

## GENERAL FISHERIES PERMITS FOR INDIGENOUS PEOPLE TO USE NETS

These criteria have been developed to guide licensing officers in regard to the issuing of General Fisheries Permits to Indigenous people to allow them to use nets. Section 178(2) of the *Fisheries Regulation 2008* state that an indigenous person may possess nets that are no longer than 80m and the mesh size is between 50mm – 215mm (2 inch – 8 ¼ inch). An authority to possess a commercial fishing net is therefore not required for indigenous people.

If any of the assessment criteria are not met by the applicant, the nonconforming components should be discussed with the applicant. Information that is provided by telephone must be recorded in a file note by the Fisheries officer. If it is not possible to meet the criteria and the applicant still wishes to proceed, the application should be forwarded to the Fisheries Policy and Planning Unit.

### 1. Assessment

- Net length is no longer than 80m and mesh size between 50mm – 215mm (2 inch – 8 ¼ inch).
- Application is for no more than three nets.
- Specific location where apparatus will be used, for example:
  - inshore and offshore waters between Port Douglas and the Daintree River
  - in waters from the southern bank of Saltwater Creek located near the foreshore adjacent to Cairns Airport to 400m north of the northern bank of the Barron River
  - in Plantation Creek, Ayr.

Note that waters listed below cannot be fished:

Coomabah Lake and Coombabah Creek	Fitzroy River 400m downstream of the barrage
Swan Bay, North Stradbroke Island	Keppel Bay within 150m radius of Middle Island Underwater Observatory
Wolf Rock (east of Double Island Point)	Hook Island within 100m radius of Observatory
Mary River 400m downstream of the barrage	Yanks Jetty at Orpheus Island – under or within 100m of jetty
Tinana Creek 400m downstream of the barrage	Centenary Lakes, Cairns
Burnett River 400m downstream of the barrage	Barron River at Barron Waters (near Stony Creek and junction of Camp Oven Creek)
Kolan River 400m downstream of the barrage	Bizant River, Princess Charlotte Bay – including German Bar Lagoon and 2km downstream of German Bar road crossing

- Proof of Aboriginal or Torres Strait Islander heritage (e.g. letter of confirmation obtained from an incorporated Indigenous organization and stamped with their common seal. Note – this is required for the first application only)
- Name of traditional owner group to which the applicant belongs.
- Waters where the net/s will be used are within the area of the traditional owner.
- Specify which event the nets are being used. Applications for the following events are to be processed by Licensing:
  - Birth
  - Funeral
  - Wedding
  - Coming of age ceremony
  - Other cultural event (e.g. NAIDOC week, Harmony Day)

Applications for the following events are to be refused:

- Easter
- Christmas
- Australia Day
- Other public or religious holidays
- Personal or domestic use
- Events with fewer than 20 people

All other scenarios are to be forwarded to the Fisheries Policy and Planning Unit for assessment.

- Dates when the net/s will be used (no longer than 2 weeks). For applications that are longer than two weeks, forward the application to the Fisheries Policy and Planning Unit.
- Written evidence has been provided from an elder of the traditional owner group stating that the application is supported.

## 2. Conditions

General fisheries permits are to be issued with the following conditions:

1. The nets may be used to collect fish for use at the following event only:

**EVENT** on **DATE**

2. The nets must not be used to take species protected under other legislation (e.g. turtle and dugong).
3. The permit holder, or an Indigenous person of the TRADITIONAL OWNER GROUP community acting under the direct supervision of the permit holder, must be in attendance (in attendance means within 100m and on or in the water) of each net that is being used at all times.
4. The nets:
  - may be set (anchoring or fixing the net to a place at both ends); and
  - must be clearly marked with the permit holders name, address and permit number on a white float at least 15 cm in all its dimensions; and
  - must not be placed across the width of creeks or rivers, navigation channels or any other areas where the placement of the net would make more than one half of the waterway impassable to a boat or fish; and
  - must not be joined together; and
  - if used by day, must be marked by light coloured floats no more than 15m apart along its length; and if used by night, must also be marked by a white light at both ends of the net which is visible for at least 400m in all directions.
5. The holder, or an Indigenous person of the TRADITIONAL OWNER GROUP community acting under the direction of the permit holder, must not allow any part of the net containing a fish to be out of the water other than to immediately remove the fish from the net.
6. Fish collected during the activity must not be sold.
7. This permit must be available for immediate inspection to an officer authorised under the *Fisheries Act 1994* (e.g. Queensland Boating and Fisheries Patrol officer) during netting activities.

