Livelihood values in Indigenous cultural fishing

Report of a meeting with Indigenous cultural fishers on the south coast of NSW

Rod Kennett, Tran Tran, Timothy Heffernan and Lara Strelnikow
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Aboriginal and Torres Islander people are advised this document may contain images of and references to people who have passed away.
Introduction

This report is based on discussions from the Aboriginal Fishing Rights Gathering (the gathering) held in Bingie on the New South Wales (NSW) south coast from 5 to 6 September 2015. It provides a summary of the presentations given by community members, academics and legal experts with regard to cultural fishing and the values associated with cultural fishing activities. The report also details the aspirations and future directions of local Aboriginal community members who hold common values and interests as cultural fishers in the region.

This report has been produced by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) for the benefit of the NSW Aboriginal Fishing Rights Group (AFRG) as part of a research project entitled Livelihood Values in Indigenous Customary Fishing. The project has been funded for two years by the Fisheries Research and Development Corporation (FRDC).

The NSW south coast has been identified as a potential case study site, and this report explores future research collaborations with Aboriginal community members who hold ties to this area. It is important to note from the outset that the idea of ‘mapping’ values was identified by community members as being problematic due to previous misuse of cultural information by external stakeholders. Accordingly, ‘mapping’ has been removed from the title, and the research project is referred to throughout this community report as Livelihood Values in Indigenous Customary Fishing.¹ Also note that both ‘cultural’ and ‘customary’ fishing are used in this report; while ‘customary’ is used in the official project title, the traditional owners we talked to prefer ‘cultural’. As such, specific references to the NSW south coast use ‘cultural’.

Cultural fishing along the NSW south coast

Traditional owners of the NSW south coast hold strong ties to the water and sea areas of their country, and these ties form crucial parts of their knowledge systems, creation stories and social relations. For generations, cultural fishing activities have been part of the area’s subsistence economy, and fish and other marine life have long been traded and supplied to communities along the coast.² Fishing also enables local Aboriginal communities to engage in traditional and cultural activities that commemorate the region’s ancestors, has the potential to support employment

¹ AIATSIS endeavours to conduct research in accordance with the ethical principles outlined in the Guidelines for ethical research in Australian Indigenous studies (GERAIS) to ensure that due care and respect are given to participants and their responses (see Appendix 1 for more details).
opportunities, and is a favourite pastime for many locals. Abalone (genus *Haliotis*), known locally as mutton-fish, and other shellfish such as oysters, mussels and lobster, are of significant importance along the south coast of NSW. Midden sites establish that mutton-fish has been caught and eaten in the area for 37,000 years, and this continues today.³

Despite its importance to local Aboriginal communities, the legislation designed to sustain and conserve marine wildlife, and policies that only recognise recreational, commercial and aquacultural fishing activities in NSW, adversely affect Aboriginal groups. Scores of Aboriginal people on the south coast of NSW have been arrested and/or reprimanded for engaging in cultural fishing activities. As a result, many groups are lobbying the government to improve local Aboriginal people’s right of access and use of marine resources for cultural purposes.⁴ Many communities also aim to negotiate the policies that affect their access to marine resources by exploring their rights and interests under the *Native Title Act 1993* (Cth) (NTA) and Indigenous Land Use Agreements (ILUAs) as well as using alternative means to assert their cultural values.

### About the Aboriginal Fishing Rights Gathering

#### Purpose of the gathering

The Aboriginal Fishing Rights Gathering was held to discuss the importance of fishing activities in the area and to devise ways to defend and safeguard the local Aboriginal community’s interests and values as cultural fishers. More than 100 local Aboriginal community members attended the gathering and they were joined by political representatives, academic and industry researchers, experts in native title and fisheries law, and other local supporters. The gathering was facilitated by Danny Chapman and included presentations by Jan Braham, Hayley Egan, Rod Kennett, Justin Gilligan, Tony McAvoy, Kathy Ridge and Wayne Riley (Appendix 2 contains the gathering’s agenda).

