I Introduction

1. Our submissions are aimed at ensuring the effective implementation of the 2007 and 2010 court orders in the Kenneth George matter which enjoined the Minister to effectively "accommodate the socio-economic rights of traditional fishers and ensure equitable access to marine resources for those fishers". We represented Kenneth George and the co-applicants in both those matters.

2. Moreover, we are instructed by our clients in the *Gongqose*[1] matter currently before the High Court in Mthatha to ensure that the MLRA is amended to **recognise their pre-existing customary rights to access marine resources in terms of sections 39(3), 30, 31 and 211 of the Constitution**. Failing that, we are instructed to continue with our application to have the MLRA declared unconstitutional, including the provisions relating to the declaration of marine protected areas and no take zones where community rights are affected.

3. We made submissions to the Department on the amendment of the MLRA in May this year. It was our contention that the effective implementation of the duty of the Minister to realise the right of small-scale fishing communities could only come about with a fundamental shift in fisheries to recognise and protect community-based rights holding and management of customary and traditional small scale fishing communities. Such a fundamental shift, we argued, requires a coordinated and coherent approach that would apply to all policies and sectors in order to avoid confusion, uncertainty and most importantly, render the Minister vulnerable to legal review.

4. In the circumstances, we proposed that the Department do the following:

4.1. Slow down the process of the amendment of the MLRA to properly consult and consider the amendments and the related policies.

4.2. Develop an overarching policy framework that provides cohesion and highlights the linkages between the various sub sector policies and the SSFP.

4.3. In the meantime, start the implementation of the SSFP which would entail an initial phase of identifying and recognising customary and traditional communities. In addition, dedicated community capacity building, particularly on

[1] David Gongqose and 2 Other v The State case nr E382/10.

establishing community based legal entities and bringing any existing DTI supported co-ops in line with the requirements of a rights holding entity in the context of the SSF policy, and proper dissemination of information about the implications of the SSFP should happen. Proper co-management structures and, where appropriate, community entities must be put in place.

II The proposed two-stage amendment process

5. The Department heeded our call on one of these proposals, but not the others. It decided on a minimalist amendment of the MLRA, stating during the short consultation process that these amendments will be followed by far more substantial amendments next year.

6. While we appreciate that the Department has shown a willingness to listen to stakeholders during the consultation process, we remain deeply concerned because our proposal for limited amendments were made specifically as part of a package of proposals. In particular, we recommended strongly that the implementation of the SSF policy must be preceded by (i) a coherent and overarching policy for the transformation of the entire fisheries sector to properly recognise small scale fishers; (ii) sufficient time to properly identify and recognise small fishing communities, in particular those with customary rights that require protection and promotion in terms of the Constitution; and (iii) provide sufficient time, resources and facilitation to enable communities to organise themselves into rights holding entities able to govern the community rights properly. Experience from the land sector has taught us that community-based entities need a lot of support in order to function properly. It does not happen by itself.

7. We understand that the Department intends to identify and verify communities, create legal entities and transfer the rights all by December this year. While our clients are desperate for rights to be transferred to them, we cannot advise that it be done in a way that will most certainly not lead to the actual realisation of

the rights of small scale fishing communities. In particular, we are concerned with the following current proposals for the implementation of the policy:

7.1. The Department is proposing that communities be identified and verified within the next couple of months, presumably based on the information of existing small scale fishing communities they have available. The problem of this approach is that it makes no provision for the recognition of communities with pre-existing customary rights to the resource. In other words, some communities along the South African coastline, like the Hobeni fishers of Dwesa-Cwebe, govern there access to resources in terms of customary law and as such have constitutionally recognised rights to the resource – rights that may only be limited in line with section 36 of the Constitution. These communities thus derive their right not from an allocation in terms of statute law, but from the Constitution itself (s39(3) as explicitly recognised by the MLRA Amendment Bill). Our concern in this regard is underlined by the memorandum attached to the Amendment Bill, which states that the Amendment 'does not contain provisions pertaining to customary law or custom of traditional communities'. We discuss this further below.