### **3. Other criteria**

#### ***Native Title***

Native title notification is not required as the use of the net will be in the applicants traditionally owned area.

**Waive fees**

Fees are to be waived as per section 9.1(c) of the *Waiving and Refunding of Prescribed Fees Policy* which states "The extent to which the activity being authorized is associated with other relevant policies and initiatives of government."

**4. Notification**

Please email a copy of the General Fisheries Permit to the District Officer of the relevant Queensland Boating and Fisheries Patrol Office.

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# Indigenous Fishing Guideline

Version V1 – March 2015

## 1 Background and context

Aborigines' and Torres Strait Islanders' rights to take fisheries resources are recognised and protected in section 14 of the *Fisheries Act 1994* (the Act). Prior to October 2008 this section provided that fisheries resources could be taken, used or kept under Aboriginal tradition or Islander custom. This also applied to fish habitats.

However, some practices used by fishers claiming to be indigenous raised some sustainability issues and this led to section 14 being reviewed.

In October 2008 section 14 was recast to provide a defence to Aborigines and Torres Strait Islanders for offences relating to the taking, using or keeping of fisheries resources or the using of fishing habitats. For the defence to be applicable the person must prove the following:

- That they are Aboriginal or Torres Strait Islander fishing in a traditional or customary manner;
- That they were fishing or using fish habitats for a personal, domestic or non-commercial communal need;
- They were using recreational fishing apparatus or prescribed traditional apparatus (currently consists of; fish trap<sup>1</sup>); and
- They were not fishing in one of 14 prescribed waters<sup>2</sup>.

In addition, in May 2009 section 178 of the *Fisheries Regulation 2008* (the Regulation) was amended to allow an Aborigine or Torres Strait Islander to possess, but not use, a commercial fishing net no longer than 80 metres with a mesh size between 50mm and 215mm. To be permitted to use this net a General Fisheries permit (GFP) is required. These permits will only be issued under certain conditions and for a limited period<sup>3</sup>.

<sup>1</sup> Section 642A of the Regulation

<sup>2</sup> Section 642B of the Regulation

<sup>3</sup> Guidelines for the issue of GFP for the use of commercial sized fishing nets

## 2 Objectives

The principal objective of this document is to provide guidance for QBFP officers when confronted with a suspected fisheries offence that involves a person who claims to be Aboriginal or Torres Strait Islander.

## 3 Relevant legislation

Section 14 of the Act  
Section 178(2) of the Regulation  
Section 642A of the Regulation  
Section 642B of the Regulation

## 4 Interpretation / definitions

*Traditional owner* (TO) means an Indigenous person who belongs to a traditional owner group.

*Traditional owner group* means a group of Indigenous people with inherited rights and responsibilities for the Country.

*Country* is the area to which an Indigenous person has rights and responsibilities for natural resources as governed by traditional and customary systems of land tenure.

*Elder* means a senior traditional owner recognized as such by the TO group.

*Native title holder* is defined in the *Native Title Act 1993* (NTA), s224 as follows:

- (a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interests on trust – the prescribed body corporate; or
- (b) in any other case – the person or persons who hold the native title.

*Native title* is defined in the NTA, s223 in part as follows:

- (1) *The expression native title or native title rights and interests means the communal, group or individual rights and interest of Aboriginal peoples or Torres Strait Islanders in relation to land or waters ...*

*Determination of native title* is a determination whether or not native title exists in relation to a particular area of land or waters. Application must be made in the Federal Court and the process is managed by the Native Title Registrar or the National Native Title Tribunal

<http://www.nntt.gov.au>.

## 5 Consultation

Consultation has been undertaken with the QBFP and the Fisheries Policy and Planning Unit. Legal advice was also sought on certain aspects of the policy.

External consultation was not required as this document is for the use of authorised officers only.