The two-day event consisted of sessions that provided participants with an opportunity to hear from experts and industry professionals about cultural and commercial fisheries and their management. Sessions were designed so that community members could ask questions, make recommendations and provide their experiences of cultural fishing in the region.

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Directions to the gathering along Kelly Road, Bingie (above) and participants arriving at the gathering (below). Photos: Tran Tran.
What happened during the gathering?

Raising the profile of cultural fisheries

Many local Aboriginal communities along the south coast of NSW see their country as cultural fisheries and wish to engage in cultural fishing and fishing practices. Cultural fisheries have been recognised as distinct from commercial fisheries since 2009 through s. 21AA of the *Fisheries Management Amendment Act 2004* (NSW) (Amendment Act), although it did not commence until November 2015. As a result, cultural fisheries were acknowledged through an interim policy in 2010 whereby Aboriginal people in NSW were exempt from paying recreational fishing fees and from being prosecuted for accessing traditional resources up to certain limits (see Appendix 3). Notwithstanding this policy, prosecutions have largely been dependent on the discretion of fisheries officers and their application of the policy.

Hayley Egan, a cultural fisheries researcher from Southern Cross University, provided insights into the establishment of the first cultural fishery along the Tweed River in northern NSW. This is seen as a best-practice model, as local Aboriginal communities obtained data on fish species, fishing locations and fishing catches to raise the area’s public profile as a site of tremendous cultural and commercial fishing potential.\(^5\) While the cultural fisheries model implemented by communities along the

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Livelihood values in Indigenous cultural fishing

Tweed River potentially can be applied to the south coast of NSW, Hayley spoke of the impossibility of a blanket policy to govern all cultural fisheries. Rather, there is a need firstly to define cultural fisheries and then to examine the unique circumstances of each region to ensure that policies complement the values and interests of each Aboriginal community.

Sensitivity to community and regional contexts is necessary, as Aboriginal cultural fishing practices are region-specific and based on individuals’ roles and responsibilities. What is more, there are different rights of access for different community members and they often dictate what fish and other marine resources can be taken; when they can be taken; the quantity that can be taken; and how fish stocks may be shared or traded. The different species of fish, bioregions and quality of water around the state also affects fishing activities and contributes to the difficulty of implementing one cohesive policy for all cultural fisheries in NSW.

While current systems are failing to protect local community values and interests, policy frameworks are neglecting the natural and cultural character of Indigenous fisheries around Australia. The aspirations shared by many Aboriginal communities deserve attention, as they are key to the design and implementation of culturally appropriate policies. The NTA, ILUAs and the establishment of marine parks and other protected areas are all valid frameworks when attempting to safeguard Aboriginal rights, values and interests. However, raising the profile of cultural fisheries, as was the case in the Tweed, assists in promoting good working relationships between stakeholders and enables better public understanding of cultural fishing practices for local Aboriginal groups.

Livelihood values in Indigenous cultural fishing

The need for cultural and livelihood values to be identified through research and used to highlight the significance of Aboriginal customary fisheries around Australia was discussed by Rod Kennett from AIATSIS. Having been a part of the 2012 National Sea Country Workshop and discussions on emerging issues in land and sea management at the 2014 National Native Title Conference, Rod spoke about how Aboriginal and Torres Strait Islander peoples feel as though they are being prevented from engaging with the sea areas of their country, especially after being prosecuted for customary fishing practices. To combat this, several Indigenous ranger programs in northern Australia are working in commercial fisheries and using

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contemporary fisheries management techniques and their own traditional knowledge to engage with the fishing sector.

An open discussion during the morning session identified that family, the transfer of knowledge between generations, and maintaining cultural ties to the ocean are all important for members of the Aboriginal community on the NSW south coast. The idea that fishing is not just a pastime but a spiritually enriching activity that brings family members and friends together and enables individuals to fulfil their roles within the community was echoed throughout the session. Rod observed that research into the livelihood values of cultural fishing is an important step when negotiating with competing stakeholder groups and asserting a place for cultural practices within the fishing sector. He also discussed how research could raise the community’s profile and the importance of fishing to local Aboriginal people.