7.2. Despite the carefully negotiated contents of the SSF policy that specifies that communities will decide, through a consultative process, which **rights-holding** legal entity they wish to form, the Department has now decided, under the influence of the Department of Trade and Industry, that all small scale communities must now form co-operativess to hold, manage and market the community right. We have advised the Department that we believe this model to be highly problematic. In the absence of any clear statements as to how this will be approached from either DAFF or the DTI, our position has not changed. We were invited to discuss the matter with the relevant people in both DAFF and the DTI, but such discussions have unfortunately not materialised. The MLRA Amendment now makes provision for co-ops to be exclusively added to the definition of 'South African person', which means that communities will be forced to indeed form co-operatives to hold their rights. We elaborate on our position in this regard below.

7.3. Finally, we are concerned that the promises from the Department made repeatedly during the negotiations concerning the Amendment of the MLRA, that it will constitute a two-stage process and that the really significant amendments for the purposes of realising the rights of small scale fishing communities would only follow next year, are rendered meaningless if the Department rushes through the implementation of the SSF policy as now proposed. What would be the purpose of the carefully crafted amendments promised if communities are already identified, recognised and rights allocated? The point, as we understood it during the negotiations around these amendments, was to start off the process of proper implementation, rather than to rush it through in a matter of months. This was the basis for many of the compromises reached.

7.4. In Addendum A, we reiterate the submissions we made setting out what we understand to be the rationale of the amendment of the MLRA and the need to facilitate effective implementation of the SSF policy in the long run.

III The Legal Entity proposed to represent communities

16. The Amendment Bill makes it clear, in the attached memorandum, that co-operatives are included in the definition of "South Africa person" to "enable small-scale fishers to access the benefits and support of the Department of Trade and Industry to co-operatives".
17. This, we submit, is not a good reason for the decision to amend the MLRA to force communities to form co-operatives to hold their community rights. (Communities will be forced to form co-operatives because the MLRA provides that rights may only be allocated to 'South African persons' and the only form of community or association now included in the definition is that of a co-operative.) While it may well be in the interests of some communities to form one or more co-operative to manage and promote the business aspect of the community, co-operatives are not appropriate legal entities to represent communities for the purposes of the SSF policy. Communities can thus not be forced to form co-operatives for the purposes of representing the community.
18. We say this for the following reasons:

18.1. The definition of small-scale fishing community encapsulates more than a business: it refers to the shared history and aspirations of the community; to fishing in terms of shared rules or customs and to self-definition. These are aspects of the notion of 'community' that extends far beyond what an association of people who voluntarily come together to form a business entity share.

18.2. The definition of 'community' for purposes of the Amendment Act thus envisions that the governance entity of the community should be able to facilitate and accommodate the development and cohesion of the community qua community. Furthermore, it is the place where shared rules of access and control of the resource are negotiated, sanctions debated and outcomes decided upon. These rules are akin to custom and tradition and not to business decisions. Our Constitution recognises customary law as an independent source of law precisely to ensure that custom is retained as the negotiated and imbedded system that it is, rather than to be turned into a version of common law.[2]

18.3. One tends to be seduced by the co-operative structure as deeply democratic because it works, in principle, on a one person, one vote system. However, in practice, almost all decisions are made by the directors of the co-operative. The exercise of the supposed distributed democracy is limited to the election of those directors – which does not happen regularly. It may make good business sense to have a group of directors take business decisions on behalf of the community. But the group is not suitable at all to negotiate the rules and customs of the community. That is what the community-based entity will have to do.

18.4. In addition, the spirit of the recognition of small scale fishing communities is to recognise their unique relationship to the marine resource (historically) and their needs as completely distinct from that of the commercial sector (although various small scale fishing communities may well have commercial aspirations). That is the very reason why the MLRA had to be amended to include this sector and why small scale fishing communities couldn't simply be accommodated

[2] The Constitutional Court has made this point on a number of occasions. See for example In *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) at para 51.

under commercial fisheries (see *Kenneth George*). To now restrict small scale fishing communities to being commercial business entities by organising themselves into co-operatives exclusively, is to resort back to precisely the commercially driven perspective that the amendment seeks to depart from.

18.5. One dire practical consequence of organising communities into co-operatives exclusively is that a co-operative, as a business entity, can go bankrupt – and thus lose the community right. The MLRA and the SSF policy (and the Constitution in the case of customary communities) do not envision such a situation.

