

**Appendix C - Submission from Indigenous Fisheries Technical Working Group to Commonwealth Harvest Strategy and Bycatch policy reviews**

## **Recommendations to address the rights, interests and objectives of Indigenous people in the current Commonwealth Fisheries Harvest Strategy Policy, and Bycatch Policy**

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### Introduction and context

This document has been developed as a submission to the current Commonwealth Fisheries Harvest Strategy Policy (FHSP) and the Fisheries Bycatch Policy (FBP) reviews, developed by an Indigenous Fisheries Technical Working Group (IFTWG). The group was convened as one component of the FRDC Project No. 2020/024 *Development of an Indigenous engagement strategy for fishing interests with a focus on the Commonwealth*, providing both direct input into the policy reviews, and a case study/trial exploring what can be achieved by the efforts of an expertise-based advisory group process as one component of wider process or structure for enhanced Indigenous engagement in Commonwealth fisheries policy development processes.

The IFTWG was initiated at an Adelaide workshop in February 2023. This workshop included 14 Indigenous participants with experience and expertise in fisheries and Sea Country planning. Following discussion of the opportunity to contribute to these current Commonwealth policy reviews, the workshop participants noted that, due to the highly technical nature of fisheries harvest strategies and fisheries bycatch mitigation strategies, appointment of a technical working group with

appropriate expertise to develop and support Indigenous inputs into these reviews was considered optimal.

The Indigenous Fisheries Technical Working Group (IFTWG) subsequently undertook work over a 6-month period during 2023. Draft recommendations were presented to a subsequent national level workshop in December 2023 in Canberra, at which a mix of government and Indigenous participants considered and provided some discussion and feedback on the recommendations themselves and the wider merits of an expertise based advisory group.

The group included Indigenous and non-Indigenous specialists with specific technical knowledge and expertise in the fisheries field. Where differences of opinion were evident, Indigenous members views were given weight, and non-Indigenous members acted as advisors on technical aspects and practical feasibility. IFTWG members included:

- Stephan Schnierer – fisheries scientist.
- Rohan Henry – aquatic environmental scientist.
- Delahay Miller – fisheries management and community engagement specialist.
- Mibu Fisher – social-ecological scientist.
- Eva Plaganyi – fisheries scientist with expertise in fisheries harvest strategies.
- David Brewer – fisheries scientist with expertise in fisheries bycatch.
- Craig Longman – legal specialist.
- Nick McClean – fisheries social scientist, IFTWG facilitator.

This document provides a set of recommendations that would assist in the review of each of the current policies to better to address the rights, interests and objectives of Indigenous people. It is not necessarily proposed that these policies are the ideal vehicle to drive this process, or that these recommended changes are sufficient to meet either this task, or the wider legislative obligations Commonwealth fisheries agencies have to give due regard to Indigenous rights and interests in fisheries management decision-making processes.

**A key point arising from the discussions in the IFTWG was that the recognition by the Commonwealth of Indigenous fishing rights in all fisheries through resource re-allocation, and development of clear partnership agreements between government and Indigenous people, are required for broad progress to be made.** These are processes that, at present, fall outside the remit of the FHSP and BCP but would appear to underpin any engagement that the Commonwealth has with Indigenous people.

In this regard it is important to note that issues relating to fisheries and their management identified by Indigenous participants in the initial workshop and technical working group process reaffirm those identified since the Resource Assessment Commission's Coastal Zone Inquiry in 1991, and in various subsequent government inquiries, research publications, international and national conferences, and community-based initiatives. These issues include but are not limited to the following;

- The protection of Indigenous fishing rights and maintenance of associated Indigenous environmental, cultural and fishing knowledge.
- Indigenous access to sufficient populations of fish to catch in order to maintain indigenous economies (subsistence, barter, trade etc.).
- The need for engagement to ensure that Indigenous fishing rights are protected when fisheries legislation/policy/strategy are being reviewed or developed.

- The need for allocation and resource sharing arrangements that protect Indigenous fishing rights whilst also providing access to commercial fishing business opportunities.

Each of these issues has some degree of bearing on the development of FHSP and BCP.

Notwithstanding the need to recognise the importance of these wider issues to Indigenous rights and interest holders, the opportunity to explore what could be done within the constraints of these existing policies, and the fisheries management processes they govern, and what can be achieved by the efforts of an IFTWG as a component of Indigenous engagement in policy development processes, was considered of value.

