

## **Submission on the Productivity Commission Draft Report on Marine Fisheries and Agriculture (August 2016)**

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Thank you for the opportunity to make some comments on the Productivity Commission Draft Report *Marine Fisheries and Aquaculture* dated August 2016.

My comments will focus almost exclusively on Chapter 5 referred to as 'Indigenous customary fishing' even though that chapter quite properly addresses both customary and commercial aspects of Indigenous fishing that I believe are inseparable from an economics perspective; the chapter also looks to comment on the articulations between Indigenous fishing (the term used in the Terms of Reference) and commercial and recreational fishing sectors.

By way of brief background, my disciplinary perspectives combine economics and anthropology. I have undertaken research on diverse aspects of Indigenous economic development for nearly 40 years mainly based at the Australian National University where I headed the Centre for Aboriginal Economic Policy Research from its establishment in 1990 to 2010. I am currently working at the Alfred Deakin Institute for Citizenship and Globalisation at Deakin University while also retaining links with the School of Regulation and Global Governance (RegNet) at ANU in an emeritus capacity. Much of my research over the years has focused on property rights, especially in situations where Indigenous people have legally recognised rights in land and the intertidal coastline. Of particular relevance to this submission is research I have undertaken for the Resource Assessment Commission in its Coastal Zone Inquiry in 1993. Over the years since and often with colleagues I have published research on fisheries in the Torres Strait with special reference to the Torres Strait Treaty, on marine turtle and dugong harvesting, on fisheries management and on the issues around Indigenous rights in wildlife, fisheries and fresh water especially under land rights and native title legal regimes. A summary of much of this research is available as [CAEPR Working Paper 96/2014](#) by Annick Thomassin and Rose Butler.<sup>1</sup> Very specifically in 2003, over a decade ago, I made submission, with colleagues Michelle Cochrane and Bill Arthur, to the WA Government's Aboriginal Fishing Strategy *'Recognising the Past, Fishing for the Future'* that raised many similar issues to this Inquiry.

To begin, it strikes me that there is a degree of dissonance between the Terms of Reference for this Inquiry as requested by Treasurer Scott Morrison in December 2015 in relation to Indigenous fishing and the response in the Draft Report at Chapter 5.

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<sup>1</sup> See Annick Thomassin and Rose Butler (2014) 'Engaging Indigenous Economy: A Select Annotated Bibliography of Jon Altman's writings, 1979–2014', *CAEPR Working Paper 96/2014*, Centre for Aboriginal Economic Policy Research, ANU, Canberra. Please note that this submission is written in an accessible style with minimum references. Full references to research referred to in the submission can be made available to the Productivity Commission on request.

The Treasurer's primary concern appears to be on what he perceives or pre-empts as a regulatory burden on the Australian marine fisheries and aquaculture sectors. And so he is directing the Productivity Commission to identify means to reduce real or imagined impediments so that productivity and market competitiveness can be enhanced.

Indigenous interests are referred to twice in the Terms of Reference. First as one element of a wider set of community interests that might be impacted by fisheries management regimes. And second, the question is raised whether existing fisheries management regimes support greater participation of Indigenous Australians (from what baseline is unspecified or to what end), provide incentive for Indigenous communities to manage their fisheries (suggesting a proprietary interest of such communities in local/regional fisheries) and finally the extent to which traditional management practices are incorporated in the fishing industry (it being unclear to me if this refers to adoption by Indigenous or non-Indigenous fishers or both).

No doubt informed and influenced by the comprehensive submissions provided on the Terms of Reference by the Northern Land Council (submission 39), the Federation of Victorian Traditional Owners Corporation (submission 40), and the Fisheries Research and Development Corporation Indigenous Reference Group (submission 57), the Productivity Commission Draft Report focuses mainly on the second reference to Indigenous interests (p131) and introducing the terminology of 'Customary fishing' (or non-market fishing) in contrast to the Treasurer's interest in commercial fishing, including by Indigenous Australians.

It strikes me that there is a major disjunct between the Treasurer's interest in the regulatory burdens imposed on the Australian fishing industry, including by Indigenous rights and interests, and the Productivity Commission's reporting informed by recent case law that indicates that there are forms of Indigenous fisheries that are beyond Commonwealth and state/territory regulation.