18.6. We thus submit that the amendment forcing communities to form co-operatives as rights-holding entities should be changed to include 'trusts' and even 'communal property associations' in the definition.

III <u>The recognition of customary rights</u>

19. One of the central tenants of the SSF policy is that it recognises, in line with the Constitution, rights arising from customary law. The first two principles of the policy read:

    The state must:

    a) Recognise the existence of any rights conferred by common law, customary law or legislation to the extent that these are consistent with the Bill of Rights;

    b) Recognise rights guaranteed by custom and law and access to, and use of natural resources on a communal basis to the extent that these are consistent with the Bill of Rights.

20. We have raised the importance of the MLRA recognising customary fishing rights repeatedly and we applaud the specific reference to section 39(3) in the amended section 19 in this regard. However, the Act needs to do a lot more to ensure that customary fishing rights are recognised. If the MLRA does not effectively do this, it will be unconstitutional.

21. In this regard, we quote from a letter to the Department of Agriculture, Fisheries and Forestry in September following a meeting about their implementation plan:

We raised yesterday once more that both the policy and the implementation plan – while subscribing to the constitutional principle of the recognition of rights arising from customary law – do not give any indication how the implementers of the policy will be able to understand the difference between recognising the (pre-existing) rights of customary communities and allocating rights to other small scale fishing communities in terms of the MLRA (as amended). Your response was that the outcome will be 'the same', in other words, that all these communities will be able to fish once the policy is implemented. While this may be true in a strictly practical sense, the outcome will be significantly different in a legal sense and have real consequences for customary communities.

If the implementation of the policy has the effect that it allocates rights to customary communities and thus denies their pre-existing customary rights that may have the effect of extinguishing their rights by operation of law. It would mean that constitutional rights are turned into conditional rights on par with the rights of other small scale communities that may be withdrawn. That would be unconstitutional.

This lesson has been learned by a number of other commonwealth countries who had to deal with exactly the same dilemma. It would only be reasonable to take note and investigate how they went about it and ensure that customary communities receive the same recognition of their customary rights.

Legislation in New Zeeland promulgated in 2004 regulating access to the coast and that extinguished customary rights were thrown out in 2011 after adverse findings on the legislation by the UN Committee on the Elimination of Racial Discrimination, amongst others, because the extinguishment of customary fishing rights by legislation was ruled to be discriminatory.

In Australia, after running into similar legal problems, the government adopted a policy on customary fishing in December 2009 (attached), clearly setting out what customary fishing means and "that it is to be articulated and clearly separated from other forms of fishing in fisheries legislation and policy to allow for the development of appropriate management arrangements that reflect customary fishing access rights, practices and sustainability requirements".

Proposed premises:

At this very late stage in the process with its shortened timeframe, and on the assumption that the second round of substantial amendments to the MLRA will address this issue in greater detail, we suggest:

a) that an understanding of the legal nature of customary rights and how its recognition differs from the rights of other communities be articulated clearly in the implementation plan or a short separate policy (see the Australian example); or

b) that the implementation plan explicitly states that nothing in it should be construed as the extinguishment of any rights arising from customary law and consistent with the Constitution; and

c) that the service provider responsible for the verification process be fully appraised of what the recognition of the pre-existing rights of customary communities means (in terms of the South African Constitution, which provides for the development of customary law in conformity with the Bill of Rights and sustainable environmental principles, in practical terms similar to the Australian policy example cited above).

22. While the Department has repeatedly assured us that customary rights will be recognised and provided for in the SSF policy, the MLRA amendment and the implementation plan. However, the memo to the Amendment Bill suggests otherwise. The final paragraph states (emphasis added):

    The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National house of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 since it does not contain provisions pertaining to customary law or custom of traditional communities.

23. While we support the position that the Bill does not require a referral to the House of Traditional Leaders because it does not pertain to issues affecting traditional leaders per se, it is not correct to say that the Bill 'does not contain provisions pertaining to customary law or custom'. If this were true, then we will indeed be required to test the constitutionality of the Act in denying customary rights.