## 6 Provisions

An inspector under the Act has the function of conducting investigations and inspections to monitor and enforce compliance with the Act. Therefore, when confronted with apparent non-compliance with this legislation, it is necessary to undertake appropriate investigations to establish whether an offence has been committed. This includes situations that involve those claiming to be Aboriginal or Torres Strait Islander fishing in a traditional or customary manner.

The current s14 provides a defence for indigenous fishers acting under aboriginal tradition or islander custom. This applies to any offence against the Act relating to the taking, using or keeping of fisheries resources or the using of fish habitats. However, this defence is only applicable if:

- The person is an Aborigine, who at the time of the offence was acting under Aboriginal tradition, or the person is a Torres Strait Islander, who at the time of the offence was acting under Islander Custom; and
- The purpose of the action was to satisfy a personal, domestic or non-commercial communal need; and
- The activity was undertaken using prescribed fishing apparatus i.e. recreational fishing apparatus or traditional fishing apparatus (currently this only includes fish traps); and
- The activity was undertaken in waters other than waters prescribed under section 642B of the regulation.

### 6.1 Burden of Proof

While this provision provides a statutory defence and places the burden of proof on the defendant it is the purpose of an investigation to establish whether or not an offence has been committed. If investigation reveals that the activity falls within the provisions of section 14 of the Act then no offence has been committed and the matter would not proceed to prosecution.

It is therefore necessary for the investigating officer to establish whether or not the elements of the defence available under section 14 exist. All elements of the defence provided in section 14 must be proven for the defence to stand.

## 6.2 Who are Aborigines and Torres Strait Islanders

Pertinent considerations to establish whether a person could be said to be aboriginal were outlined in the Supreme Court of Queensland in Stevenson v Yasso. These are:

1. Be of Aboriginal descent;
2. Identify as an Aborigine; and
3. Be recognised as such in the Aboriginal community.

The same considerations could be applied to a Torres Strait Islander.

Acceptable evidence includes being listed as a Native Title Claimant, a certificate of “Confirmation and acceptance of Aboriginality or Torres Strait Islander descent” or similar documentation or statements from community elders.

## 6.3 What is Aboriginal tradition and Island custom

Only the traditional owners, or those who have received permission from the traditional owner group, can be considered to be acting under aboriginal tradition or island custom on Country.

**An aboriginal or Torres Strait Islander must be fishing on country (or have permission to fish in that area from a TO of the area) for the s14 defence to apply.**

The local traditional owner group should be able to give further advice regarding individual TOs or those accepted or authorised by the TO group.

## 6.4 What is personal, domestic or non-commercial communal need

These terms are not defined in the fisheries legislation and their meaning can be drawn from normal dictionary definitions, e.g.

Personal need - to feed the fisher

Domestic need - to feed the fisher's family

Non-commercial communal need – to feed a communal gathering

This allows for product distribution within and between indigenous groups and traditional bartering practices. It does not allow the sale of fish for monetary gain.

The amount of product caught may assist with determining the purpose of the fishing activity. If the elements of a section 14 defence apply to an indigenous fisher, offences related to fish regulated by number do not apply. However if a large quantity of fish has been caught further investigation would be required to establish the purpose of keeping a commercial quantity of product.

## 6.5 What is prescribed fishing apparatus

For the purpose of section 14 prescribed fishing apparatus means either recreational fishing apparatus or specifically prescribed traditional fishing apparatus.

### 6.5.1 Recreational fishing apparatus

Recreational fishing apparatus is collectively defined in Schedule 11, Part 2 of the Regulation with some apparatus also being individually described in this schedule.

Chapter 4 of the Regulation provides the declarations for recreational fishers.

**Indigenous fishers must use the recreational fishing apparatus listed in schedule 11 in accordance with the regulated fishing apparatus declarations.**

### 6.5.2 Traditional fishing apparatus

Traditional fishing apparatus is specifically prescribed in section 642A of the Regulation. At present only fish traps are prescribed in this section and are defined as follows:

*A structure made predominantly from stone or organic material that creates a holding area designed to capture a small quantity of fish.*

Clearly this description requires a degree of interpretation when deciding whether a structure would be considered a fish trap. This must be done on a case by case basis.