This disjunct is historically very directly linked to the Mabo High Court judgment of 1992. Before that date there was no recognition of unique Indigenous fisheries rights and interests besides those defined in the Torres Strait Treaty signed in 1978 and ratified in 1985 that guaranteed traditional rights to fish for livelihood and provided some commercial concessions to Islander interests; and unusual forms of state regulation like Community Licences in the NT that allow the take of some insignificant species like mullet for community-based commercial sale. There were though, as became apparent in the Blue Mud Bay case (*Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* [2008] HCA 29), instances of reservation under Crown Land Ordinances in the NT of the coastal zone for exclusive Aboriginal use.

S.211 of the *Native Title Act 1993*, which guarantees that customary use rights and interests in resources including marine resources as a common law property right fundamentally and irrevocably altered the Australian regulatory framework in relation to fisheries. This guarantee was given legal imprimatur by the High Court of Australia in *Yanner v Eaton* ([1999] HCA 53) based on the overturning of a Queensland State prosecution of Murandoo Yanner for the harvesting of an estuarine crocodile for domestic consumption. Interestingly, the Productivity Commission does not make direct reference to this crucially significant test case.

The Productivity Commission does refer (at Box 5.3) to some selected case law directly influenced by the Yanner precedent including *Commonwealth v Yarmirr* (2001) HCA 56, *Akiba v Commonwealth*

(2013) HCA 33 and *Karpany v Dietman* (2013) HCA 47 each of which incrementally builds on the property rights in S.211 that do not prohibit or restrict the non-commercial fishing activities of native title holders. By the time of *Akiba* (2013), jurisprudence had evolved to provide native title holders a non-exclusive right to trade (deal commercially with) marine species.

What this means in effect is that in Australia today there are two co-existing and arguably incommensurate property regimes in relation to marine (and freshwater) fisheries, one that includes the commercial and recreational sectors and is **regulated** (and inclusive of many Indigenous Australians); the other that is Indigenous only and native title-based and entirely **unregulated** (despite occasional generally unsuccessful attempts by fisheries authorities to intervene).

From the perspective of the Treasurer's terms of reference this coexistence and potential incommensurability might be of limited concern because it is generally assumed that Indigenous native title (customary) fisheries are relatively insignificant. This assumption is based on no hard evidence and takes no account of the relative value of such non-commercial fishing for livelihood for people who are generally viewed as the most socioeconomically disadvantaged in Australian society. In some regional contexts such as along the Northern Territory fisheries-rich intertidal zone which is 84 per cent Indigenous owned after the Blue Mud Bay decision, such fisheries have significant value to individuals, families and communities.

But from two other perspectives the current situation is potentially deeply problematic.

First, from the theoretical perspective of economics the co-existence of two different property rights regimes, sometimes in relation to the same species undermines allocative and regulatory efficiency and effectiveness. A similar issue arises with the indeterminacy over property rights in fresh water that I raised over a decade ago in response to the COAG Water Property Rights Draft Discussion Paper that appears unresolved in the National Water Initiative over a decade later<sup>2</sup>. It is generally accepted if deploying a standard western economics framework (state regulation and allocation of private property rights) that murky property rights will increase transactions costs and will result in sub-optimal allocation of resources, the sort of issue the Productivity Commission is expert at addressing.

In this case however we are dealing with an unusual form of restricted common property rights, with the restriction being limited to the legal beneficiaries from that right, native title holders, not the amount that can be taken which is uncapped. It is important not to confuse this common property regime with open access.<sup>3</sup> In such circumstances it needs to be native title holders and not fisheries management agencies who govern fisheries. This is a rare situation in Australia of those with territorial rights also enjoying property rights and in effect political jurisdiction over non-commercial utilization of fisheries. I do not believe that any of governments, the Productivity Commission, or native title holders themselves recognize this eventuality resulting from case law clarifying common law native title rights in fisheries.

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<sup>2</sup> Jon Altman (2004) 'Indigenous interests and water property rights', *Dialogue*, Volume 23, 3/2004: 29–34.

<sup>3</sup> Carol Rose (2004) Economic claims and the challenge of new property' in Katherine Verdery and Caroline Humphrey (eds) *Property in Question: Value Transformation in the Global Economy*, Berg, Oxford, 275–296.

This unusual form of native title rights and interests in fisheries in Australia is similar to institutional forms in other settler societies like Canada and New Zealand in relation to First Nations and Maori customary fisheries. But it makes the standard property rights framework as espoused implicitly in the Treasurer's terms of reference for this Inquiry, with its emphasis on state regulation of fisheries and allocation of private property rights as increasingly tradable quota in relation to commercial fisheries, an inadequate explanatory framework. This recently established new institutional form in relation to fisheries might require greater utilization of ideas from the new institutional economics as developed in particular by the late Elinor Ostrom. Such new ways of looking at Indigenous property rights have attracted some attention in New Zealand in relation to Iwi (tribal) property rights and associated regulatory regimes.