IV Need for further overhaul of the MLRA

24. South Africa is a constitutional democracy. The principle of the rule of law, including the principle of legality, is both a founding and pervasive value of our constitutional dispensation and a self-standing justiciable and enforceable claim.
25. The Constitutional Court has given meaning to this doctrine for our purposes: the principle of legality demands that "any exercise of official power to the detriment of any person must comply with whatever terms and conditions may be set by any applicable law as may happen to exist".[3] In Fedsure, the Court held:

    It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that <u>they may exercise no power and perform no function beyond that conferred upon them by law</u>.
26. It is our submission that, in order for the Minister to give effect to the implementation of the SSF policy – as she must in terms of the 2007 *Kenneth George* Court Order – the exercise of her power and functions will have to be clearly outlined in the Act in order to protect her from unnecessary legal attack. If the MLRA does not expressly include the recognition of rights arising from customary law, for example, the implementation of the policy may open the Minister up for challenges of expropriation and even arbitrary deprivation.
27. Certain key legal principles and constitutional duties are entrenched in South African law and therefore enjoin the Minister to perform her functions to give effect to these principles and duties. The legislation should <u>enable</u> the Minister to do so.
28. This function of legislation is clear from our Constitution. The text provides in various instances for the recognition and protection of rights, but directs that Parliament must enact legislation to make that possible. Similarly, while the rights protected in international human rights instruments ratified by South Africa are binding upon the State, the very first legal duty of the State is to give effect to those rights <u>through legislation</u>.[4]
29. Most pertinent to the transformation envisioned by the SSFP, s 25(8) of the Constitution provides that:

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[3] Constitutional Law of South Africa Michelman

[4] See for example Article 1 of the African Charter on Human and Peoples' Rights.

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

30. It is therefore clear that the objective of the SSFP, in line with the Constitution, to "provide redress and recognition to the rights of Small Scale fisher communities in South Africa who were previously marginalized and discriminated against in terms of racially exclusionary laws and policies", must be facilitated by legislation.
31. It is inevitable that the recognition of small scale fisheries will involve taking resources from the existing sectors. As much has been confirmed by the Department of Agriculture, Fisheries and Forestry (DAFF). The Minister could only effectively and safely perform this function is, in terms of ss 25(8) and 36 of the Constitution, a law of general application allows her to do so. The MLRA must perform that function. If it does so, it will bring to an end the uncertainty that is currently hampering the Department's efforts of implementation.
32. The recent Constitutional Court decision in *Agri SA v Minister of Minerals and Energy* brought to an end a long battle to allow that Minister to perform her duties in transforming ownership of South Africa's mineral wealth. The similarities in objectives between the Mineral and Petroleum Resources Development Act (MPRDA) and the MLRA are such that lessons must be drawn from it in amending the MLRA.
33. The MPRDA, like the MLRA should do in its amended form, represented the introduction of a new regulatory regime in order to comply with the constitutional imperative of restitutionary equality. Like the MLRA, the MPRDA contains principles that frame the Act in the language of transformation.
34. Despite accepting the legitimacy of the government's regulatory overhaul of mining rights regulation, previous mineral rights owner still insisted that they were expropriated in cases where they were not able to convert their (old order) mining rights into new ones. They sought compensation for such expropriation.
35. What they could not argue, was that the Minister's actions constituted arbitrary deprivation (in terms of s 25 of the Constitution) and was therefore unlawful, because she had enabling legislation to perform the transformation of the industry. The

previous owners accepted this, but argued that they should still be compensated for their loss.

36. Both the Supreme Court of Appeal and the Constitutional Court found that the MPRDA did not expropriate the rights of the previous owners. While their reasoning differed, the fact that the Constitution bound the Minister to transform rights holding patterns previously based on racial discrimination was a deciding factor. Had the MPRDA not provided her with the legislative mechanisms to do so, however, she would have been open to an attack of arbitrary deprivation – an attack that she would have lost. This is a lesson not to be ignored.
37. The Minister cannot protect herself by doing nothing. In terms of the Constitution and legal doctrine accepted into South African law, the Minister is bound to do the following:

37.1. Effectively implement the SSFP (in terms of the Kenneth George Orders of 2007 and 2010);

37.2. Recognise rights arising from customary law in terms of s39(3), 30, 31 and 211 of the Constitution;

37.3. Recognise aboriginal rights to resources as confirmed in *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC);

37.4. Achieve resource reform and redress in terms of s25(8) of the Constitution; and

37.5. Promote equality in terms of s 9 of the Constitution.

38. This is the basis for the SSFP. Failure to do so effectively will equally render her vulnerable to legitimate legal review.
39. On this basis, we submit that the MLRA must clearly outline the imperatives and mechanisms by which the SSFP will be implemented when it is amended through a second round next year.
40. We submit that the current amendments provide no such mechanisms.

