

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

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Thank you for the opportunity to provide late comments on the *Productivity Commission, Marine Fisheries and Aquaculture, Draft Report*. Given time constraints, my submission will only focus on some aspects discussed in *Chapter 5, Indigenous Customary Fishing*. The views presented in this submission are my personal views.

Background

My comments are informed largely by my doctoral research in anthropology which examines and confronts the fisheries co-management arrangements in place in the Torres Strait region and contemporary Torres Strait Islanders fishing and management practices. This research is based on a 15-month fieldwork conducted in the Torres Strait region between 2008 and 2010.

My doctoral dissertation aims at establishing the extent to which customary fisheries management practices, in this case those of Masig Islanders, are taken into account in the elaboration of fisheries management and development strategies by the Torres Strait Protected Zone Joint Authority.

This research also documented the strong interplay between the customary and commercial sectors of Masig Islanders fisheries system and the importance of these sectors for the Island and region's broader economic stability (for more details see Thomassin, 2016).

General Comments

Many of the reservations I have were raised by the New South Wales Aboriginal Land Council (Submission 103), FRDC Indigenous Reference Groups (Submission 87) and Professor Jon Altman (Submission 88).

The terms of reference for this inquiry instructs the Commission to investigate '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'.

Reforms in regards to Indigenous customary fishing are urgently needed. Heavy restrictions in states like NSW have had damaging economic, social and cultural impacts on Aboriginal families along the coast.

There are many references in this report regarding the need to consult Indigenous fishers and communities, noting that 'There is also relatively poor input from Indigenous people into fishery management decisions' with only one mention of possible representation on decision-making process.

Here I would like to emphasise that, even in context like the Torres Strait where Indigenous groups are formally consulted and participating to the fisheries management process, the bureaucratic framework supporting the management largely limit the capacity for Indigenous perspectives and institutions to influence fisheries management directions and development outcomes. More inputs from Aboriginal and Torres Strait Islander groups are indeed needed, but they may have little impact if not accompanied by some decision-making power.

Indigenous groups are more than stakeholders in the various fisheries sectors. They have not relinquished their ownership rights over their land and sea territories and the resources they encompass. Hence, at the very least, some decisional power should be devolved to them.

In section 5.2 titled 'How customary fishing is regulated', there are no reference to the customary institutions and tenure regimes that regulate and control customary marine activities and defines fisheries rights and responsibilities. I have documented such institutions in my doctoral dissertation and other examples have

been documented (see for examples, Peterson and Rigsby 1998). I would argue for the need to recognise, understand, engage with, and support these institutions and investigate how in some contexts, they can become part of the foundation of management strategies for both the Indigenous and non-Indigenous sectors.

On p.147 of the report it is stated that: 'It may be argued that customary fishing rights exist to address unique cultural, historical or spiritual needs; in contrast, commercial activities involve monetary incentives that are not unique to Indigenous people'. This statement is concerning for various reasons. One of such reasons is that customary fishing also serves important economic needs and plays an important part of economic strategies that articulate customary and economic fishing with other land-based sources of income (see Altman 2001). On the other hand, commercial fishing practices may be undertaken to address cultural, historical and spiritual needs and are also often regulated by customary rules (Thomassin 2016).

Given the diversity of Aboriginal and Torres Strait Islanders cultures and communities across the country, it appears to me that the report has focused mainly on mainstream economic options when it comes to thinking about the involvement of Indigenous people in commercial fisheries. It may be useful to foster approaches and economic development alternatives which would take into account Aboriginal and Torres Strait Islanders perspectives in relation to acceptable level of extraction of marine species (which may or may not be in line with market-orientated and profit-driven approaches aiming toward the optimal utilisation of the resources).

Comments on specific recommendations

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.

In line with the FRDC IRG submission, I agree that Aboriginal and Torres Strait Islanders' customary fishing sector should be recognised as a sector in its own right in fisheries management regimes as it is already the case in context such as the Torres Strait.

The second part of the statement is nevertheless more problematic. The FRDC IRG and Professor Jon Altman's submissions already raised issues emerging from defining 'customary fishing' through the Native Title framework (some of which are discussed by FRDC IRG; Jon Altman)

Customary fishing practices, which are often encompassed within complex customary marine tenure regimes, vary greatly along the Australian coasts. These practices are sustained by rich and diverse cultures. Customary fishing practices, like 'traditions' and 'customs', are also dynamic and changing in nature.

In the spirit of the Article 3 and 11 1. of the UN Declaration of the Rights of Indigenous Peoples which recognises that:

'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'

and

'Indigenous peoples have the right to practise and revitalize their cultural traditions and customs'

the Productivity Commission should recognise and support the rights of Aboriginal and Torres Strait Islander groups to define what 'customary fishing' consist of in their context, knowing that such definitions may be amended with time according to changing circumstances.