Initial recommended changes to the two policies are made in the following three broad categories:

1. Inclusion of statements on Indigenous **rights, interests and objectives**, that create a standard that the governments/proponents must meet with respect to engaging Indigenous groups in strategy development.
2. A clear process for demonstrating that any given **strategy meets this standard**.
3. A set of **default principles** considered most likely to produce outcomes that meet Indigenous rights, interests and objectives, with relevant precedents/examples noted.

These recommendations have been developed on the basis of the following inputs:

- Initial discussion at the Adelaide workshop.
- Detailed discussions within the IFTWG over a 6-month period concerning the Commonwealth policies under review.
- Examples on developing Indigenous-inclusive fisheries harvest strategies and fisheries bycatch mitigation strategies, collated from existing published literature.
- Indigenous engagement guidelines for impact assessments under the EPBC Act and the United Nations Convention on Biological Diversity.

These recommendations take the form of text to be inserted into either the FHSP and BCP and any guidelines associated with the implementation of the policies.

## 1. Recommendations on Indigenous rights, interests and objectives

### Indigenous rights and responsibilities in fisheries

**Recommendation 1.1** Insert in both harvest strategy policy and associated harvest strategies in specific fisheries, and the bycatch policy and associated bycatch mitigation strategies in specific fisheries, the following statement on legislation and government commitments.

In implementing this policy and associated strategies, fisheries management agencies and stakeholders must take into account the following:

- United Nations Declaration of the Rights of Indigenous People.
- United Nations Food and Agriculture Organisation Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication.

- United Nations Convention on Biological Diversity, with particular reference to the:
  - *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.*
  - *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity*
- The Environmental Protection and Biodiversity Conservation Act, with particular reference to *Engage Early - Guidelines for best practice Indigenous engagement in environmental assessments under the EPBC Act.*
- National Agreement on Closing the Gap.
- National Native Title Tribunal 2004 Fishing Principles to Guide Indigenous Involvement in Marine Management.
- Native Title Act 1993

**Recommendation 1.2:** In both harvest strategy and bycatch policies or associated guidelines include the following definition of Indigenous fishing.

**Indigenous fishing** is defined as fishing that is done by Aboriginal and Torres Strait Island people and utilising methods of catch and disposal of their choosing. Indigenous catch is a component of a coastal indigenous economy comprising direct consumption; sharing or gifting among family, kin or community networks; barter or trade; use in ceremony; to generate revenue through commercial sale.

*Explanatory text:* This broad definition of Indigenous fishing highlights that Indigenous fishing has always been an evolving practice that has historically included social, cultural and economic uses of resources, and is responsive to changing social, cultural and economic circumstances. This includes the participation of Indigenous fishers in both commercial and non-commercial fishing, each of which represent a continuation of relationships to Sea Country.

This definition further highlights that governments should, in line with legislative obligations and international commitments:

- Protect and give priority to Indigenous fisheries as the first fisheries in this country and ensure that changing circumstances within non-indigenous fisheries management systems, do not impact indigenous fisheries economies.
- Ensure that the development of any rules and regulations with respect to Indigenous fishing are negotiated with meaningful input and guidance from impacted Indigenous parties.

### Explanatory box: Legislative obligations and international commitments related to Indigenous fishing

The **Commonwealth Fisheries Management Act 1991 (FMA)** in its objects

- a) states that AFMA 'in the performance of its functions, is to have regard to the objective of ensuring that the interests of commercial, recreational and Indigenous fishers are taken into account.'
- b) mandates the application of Ecologically Sustainable Development principles which includes the requirement to consider social and equity considerations in decision-making.

*NB: a paramount interest held by Indigenous peoples is that their rights and custodial responsibilities in fisheries and Sea Country are recognised and protected (see UNDRIP for an account of the nature of those rights)*

The **Environment Protection and Biodiversity Conservation Act 1999** in its objects

- a) 'recognise(s) the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity, and 'promote(s) the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.'
- b) mandates the application of Ecologically Sustainable Development principles which, in the EPBC Act includes the requirement to consider social and cultural aspects of the environment when considering the impacts of development, in addition to those aspects noted above in the FMA.