V The consideration of international and foreign law

41. South Africa is not the first country to be faced with the challenge of effectively recognising and protecting customary rights of fishing communities in the context of a

larger, commercially-driven industry. It would thus be unreasonable not to carefully investigate comparative examples in particular to seek the best examples of effective implementation prior to amending the MLRA.

42. The Constitution of South Africa mandates every court, tribunal and forum, when interpreting the Bill of rights, to consider international law. In order for an international agreement to become law in the Republic, it must be enacted into national legislation, however, even if international law has not yet become incorporated in national legislation, it should be used as an interpretive tool on the state's obligations to protect and fulfil the rights in the Bill of Rights.
43. In *Glenister* the Constitutional Court stated the following about the interpretive value of international law:

    International agreements, both those that are binding and those that are not, have an important place in our law. While they do not create rights and obligations in the domestic legal space, international agreements, particularly those dealing with human rights, may be used as interpretive tools to evaluate and understand our Bill of Rights.
44. Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be "consistent with the Republic's obligations under international law applicable to states of emergency." These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution."
45. The Constitution not only mandates the consideration of international law, but states that foreign law may be considered. Our courts have stated that foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with issues that confront us in a particular situation. However, when considering foreign law it is important to consider the contextual framework of the South African legal system, our history and circumstances and the structure a language of our own Constitution when. It should be noted that most of the countries relevant for our

current purposes – notably Canada, Australia– have been cited as relevant to aboriginal/customary rights by our Constitutional Court.

46. It is through these constitutionally mandated provisions that we are required to turn to international agreements and foreign law in the context of recognizing, protecting and protecting customary marine resource use and governance.

Relevant international law

47. Research conducted by J Sunde as part of her PhD (Sunde, J 2013 Expressions of living customary law along the coastline: the contribution of customary law to small-scale fisheries governance in South Africa, unpublished research in preparation, University of Cape Town) clearly outlines the increasing emphasis on statutory recognition of customary rights. For example, she cites the following:

47.1. International institutions providing guidance on governance of marine and coastal resources have urged States to recognize customary systems of law and the rights to natural resource tenure derived from these systems, their indivisibility from basic human rights, and their importance in seeking protection of biological biodiversity and sustainability for future generations (FAO 2013, UN CBD 2012).

47.2. In particular, the link between a community's right to culture and their customary tenure systems has been emphasized (CBD 2010, CERD 2006).

47.3. The Convention on Biological Diversity (CBD) (1992) urges member states:

Subject to its national legislation, 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 (CBD:1992:Article 8(j)).

Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements (CBD, 1992: Article 10 c).

36.4 The Voluntary Guidelines on Tenure (2012) provide clear guidelines of relevance to amendments to the MLRA:

- *States should provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Such recognition should take into account the land, fisheries and forests that are used exclusively by a community and those that are shared, and respect the general principles of responsible governance. Information on any such recognition should be publicized in an accessible location, in an appropriate form which is understandable and in applicable languages.*
- *Where indigenous peoples and other communities with customary tenure systems have legitimate tenure rights to the ancestral lands on which they live, States should recognize and protect these rights. Indigenous peoples and other communities with customary tenure systems should not be forcibly evicted from such ancestral lands.*
- *States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems.*
- *States should, in drafting tenure policies and laws, take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems. There should be full and effective participation of all members or representatives of affected communities, including vulnerable and marginalized members, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems.*

36.5 Confirming these Tenure Guidelines, the Draft Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the context of Food Security and Poverty Eradication (FAO 2013) currently being negotiated by member states in the FAO Committee on Fisheries (COFI) advises that

All parties should recognize and respect legitimate customary tenure rights of small-scale fishing communities including when not currently protected by law. States should take appropriate measures to identify record and respect legitimate tenure right holders and their rights, whether formally recorded or not. Local norms and practices, as well as customary or otherwise preferential access to fishery resources and land by small-scale fishing communities including indigenous peoples, should be recognized, respected and protected in ways that are consistent with international human rights standards and the United Nations Declaration on the Rights of Indigenous Peoples.

