MARINE LIVING RESOURCES AMENDMENT BILL, 2013

Submissions to the Department of Agriculture, Forestry and Fisheries (DAFF) on the MLRA Amendment Bill, 2013

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PRINCIPAL STATEMENT: THE PERCEIVED NEED TO AMEND THE MLRA PRIOR TO IMPLEMENTATION OF THE SSFP AND PROPOSAL FOR PHASED IMPLEMENTATION

1. Our submissions are made on behalf of Masifundise, an NGO that facilitates the mobilisation and organisation of small scale fishing communities at the grass roots level, in order for communities to become empowered and capable of taking part in political and economic decision making processes. As such, 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".

2. It is our contention that the effective implementation of this duty can 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 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.

3. Our submissions on this amendment should thus be read with our submissions, and those of our clients, with regards to the draft General Policy and the Sector Specific Policies yet to be gazetted. In this regard, we reiterate the point made to your Department in a letter of 8 May 2013 on behalf of Masifundise. In that letter, we pointed out that it was not possible to provide final comments to the draft General Policy as there is as yet no clarity as to what the MLRA amendments will indeed look like. Indeed, our concerns about commenting in a vacuum, as it were, are exacerbated by the contradictions between the various documents and draft sectoral policies currently circulated for hurried public comment. This process will not make for good law making and certainly will not facilitate the proper realisation of the rights of our client communities.

4. In the circumstances, we propose that the Department does 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 will entail an initial phase of identifying and recognising customary and traditional communities. In addition, dedicated community capacity building, particularly on 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 must happen. Proper co-management structures and, where appropriate, community entities must be put in place. There is nothing in the current Act which precludes these initial phasing in from taking effect and if this is not done, no number of amendments to the Act will be able to ensure proper implementation in any event.

4.4. Postpone the allocation of long term rights which is already creating uncertainty amongst small scale fishing communities until the MLRA is properly and fully amended. There are various mechanisms by which such allocation may be postponed.

4.5. If there are very specific sections in the Act that have to be amended as a matter of urgency to allow for the initial phasing-in of the SSFP, such as a definition, these may be amended by in terms of a General Laws Amendment Bill. For example, it has been mentioned that rights allocation to a community entity is currently not possible under the Act. This, we believe is not correct and we invite the Department to further discussion on the legal possibilities of employing thrust with prescribed requirements that safeguard community and public interest pending law reform.

PROCEDURAL OBJECTIONS

5. On 25 April 2013, General Notice 434 of 2013 was published inviting all affected parties to submit written comments on the draft Bill to the Department by no later than 10 June 2013. This provided interested parties with more than one month in order to make submissions. On Monday 13 May 2013 General Notice 472 of 2013 was published which indicated that the previous General Notice 434 of 25 April 2013 was withdrawn and the new closing date for written submissions was the 24 May 2013.

6. The withdrawal of the notice essentially meant that stakeholders were notified two weeks before their written comments were due, that their comments had to be submitted at a shortened notice. The Department has maintained at public meetings on 14 May and 20 May 2013 that they believe this was lawful as in total people were still aware of the draft bill for 30 days.

7. This reasoning is flawed. The legal duty of facilitating public participation is a substantive rather than a formal one. In *Doctors for Life*, the Constitutional Court[1] fleshed out the meaning of this principle. It held that the facilitation of engagement in the law-making processes is not an end in itself, but a means to reach the goal of meaningful participation. As such, it is an aspect of the right to political participation. [2] This duty seeks to 'ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation'. [3] The purpose is "to enable the public to impact on decision-making with regard to laws affecting them". [4]

8. Most pertinent to this Act, which aims to give effect to the rights of previously marginalised and disadvantaged communities within an industry dominated by the voices of commercial and recreational interests, is the statement by the Constitutional Court that participation

[1] *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).
[2] Para 89.
[3] Para 92.
[4] Para 113.

enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special important to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist (added emphasis). [5]

9. The requirement for the legal duty to facilitate public involvement was articulated as follows by Ncgobo J:

"The forms of facilitation an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say[…] Merely to allow public participation in the law-making process is, in the prevailing circumstances [of our country's gross inequality], not enough. More is required."(emphasis added).[6]

10. The breadth and depth of a consultation and participation relate to parliamentary and pre-parliamentary processes.

11. We submit that your process of public participation will not withstand constitutional scrutiny for at least the following reasons:

11.1. For people with access to government gazettes and who are able to understand English, the truncated time frames announced halfway through the process have made comment and participation more difficult rather than easier as is the Department's duty.