The primary aims of a research project into livelihood values in Indigenous cultural fishing are to:

- identify the social, cultural and economic values of cultural fishing
- identify the differences between what communities want and how the FMA and other policies affect cultural fishing
- build capacity for fisheries research and management
- develop a set of tools that can be used to explain the value of Indigenous fisheries to policymakers.

Research will help to explain what is important to Aboriginal community members in fisheries planning and management. Community researchers will collect responses from the local community. This information will be used to ensure that the government and other groups are aware of the cultural and economic values and interests held by members of the local Aboriginal community. The project also aims to build Indigenous research capacity through AIATSIS hosting community researchers in Canberra to undertake project-related work and engage in other AIATSIS research activities, including co-presenting research findings at a public seminar.

The anticipated research outcomes of the proposed project were discussed, and many members of the community felt that this project could help to educate youth on cultural practices as well as increase the social, emotional and mental character of the region — especially following the many prosecutions and arrests in the area. These outcomes are much broader than just fishing for subsistence living, and investigations into these values will contribute to recognition of Aboriginal people as the first fishers of the region. Jo Ruscoe from the FRDC explained to participants that funding had been awarded to AIATSIS to undertake research into this area and
answered questions about the FRDC’s role in the research. Stephen Schnierer from Southern Cross University also discussed the relative merits of research that focuses on values to highlight the issues affecting local Aboriginal community members, rather than relying purely on datasets or numbers.

A research project of this kind, which enquires into the qualitative aspects of cultural fishing, also has the potential to build capacity in the community. Capacity building may be achieved through community members negotiating their interests and values as cultural fishers with other stakeholder groups, which will no doubt assist Aboriginal communities along the south coast of NSW to improve their social, political and economic standing. Community capacity could also be built through a study exchange at AIATSIS, which would provide members of the community with skills and insights useful to them in representing their communities and raising the profile of Indigenous customary fishing. The need to build capacity in the area was reinforced throughout the session by pleas from community members for research to stop young people being prosecuted for their part in cultural fishing and to educate locals about their rights and interests.

Protected areas and fishing rights

Justin Gilligan, Acting Manager of Batemans Marine Park, discussed the marine park’s initiatives towards working with the local Aboriginal community. Locals were interested in learning more about the forthcoming review of the marine park and made recommendations that:

- an advisory panel be established that would include members from the seven local land councils
- a quota of Indigenous delegates be appointed to the marine park board
- local Aboriginal people be exempt from paying marine park fees for accessing traditional resources
- exclusive access to culturally significant sites be granted to Aboriginal people.

The community expressed their concern at the alarming rate at which locals are being prosecuted and pleaded that marine park officers use more discretion when dealing with Aboriginal people. There was also a feeling that there is a disjuncture between locals and the marine park, which needs to be addressed. Justin expressed an interest in working towards bridging this divide and a desire to work more closely with members of the local Aboriginal community.
Cultural fishing and the law

Tony McAvoy SC and Kathy Ridge led the afternoon session and discussed community members' legal rights and interests as cultural fishers. In particular, they discussed the implications of the NTA and the FMA on cultural fishing practices along the NSW south coast. Under the NTA, a group’s rights and interests over their country is recognised if they can establish connection based on traditional law and custom. If exclusive possession native title is recognised, groups have the right to decide who can enter their country. If non-exclusive possession native title is recognised, a group’s right to access country may still be recognised but these rights and interests are shared with others. Under s. 211 of the NTA, native title holders do not require a permit to undertake fishing activities as long as the activities are for non-commercial communal or domestic purposes in accordance with traditional law and custom. However, in order to mount a successful defence based on s. 211, the following criteria need to be demonstrated:

- Individuals must be fishing within the bounds of their own country.
- Individuals must be able to establish a connection to country.
- Individuals must comply with the requirements under the provision, such as fishing for non-commercial, domestic purposes.