36.6. There are several international human rights instruments which have crystalized the protection of customary marine resource use and governance rights including: The Convention on Biological Diversity, 1995; United Nations Declaration on the Rights of Indigenous Peoples, 2008; African (Banjul) Charter on Human and Peoples' Rights.

36.7. In particular, it should be noted that the African Commission on Human and Peoples' Rights have recognised fishing as an aspect of cultural rights that requires protection. In the Endorois decision, it found:

This Commission also notes the views of the Human Rights Committee with regard to the exercise of the cultural rights protected under Article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Committee observes that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal

measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."

Foreign law

37. It is important to look at the way in which foreign jurisdictions have implemented the recognition and regulation of customary tenure - specifically related to marine resource management - in order for us to draw on these experiences and implement the mechanisms which would best promote international guidelines, as well as fit into our constitutional context.

38. We submit that if the Department is to achieve success in the integration of the Small Scale Fisheries Policy into the MLRA Amendment Act it is imperative that the Department turns to these foreign jurisdictions in order to consider where other counties have achieved substantial success and where they have fallen short.

39. When considering the different constitutional, legislative, policy and jurisprudential frameworks, we submit that an overarching theme which emerges is that legislative recognition of customary rights is the starting point to achieving firstly protection of customary communities and their rights of access to the resource, and secondly, for creating a policy space where these systems can develop.

40. Drawing once more from the research of J Sunde towards her PhD cited above, we would draw your attention to the following examples she cites:

40.1. In Canada, the Canadian Constitution Act of 1982, Section 35 recognizes existing Aboriginal and treaty rights. In the decision of the *Supreme Court Sparrow v R* [1990] 1 SCR 1075 (SCC), the aboriginal right to fish for food, social and ceremonial purposes was affirmed. This recognition of non-commercial fishing rights was then given statutory recognition in the fisheries legislation.

40.2. In response to the decisions from the Canadian Supreme Court that emphasised the necessity of consulting with Aboriginal groups when their fishing rights might be affected, the DFO created an Aboriginal Fisheries Strategy (AFS) in 1992. Fisheries agreements negotiated under the AFS contain provisions respecting

amounts of fish that may be fished for food, social and ceremonial purposes; terms and conditions of communal fishing licences; and co-management arrangements between Aboriginal groups and DFO involving stock assessment, fish enhancement and habitat management, and fisheries enforcement initiatives (Durette 2007:6 in Sunde 2013). More recently the Department of Fisheries within the Fisheries and Oceans Canada has developed an Aboriginal Policy Framework (2007) that sets out customary fishing rights.

40.3. New Zealand has given considerable statutory recognition to customary rights to both marine title and the use of marine resources for both customary (subsistence, cultural and sacred ritual purposes) and commercial fishing rights (McClurg 2011, Williams 2003, Dawson 2008, MakGill 2011, Durette 2007 cited in Sunde 2013). A prolonged struggle and complex process of recognition of Maori aboriginal rights culminated in the 1992 Treaty of Waitangi (Fisheries Claims) Settlement Act. This included the allocation of a significant portion of the total allowable catch to Maori interests. Maori peoples have established customary groups, iwi, and rights have been allocated to registered iwi.

40.4. Secondly, it made provision for the statutory recognition of Maori customary non –commercial fishing and undertook to develop systems to protect these rights (customary fishing rights fact sheet, Department of Fisheries undated). A system was developed with the participation of Maori and resulted in a mosaic of policy mechanisms to protect customary rights. These include the Customary Fishing Regulations Two sets of customary fishing regulations have been developed including the Fisheries (South Island Customary Fishing) Regulations and The Fisheries (Kaimoana Customary Fishing) Regulations 1998. The Ministry of Fisheries has developed a Customary Fisheries Manual "designed to assist in the understanding of Customary Fisheries Legislation and options available for Customary Management" (DOF 2009).

