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Marine Fisheries and Aquaculture Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY 2601

BY EMAIL ONLY: fisheries.inquiry@pc.gov.au

Dear Commissioners,

AIATSIS Submission – Marine Fisheries and Aquaculture

The Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**) welcomes the Productivity Commission's inquiry into Australia's Marine Fisheries and Aquaculture

Our contribution is informed by: our legislative function to advise the Commonwealth on the situation and status of Aboriginal and Torres Strait Islander culture and heritage; the commission's draft report and current public submissions; and our expertise and research background in areas relevant to the inquiry and previous public submissions to similar inquiries.

We attached our brief submission for your consideration in drafting your final report and recommendations.

Yours sincerely,

Dr Lisa Strelein

Executive Director – Research

AIATSIS Submission to the Productivity Commission's Inquiry into Australia's Marine Fisheries and Aquaculture

AIATSIS' Expertise and Context

The Australian Institute of Aboriginal and Torres Strait Islander Studies (**AIATSIS**) welcomes the opportunity to contribute to the Inquiry. Our contribution is confined to the commissions draft findings in regard to the Terms of Reference relevant to Indigenous Australians namely:

5. *The extent to which fisheries management regimes align with and protect the interests of the wider community (in particular, the balance between commercial, recreational, indigenous fishing and conservation interests, and consumers' interests).*

6. *The extent to which fisheries management regimes support greater participation of Indigenous Australians, provide incentives to Indigenous communities to manage their fisheries, and incorporate their traditional management practices in the fishing industry.*

AIATSIS has developed significant expertise in the development, application and reform of Indigenous law and policy. For over 20 years the Native Title Research Unit (NTRU) has provided research and information resources to support the native title sector. AIATSIS also conducts research in the area of Indigenous livelihoods based on land and sea resources and management including a current project on the livelihoods values of Indigenous customary fishing.

With respect to the specific findings and information requests made by the Commission we make the following recommendations and observations.

Guiding principles for the report and recommendations

AIATSIS welcomes the framework provided for the inquiry by the terms of reference, which specifically focus the attention of the Commission on not only protecting Indigenous fishing interests, but also increasing participation of Indigenous peoples in fisheries management.

We commend the Productivity Commission for the approach taken in the draft report and the level of respect and understanding demonstrated throughout. In particular, the report recognises the significance of participation in and management of fisheries to the cultural survival of Indigenous peoples and the health and wellbeing of the communities concerned.

We agree with the assessment of the regulatory framework for government involvement in fisheries management, which, in short, concerns the management of resources on behalf of all Australians.

The report notes that governments' regulatory role is directed to two key matters:

A. the rules in relation to taking the fish: where, what, how and how many; and

B. the rules in relation to who can take fish: determining priorities as between competing interests

AIATSIS support the recognition of customary fishing as a sector in its own right. In addition we note that there are opportunities for Indigenous peoples to be active partners in the regulation and management of fisheries in all three of the key task areas identified in the report across all fisheries sectors.

Customary fishing and native title

The Commission has rightly based its discussion and recommendations on the presumption that any regulatory and management regime must not be inconsistent with the recognition and enjoyment of native title rights and interests. Native title can be strong enabler of greater involvement of Indigenous peoples in decisions concerning their lands and waters and resources. However, it is also important to acknowledge that native title is a very strict legal standard that does not necessarily reflect the rights and interests that Indigenous people may hold in relation to fisheries under their own laws and customs or under international law. In the context of the terms of reference for the inquiry – to increase participation and incorporation of traditional knowledge into fisheries management – native title may not always provide the framework to maximise these aims.

For example, the report does not deal appropriately with circumstances in which traditional owners do not receive recognition of their customary rights under native title. Native title requires very onerous standards of proof, which some Indigenous peoples in Australia may be unable to establish to the satisfaction of the Courts. In other instances, native title has been impacted by extensive settlement and land that can be reclaimed under native title laws may be limited by extinguishment.[1] There are also instances, such as in Victoria and South West WA where groups have reached alternative settlements that require the groups to agree that native title does not exist.