[5] Para 115.
[6] Para 125.

11.2. It unduly and arbitrarily excludes persons who are not able to meet these deadlines at such short notice.

11.3. By the public meeting held on 20 May 2013, no versions of the draft Bill in languages other than English were available. Given the fact that a substantial percentage of the members of small scale fishing communities who will be directly affected by these amendments do not understand English, their participation has effectively been either excluded completely or, in as far as versions are made available, limited to the timeframes dictated by such availability.

12. It may be noted that the series of so-called 'public consultation' meetings currently being held by DAFF does little to alleviate these concerns. Representatives from the LRC attended one such meeting in Cape Town on 20 May 2013. While the efforts by the Department to disseminate information on the Bill should be commended, these meetings cannot serve any greater purpose than indeed information dissemination. For many attending such public hearings it is the first time they have the opportunity to read and engage with the contents of the Bill. This is due to a range of factors including that many stakeholders do not have access to Government Gazettes or the internet.

13. No copies of the Draft Bill in Afrikaans or isiXhosa were available. After extensive complaints from the majority participants in the room who indicated by a show of hands at the outset that they were all Xhosa-speaking, the presentation on the draft amendments were made in isiXhosa. Important as that was, the presentation was four days prior to the deadline for comments which substantially prejudices any non-English speakers in the participation process.

14. It should also be noted that, when concerns about the translation of the Bill were raised, the response from the Chair was that firstly, it was not practice for their Department to provide Bill's in different languages, and that secondly, once the legislative process was finalised, the Act would be made available in those languages for stakeholders who were not able to understand English.

15. We submit that the response from the Chair was problematic on both accounts. As we have pointed out above, public participation is a central tenant to our participatory democracy, and stakeholders' engagement in the legislative process is a constitutionally mandated principle. It is the Department's obligation to ensure that all stakeholders are able to meaningfully participate in the process. If stakeholders are not able to understand the proposed legislation by the Department, the process can be rendered nugatory.

16. Secondly, it is pointless for the amendments to only be available in other languages after consultation is over.

THE NEED FOR THE MLRA TO FACILITATE EFFECTIVE IMPLEMENTATION OF THE SSFP IN THE LONG RUN

17. 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.[7] 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."[8] <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>

18. 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 fisheries sector be recognized for its social, socio-economic

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

[8] Insert ref

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*:

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

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

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

18.4. 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

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

19. 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.

THE MINISTER'S DUTY UNDER THE CONSTITUTION, THE MLRA AND CUSTOMARY LAW

20. 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.

21. 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".[9] 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 they may exercise no power and perform no function beyond that conferred upon them by law."*

22. 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.

23. 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 enable the Minister to do so.

24. 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

[9] Constitutional Law of South Africa Michelman

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 through legislation.[10]

25. Most pertinent to the transformation envisioned by the SSFP, s 25(8) of the Constitution provides that:

> *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).*

26. 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.

27. It is inevitable that the recognition of small scale fisheries will involve shifting 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.

28. The recent Constitutional Court decision in *Agri SA v Minister of Minerals and Energy*[11] 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

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

[11] Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9 (18 April 2013)

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.

29. 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.

30. 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.

31. 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.

32. Both the Supreme Court of Appeal and the Constitutional Court found that the MPRDA did <u>not</u> 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 <u>not</u> 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.

33. 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:

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

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

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

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

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

34. This is the basis for the SSFP. Failure to do so effectively will equally render her vulnerable to legitimate legal review.

35. On this basis, we submit that the MLRA must clearly outline the imperatives and mechanisms by which the SSFP will be implemented.

36. We submit that the current amendments provide no such or at best clumsy mechanisms. The relative space afforded small scale fisheries in the amendments do not translate into effective enforceable and enabling mechanisms.

37. We will reiterate some of our submissions made last year and supplement these with specific comments on the new amendments. Before we do so, we turn to international and comparative best practices. 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.

THE CONSIDERATION OF INTERNATIONAL AND FOREIGN LAW

International Law

38. 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.

39. In *Glenister*[12] 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.*
>
> *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."*

40. 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

[12] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011).

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.

41. 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

42. 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:

42.1. 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).

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

42.3. 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).

42.4. 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.*

42.5. 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.

42.6. 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.

42.7. 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[13] 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

43. 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.

44. 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.

45. When considering the different constitutional, legislative, policy and jurisprudential frameworks, we submit that an overarching theme which

[13] 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, African* C.H.R. (2010).

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.

46. 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:

46.1. 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.

