

19 October 2016

Marine Fisheries and Aquaculture
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

*spirit
of
Change*

ABN 32 122 833 158

12-14 Leveson Street
North Melbourne 3051
PO Box 431
North Melbourne 3051

Tel: +613 9326 7822
Fax: +613 9326 4075

Via Email: fisheries.inquiry@pc.gov.au

Dear Sir / Madam

Thank you for the opportunity to provide comment on the Marine Fisheries and Aquaculture Draft Report (Draft Report). The NNTC, as always, is committed to working closely with the Government to assist in the development of improved policy and legislative reforms to secure socio-economic benefits for Aboriginal and Torres Strait Islander peoples across Australia.

The National Native Title Council (NNTC) is the peak body for the Indigenous Native Title Sector. The NNTC provides a voice on matters of national significance; promotes the interests of Traditional Owners at the local, regional, national and international level; and advocates on their behalf on land and land related matters.

Traditional Owners seek to prosper from the rights and interests they possess and have aspirations to not only participate in modern economic life, but to be significant contributors to the economy. Native title enables Indigenous participation in Australia's economy, society and environment for the benefit of all Australians. By translating native title rights and interests into tangible economic and social benefits for their communities, Traditional Owners can achieve far higher levels of economic participation and wealth creation through employment, investment and enterprise development.

Introduction

The NNTC wishes to provide comment on the Draft Report of the Inquiry, which will generally refer to two Terms of Reference, being:

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); and
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.

This submission will also focus almost exclusively on Chapter 5 of the Draft Report referred to as 'Indigenous customary fishing' with the understanding that some comments may relate to other chapters contained in the report, in particular 'Commercial Fishing' detailed in Chapter 3.

By way of general principle, the NNTC believes that any initiative arising as an outcome from this Inquiry should not impede the rights of Traditional Owners to undertake customary fishing or commercial fishing nor should it impede opportunities to develop commercial ventures such as aquaculture or eco-tourism.

Indigenous people have fought strongly over many years to gain the rights and recognition over traditional lands and waters and any policy reform or legislative change that may impact on customary fishing rights should only occur with the free, prior and informed consent of Traditional Owners and the full and proper consideration of the rights and interests of Indigenous peoples in mind.

The Draft Report notes that the 'central aim of Australian fishing laws is to strike a balance between exploiting and maintaining the value of fish resources for the benefit of current and future users' (p. 3). The Draft Report also suggests that Governments 'must limit catches to sustainably manage resources and, where there is competition between fishers, determine the rules for shared access' (p. 3). By way of further general principle, the native title rights and interests of Indigenous fishers, for personal, domestic, communal or commercial purposes, should in no way be subordinated to the rights of others.

Native Title

The *Native Title Act* (1993) (NTA) provides recognition that Indigenous people have rights and interests to their lands and waters that come from their traditional laws and customs. Two of the central objectives of the NTA are set out in its Preamble which states that:

it is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. ... A special procedure needs to be available for the just and proper ascertainment of native title rights and interests ... to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

It is therefore important that any recommendations being proposed by the Productivity Commission (the Commission) that relate to customary and commercial fishing of Indigenous peoples be done with due and proper consideration of the principles contained within the NTA.

As the Commission has noted in its Draft Report, Indigenous peoples have historically used fisheries for commercial purposes. S.211 of the Native Title Act 1993 provides for the exercise or enjoyment of native title rights and interests in relation to land or waters consisting of particular activities, including fishing, for the purpose of satisfying their personal, domestic or non-commercial communal needs. Decisions of the High Court have subsequently accepted as legitimate the

commercial use of native title rights and interests¹. These shifts in jurisprudence will do much to encourage the development of indigenous commercial initiatives which take customary trade rights and practices as their starting point, but are not strictly confined to the manner and form of those indigenous trade rights and practices which existed at the time of sovereignty.

Economic development for Traditional Owners and native title groups is a key aspiration and the NNTC believes that there are sufficient mechanisms now in the NTA to allow for recognised rights in land and waters to provide a foundation of secure interests that can be leveraged against, and that don't require the extinguishment of the underlying native title. The NNTC is of the view that the main impediment to achieving aspirational outcomes is due to barriers created by the bureaucratic and legislative mechanisms in various Government jurisdictions. Such barriers can impede Traditional Owners from realising the full potential of their land and waters and from taking their place in the economy. Therefore a key challenge is the protection of Aboriginal people's property rights in fisheries legislative frameworks. Any framework must be developed in a tangible and pragmatic manner that supports community capacity to provide services and delivers jobs, resilience and sustainability for Indigenous communities.