40.5. New Zealand has very recently embarked on an unusual approach to the issue of marine property rights and the harmonisation of customary and statutory law. The recently enacted Marine and Coastal Area (Takutai Moana) Act of 2011 ("the MCAA or Act") establishes a new regime for recognition of customary rights and title over the foreshore and seabed. It tries to accommodate both common law

access to the coast for the public at large and public interests in this coastal zone but at the same time, tries to recognise customary rights through codifying these rights within the statute. This reform was a response to recent jurisprudence that established that Maori customary title can coexist with the public right of access. In its decision, *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643.

40.6. In Australia, it was presumed that any previous Aboriginal title rights to the land (and sea) had been extinguished by the act of colonization and a system of statutory land rights Acts were introduced to provide access to land for Aboriginal People with varying provisions for claims to the intertidal waters and estuaries. For example, The 1991 Aboriginal Land Act (Qld) includes provision for the Queensland Government to gazette intertidal land as available for claim if it is adjoining Aboriginal-owned land. The Act also provides statutory recognition of Aboriginal tenure and claims to the land beneath the estuaries and tidal streams that penetrate some distance into the Aboriginal Deeds of Grant in Trust (National Oceans Office 2004:40). Whilst Australia has lagged behind its Commonwealth counterparts in statutory recognition of specific customary fishing rights at national level in fisheries specific legislation (Durette 2007), the recognition of Native Title (Native Title Act of 1993) has enabled the possibility of native title in the sea being recognised, provided Aboriginal claimants can demonstrate its existence in their customary law, and provided it has not been extinguished.[5]

[5] The first case to test this Act in this regard was a customary sea claim in the Murray Islands. In Mabo v Queensland (No. 2) the court recognised customary rights where Native Title has been established. Although recognised under common law, this has provided the basis for later claims to the sea, intertidal zone and the sea beds. The rights recognised in Mabo have been further extended in subsequent jurisprudence. In 1998, in Commonwealth v. Yamirr and Yamirr v. Northern Territory, also known as the Croker Island case the traditional inhabitants of the area (Crocker Island and nearby Islands) whose land had already been granted to them under statute through the Aboriginal Land Rights Act, claimed "full, exclusive recognition of native title to sea and seabed" (National Oceans Office, 2004:43). The Federal Court determined that native title did continue to exist in the sea, but that it was a non-exclusive right. On appeal of this decision to the Full Bench of the Federal Court, the original decision was confirmed in 1999. This decision was then again confirmed by the High Court. The High Court decision elaborated on the interpretation of 'native title'. It confirmed that " native title exist in the sea, it has been regulated by government acts, but not extinguished; is not exclusive because: it has not been established as exclusive under customary law, and it is contrary to the public access, fishing and navigation rights under common law" (ibid). Further, it "includes the rights to fish, hunt and gather, access the sea and sea bed, travel through and within the claim, visit and protect places of cultural and spiritual importance, safeguard cultural and spiritual knowledge and that Aboriginal rights must yield to other rights and interests under Northern Territory or Commonwealth legislation" (ibid). It is interesting to note that in a dissenting opinion, Justice Kirby found that "exclusive native title in the sea is consistent with public common

40.7. In Australia therefore, customary marine title and rights to resources are recognised on an individual community claim basis in terms of the Native Title Act and any community or group must demonstrate that these rights derive from traditional laws and customs and that they have a connection with or occupy the area concerned. Individual states have subsequently developed legal and policy mechanisms for regulating Aboriginal customary fishing rights. Within this limited statutory recognition, the Torres Strait Fisheries Act of 1984 reflects the most developed recognition of customary fishing rights. It includes definitions for Community Fishing, Traditional Inhabitants, Traditional Fishing and Treaty Endorsement (Section 3) and also makes provision for the licensing of community and other commercial fishing (Section iv).

40.8. Although several Pacific Island states in Melanesia, Polynesia and Micronesia have legally recognised customary marine resource use and governance rights including amongst others Vanuatu, Fiji, Samoa and Papua New Guinea (Vierros et al 2010:23), a detailed discussion of these legal mechanisms is beyond the scope of this submission.