It is intended that more traditional fishing apparatus will be added to the prescribed list after further consultation with indigenous fishers.

## 6.6 What are prescribed waters

Section 642B of the Regulation prescribes the regulated waters for the purpose of section 14 of the Act. These waters are 14 of the 17 regulated waters listed in section 33 of the Regulation that are closed to all fishing. The 3 regulated waters that have not been closed to indigenous fishing are traditionally used by indigenous communities.

## 6.7 Commercial Fishing Apparatus

By definition, any apparatus that is not defined as recreational fishing apparatus in schedule 11 of the Regulation is commercial fishing apparatus. Under section 178 of the Regulation an Aboriginal or Torres Strait Islander may possess but not use a commercial fishing net i.e. a net of a type that is commercial fishing apparatus. These nets can be up to 80 metres long with a mesh size between 50mm and 215mm. A General Fisheries Permit (GFP) must be held if this net is to be used.

GFPs will only be issued to traditional owners and will generally only be issued for a limited period for specific cultural or ceremonial events. There are also conditions under which the nets must be used. These conditions are designed to ensure that the owner of the nets can be easily identified, that the nets do not pose a hazard to boating and to ensure the nets are not used in a way that threatens the sustainability of fish stocks.

The licensing unit processes these GFP applications using a set of established guidelines.<sup>4</sup>

## 6.8 Native title Implications

Native title is recognised by the common law of Australia and is protected under the Commonwealth's *Native Title Act 1993* (NTA). During the drafting of the amendments to section 14 of the Act, legal advice was sought in relation to the application of the NTA.

The interaction of the recent amendments to section 14 of the *Fisheries Act 1994* with the provisions of the NTA is complex. However, the legal advice received indicates that the amendments are consistent with the NTA in that section 24HA of the NTA provides that the making, amendment or repeal of legislation in relation to the management or regulation of living aquatic resources is valid.

However, Section 211 of the NTA **may** still override the *Fisheries Act 1994*, for instance, if a native title holder is using a commercial fishing net without a permit. **However** this is yet to be determined by a court. Regardless, this defence would need to be provided by the defendant and tested to the satisfaction of the court. The validity of a native title claim is not something that can or should be determined by a QBFP officer in the field.

Further investigation will need to be undertaken to decide upon the most appropriate enforcement to take when confronted with an indigenous fisher claiming native title.

sch3(10)(1)(f)

<sup>4</sup> Guidelines for the issue of GFP for the use of commercial nets

sch3(10)(1)(f)

## 6.9 Seizure considerations

The powers of seizure are outlined in Part 8 of the Act and covered in detail in the Seizure Policy and in Part 1.12 of the Investigations Procedure Manual. These provisions apply equally to investigations into suspected offences committed by indigenous fishers. However, the following is particular notable:

Section 14 provides a defence for a traditional owner (or an indigenous person who has approval from a traditional owner to fish in the area) for an offence that relates to fisheries resources or the using of fish habitats. If the officer is satisfied that this provision applies to the fisher it is not unlawful for the fisher to take, use or keep regulated fish or fish in regulated waters.

**If Section 14 applies, an indigenous fisher can take, use or keep regulated fish and can fish in regulated waters (apart from in one of the 14 waters that are completely closed to all fishing).**

It is not an offence for an indigenous fisher to **possess** a commercial fishing net with a mesh size of between 50mm and 215mm and a length no greater than 80m<sup>5</sup> without an authority, however a GFP is required for the **use** of the net. If an indigenous person is using a commercial net of lawful dimensions without a GFP it may be appropriate to seize the net for the purposes of obtaining sufficient evidence to prove the offence, for example photographing and measuring. However, unless the net itself is required for evidence or forfeiture of the net is to be sought in court, the chief executive must return the net.<sup>6</sup> It is important to note that where there is an offence involving a net of lawful dimensions and the net is seized it must be returned if a FIN is issued for the offence. That is, it cannot be said that the net is required for evidence (photographs, measurements and observations would suffice for a FIN) and a net of lawful dimensions is not subject to forfeiture by the chief executive.