Customary Fishing

Recommendation 5.1

Customary fishing by Indigenous Australians should be recognised as a sector in its own right in fisheries management regimes.

The definition of Indigenous customary fishing should be consistent with native title.

The NNTC welcomes the view that customary fishing should be recognised as a unique and specific sector within the fisheries management framework. Such a recognition should guide the principles for specific customary fishing allocations to be embedded within Australia's water planning and management regimes delivering cultural, spiritual, social, environmental and economic benefit to Indigenous communities.

To assist in understanding the nature and extent of customary fishing across Australia, the NNTC would agree with the definition provided by the NTA, with the understanding that this be as broad as possible. Section 223 of the NTA sets out a definition of native title and native title rights and interests that native title claimants must satisfy in order to establish that they hold native title rights and interests. Under s. 223 native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters.

In effect, native title rights and interests are possessed under traditional laws and customs acknowledged and observed by Aboriginal and Torres Strait Islander Peoples. However, it is

¹ See *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 (7 August 2013), which provides a landmark decision on the native title right to commercial fishing). The High Court held unanimously that any State or Commonwealth legislation prohibiting commercial fishing without a licence did not extinguish the native title right of Torres Strait Islanders to fish for commercial purposes in certain areas.

important to recognise that Indigenous laws and customs are not only “traditional” if they remain identifiable through time, regardless of whether there is a change in those laws or customs or the manner in which they are acknowledged or observed.

A recent Inquiry by the Australian Law Reform Commission (ALRC) recognised the right of Indigenous peoples to ‘practise and revitalize their cultural traditions and customs’ over time. The ALRC recommended that the NTA should be amended to provide that traditional laws and customs may adapt, evolve or otherwise develop and to clarify that it is not necessary to establish that the acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty.²

Information Request 5.1

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

The NNTC would suggest that the approach to proving entitlement may vary between jurisdictions and even between native title groups across Australia. There are many Indigenous Ranger groups operating across the country that may be able to play a vital role in the management of customary fishing.

By way of example, the South West Aboriginal Land and Sea Council (SWALSC) provide members of the Noongar community with a Fishing Licence Card in accordance with the Fish Resources Management Act 1994 which provides that:

An Aboriginal person is not required to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of the person or his or her family and not for a commercial purpose.

The issuing of the Fishing Card is only distributed to members of SWALSC and the holder of the Card must comply with rules regarding bag quotas, sizes and seasons.

Determining allocations to the customary fishing sector

The Draft Report suggests that:

Fishing undertaken for Indigenous customary purposes should be considered as a separate sector in an allocation process (p. 70)

The NNTC would recommend that any development of allocation policies for customary fishing be done in accordance with the free, prior and informed consent of Traditional Owners either through their Native Title Representative Body or Service Provider (NTRB/SPs) or their Prescribed Body Corporate (PBCs). As more native title claims are resolved the proliferation of PBCs will increase, therefore the development of an allocation framework should be done in close consultation with these organisations as well as NTRB/SPs where appropriate. The NNTC would be willing to assist the Government in engaging Traditional owners through their relevant NTRB/SP or PBC to facilitate this process.

² ALRC (Australian Law Reform Commission) 2015, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, ALRC Report 126, Australian Law Reform Commission, Sydney NSW, p. 29.

Should the outcome of the Inquiry result in an auction for recreational fishing allocations (Draft Report p. 75), the NNTC would recommend that any customary fishing allocation be quarantined outside of this process.

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.

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.

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

Consistent with the 2004 Principles Communiqué on Indigenous Fishing, developed by the National Indigenous Fishing Technical Working Group³, which state a desire to protect customary fishing, governments should set aside shares in overall allocations sufficient for local Indigenous communities to maintain their traditional customs. This would, in practice, accord priority to customary fishing take.

Cost recovery

The Working on Country program, through its facilitation of funding for Indigenous Protected Areas (IPA) and Ranger groups, is a natural extension of native title in an area of primary interest for Traditional Owners and enables them to practice a broad suite of the rights recognised by the courts. Within these programs, Traditional Owners protect important environmental and cultural values on behalf of all Australians by caring for their country and playing an active role in natural resource management.

Information Request 5.2

How should cost recovery be applied to customary fishers?