Information Request 5.1

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

This complex matter is for Indigenous Australians to resolve through their internal mechanisms and processes. Given the great diversity of Aboriginal and Torres Strait Islander societies, such processes, mechanisms and protocols are likely to vary significantly across the country and therefore command a diversity of approaches.

I would like to emphasise the concern raised by the NSW Aboriginal Land Council in regards to the 'Proposals to place the onus on Aboriginal peoples to prove "entitlements" to undertake customary fishing.'

DRAFT RECOMMENDATION 5.2

a. 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 sector should be afforded a priority share of resources in fisheries where catch or effort is limited, noting, as did the FRDC IRG, 'that such a share should build Indigenous community growth into any process'. As the IRG also noted 'the share for Indigenous people may be large, and Agencies should not seek to limit the amount, but strive to allow the necessary amounts for current and future utilisation'.

In addition, the wording relating to 'proven traditional laws and customs' is highly problematic. There are possible negative ramifications associated with such wordings as it suggests that traditional law and customs may be fixed in time and substance. Such reading could amount to important limitations in terms of practices and access to specific resources when not deemed part of arbitrarily pre-determined 'traditional laws or customs'.

b. 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.

As emphasised by NSWALC, FRDC IRG and Altman, this proposition demonstrates a lack of understanding of Indigenous contemporary and historical realities. Aboriginal and Torres Strait Islander groups have mechanisms and arrangements that set the conditions for other communities or group to access and use their resources.

Masig's customary marine tenure regime, for example, includes reciprocal arrangements allowing Torres Strait Islanders from other communities (including kin and affines) to fish in their territory.

This proposition seems to make abstraction of the responsibility to provide for the family (especially for those among family members who are not able to fish themselves may this be because of their workload, their age or their health).

c. Customary allocation and any control over customary fishing activities should be developed in consultation with Indigenous communities

Where not erased by processes of colonisation, mechanisms dealing with these issues are likely to be already in place. Consultation with Indigenous communities around these matter is indeed essential but again, would also need to be accompanied by decision-making power.

Information Request 5.2

How should cost recovery be applied to customary fishers?

While colonisation has disrupted and, at time, destroyed customary marine tenure regimes and associate management practices, many of these regimes and practices still govern Aboriginal and Torres Strait Islanders customary and commercial fisheries. Accordingly, customary fishing activities are already defined, regulated and managed through diverse and dynamic regimes. In the Torres Strait for example, such marine tenure regimes circumscribe who is entitle to fish or hunt in given territories, how much can be taken according to the circumstances, which gear or technique is allowed, what are the fishers responsibilities, etc. These regimes include entry conditions for outsiders. The owners of each sea estate also monitor the movements and activities occurring across their territories, offering indirect and free support to fisheries patrol and custom officers.

Better understanding of and support for Aboriginal and Torres Strait Islanders marine tenure regimes, institutions and economies is needed. This would help making visible how these contribute to sustainable fishing practices, highlight possible shortfalls and avoid further encroachments on Indigenous fishing rights.

As Jon Altman emphasised, the non-commercial Indigenous customary activities occur in conjunction with other Indigenous and non-Indigenous fishing sectors¹, thus the need for a form of regulations to be implemented (in partnership with Indigenous groups). The cost of regulation should be absorbed by the state and commercial operations.

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.

I would like to reiterate here the dynamic and changing nature of ‘traditions’ and ‘customs’ which implies the capacity to adopt or adapt new practices with time, which, in this case, includes commercial fishing. In places like the Torres Strait, commercial fishing is an inextricable and highly significant aspect of Torres Strait Islander culture. Commercial and customary fishing activities happen simultaneously on the sea and are interdependent with, at time, part of the catch or (even part of an animal) sold on the market while the rest is consumed and shared (see Thomassin 2016).

References

Altman, JC, 2001, ‘Sustainable development options on Aboriginal land: the hybrid economy in the twenty-first century’, *Discussion Paper 226*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

Peterson, N. and Rigsby, B. (eds), 1998, *Customary marine tenure in Australia*, Oceania Publications, University of Sydney.

Thomassin, A., 2016, ‘Hybrid economies as life projects? An example from the Torres Strait’, in Sanders, W. (ed), *Engaging Indigenous Economy: Debating diverse approaches*, ANU Press, Canberra: 95-110. <http://press-files.anu.edu.au/downloads/press/p344543/pdf/ch082.pdf>

¹ For example, in the case of the co-occurrence of customary and commercial fishing of abalone in NSW, a sector which is subject to significant pressure (see NSWALC submission).