46.2. 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.

46.3. 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.

46.4. 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).

46.5. 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.

46.6. 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.

46.7. 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).

46.8. 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.

46.9. 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 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)."

SECTION SPECIFIC COMMENTS

47. **Amendment of the Long Title**: the long title should establish the Minister's recognition of customary rights to fishing as the legal basis of the SSFP. Suggested wording to insert:

'to recognise, promote and regulate rights of communities conferred by customary law in line with the Constitution; to provide for mechanisms for the effective realisation of the rights of previously marginalised small scale fishing communities'.

48. **Definitions**: the suggested definition of community does not provide sufficient content to the notion for the purposes of this Act. It should be remembered that the SSFP provides for a fundamental transformation from an individual-based rights system only to community-based rights holding and management. As such, the definition of community that will both hold and manage rights is crucial. We suggest the following definition:

"community" means any group or portion of a group of persons whose access to a marine resource is regulated in terms of shared rules determining access to the resource which they hold in common, including groups who wish to have their communal access to the resource managed in terms of shared rules contained in a constitution;[14]

49. We further recommend that specific reference to customary fishing communities be included so as to clearly delineate those communities who have pre-existing rights to resources (subject to regulation):

"customary fishing community" means a community whose rights to the resource are derived from shared rules in terms of customary law.

50. For the same reason, a small scale fishing community should be defined:

"small scale fishing community" means a community which has defined itself and its members by historical practice and usage.

51. Section 1A of the amendments provide for the 'public trusteeship of marine living resources'. While this insertion seems to be a commendable attempt at addressing the need to balance the 'public interest' and the rights of local communities to equality and food security, it is suggested that the concept of public trusteeship has not been sufficiently defined in South African law to

[14] If a customary fishing community adopts a constitution for its activities or part of its activities in respect of its pre existing customary rights, it does not necessarily convert its constitutional right to a conditional right envisaged for small scale fishing communities.

provide the Minister with a clear mechanism to implement this important principle.

52. Commentators suggest that despite the fact that the public trust doctrine has become a permanent fixture of South Africa natural resources law, the doctrine remains a murky area because neither policy papers nor legislation provide much guidance as to how it must be interpreted. [15]

53. The confusion is exacerbated in that the different pieces of legislation that have incorporated the notion, have done so in a manner that is not uniform. In fact, each ingrains a new concept of 'public trusteeship'.[16]

54. This is not to deny that the doctrine has had a significant impact on the law of property in South Africa – in line with the Constitution – given that it challenges the traditional concepts of ownership and property. Unfortunately, while courts have referred to the State as 'custodian' and 'trustee', there has been limited if any development of substantive content to the concept. The consultation

[15] Loretta Feris, 'The Public Trust Doctrine and Liability for Historic water pollution in South Africa', 8/1 *Law, Environment and Development Journal* (2012), p.1.

[16] Section 3 of the National Water Act 36 of 1998 the "as the public trustee of the national's water resources, the National Government acting through the Minister, must ensure that waters protected, used, developed, conserved, managed and controlled in a sustainable and equitable matter, for the benefit of all persons and in accordance with its constitutional mandate."

The National Environmental Management Act 107 of 1998 in section 2(4)(o) states that "The environment is held in public trust for the people. the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage"

Section 3 of the Mineral and Petroleum Resources Development Act 29 of 2002 states that "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South African's"

Section 3(1) of the National Environmental Management: Biodiversity Act 10 of 2004 states that "in fulfilling the rights contained in section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity must manage, conserve and sustain South Africa's biodiversity and its components and genetic resources and implement the Act to achieve the progressive realisation of those rights.

Section 3 of the National Environmental Management: Integrated Costal Management Act 24 of 2008 states in section that "the state in its capacity as the public trustee of all costal public property must ensure that costal public property is used, managed, protected, conserved and enhanced in the interest of the whole community."

exercise could provide the opportunity to ensure that stake holders understand what can be expected of the minister in her new role as custodian or trustee.

55. The Amendment of section 2 of the Act provides for the insertion of a number of principle and objectives relevant to the SSFP. This is to be welcomed. However, the following submissions are made:

55.1. In terms of the principles of the interpretation of statutes, the principles and objectives of an Act do not provide strongly enforceable mechanisms in the absence of enabling provisions. The current amendment does not allow for any legislative mechanisms to enable the Minister to, for example, 'recognise, protect and support the rights of small-scale fishers in line with national and international instruments' or effectively 'incorporate a community-based rights approach to the allocation of marine living resources'. As such, these principles as currently formulated may have limited application to current decision making.