For some groups who have been dispossessed from their traditional country, fishing may remain one of the critical methods of maintaining and transmitting cultural knowledge and connecting to Country. AIATSIS is concerned that relying on 'proven native title rights' as the basis for determining the scope of customary fishing plans may further disenfranchise those Indigenous peoples most affected by colonisation.

In relation to the Recommendations, AIATSIS suggests that the draft recommendation 5.1 be reworded to state that the definition of Indigenous customary fishing should 'expressly avoid any inconsistency with native title'. In this way 'consistent with' does not have the unintended result that native titles become a limiting factor rather than an enabling factor.

[1] As the High Court has noted on several occasions, extinguishment under Australian law does not necessarily reflect the continued existence of the right or interest under Aboriginal or Torres Strait Islander laws and customs. Extinguishment is perhaps best understood as a withdrawal of recognition by the Australia law.

The right to take versus the right to trade

The Report contains some inconsistency in the summation of the outcomes of recent cases concerning native title and fisheries.

The report refers to the High Court decision in *Akiba v The Commonwealth* (2013 HCA 33 *(Akiba)* and states that this case confirmed 'a right to trade' (pp19, 147). This is not technically correct and apt to mislead. In contrast, the summary of *Akiba* in Box 5.3 (p137) contains a correct summary of the findings. The incorrect interpretation is incorporated into the analysis, key findings. Although, on its face, recommendation 5.3 requires no change.

The critical difference, for the purposes of the report, is that the *Akiba* case recognises a right to take for any purpose, not a right to trade as such. Importantly, the decision does not require that native title groups must establish evidence of trade or a 'tradition of commercial fishing' (p147). Rather the group need only establish that the laws and customs of the group in relation to land and waters entitled them to take the resources with no prescription as to the purposes for which the resources could be used.[2] The right to take resources can therefore be exercised for commercial or non-commercial purposes, or indeed any other purpose that could be imagined (*Akiba* p10).

It is important to note that regulation of commercial fishing would apply equally to any Indigenous person engaged in fishing in accordance with their laws and customs for commercial purposes. Contrary to the arguments put forward at p147, there is no reason why definitions of customary fishing should not include commercial fishing where all other requirements in relation to commercial operations are satisfied.

We would further note that the circumstances described in the report of trade and exchange within and between Indigenous groups would be captured by the concept of communal use. Reference to personal and communal/community use (p135, 137) in a determination does not necessarily preclude trade and commerce. As a consequence, many determinations specify 'non-commercial purposes' in order to achieve the purpose of precluding commercial activity.[3]

There are other minor clarifications in relation to native title that the Commission may wish to consider in finalising the report:

1. The key points of Chapter 5 (p131) incorrectly suggest that a native title right to trade is limited to 'within and between Indigenous communities'. The right to take for any purpose does not limit with whom a catch may be traded.
2. The opening definition of customary fishing, which prescribed non-commercial purposes (NNTT 2004) (p132) is out dated and not consistent with current native title law. The definition should be contained to 'fishing in accordance with Indigenous laws and customs'.

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[2] Noting of course that other laws and customs may impose rules or restrictions as to how resources are used once taken, for example, requiring a catch to be shared. However, the High Court and trial judge note that these are not laws in relation to land and waters and are therefore not laws of relevance to the proof or exercise of native title.

[3] See LM Strelein, 'The Right to Resources and the Right to Trade', in S Brennan, M Davis, B Edgeworth and L Terrill (eds), *Native Title From Mabo to Akiba: A Vehicle for Change and Empowerment?,* Federation Press 2014.

3. It is worth noting in relation to s211 (pp136-7) that the provision exempts native title holders from licencing or permit regimes, except where those regulations are for research, environmental protection, public health or public safety purposes.
4. It is not technically correct to suggest that Indigenous land Use Agreements (ILUAs) can be entered into 'whether or not native title exists' (p138). While ILUAs can be entered into prior to a determination of native title, a group who has a determination that native title does not exist cannot enter into an ILUA.
5. It is wrong to suggest that the rights afforded by native title depend on 'traditional practices' (pp136, 142). The High Court specifically reiterated that the rights protected under native title are determined by the laws and customs of the group and not by how those rights are exercised from time to time. The phrase 'traditional practices' should be replaced in these instances with the phrase 'traditional laws and customs'.

Management of fisheries – partnership rather than consultation.

