

14 October 2016

Melinda Cilento
Commissioner
Australian Marine Fisheries and Aquaculture
Productivity Commission
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Dear Commissioner

FRDC IRG Submission - Draft Report of the Productivity Commission Inquiry into the Regulation of Australian Marine Fisheries and Aquaculture Sectors.

The Fisheries Research and Development Corporation (FRDC) Indigenous Reference Group (IRG) considered the Draft report of the Productivity Commission Inquiry into the Regulation of Australian Marine Fisheries and Aquaculture Sectors (Report) at an annual meeting on 4th and 5th October 2016. The IRG is not a representative body and, as such, the members do not speak on behalf of all Australia's Indigenous people, but can provide some high level views based on their collective experience, knowledge, and involvement at all levels of the various fishing sectors.

Not all aspects of the Report recommendations aligned with the views of the members, but the members support the concept of:

- Customary fishing being recognised as a fishing sector in its own right in fisheries management regimes.
- The Indigenous sector being afforded a priority share of resources.
- Customary allocations and any management controls being developed in consultation (i.e. led by) with Indigenous communities.
- Customary fishing allowing fishing activity for commercial purposes.

The group were unclear as to the context and language used in some sections, so their thoughts are based on how they interpreted the wording. Following is an overview of the IRG member's views on the Report recommendations for the Commission's consideration in developing its final report.

Draft Recommendations 5.1.

The IRG agreed that Customary Fishing should be recognised as a sector in its own essence and the Primacy¹ of that sector should be pre-eminent in any management regime.

The IRG noted the Commission used the Native Title Act in its Report to define several Indigenous fishing activities. Native Title definitions are beyond the role of the IRG and require an expert understanding and legislative clarity in its application. Any comments provided by

¹ Primacy as endorsed at the Indigenous Research RD&E Priorities for Fishing and Aquaculture, Cairns Forum November 2012. *'Indigenous people have certain recognised rights associated with and based on the prior and continuing occupation of country and water and activities (e.g. fishing, gathering) associated with the use and management of these'*

the IRG on Native Title matters may have unintended legal ramifications, fail to address current and future precedents, and have associated risks that extend beyond fishing. The IRG would recommend, as a matter of due diligence and for your respective reassurance, that you address these topics through other bodies tasked with administration and/or application of Native Title legislation.

In particular, the IRG felt that the 2nd point specifically linking the definition of customary fishing to Native Title was not appropriate and required further legal analysis for the following reasons:

- The current overarching definition is inadequate as it refers to ‘satisfying personal, domestic or non-commercial communal needs’, whereas a range of decisions and current legislation note historical commercial activities through barter, trade or sale.
- The rights associated with Native Title will vary from group to group and settlement outcomes, and as such this could lead to disadvantages to some groups.
- Linking customary rights with individual Native Title settlements will lead to more inconsistencies, not national consistency.
- People without Native Title Claims or Determinations could be excluded from Customary Fishing.
- It limits Indigenous Australians’ access to the resource to that of the legal outcomes from a Native Title determination. The vagaries of those decisions could then limit access and be used to define species, harvest methods and purposes.
- Based on legal precedence, rights will change over time and will need to be updated.

The IRG believe that a way to help address this issue would be for the Commission, or appropriate Federal Agency, to fund a stakeholder forum to bring together key people with expertise in this area. IRG members were prepared to provide some advice on potential attendees, and a number would also be prepared to participate.

Information Request 5.1.

Bearing in mind previous views, the IRG considered the best way for Indigenous Australians to demonstrate their entitlement to undertake customary fishing was to allow Indigenous Australians to resolve this issue through their internal processes. It should be noted that this may have some temporal, spatial and operational variations, based on a range of factors such as length of colonisations etc.

Draft Recommendations 5.2.

IRG members agreed that the Indigenous customary fishing sector should be afforded the first share of any allocation and as a priority share of resources – this enshrines the concept of Primacy¹. They noted that such a share should build Indigenous community growth into any process.

The IRG noted there appears to be an expectation that any Indigenous allocation will be insignificant, but in reality 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.