55.2. Moreover, the two principles in the SSFP that speak directly to enforceable rights have been omitted and should be included. These are principles (a) and (b) of the policy which read:

a) Recognise the existing rights of small-scale fishing communities in terms of customary law, common law or legislation as long as these rights are consistent with the Bill of Rights;

b) Recognise rights to access and use of natural resources on a communal basis that come from custom and law as long as these are consistent with the Bill of Rights.

56. In order to enable the principles and objectives relevant to the SSFP listed, we recommend that the following enabling provisions be inserted (here drafted in the form of a chapter):

Recognition of customary fishing communities

1 Notwithstanding the provisions of the other chapters of this act, customary fishing communities shall have the right to exercise their customary rights, by virtue of the operation of law as envisaged under section 211 and interpreted in terms of section 39(2) and (3) of the Constitution

2 Section 2 above shall be subject to the obligation to exercise the right in a manner consistent with :

a) as between members of a customary fishing community, the equality and non- discrimination provisions of the constitution;

b) the powers of the minister under this Act to regulate the small scale fishing sector in a manner reasonable and subject to free prior informed consultation with the affected customary fishing communities or affected members thereof.

Recognition of small scale fishing communities

3 Small scale fishing communities have defined themselves and their members in terms of historical practice and usage, and through recognition by neighbouring communities and organs of state.

4 The right of small scale fishing communities to participate in near-shore fishing is subject to a statement of support by a relevant organ of state, provided that a statement of support will be formulated in consultation with the relevant community.

5 The right of small scale fishing communities to participate in near-shore fishing may be regulated by the minister.

6 Relevant organs of state may, on application, issue statements of support to small scale fishing communities.

Transitional provisions with regard to the recognition of small scale fishing communities

7 Relevant organs of state shall issue statements of support to small scale fishing communities within two years of this chapter coming into operation, and thereafter on application by a community.

8 Communities whose members participated in the interim relief arrangements authorized by the minister in 2011, are regarded as recognized as small scale fishing communities for a period until two years after the coming into operation of this chapter.

Advisory committee on customary and small scale fishing communities

9 The powers and duties of the advisory committee include:

a) advising a relevant organ of state on the terms of a statement of support including defining the membership thereof, if the applicant community cannot agree thereon and if the committee so decides

b) advising the minister on the regulation of customary and small scale fishing;

c) advising on, monitoring and reporting on the vital role of women and youth, their recognition and the promotion of their full participation in customary and small scale fishing and its institutions;

10 The committee shall be constituted of members who have knowledge of customary and small scale fishing communities and who have demonstrated their commitment to promote the purpose of this chapter. At least 60% of the members of the committee must have been nominated by customary and small scale fishing communities.

Regulation of customary and small scale fishing communities

Institutional and procedural regulatory mechanisms

11 The regulation of fishing under this chapter will recognize the value of participatory decision making and co management, and promote the recognition and development of existing local institutions, and the establishment, maintenance and development of local institutions.

12 Small scale fishing communities that wish to hold and regulate its rights in in a legal entity with codified rules, may do so and may choose do so in a manner prescribed by regulation.

13 Any change in regulatory and management arrangements will be subject to full prior informed consultation of the customary and small scale fishing communities affected and its members.

14 Regulatory decisions must take into account the impacts upon, interests, needs and values of the affected customary or small scale fishing communities and their members

Substantive regulatory mechanisms

15 Regulatory mechanisms decided upon may apply to a designated area using a range of spatial, temporal or gear related means if and when it is required in order to promote and develop the marine resources harvested by customary and small-scale fishing communities.

16 Regulatory decisions must take into account the impacts upon, interests, needs and values of the affected customary or small scale fishing communities and their members, and must include consideration of the rights of affected communities and their members to:

a) food (and the right of children to basic nutrition);
b) substantive equality;
c) redress;
d) choose ones' trade freely; and
e) develop in terms of policies freely chosen.

57. With regards to the amendments to s43 of the MLRA (at para 30 of amendments), we recommend that such amendments should include the

following in order to give effect to the legal rights of local communities in terms of international and constitutional law:

Marine Protected Areas

22 Regulation of fishing by customary and small scale fishing communities in any existing or new marine protected area shall be subject to free prior informed consultation of any affected customary and small scale fishing community.

23 Deprivation of fishing by customary and small scale fishing communities in any existing or new marine protected area shall be subject to

a) free prior informed consent of any affected customary and small scale fishing community, and

b) compensation and alternative redress.