The chief executive may order forfeiture of a net of illegal dimensions. However, unless prosecution action is proposed, consideration should be given to returning the net to the owner where possible. This can only occur if the net can be modified to comply with requirements. Any modifications should only be undertaken with the written consent of the owner.

<sup>5</sup> S178(2) of the Regulation

<sup>6</sup> See section 1.12.4 of the Investigation Procedures Manual for more information on keeping seized things

sch3(10)(1)(f)

Nets being used by indigenous fishers are sometimes left unmarked and unattended. As it is impossible to establish at first glance who owns an unmarked, unattended net this apparatus must be treated in the usual manner i.e. the thing is seized and if the owner can not be found after reasonable inquiries or, having regard to its value it is not reasonable to make inquiries about its owner, the chief executive may order the forfeiture of the thing to the State.

In the case of nets that are seized in or around Aboriginal or Torres Strait Islander communities reasonable inquiries may include approaching the local traditional owner group.

## 6.10 Issuing infringement notices

FINs that may be particularly relevant to indigenous fishers are as follows:

FIN code F004 – for the purchase, sell ...use of a net that is commercial fishing apparatus;

FIN code F005 – for contravening a regulated fishing apparatus declaration eg. marking apparatus;

FIN code F017 – for the contravention of a condition of an authority involving the use of fishing apparatus eg. non-compliance with a condition of a GFP.

These FINs carry substantial fines and due consideration of the matter should be given before an infringement notice is issued.

sch3(10)(1)(f)

<sup>7</sup> These are some of the conditions on the GFP for indigenous fishers using a commercial net

## 6.11 Interviewing Aboriginals or Torres Strait Islanders

Procedures for interviewing a person who identifies as an Aboriginal or Torres Strait Islander are set out in section 420 of the *Police Powers and Responsibilities Act 2000* and discussed in Part 5.12.1 of the Investigation Procedures Manual. These procedures are considered best practice.

However it often may be impractical to comply with these standards when attempting to establish the facts of a matter in the field. Therefore, preliminary enquiries can be made in the usual manner, with particular consideration given to the person's perceived level of education and understanding and the possibility of providing access to a support person.

In addition, particular care should be taken when issuing the caution. The caution should be explained in simple terms by the Officer then the indigenous person should be asked to tell the officer in their own terms what is meant by the caution. Further questioning should not proceed unless it is clear that the indigenous person fully understands their right to remain silent.

If a more in-depth interview is required a written request should be made. This request should include the contact details for the local Aboriginal and Torres Strait Islander Legal Services and the offer of the presence of a support person. An example of a written request for interview is including as supporting information to this policy.

## 6.12 Dugong and Turtles

It is sometimes claimed that commercial fishing nets are being used for the purpose of traditionally hunting protected animals under the *Nature Conservation Act 1992*, eg. dugong and turtles. Legal advice has been received that the unauthorised use of commercial fishing apparatus is still unlawful under the Act despite claims that fish are not being targeted. Therefore, further investigation into such complaints must be undertaken to establish whether an offence under the *Fisheries Act 1994* has been committed.

## 6.13 Local arrangements for indigenous fishing

Depending on the traditional owner group in the area it may be appropriate for individual districts to establish an agreement with this group that will build community responsibility and assist with the enforcement of the legislation. This would not be a formal agreement and would not be enforceable, however it may assist in identifying traditional owners in the area. Any person that is using commercial fishing nets who is not identified by the local traditional owner group would then come under greater scrutiny.

Establishing dialogue with traditional owner groups may also be a vehicle to promote desirable fishing practices and to discourage those that are not. As previously mentioned, although the use of commercial fishing nets is unlawful without a GFP, it is of greater concern if the nets are being used in an undesirable manner (see **6.9 Seizure**).

This approach may be of particular assistance in remote areas where regular visits by QBFP is unlikely. The same considerations could be applied to Torres Strait Islander communities.

For consistency, any agreement with traditional owner groups, written or verbal, should be communicated with the Senior Compliance Officer.

## 7 Policy amendments

Replaces 'Compliance Policy – Indigenous Fishing' dated 06 October 2009

## 8 Supporting information

Indigenous Fishing Strategy

Legal advice regarding the use of commercial fishing nets and Dugong dated 26 June 2009

Letter requesting attendance for formal interview



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