The role of Aboriginal Land and Sea Rangers as managers is essential for culturally appropriate delivery of environmental and biosecurity services that enable both built markets and management of resources through diverse associated services and cultural practices. Participating communities have achieved significant environmental outcomes in areas such as threatened species management, feral animal and invasive weed control, fire management and management of cultural sites. As the Commission suggests Indigenous communities may be able to contribute more effectively through non-monetary means (p. 146) such as self-management through Indigenous ranger programs. This option may be worth exploring and the NNTC would suggest that it be explored in consultation with NTRB/SPs and PBCs.

³ National Native Title Tribunal 2004, *Fishing principles to guide Indigenous involvement in marine management*, The Principles Communiqué on Indigenous Fishing, http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Fishing_principles_to_guide_Indigenous_i.aspx (accessed 17 October 2016).

Fishing for commercial purposes

As the Commission has noted in its Draft Report, Indigenous peoples have historically used fisheries for commercial purposes.

Empowering Traditional Owners is a core principle for the NNTC as well as its members and can be achieved through the promotion of economic development to deliver real benefits for Traditional Owners and their communities. With the current political emphasis on Indigenous economic development, it is also timely for a reconsideration of the impediments placed on Traditional Owners who wish to engage in commercial activity based on their native title rights.

Traditional Owners seek to prosper from the rights and interests they possess and have aspirations to not only participate in modern economic life, but to be significant contributors to the economy. Native title enables Indigenous participation in Australia's economy, society and environment for the benefit of all Australians.

By translating native title rights and interests into tangible economic and social benefits for their communities, Traditional Owners can achieve far higher levels of economic participation and wealth creation through employment, investment and enterprise development.

In 2015 COAG launched an investigation into Indigenous land administration and use. The COAG process resulted in all Australian governments committing to working with Indigenous stakeholders to improve the processes for doing business on Indigenous land and land subject to native title. The suite of recommendations proposed by the Senior Officers Working Group to COAG included commitments to support more effective and efficient local decision-making and to support the ability of Indigenous landowners and native title holders to use their rights in land and waters to promote private investment, creating bankable interests on exclusive possession native title land and use of commercial native title rights.

The strong view put to COAG was that development on Indigenous land and waters will only be successful and sustainable where Indigenous people are provided with the opportunity to be partners in development, to give their free, prior and informed consent and to benefit economically and socially from the development. Such an approach is also consistent with the United Nations Declaration on the Rights of Indigenous Peoples and will be the core principle for the NNTC in promoting Indigenous control for the economic development on Indigenous land.

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.

In this respect the ALRC recommended that the NTA be amended to explicitly define native title rights and interests as potentially including commercial uses, while retaining the need to prove a tradition of commercial fishing.⁴ The NNTC firmly believes that amending the NTA as proposed by the ALRC would provide an important mechanism to secure economic development, while recognizing the value of existing cultural economies. The NNTC would recommend that fisheries

⁴ Op cit, See Recommendation 8-1, p. 30

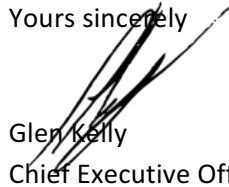
laws should be reviewed across the jurisdictions to ensure they appropriately reflect the ability of customary fishing to include commercial uses.

The NNTC would suggest that any recommendations proposed by the Commission should consider strategies that would encourage and support Aboriginal and Torres Strait Islander investment and development opportunities.

Finally, the NNTC strongly supports the suggestion that the Government should consider establishing a national Indigenous stakeholder forum, appropriately resourced, to develop a clear and proper response that will adequately address the issues raised through this Inquiry. Aboriginal people's participation in the development of appropriate management frameworks and allocation regimes is fundamental for the management and development of Indigenous people's fishing sector interests and also to assist in the protection of Indigenous land and water assets. The stakeholder forum should review the 2004 Principles Communiqué on Indigenous Fishing, developed by the National Indigenous Fishing Technical Working Group⁵ as well as provide a starting point for engagement with the Indigenous community on the issues raised through the Commission's Inquiry.

I trust you find these comments useful and constructive, however if you have any queries or require any further information please do not hesitate to contact me at your convenience.

Yours sincerely



Glen Kelly
Chief Executive Officer

⁵ National Native Title Tribunal 2004, *Fishing principles to guide Indigenous involvement in marine management*, The Principles Communiqué on Indigenous Fishing, http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Fishing_principles_to_guide_Indigenous_i.aspx (accessed 17 October 2016).