Second, from an Indigenous standpoint, the belated recognition of native title rights in mainly coastal and estuarine fisheries, that are open-ended and unregulated, constitutes a sui generis and potentially very valuable form of property. This is especially so where there is competition between native title holders and commercial and/or recreational interests over the same species. Even though only recognized in the late 20<sup>th</sup> century native title rights and interests in fisheries clearly predate the commercial and recreational rights and interests of others. In other settler colonial contexts, like Canada, such rights and interests take precedence over all other rights and interests and probably should in Australia as well. What is more, given that the sustainability of some iconic species (like barramundi) might be impacted by exploitation by diverse interest groups, some regulated, some unregulated, it is possible that any negative impacts of commercial or recreational exploitation or over-exploitation of fisheries on native title rights and interests might be compensable, with the allocator of private property rights being potentially liable to pay compensation.

These complex and complicating issues are not properly addressed by the Productivity Commission in its draft chapter on Indigenous customary fishing. But they should attract the attention of the Federal Treasurer with his oft-stated commitment to 'budget repair' given the potential for legal disputation over the priority of native title rights and interests; and the interdependencies of fisheries, between offshore and coastal fisheries; and between coastal, estuarine and fresh water fisheries in relation to some species (again like barramundi) that migrate between fresh and salt water to breed. Successful legal challenge might see compensation payable.

Instead an attempt is made to distinguish between Indigenous customary fishing, which is rightly seen following Akiba as including fishing for commercial purposes, and the participation of Indigenous Australians in commercial fishing, with no specific mention being made of Indigenous participation in recreational fishing. This all seems to avoid addressing the complexities associated with the new 'native title' institution identified above.

In particular at its first key point (p 131), the Productivity Commission states 'Customary fishing is culturally significant for many Indigenous Australians, providing unique benefits associated with the maintenance of traditional customs'. This statement, in my view, intentionally or unintentionally discursively devalues the **economic** significance of fishing for many Indigenous Australians. One could similarly state 'commercial fishing is culturally significant for many non-Indigenous Australians', with this culture being predominantly capitalist and individualistic and framed as private property as distinct from Indigenous culture that might where native title is determined be

predominantly non-capitalist and relational (as required under the native title statutory claims regime) and framed as restricted common property.

My commentary so far seeks to properly problematize the challenges posed by two arguably incommensurate property rights regimes in fisheries that could be crudely categorised as state owned and regulated and native title owned and regulated. I do not have any straightforward answers for the Productivity Commission on how to deal with these two potentially competing regimes. And so I am sympathetic to the conceptual, theoretical and practical challenges that are posed by the new property rights in fisheries created by 'native title rights and interests'. Nevertheless it does seem imperative that under such circumstances of conceptual uncertainty we ask the right questions. This in turn might require the Productivity Commission to challenge the market-focused basis of the Treasurer's Terms of Reference and singular framing of property rights where in fact a binary exists; or, at the very least, to highlight the extent of the regulatory challenges on hand given that 'common property' native title rights and interests fall outside the private property system as generally understood.

To conclude, at various points in Chapter 5 (see p 131 dot point 3), the Productivity Commission looks to conceptually bring native title rights and interests into a singular state controlled resource sharing regulatory framework. But for native title holders the legal protection of S.211 of the Native Title Act that affords them an uncapped common property right to take any marine resource for non-commercial purposes there is no incentive to join such a regulatory regime. In reality the courts have found that native title rights and interests are exempt from fisheries laws and regulations. Furthermore, along the coastal zone of the NT land owners have the right to physically exclude all other parties from the intertidal zone. This is a powerful property right with considerable potential leverage that the traditional owners of coastal estates have not really exercised since the Blue Mud Bay decision of 2008. Like the Productivity Commission they too are coming to terms with this new and unusual form of restricted common property in the Australian context.

Bringing customary fisheries that now also include non-exclusive commercial fisheries rights in some contexts into the regulatory framework of the state will prove both difficult and challenging. Any proposals to regulate native title fisheries need to progress with extreme caution and much consultation if conflict over resource allocation, litigation and costly compensation are all to be avoided. It is not helpful that the Terms of Reference for this Inquiry appear to favour commercial fisheries interests over Indigenous, often basic livelihood, interests. This may reflect the influence of vested commercial fisheries interests and their political alliances with political and bureaucratic elites. But it does not properly consider what are essentially legally-enforceable Indigenous rights and interests in fisheries.