Concerns were raised with the wording relating to ‘*proven traditional laws and customs*’. Depending on resources, process and capacity (legal, Indigenous groups, Agency and

community) such proven activities may leave some Indigenous Australians with no allocation, or a limited allocation.

The views of the Commission with respect to tradeability or transferability were queried. The following key matters were raised for the Commission to consider:

- Indigenous communities have always had in place arrangements that allow the sharing of resources with other communities and groups. This is documented in many historical accounts and can be verified by expert anthropologists.
- Allocations need to take into account spatial and operational needs (e.g. access to a specific resource may be impacted due to development or restricted access) and arrangements for possible access to an alternate cultural take may be needed.
- Customary fishing rights will need to be transferable in cases where physical access to the resource for cultural purposes is not legally or operationally possible. In these cases an alternate source of the seafood may be needed to meet requirements.

Members agreed that any customary allocations and associated controls should be developed in consultation with Indigenous communities, who should take the lead.

Customary fishing is an important component of Indigenous Australian life and is undertaken in all jurisdictions. References to small numbers and limited areas could well be linked to the lack of data, or the data collection methodologies used to make such assertions. To better understand what cultural use is (what, how, why, where and how much) will require supporting information and data.

Members believed that the ongoing reference, at a jurisdictional level, to an exemption to having to comply with legislation was a weaker level of rights than an officially legislated acknowledgment of Indigenous rights. If exemptions are to be used, what they refer to must be clearly stated in the legislation, and should acknowledge the Primacy that comes with Indigenous fishing rights.

Issues such as potential requirements for measures to maintain sustainability should be Indigenous community driven and developed by the community. This includes potential prohibitions on activities and should take into account needs and cultural drivers.

INFORMATION REQUEST 5.2

Cost recovery should be covered through public good funding.

DRAFT RECOMMENDATION 5.3

Members agree that the definition of customary fishing in fisheries laws should provide for fishing for commercial purposes. As previously mentioned, if this is purely linked to Native Title it has some issues that need to be addressed.

Over time, adapting to colonisation and changing technology has led to the evolution of traditional laws and customs. One issue relates to 'proving' those traditional laws and customs and the capacity to develop positive and equitable outcomes for Indigenous Australians through that process.

SECTION 5.4

The members noted your findings relating to the incredibly low Indigenous participation in commercial fishing and strongly support an approach that provides real commercial access

and/or quota with ongoing support, resourcing and capacity building requirements, with community involvement, to build sustainable and viable businesses.

We feel that one option may be for each jurisdiction to explore options for allocating a proportion of commercial fisheries access (e.g. licences, quota, catch, effort) in the form of an Indigenous community quota for Indigenous fishers seeking entry to a commercial fishery. Such an initiative would run in parallel with any commercial rights forthcoming (eventually) as a result of Native Title or other determinations or legal decisions.

Any government strategy would need to meaningfully help Indigenous participants overcome any technical or capacity barriers. For example, under the 'Aboriginal Aquaculture in Canada Initiative', the Canadian Government provides targeted funding for proposed aquaculture projects in the development of business and administration skills.

GENERAL COMMENTS

Members believe the definition of Customary use is too narrow and needs more investigation and consultation with Indigenous people. in the first instance (and then other sectors). to acknowledge that it includes a component that allows trade, barter and economic activities. This activity is recorded from the time of the Macassans, and inter-community trade is embedded in Indigenous Australians life for many 1,000's of years. As with technology, the definition of trade and barter needs to be expanded as times change.

Customary trading has included international commerce and trade with settlers since the time of colonisation – the major difference now is that society works using currency rather than trading in fresh fish or shells. It was noted that is very difficult to trade for your food at the local store using seafood as your currency.

The IRG agree that the lack of data is a limiter and have identified this as a priority area for their investment this year. They will also be seeking engagement and financial support from each of the States, Territory and Commonwealth as part of addressing this ongoing and unresolved matter.

Please feel free to contact me if you require any further information or clarification.

Yours sincerely

Chris Calogeras

Executive Officer – Indigenous Reference Group