Further questions about the requirements under s. 211 that fishing be carried out for non-commercial or domestic purposes were also discussed, including whether this may limit the quantity of fish and other marine resources that can be taken. This is an important aspect of the NTA, as it would be difficult to persuade a magistrate that a large quantity of marine resources was for non-commercial purposes. This appears to have been the outcome of a case in South Australia, where five Aboriginal men were found guilty of poaching abalone from waters off Yorke Peninsula.

Questions about whether people who have been adopted or included in an Aboriginal community could rely upon this as a defence were also raised. Tony and Kathy suggested that if someone can prove that the process of adoption or inclusion was based on traditional law and custom then they could potentially rely on s. 211. Tony then discussed the case of Mueller v Vigilante [2007] WASC 259, in which a

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7 Section 211(2) NTA.
8 V Malandirs, ‘Abalone poachers convicted despite arguing native title rights to SA court’, ABC News, 15 September, available from http://www.abc.net.au/news/2015-09-11/abalone-poachers-convicted-native-title-point-pearce/6766984. In 2011, authorities caught the men with 370 abalone, more than half of which were undersize. Lawyers argued that the men had a right to the catch under the NTA; however, the magistrate held that the men had stolen the fish for commercial gain rather than for cultural purposes. It is possible this decision will be appealed; evidence could be presented that a large catch was intended to be shared with others. The example proved to be a useful illustration of the intricacies of the NTA and its application.
non-Indigenous man was fishing with two young Indigenous men. The man was able
to rely upon his honest and reasonable belief that the young men had a right to be
fishing in the area under s. 211 of the NTA to avoid prosecution.

The issue of proof of Aboriginality was raised and Tony explained that a community
would need to demonstrate that they were descended from apical ancestors to prove
Aboriginality in relation to native title. Another community member asked whether
those who were not directly fishing but were involved with bringing fish in and helping
others would be covered by s. 211. Tony suggested that where fishing was
demonstrated to be part of traditional cultural practice there could be reason for
individuals to rely upon s. 211 as a defence.

The group also discussed whether a native title claim could provide a community
with the best outcome in terms of safeguarding their cultural values and interests.
Tony stated that this was a risk assessment that the community would need to make.
For example, where it was previously believed that ILUAs were intergenerational
there have been instances of state governments breaking agreements with
traditional owners.

Tony also raised the possibility of a defence based upon s. 287 of the FMA. The Act
states: ‘This Act does not affect the operation of the Native Title Act 1993 or the
Native Title (New South Wales) Act 1994 in respect of the recognition of native title
rights and interests within the meaning of the Commonwealth Act or in any other
respect.’ Therefore the FMA should not affect any native title rights or interests.

Kathy pointed out that there has been little case law developed on the native title
‘defence’ provision of s. 211 of the NTA because prosecutions for ‘poaching’ marine
resources are either discontinued or not pursued when a defendant raises their
native title rights and interests in court.

The most pressing recommendation, according to Kathy and Tony, was that s. 21AA
of the Amendment Act be commenced immediately because it permits Aboriginal
people to fish for cultural purposes. Since the amendment bill was passed in 2009,
两 successive state governments have failed to commence s. 21AA and make it
law resulting in more than 500 Aboriginal people being fined, jailed or having their
equipment confiscated. The NSW Government continue to assert that they are still
drafting regulations. The government have indicated they are committed to the
National Indigenous Fishing Principles, and the suggestion was made that the
extent to which the government have fulfilled their obligations under this agreement
ought to be explored.

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fishing-rights-made-law/6331716.
It was also proposed that the development of an identification card in the short term could include a short summary of cultural fishers’ rights and the ways in which community members may respond when questioned by fisheries officers. The ethical and logistical implications of this idea were discussed throughout the session, and this appeared to be a popular idea among the local Aboriginal community. The afternoon session proved to be very informative for local community members, many of whom appreciated their questions and recommendations being considered. A complete list of participants’ questions is contained in Appendix 5.
Livelihood values in Indigenous customary fishing research project

About the research project

The morning session of the second day was dedicated to further explaining the proposed research into livelihood values in Indigenous customary fishing. The research project emerged from discussions about the values, aspirations and impediments experienced within the broader context of sea country management and livelihood development which took place at a workshop during the 2014 National Native Title Conference. Communities to be included in this project include the Crocodile Rangers in the Northern Territory (NT), the Far West Coast Aboriginal Fishing Corporation in South Australia, and the AFRG on the south coast of NSW.