The **United Nations Declaration on the Rights of Indigenous Peoples** states that '*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 21.2

The **United Nations Food and Agricultural Organisation Code of Conduct for Responsible Fisheries**, states that:

- '*States should appropriately protect the rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction*'. Article 6.18
- '*When deciding on the use, conservation and management of fisheries resources, due recognition should be given, as appropriate, in accordance with national laws and regulations, to the traditional practices, needs and interests of indigenous people and local fishing communities which are highly dependent on fishery resources for their livelihood.*' Article 7.6.6

**The UN FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication**, states that among other things in relation to Indigenous fishers:

- '*States should recognize the need for and work towards policy coherence with regard to, inter alia: national legislation; international human rights law; other international instruments, including those related to indigenous peoples*'. Article 10. Policy coherence, institutional coordination and collaboration

## **Incorporating Indigenous specific policy objectives and definitions.**

**Recommendation 1.3** Insert as a general guiding statement related to objectives into each policy document the following text. This text has been adapted from the NSW Harvest Strategy Policy.

To ensure the effectiveness of these policies at achieving the wider objectives of the Commonwealth Fisheries Management Act 1991 including the implementation of Ecologically Sustainable Development principles, Fisheries Harvest Strategy and Bycatch Policies and associated strategies should, as far as possible, integrate the full set of biological, economic, social and Indigenous specific objectives relevant to the fishery or species, where they relate to harvest.

**Recommendation 1.4** to ensure consistency in policy documents with text in recommendation 1.3, insert into the Harvest Strategy Policy the following definition of a harvest strategy (changes from existing text in the policy highlighted in yellow):

A harvest strategy sets out a decision framework necessary to achieve defined biological, economic, **social and Indigenous objectives** for commercial fish stocks in a given fishery. It is sometimes referred to as a management procedure. Harvest strategies outline:

- processes for monitoring and assessing the biological and economic conditions of commercial fish species within fisheries against fishery-specific reference levels (a reference point or points) **and can include monitoring and assessment of conditions for social and/or Indigenous objectives where these have been identified in terms that are assessable under a harvest strategy framework.**
- pre-determined rules that control fishing activity according the biological, economic, **social and/or Indigenous specific** conditions of the fishery (as defined by monitoring or assessment)—these rules are referred to as harvest control rules or decision rules.

**Recommendation 1.5** To ensure consistency in policy documents with text in recommendation 1.3, insert into the Bycatch Policy the following statement on the objective of the bycatch policy strategy (changes from existing text in the policy highlighted in yellow):

The Bycatch Policy aims to minimise fishing-related impacts on general bycatch species in a manner consistent with the principles of ecologically sustainable development and with regard to the structure, productivity, function and biological diversity of the ecosystem, **and with regard to the maintenance of economic, social and Indigenous specific values of bycatch species held by non-commercial fishing resource users.**

## **Schedule of species of importance to Indigenous people**

**Recommendation 1.6** Develop a schedule of species of importance to Indigenous people. To enable this, insert the following text into both the Harvest Strategy and Bycatch Policies.

A schedule of species of importance to Indigenous people will be developed and maintained to ensure that direct and indirect impacts of commercial fishing operations on these species and associated Indigenous values, are accounted for in management.

Fish and other marine species are of importance to Indigenous people for a variety of reasons, including (but not limited to) for food, for trade and economic benefit, as a target of cultural fishing, for use in cultural practices and traditions (e.g. ceremonies, communal sharing/gifting), for medicine, as a part of traditional cultural stories and language, and as a part of a people's identity.

This schedule incorporates three tiers with associated actions:

**Tier 1:** Species identified as of exceptional significance to Indigenous people. Where a species is identified as of exceptional significance, assessment and management action should be taken to protect Indigenous values associated with the species, developed through engagement with Indigenous groups associated with this species.

**Tier 2:** Other species of importance to Indigenous people but are not of exceptional significance. Inform Indigenous groups associated with this species of ecological risk and impact assessments, potential impacts identified, and management actions for this species. Remain open to discussion.

**Tier 3:** Species and ecological processes that have direct or indirect impacts on species in tier 1 and 2. For these species, risk assessments should be undertaken to determine the likelihood of commercial fisheries impacting on Indigenous values.

This list will be reviewed periodically to allow for species that may enter or exit the list over time.

## 2. Recommendations on demonstrating due process

The following section has been developed based on the assumption that recommendations in Section 1 have been adopted.

**Recommendation 2.1** That the following text be included in guidelines for both Fisheries Harvest Strategy Policy and Bycatch Policy.

