of people fishing in Queensland who do not engage in illegal sales of fisheries products.

QYAC does however support the establishment of better processes for future fisheries management developed in consultation with Indigenous working groups who are committed to the long term stewardship of these natural and cultural resources.

QYAC supports enhanced compliance and stiffer penalties for persons convicted of offences or black marketing.

Ensuring issues of Native Title and access to sea country are considered will also reduce conflict and the cost to government while enhancing the returns to the economy and the community through the enactment of the amended Act.

Please call Cameron Costello on [redacted] to discuss any aspects of this submission.

Annexure A

National Indigenous Fishing Principles

1. Indigenous people are 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 Indigenous participation in fisheries related businesses and fisheries management, together with related vocational development, must be expedited.