In Chapter 5 on Indigenous fishing the Productivity Commission makes one draft finding, three draft recommendations and two requests for further information. I append some brief quite specific comments on these.

## Appendix: Brief commentary on draft findings, recommendations, requests in Chapter 5

I make some brief comment on each, italicising the Productivity Commission's wording to distinguish it from my response.

### *DRAFT FINDING 2.1*

*Decisions by governments on the allocation of fishery resources are severely constrained by a lack of comprehensive and current data on the participation and take of the recreational and customary fishing sectors.*

- It would be very helpful to have more information on Indigenous fishing effort and returns. Time-series information admittedly more on effort than catch is provided by the National Aboriginal and Torres Strait Islander Social Survey conducted by the Australian Bureau of Statistics in 1994, 2002, 2008 and 2014–15, but this is neither referred to nor analysed.
- The reference to the (Indigenous) customary sector alongside the recreational fishing sector is unhelpful especially in situations where fishing is a key component of Indigenous food sovereignty and security.
- The regulatory decisions made by governments if better informed on the Indigenous take might see a decline in commercial and recreational allocations if my argument that uncapped Indigenous non-commercial take must be afforded priority is accepted.

### *DRAFT RECOMMENDATION 5.1*

*Customary fishing by Indigenous Australians should be recognised as sector in its own right in fisheries management regimes. The definition of Indigenous customary fishing should be consistent with native title.*

- Customary fishing by Indigenous Australians is a sector in its own right, but it is not unconnected to other sectors. How it articulates with fisheries management regimes remains unresolved given that it is a restricted common property regime.
- While S.211 customary rights are only conferred after determination of native title, the judicial decision in the Federal Court case *Pareroultja and Others v Tickner and Others* ([1993] FCA 654) that statutory title to land is not inconsistent with the continuance of native title rights and interests is significant.

### *DRAFT RECOMMENDATION 5.2*

*The Indigenous customary fishing sector should be afforded a priority share of resources in fisheries where catch or effort is limited. This allocation should be sufficient to cover cultural use by the local Indigenous community in accordance with proven traditional laws and customs.*

- Indigenous customary fishing should be afforded priority, but this cannot be a share as what is referred to as 'cultural' use that is often 'economic' or 'livelihood' use is uncapped under native title law

*Customary fishing rights should not be tradeable or transferrable, recognising the unique characteristics of the associated cultural benefits and that these benefits are exclusive to the community concerned.*

- While this makes sense in principle, in reality communities that exercise native title rights and interests are invariably composed of native title holders as well as their affines and other kin. It should be at the discretion of native title holders to allocate non-market rights in accord with their modes of governance possibly assisted by Registered Prescribed Bodies Corporate or Native Title Representative Bodies.

*Customary allocations and any controls over customary fishing activities should be developed in consultation with Indigenous communities*

- The wording here suggests a regulatory hierarchy. Any controls over customary fishing activity (given that it is uncapped) can only be determined by native title holders who might seek the assistance of state regulators to implement their management imperatives.

### **DRAFT RECOMMENDATION 5.3**

*The definition of customary fishing in fisheries laws should provide for fishing for commercial purposes, but only where consistent with traditional laws and customs.*

- This recommendation looks to freeze contemporary rights and interests in tradition without due recognition that all traditions change over time,
- Given the difficulty in implementing a practical distinction between customary and commercial (if a surplus of fish is caught for non-commercial use should it be allowed to rot rather than be traded commercially?) it is probably sensible to allocate all native title holders customary and exclusive or non-exclusive restricted commercial common property rights in fisheries. This though raises important questions of the impact of such allocation on the value of commercial allocation that have been already made to non-Indigenous stakeholders.

### **INFORMATION REQUEST 5.1**

*What is the best way for individual Indigenous Australians to prove their entitlement to undertake customary fishing?*

- This is an issue that will vary continentally and should be resolved by native title holders assisted by their Native Title Representative Bodies, Land Councils and Registered Prescribed Bodies Corporate.

### **INFORMATION REQUEST 5.2**

*How should cost recovery be applied to customary fishers?*

- Arguably as native title fisheries are unregulated there should be no regulatory cost. But in reality because there are inter-dependencies between fishery sectors and there may be need for forms of regulation to ensure sustainability native title holders may need to be involved in regulation. Indeed giving sea rangers exclusive political jurisdiction over coastal fisheries management along say the NT coastline makes good sense. But because customary fisheries are not commercial they do not generate monetary income and so the cost of regulation will need to be covered by the state or commercial or recreational fishers in the interest of governing fisheries holistically and effectively.