The research team

The research team of Indigenous and non-Indigenous researchers includes Rod Kennett, Tran Tran and Lisa Strelein from AIATSIS, Stephen Schnierer from Southern Cross University, Matt Osborne from the Department of Primary Industries and Regions in South Australia, Robert Carne from the NT Department of Primary Industry and Fisheries, and Bradley Moggridge from the Aboriginal Water Initiative, NSW Department of Primary Industries.

Community endorsement of the research project

AIATSIS researchers Rod Kennett, Tran Tran, Timothy Heffernan and Lara Strelnikow attended the gathering. They presented a research proposal during the gathering and asked for permission and support to document the community’s ongoing efforts to safeguard their interests and values as cultural fishers. The proposal was openly endorsed by members of the local Aboriginal community and a resolution was put forward to ensure that an AFRG steering committee guide the research project. A copy of the research project flyer distributed at the gathering is contained in Appendix 4.

Role of the AFRG steering committee

The AFRG steering committee is an open group, made up of several volunteer community members, who make decisions about the direction of the AFRG. In addition to formulating a mission statement, the steering committee is committed to guiding this research project, and AIATSIS will consult with them on an ongoing basis throughout the project.
Where to from here?

Future directions and aspirations

The final session was dedicated to a discussion about the AFRG’s future directions and aspirations. A group mission statement was a popular idea among the community. One meeting participant offered the following mission statement as a guide:

To secure for Aboriginal people the right to manage and use the fisheries resources in their traditional country in a way that respects and honours their rights to use and manage natural and cultural resources as First Australians. This right to use and manage includes a fair and just allocation of resources and accompanying access rules that support the creation of income, livelihoods and industry by Aboriginal people.

The need for a mission statement will be explored at future meetings; however community members felt that it was a good way to communicate the group’s values and interests with regard to marine resources. Equitable relations with government and other stakeholder groups were identified as being important to the future creation of income, livelihoods and enterprise by Aboriginal people. Some attendees also suggested that a group mission statement should be accompanied by a detailed history of the AFRG as well as a business plan that details future commercial and cultural ventures that could be explored by the local community.

An online crowd funding campaign was discussed as a culturally appropriate and ethical initiative to support the development of cultural fisheries in the region and to garner support for the AFRG. The logistical and administrative aspects of crowd funding were debated, and many members of the local community suggested that support for such a campaign could be gained by contacting previous supporters and encouraging them to get involved. Building up membership of the AFRG was identified as a key concern, and the community expressed a desire to rally support from their coastal neighbours from south-eastern Sydney to Eden in southern NSW.

Wayne Riley discussed the prospect of establishing a cooperative. However, after extensive debate about logistical and financial constraints, this idea was put on hold. The role of land councils, native title service providers and other representative bodies was also discussed, and participants sought to clarify how these organisations could help the AFRG safeguard their rights and interests as cultural fishers. A suggestion was that they assist in distributing identity cards that detail cultural fishers’ rights, values and interests. Another suggestion was that members of the local Aboriginal community run in local and state politics, and it was felt that this may help to strengthen the community’s social, economic and political standing. Others suggested that, with a clearer, more defined role, representative bodies and future political candidates from the community could successfully raise the area’s
profile and highlight the community’s interests and challenges to the wider Australian community.

**Recommendations from the gathering**

Members from the local Aboriginal community made various recommendations throughout the gathering, including that:

- the NSW Government be educated on Aboriginal cultural values
- the NSW Government demonstrate how the National Indigenous Fishing Principles have been implemented
- section 21AA of the FMAA be commenced immediately and that the fishing sector be regulated following its commencement if future problems arise.