The report rightly notes that Indigenous peoples have not only been resource users but resource custodians and managers for tens of thousands of years. The right of Indigenous peoples to be involved in decision making with respect to the management of their traditional Country is recognised in the report but could be strengthened, in particular with reference to the formulation of the recommendations in relation to the development of management plans.

The emphasis on development of management plans 'in consultation with' Indigenous peoples undermines the main arguments of the report which highlight the need to engage Indigenous peoples actively in the management of fisheries and incorporate traditional knowledge into the development and implementation of fisheries management plans. Consultation is not an appropriate approach to stakeholder engagement in this context where place based planning and participatory management is the desired outcome. Instead, developing allocations and controls should embody best practice in engagement with Indigenous peoples that empowers participants and establishes a strong partnership between regulators and Indigenous peoples to actively manage fisheries into the future.

AIATSIS suggests that recommendation 5.2 should be reworded to ensure that customary allocations should be developed 'in partnership with' (not 'in consultation with') Indigenous peoples.

Determining access allocations for customary fishers

AIATSIS supports the prioritisation of Indigenous fisheries in recognition of the importance of Indigenous fishing to the cultural survival of Indigenous peoples. Consistent with comments elsewhere in this submission we suggest that the word 'proven' be removed from recommendation 5.2.

The report rightly extends this prioritisation to ensuring that Indigenous peoples are the first decision-makers in relation environmentally sustainable management practices. That is, Indigenous peoples should be empowered to actively manage the environmental aspects of sustainable harvesting prior to any resort to externally imposed restrictions.

The report proposes that access allocations for customary fishing should be allocated on the basis of the total catch needed to accommodate Indigenous communities' contemporary customary practices. The report goes on to say that:

> However, this approach is difficult to apply in practice as the benefits of customary fishing include unique cultural benefits obtained through the fisher's participation in his or her traditional practices that are challenging (if not impossible) to quantify.

We agree that quantification of Indigenous values in fisheries is challenging and certainly any contingent evaluation method like 'willingness to pay' is inappropriate.

However, while this quantification is a challenge, improved recognition within fisheries management of the nature and scale of the benefits that customary fishing provide to Indigenous communities will greatly improve allocation decisions. These benefits include social, health and economic benefits that make significant contributions to maintenance of culture, community health and wellbeing. Incorporating the value of these benefits into a framework for deciding catch allocation to customary fishing may strengthen community acceptance of allocations, and supply fisheries managers with more information and a nuanced understanding in both setting and, if necessary, adjusting allocations to customary fishing.

As already discussed, for many Indigenous peoples, participation in fisheries is critical to cultural maintenance and survival. However, the report should avoid a singular focus on 'cultural' values in the conceptualisation of Indigenous values and benefits from ecosystem goods and services. The recognition of 'unique' cultural benefits specific to Aboriginal and Torres Strait Islander peoples often appears to come with the cost of ignoring non-cultural benefits.[4]

In the following we briefly outline some research findings on the benefits of customary fishing (and other resource use).

Customary fishing brings a number of economic, social and health benefits to both customary fishers and their families and communities. A current AIATSIS research project involves working with Aboriginal people in NSW, SA and NT to identify these and other values associated with Indigenous customary fishing. Evidence offered below, where not otherwise cited, comes from the preliminary findings of this project which are corroborated by pre-existing national and international research.

The chief economic benefit is that wild aquatic foods are substitutes for many store-bought foods. While the contribution of wild foods to diets can vary greatly, as Gray and Altman noted even a small level of substitution can improve economic position:

[4] See for instance: S Jackson, 'Compartmentalising Culture: the articulation and consideration of Indigenous values in water resource management', *Australian Geographer*, vol. 37, no. 1, 2006, pp. 19–31.

> While the value of wild resources harvested is only a relatively small proportion of income, it is a significant contribution to the consumption levels of a relatively low income population.[5]

Families with lower incomes spend higher proportions on basic necessities, so substitution for non-market goods is an effective way to increase discretionary income. Customary fishing often involves cultural obligations to share catch, reciprocally or otherwise, through extended kin networks, so these benefits can spread through an entire community or group of communities from a relatively small number of active fishers.

