SUBMISSION TO THE PRODUCTIVITY COMMISSION'S MARINE FISHERIES AND AQUACULTURE DRAFT REPORT 2016

Dr Seán Kerins, Centre for Aboriginal Economic Policy Research, The Australian Nation University.

BACKGROUND

This submission will focus on Chapter 5 'Indigenous Customary Fishing'. The submission is drawn from my experience of working with Indigenous peoples in both Aotearoa/New Zealand and Australia. From 1991 I worked at *Te Puni Kōrkiri* (the Ministry of Māori Development) where I was involved in policy work concerning Māori fishing rights. Then, from 1993 until 2001, I worked as a customary fisheries policy analyst at *Te Ohu Kai Moana* (The Treaty of Waitangi Fisheries Commission). Here, I was involved in implementing the customary components of the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992. From 2002 until 2007 I was employed by the Northern Land Council in Darwin where I worked closely with Indigenous peoples in caring for Country enterprises, which included ranger programs and planning for sea country management. Since late 2007 I have been based at the Australian National University where my research has been focussed on Indigenous cultural and natural resource management in northern Australia. My PhD research, based in the northeast Atlantic, focused on marine common property resources and community-based institutions through which local communities manage their resources.

COMMENTS ON THE PRODUCTIVITY COMMISSION'S MARINE FISHERIES AND AQUACULTURE DRAFT REPORT

Defining customary fishing

Customary fishing is a poorly defined concept within the Productivity Commission's Marine Fisheries and Aquaculture Draft Report (the report). The literature the report draws on to develop its definition is shallow. There is also no inclusion of how Indigenous peoples themselves may set out the nature and extent of their customary fishing rights according to their own Laws and customs.

The lack of a comprehensive definition of customary fishing along with the exclusion of Indigenous peoples in shaping an understanding of the nature and extent of their customary fishing rights means that without this vital knowledge it is both unreasonable and unjust to start developing policies for the recognition and inclusion of Indigenous customary fishing within state, territory and commonwealth fisheries management regimes.

The report also struggles to establish where Aboriginal and Torres Strait Islander peoples' customary fishing rights may be held. For example, the report talks of "local Indigenous community(ies)" (p131), suggesting customary fishing rights may be held by a community of Indigenous people. In other places the report talks of "traditional owners" and links customary fishing rights with these groups and their lands. Then, in other places, the report talks of Indigenous people and suggests that it is this group that is associated with customary fishing rights. A vital part of developing policy to recognise customary fishing is to first identify the Indigenous people who may hold these rights through their own Laws and customs and then engage with them in a meaningful and transparent way to determine the nature and extent of these rights and how they may be included within state, territory and commonwealth fisheries management regimes.

Recognise the full nature and extent of Indigenous customary fishing

While the Productivity Commission is to be commended for recognising Indigenous customary fishing and recommending that the state needs to recognise and include this sector within wider fisheries management regimes it is vital that the process for doing this is not rushed and that it is done in cooperation with Indigenous peoples who through their own Laws and customs hold rights to fisheries and fishing places.

In Aotearoa/New Zealand, for example, the Waitangi Tribunal[1] after two long and exhaustive inquires published two seminal reports that set out the breadth of Māori Customary fishing rights in a collaborative and authoritative fashion (see the Muriwhenua Fishing Claim Report 1988 and the Ngai Tahu Sea Fisheries Report 1992).

After hearing evidence from Māori and other experts the Waitangi Tribunal concluded that customary fishing rights:

- included both commercial and non-commercial elements;
- were not only about the fish that Indigenous people caught, but also their fishing places;
- included rights to manage fisheries and fishing places; and
- could develop and utilise new technologies.

The Waitangi Tribunal also found that the NZ Government had an active duty to protect Māori customary fishing rights and that this required more than just the recognition of a right. The Tribunal stated that the NZ Government must take all the necessary steps to assist Māori in their fishing to enable them to exercise that right.

These findings led the way for the New Zealand Government to recognise Māori fishing rights throughout New Zealand's entire Exclusive Economic Zone. This was done in two major settlements.

First, in an interim settlement the Māori Fisheries Act 1989 divided Māori customary fishing rights into two sectors, commercial and non-commercial (customary). Here, to address the issue of claims to commercial fisheries, the first part of the Act provided for the establishment of the Māori Fisheries Commission which would receive 10 per cent of the Total Allowable Commercial Catch (TACC) of each species in each quota management area within the Quota Management System at that stage. This transfer of Individual Transferable Quota to the MFC by the Crown was effected by the NZ Government entering the quota market and purchasing ITQ on a willing buyer-willing seller basis.

Non-Commercial (customary fishing) rights were recognised in the second component of the Māori Fisheries Act by way of what are known as *Taiapure*. *Taiapure*, were designed to return customary fisheries rights to *hapu* (sub-tribes) and *iwi* (tribes) by way of place based local fisheries management.

Second, in 1992 in a full and final settlement a Deed of Settlement was signed between Māori and the Crown in which the Crown agreed to pay $150 million in three annual tranches to fund Māori into a 50/50 joint bid for Sealord. Māori thereby acquired a 50 per cent stake in New Zealand's largest fishing company which owned around 26% of all New Zealand ITQ (by tonnage) at the time.

[1] The Waitangi Tribunal established, under The Treaty of Waitangi Act 1975, to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty. Initially the Tribunal had powers to only examine claims from the date of its establishment. In 1985 its powers were widened to examine claims dating back to 1840.