Further, to protect and safeguard local Aboriginal peoples’ rights and interests, it was recommended that:

- AFRG register themselves under a business name and/or become incorporated
- a group mission statement be composed and accompanied by a detailed history of the AFRG and a business plan that details future commercial and cultural ventures that could be explored by the local community
- AFRG pursue and administer crowd funding initiatives to raise funds
- Aboriginal community members be given fee exemptions and exclusive access to marine resources under s. 211 of the NTA (which could be achieved through an Aboriginal block fishing licence)
- Aboriginal community members be better educated about their rights and interests under the NTA, FMA and other legislation affecting their interaction with water areas of their country. This will prevent people being misinformed and preclude evidence being used against them in court. Community members felt that this could also be achieved by:
  - creating a community website to keep all members up-to-date with the policies and procedures that affect their right to take marine resources
  - producing an identity card (which could be distributed by the local land council) with an individual’s name, affiliation and legal rights and interests as a cultural fisher under s. 211 of the NTA.
- local Aboriginal businesses and traineeships be further supported by the local community. This could be achieved through younger community members
accompanying senior members on fishing trips (where possible) which would enable them to gain knowledge about cultural fishing.

Finally, it was recommended that, with regard to the research project Livelihood Values in Cultural Fishing:

- the research project be endorsed by the community
- the AFRG steering committee assume responsibility for steering the research project, including recruitment of community members to contribute to research.

Participants and presenters at the gathering. Photo: Timothy Heffernan.
Appendices

Appendix 1: Extract from GERAIS

The following principles from the AIATSIS *Guidelines for ethical research in Australian Indigenous studies* are acknowledged and adhered to throughout the research project:

**Principle 6** Consultation, negotiation and free, prior and informed consent are the foundations for research with or about Indigenous peoples.

**Principle 7** Responsibility for consultation and negotiation is ongoing.

**Principle 9** Negotiation should result in a formal agreement for the conduct of a research project.

**Principle 10** Indigenous people have the right to full participation appropriate to their skills and experiences in research projects and processes.

**Principle 11** Indigenous people involved in research, or who may be affected by research, should benefit from, and not be disadvantaged by, the research project.

**Principle 12** Research outcomes should include specific results that respond to the needs and interests of Indigenous people.

**Principle 13** Plans should be agreed for managing use of, and access to, research results.

**Principle 14** Research projects should include appropriate mechanisms and procedures for reporting on ethical aspects of the research and complying with these guidelines.
## Appendix 2: Workshop agenda

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td><strong>Day 1</strong></td>
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<tr>
<td>Morning session</td>
<td><strong>Welcome to country</strong> – Danny Chapman (Master of Ceremonies)</td>
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<td></td>
<td><strong>Cultural fishing rights and the NSW south coast</strong></td>
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<td></td>
<td>Jan Barham – Australian Greens</td>
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<td></td>
<td>Hayley Egan – Southern Cross University</td>
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<td></td>
<td>Rod Kennett – AIATSIS</td>
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<td></td>
<td>Justin Gilligan – Batemans Marine Park</td>
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<tr>
<td>Lunch break</td>
<td>Smoking ceremony and entertainment</td>
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<tr>
<td>Afternoon session</td>
<td><strong>Cultural fishing and the law</strong></td>
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<td></td>
<td>Tony McAvoy – Frederick Jordan Chambers, Sydney</td>
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<td></td>
<td>Kathy Ridge – Ridge and Associates, Sydney</td>
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<td><strong>Day 2</strong></td>
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<tr>
<td>Morning session</td>
<td><strong>Livelihood values in Indigenous cultural fishing</strong></td>
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<td></td>
<td>Rod Kennett – AIATSIS</td>
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<tr>
<td>Lunch break</td>
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<tr>
<td>Afternoon session</td>
<td><strong>Future directions and community aspirations</strong></td>
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<td></td>
<td>Wayne Riley – Indigenous aqua and agricultural business model</td>
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<td></td>
<td>Discussion – where to from here?</td>
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<td>Wrap-up session</td>
<td><strong>Consolidation of major themes</strong></td>
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## Appendix 3: What cultural fishing rights do I have?