40.9. Sunde concludes:

Despite uneven recognition of customary law at Constitutional level and the tendency to view customary law through a common law lens in many instances, all the countries mentioned above have made significant strides in developing policy mechanisms for the representation of indigenous and local customary communities in policy and decision-making processes, in documenting and undertaking research on customary marine resource use, governance practices and traditional ecological knowledge, in developing strategies and policy guidelines for the approach to recognition of customary practices, regulatory frameworks and guidelines for the administration of these practices and in working towards ensuring budgetary support for customary marine resource use and governance structures. In general, the issue of customary rights to marine resources is firmly in the public domain and is acknowledged by the non-native

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law rights" and that "the claimants may have the authority to exclude people conducting tourist activities, fishing without a licence or extracting natural resources without the Traditional Owners' consent" (ibid). This decision has paved the way for numerous claims that are still pending (ibid).

population in these countries. Thus, notwithstanding the very weak or non-existent recognition of the source of customary law, and the dangers that in codifying customary law in terms of common law it will not be able to develop further, it is noted that one could argue that these countries have made further strides in granting recognition to the substance of customary marine practices than South Africa.

One of the key lessons emerging from international experience in this regard is that legal recognition of customary fishing systems is critical. Many argue that customary fishing practices are 'just that, customs', and they are not 'law'. However, as the New Zealand Law Commission has noted, "There is little point in debating whether a custom is technically law or not in circumstances where it is being broadly recognised and applied by society " (New Zealand Law Commission in Trechera 2008).

Addendum A: the rationale of the amendment to the MLRA

41. The Draft Marine Living Resources Amendment Bill ('the Draft Bill') covers many different substantive aspects, all of which will not be addressed in our submissions. Our interest is in what appears to be the central concern of this Bill, namely to facilitate the effective implementation of the Policy for the Small Scale Fisheries Sector ("the SSFP") in South Africa.[6] The policy aims to "provide redress and recognition to the rights of Small Scale fisher communities in South Africa who were previously marginalized and discriminated against in terms of racially exclusionary laws and policies."[7] <u>While we applaud this aim in the strongest terms, we are deeply concerned that the draft amendments do not facilitate the effective implementation of that very aim.</u>

42. Indeed, the promotion of the substantive equality of previously marginalized groups was the primary rationale for the development of the small scale fisheries policy. It was also to provide a much needed mechanism for the recognition of the customary rights of certain communities. In addition to this, there was a need that small scale

[6] The Policy for the Small Scale Fisheries Sector in South Africa was gazetted on the 20 June 2012.

[7] Insert ref

fisheries sector be recognized for its social, socio-economic and macro-economic contribution to basic food security, poverty alleviation and job creation. The development of the policy was a result of a complicated array of factors which necessitated its development including, inter alia:

42.1. a need for a holistic approach to fisheries management;

42.2. the need to change the existing governance approach which is orientated toward the export driven, commercial fisheries sector in South Africa;

42.3. the absence of recognition of the Small Scale fisheries sector in legislation;

42.4. the Equality Court orders in the *Kenneth George* cases compelling the state to finalise a policy framework that would accommodate traditional and subsistence Small Scale fishers; and

42.5. international and regional agreements on developing sustainable and responsible fisheries to which South Africa is a party.

43. On 25 July 2012, we submitted extensive comments to the Department following its call for input on the amendment of the Marine Living Resources Act ('the MLRA'). We submitted that the need to amend the MLRA to bring it in line with the SSFP should be viewed in light of the policy's objective to introduce "a shift in Governments approach… adopting a developmental approach and an integrated and rights based allocation system". We submit that for two central reasons, the MLRA must explicitly provide for the recognition and regulation of the constitutional rights that gave rise to the SSFP. These rights include those arising from customary law, as well as the rights to equality, to culture and to basic socio-economic needs. First, such inclusion would facilitate proper decision making by the Minister and protect her from arbitrary litigation as the constraints on her decision making powers would be constrained in law. Secondly, and in line with international best practice, we submit that the recognition of these rights in the context of the larger fisheries sector and, where appropriate, its regulation should be entrenched in legislation.