In addition, the Deed of Settlement promised Māori 20% of quota for all species henceforth brought into the Quota Management System. The Crown also agreed that it would, in consultation with Māori, "cause" Māori to participate in the Fisheries Statutory Bodies so as to reflect both the management responsibilities associated with customary fishing and the special relationship between the NZ Government and Māori. Finally, the Deed of Settlement promised legislation which would empower the making of regulations recognising and providing for customary food gathering and the special relationship between the *tangata whenua* (traditional owners) and those places which are of customary food gathering importance to the extent that such food gathering is not commercial in any way nor involves pecuniary gain or trade.

Further, when allocating coastal space for aquaculture the Crown would reserve twenty per cent of coastal space for Māori *iwi* (tribes).

Considering the diversity of Indigenous peoples in Australia who hold rights to fisheries and fishing places through their own Laws and customs the Australian Government should consider establishing a Fisheries Task Force to work with Indigenous peoples to recognise the nature and extent of customary fishing rights and how these may be included with in the various commonwealth, state and territory fisheries management regimes. Once this process has been undertaken it would then be possible to define customary fishing to allow the Australian Government to take all the necessary steps to assist Indigenous Australians in their fishing to enable them to exercise their right to support their economic and social development.

Indigenous Protected Areas and the management of fishing and fishing places

Just as there was the expectation by Māori that non-Māori fishing would not unduly impinge on their customary fishing rights so too is there an expectation by Australian Indigenous peoples that non-Indigenous fishing not unduly impinge upon their customary fishing rights without a prior arrangement or agreement, or unless those interests were clearly waived by the right holder. To ensure this, in a policy sense, Indigenous peoples need to be included within fisheries management regimes, not as just another stake-holder but as the holders of customary property rights to fisheries and fishing places. This would enable Indigenous peoples' participation in the decision-making regarding the allocation of shares and controls over customary fishing activities as suggested by draft recommendation 5.2.

Many Indigenous people currently struggle to exercise their Laws and customs to their fisheries and their fishing places. In some places such as the south coast of NSW Indigenous people face criminal conviction for exercising their Laws and customs to marine resources, while in other places Indigenous peoples marine estates are inundated with fishers. For example, each year around the Sir Edward Pellew Islands and the McArthur River delta in the southwest Gulf of Carpentaria in the Northern Territory there are thousands of recreational fishers, mostly from interstate, whose activities impact directly on Indigenous customary fishing rights. This region is the ancestral country of Yanyuwa people, a salt water people renowned for their dugong and turtle hunting skills, whose economies, knowledge and cultural identities are enmeshed in the coastal and marine environment. The Yanyuwa people have little say about the allocation and management of fishing resources in this region and little say over where people can and cannot fish.

One policy tool currently available that can provide for Indigenous peoples' management of marine areas is an Indigenous Protected Area (IPA). An IPA is an area of land and/or sea country which has been voluntarily declared to be a protected area by its Indigenous traditional owners. IPAs are managed by Indigenous people according to international guidelines and recognised by commonwealth, state and territory governments as part of Australia's National Reserve System.

Today, there are 74 IPAs throughout Australia, encompassing just over 650,000 square kilometres of land and contributing over 44% of Australia's National Reserve System. There are a small number of IPAs that encompass the marine estate, such as the Dhimurru IPA in northeast Arnhem Land. Dhimurru was the first IPA to include areas of sea country through the incorporation of registered marine sacred sites and then later the inclusion of 4,500 square kilometres of sea country within a plan of management.

IPAs provide a mechanism for Indigenous people to exercise their customary fishing rights over specific areas of their ancestral country. They also create a mechanism for other fishers and government agencies to cooperate with Indigenous people to manage marine areas and fisheries. Sea country IPAs are usually governed through Indigenous organisational structures that enable traditional owners to direct and guide their rangers, supported by an advisory group, chaired by traditional owners and comprising representatives of government agencies and other stakeholders.

Australia's international obligations for the protection and promotion of customary rights

It's important to note that Australia also has international obligations to actively protect Indigenous peoples' customary rights to natural resources, including fisheries. These obligations are outlined in both the Convention on Biological Diversity and the United National Convention on the Rights of Indigenous Peoples.

Convention on Biological Diversity

Article 10 (c) of the Convention on Biological Diversity obliges the Australian Government "as far as possible and as appropriate" to "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

Further, Article 8 (j) obliges the Australian Government "subject to its national legislation," to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

The United National Convention on the Rights of Indigenous Peoples.

The United National Convention on the Rights of Indigenous Peoples (UNDRIP) is a strong framework for establishing state-Indigenous relations regarding natural resource management, including marine areas.

Article 25 of the UNDRIP for example sets out how "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

Article 26.2 affirms, "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

Article 27 encourages the state to, "establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources,

including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

The UNDRIP is a useful framework for guiding relations between states and Indigenous peoples. It is something that the Australian Government should be drawing upon to develop meaningful and on-going relationships with Indigenous peoples.

Recommendation

The Australian Government, recognising the diversity of Indigenous peoples with rights to the fisheries and fishing places, establish a Fisheries Task Force that includes Indigenous peoples' representatives, to advise commonwealth, state and territory governments on appropriate policy frameworks to recognise, protect and to assist Indigenous peoples in exercising their customary fishing rights.