<table>
<thead>
<tr>
<th>Tenure</th>
<th>Exclusive Possession</th>
<th>Explanation</th>
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| Has native title been recognised? | Yes | If native title is recognised, s. 211 of the NTA provides limited protection of native title rights and interests by exempting cultural fishers from licensing and permit requirements. Specifically, fishing may be undertaken where it is for the purpose of satisfying personal, domestic or non-commercial communal needs; and in the exercise or enjoyment of native title rights and interests. This section has provided a defence to prosecution for charges including:

- the taking of juvenile crocodiles without a permit under the *Fauna Conservation Act 1974* (Qld), which was permissible where there was a recognised native title right (*Yanner v Eaton*).
- possessing a quantity of undersized abalone, taken in accordance with the traditional laws and customs of the relevant native title holders, the Narrunga people (*Karpany v Dietman*).

Determining the existence and or extinguishment of a native title claim is a complex task that has not been considered in the fishing defence cases. Defences under s. 211 have been raised on the basis that statute may regulate the exercise of the native title right without abrogating it.

In *Akiba*, Hayne, Kiefel and Bell JJ stated that: ‘[s]ection 211 can only be engaged if relevant native title rights and interests continue to exist.’ Further, unless there is an express prohibition in past NSW fisheries legislation that applies to the native title rights and interests, the legislation will be considered to regulate rather than extinguish the rights.

| | No | In the absence of a recognised native title claim, s 211 may potentially provide some protection. This is currently under consideration in Tasmania over an area where there is no native title, but where Indigenous cultural activities are carried out. In *Mueller v Vigilante*, two Aboriginal boys relied upon traditional rights with respect to fishing in order to bring themselves within s 211(2). No specific evidence of their being native title holders was provided.

Note this scenario is different to where native title rights and interests have been permanently extinguished. That is, under native title, the rights of the Indigenous people of Australia are assumed to have continued to exist unless there is an express intention to extinguish those rights and interests.

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10 *Native Title Act 1993* (Cth), s. 211(2).
11 *Yanner v Eaton; Karpany v Dietman*.
15 Emily Bryan, ‘Aboriginal heritage raised as a defence for Tasmanian father and son taking whitebait without licence’, [accessed 24 August 2015].
16 *Mueller v Vigilante* [2007] WASC 259 [14].
<table>
<thead>
<tr>
<th>Are land rights recognised under Aboriginal Land Rights Act 1983 (NSW)?</th>
<th>Yes</th>
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<tbody>
<tr>
<td>Land rights are granted in the form of freehold land, rather than rights and interests in land being recognised as occurs under the NTA. While generally the grant of freehold title will completely and permanently extinguish native title, native title can exist on land where land rights have been allocated in certain circumstances. Land granted as a result of a land claim made after 28 November 1994, will be subject to any native title rights and interests existing immediately prior to the transfer continue to exist. For other types of land, including Aboriginal Land Trusts and land granted under the Land Rights Act for a claim lodged prior to 28 November 1994, native title may have been extinguished. Under the Land Rights Act, hunting and fishing rights over any land may be negotiated by a Local Aboriginal Land Council with the owner to permit Aboriginal persons having access to the land for those purposes. Should negotiations fail to result in an agreement, the Council may apply to the Court for a permit conferring the traditional rights.</td>
<td></td>
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<tr>
<td>No</td>
<td></td>
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<tr>
<td>If land rights are not recognised, Aboriginal cultural fishing may be undertaken as permitted by the FMA. The FMA defines ‘Aboriginal cultural fishing’, as “…fishing activities and practices carried out by Aboriginal persons for the purpose of satisfying their personal, domestic or communal needs, or for educational, ceremonial or other traditional purposes, and which do not have a commercial purpose.” Aboriginal persons who fish are not required to pay recreational fishing fees. If Aboriginal people want to take fish outside this regulation to cater for larger cultural gatherings and ceremonies, they must apply for a special authority to be issued under s 37. The following details are also required:</td>
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- The name and address of the applicant, type of vehicle(s) used to transport fish and the details of where fishing will occur
- The species and quantities to be taken
- The name, location and attendance list of the event for which the permit is sought

Section 21AA, which has not yet commenced, allows regulations to be made regarding special limits for Aboriginal cultural fishing in relation to the bag and possession limits. In the meantime, the Aboriginal Cultural Fishing Interim Access Arrangement applies.