One of the primary social benefits is thus the community resilience built by the sharing of catch. The sharing of catch supports food security, acting as a safety net for all members of the community, but especially Elders, for whom there is often a specific obligation to provide. The reciprocal exchange of catch between households based on kinship networks and proximity builds social capital and fosters community cohesion.

The substitution of wild aquatic foods for store-bought foods carries numerous health benefits. The health benefits of regular seafood intake are well established.[6] Reported anecdotal outcomes of restrictions on customary fishing include increased incidence of diabetes, high blood pressure and iodine deficiency among fishers and their families. In some communities, when people become ill they will readopt traditional food items, including seafood, in order to speed their recovery.

Cost recovery from customary fishers

The issue of cost recovery from customary fishers is a vexed one. While ideally all who benefit from fisheries management should contribute to the costs, it may not be appropriate in most jurisdictions to seek direct costs from customary fishers. As noted in the draft report, being such a small proportion of fishers, and the fact that their right to fish does not derive from the dispensation of a permit, makes designing a cost-effective cost recovery system difficult.

Fisheries managers also need to be cognisant of the fact that in many jurisdictions to date customary fishers feel that they have not benefited from management – indeed, many feel it has led to their exclusion from fisheries they helped establish. Inadequate legal recognition of customary fishing rights has led to customary fishers being fined and imprisoned as a consequence of implementing fisheries regulations. Even once adequate recognition is afforded, attempts to levy access fees for a pre-existing right – which would then fund the activities of those enforcement agencies which had previously pursued cases against customary fishers – could be met with hostility and non-compliance.

There is overwhelming evidence of the success of Indigenous ranger programs in contributing to better environmental management as well bringing social, cultural and health

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[5] M Gray, J Altman & others, 'The economic value of harvesting wild resources to the Indigenous community of the Wallis Lake Catchment, NSW', *Family Matters*, no. 75, 2006, p. 24, p. 32.

[6] EK Lund, 'Health benefits of seafood; Is it just the fatty acids?', *Food Chemistry*, vol. 140, no. 3, 2013, pp. 413–420.

benefits to their communities. They play a significant role in fisheries management, especially in north Australia, and in some areas are providing the physical and governance infrastructure to support greater engagement of Indigenous people in commercial fisheries. Rangers can play a significant role in 'cost recovery' as suggested in the report, however current government funding for ranger programs is largely directed to 'protected area' management rather than creating new livelihood opportunities, plus the extent to which such funding will continue to be available is unclear. A better understanding of the role of ranger programs in fisheries management and in building Indigenous fishing capacity would be of significant benefit to the sustainable management of Australian fisheries and we encourage the commission to consider this in its final report.

Participation of Indigenous Australians in commercial fishing

The report acknowledges that many people raised concerns about the low participation of Indigenous people in commercial fishing. This was not always the case, and in many areas the current low level reflects a decline from high levels of participation as Indigenous fishers were squeezed out of the commercial industry by a range of exclusionary processes. In many such cases, Indigenous fishers assert that the original commercial fishery was developed on their labour and expertise.

Given the TOR to investigate greater participation of Indigenous people in fisheries an acknowledgement in the report of this historical erosion of Indigenous engagement in commercial fishing is warranted. Further, the report has the opportunity to recognise and recommend that Australian fisheries should actively seek and support greater Indigenous engagement in commercial fisheries as a means of addressing Indigenous disadvantage and creating local livelihoods.

Such a recommendation would be consistent with developing case law regarding native title rights to use resources. It would also acknowledge the economic value to Australia of using a renewable resource such as fish to support Indigenous wellbeing and development as an alternative to ongoing investments in welfare. The report identifies that there are issues still to be addressed in increasing Indigenous engagement in commercial fisheries and aquaculture, but none of these are in themselves a reason for not pursuing this policy objective.

We also note that Indigenous entry into commercial fisheries does not always require the loss of access by other fishers. The NT coastal licences to which the report refers for example do not provide a right to take the most commercially significant species, such as barramundi and Spanish mackerel. Indigenous commercial fishers in some cases target species which are of limited appeal in non-Indigenous markets, such as mullet.

The above should not preclude buybacks and other schemes which have been used to increase recreational allocations also being employed to increase Indigenous commercial allocations.