The amount of fish allowed for communal needs, or possessed by an individual Aboriginal person undertaking cultural fishing, is double that of the current recreational bag/possession limits, other than those for species with specific limits (see Figure 1).

The shucking of abalone, rock lobster and turban shell within 100 meters of the high water mark is allowed if the fish are consumed within that area.

These rules apply to all waters where recreational fishing is permitted, this includes the appropriate zones of marine parks and aquatic reserves.

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17 FMA s 4.
18 FMA s 34C(2)(f).
19 FMA s 37(1)(c1); noting that it should not be granted if it would be inconsistent with native title rights and interests, or with the terms of ILU agreement: s 37(8).
20 FMA s 37(3A).
Table 1: Daily take and possession limits, September 2015

<table>
<thead>
<tr>
<th>Species</th>
<th>Daily Limit</th>
<th>Possession Limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abalone</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Flathead</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td>Bream and Tarwhine</td>
<td>40 in total</td>
<td>40 in total</td>
</tr>
<tr>
<td>Tailor</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td>Blue Swimmer Crab</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td>Trevally</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td>Luderick (Blackfish)</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td>Murray Cod</td>
<td>4</td>
<td>8</td>
</tr>
</tbody>
</table>
Appendix 4: Research project flyer

Mapping livelihood values of Indigenous customary fishing

The research team includes Indigenous and non-Indigenous researchers:
- Dr Rod Kennett
- Matt Osbourne
- Associate Professor Stephan Schnierer
- Dr Tran Tran
- Dr Lisa Sirelein
- Robert Carne

Who is involved in the project?
The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has received a research grant from the Fisheries Research Development Corporation (FRDC) to investigate Indigenous values in customary fishing over two years.

What is the project about?
The aim of this research project is to:
1. Identify cultural, social and economic values of Indigenous fishing
2. Look at the differences between what communities want and fisheries policy and legislation
3. Build fisheries research and management capacity
4. Develop a set of tools that can be used to explain the value of Indigenous fisheries to policy makers

How will this research benefit you and your community?
The research will help to explain what is important to your community in fisheries planning and management. This information will be used to ensure that the government and other groups are aware of your cultural and economic interests.

What will the researchers do and when?
- Meet with everyone to discuss when workshops should occur and who will be involved from the community
- Conduct interviews and hold workshops
- Invite you to attend a study tour of AIATSIS
- Provide financial and educational support for community researchers

What will happen to the information you provide?
Your information will be used to inform policy change. We will also use this information to create:
- A final project report
- Community reports for each case study area
- A draft manuscript for peer-reviewed publication
- A toolkit that can be adapted and used by other communities
Appendix 5: Participants’ Questions

The following questions were asked by participants over the course of the gathering:

- How can adopted members of our community be part of a native title case?
- Do Aboriginal people from the NSW south coast have reciprocal cultural fishing rights and interests in other parts of Australia?
- If I have a commercial fishing permit, how would I defend myself for commercial as well as cultural fishing activities?
- Is s211 a framework that could help to negotiate a position for cultural fishing within the commercial fishing sector?
- Given the fact that many native title claimants are not awarded exclusive rights over their country, is it advisable to explore ILUAs over some areas of country and native title over others and, if so, how would this improve our rights and interests?
- Are there legal avenues for compensation for the loss of cultural expression and for impacts to our socio-economic standing and wellbeing that have come about from prosecution and being disenfranchised?