### **Indigenous engagement in the development of fishery harvest strategies, and bycatch mitigation strategies.**

In meeting the objectives of the Commonwealth Fisheries Management Act 1991, commercial fisheries managers must ensure that the rights and interests of Indigenous fishers are appropriately considered. All Commonwealth fisheries are managed according to a harvest strategy, and most have bycatch mitigation strategies already in place. Where a strategy is not yet in place, then the opportunity for Indigenous input must be from the beginning of strategy development. Where a strategy is already in place, these must be reviewed at least every 5 years, and so the opportunity for Indigenous input will come at the review stage.

The following principles and process ensure that Indigenous people are able to meaningfully input into these processes, where the desire and capacity exists, and provide proponents with a structured process to meet this obligation in the course of developing or reviewing a FHS or BCS.

### ***Principles and key contextual points***

- **Responsibility lies with government and industry (the proponents):** A fishery harvest strategy or bycatch mitigation strategy is a tool designed, developed and implemented to meet the legal obligations and respective policy objectives of the government under the Commonwealth Fisheries Management Act 1991 to manage commercial fisheries sustainably and to bring benefit to the Australian community. In some cases, these responsibilities may also apply to commercial fishery stakeholders, particularly where formal co-management arrangements are in place. It is the responsibility of these parties as proponents of a strategy to demonstrate that, in meeting these obligations, they have made appropriate efforts to protect Indigenous fishers' rights and interests in the individual strategies developed.
- **Equitable benefit sharing:** For a strategy development and associated engagement process to have integrity with respect to these obligations, there must be some demonstrable outcome that meets the rights, interests and objectives of Indigenous groups connected to the fishery.
- **Working with Indigenous organisations and communities:** Processes involving Indigenous organisations and communities are likely to take longer to achieve progress than might normally be expected in a commercial fishery setting. Where an obligation to consult widely among the community exists, investment of additional funds in engagement may also be required. These realities must be explicitly factored into strategy development in the planning phase.
- **Free, Prior and Informed Consent:** Proponents must have free prior and informed consent as the objective of engagement and consultation before any of the following actions are taken:
  - The adoption of legislation or administrative policies that affect indigenous peoples (UNDRIP article 19)
  - The undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources (UNDRIP article 32).
- **Self-determination:** Any potentially affected Indigenous community, organisation or nation group must be engaged in strategy development process by the proponents in the manner the community/organisation/nation group identifies as the most appropriate.

This may include:

- Having high level input into strategy design through identifying species and ecological processes of interest, as well as broad objectives and outcomes that can assist in guiding strategy development.
- Through detailed involvement in the technical development and design of the strategy via indigenous leaders, representatives or nominated experts, where this capability and willingness exists. One example could be their participation in formal management

advisory committees (MACs) for fisheries, or the establishment of a specific Indigenous fisheries advisory committee.

- Facilitating processes of feedback and consultation to the wider community, to feed into a technical development and design process that is shouldered by the proponents.
- Maintaining a watching brief and being regularly updated on progress with opportunity to respond if necessary.
- Choosing not to participate in the strategy development in any way.

- **Community development and capacity:** Different Indigenous communities are at different stages of development, and with different capabilities. However, the low capacity of some groups to engage in a detailed and technical fisheries management process should not preclude meaningful benefit flowing to Indigenous people with rights and interests in a fishery. In particular, the following situations should not preclude or remove the requirement for a fishery or associated strategy to meaningfully deliver outcomes of relevance to Indigenous groups.
- The lack of current involvement of Indigenous groups in the commercial fishery that the strategy addresses.
  - Inability or unwillingness of Indigenous groups to participate in strategy development at a particular time.
  - A lack of publicly available information on Indigenous rights and interests in a fishery or associated Sea Country at the time of development of a strategy.

Where these circumstances exist, proponents must support Indigenous organisations and communities to develop clear statements on what their rights, interests and priorities are in relation to fisheries and Sea Country.

- **Key organisations to engage:** Proponents of a strategy should broadly seek contact and dialogue with a wide range of groups who may be potentially impacted by the strategy. They should proactively seek and follow up on involvement from the following groups with overlapping Sea Country or in adjacent coastal areas:
- Community-controlled and representative Indigenous organisations.
  - Indigenous rights holders.
  - Indigenous groups/individuals with recognised involvement in, knowledge of or interests in fisheries and Sea Country.

Such proactive efforts should not preclude the possibility that other groups may wish to have a future involvement in fisheries and Sea Country activities.

- **Delivering benefits in the absence of detailed engagement:** Where communities and organisations are not in a position to engage in the process of strategy development, then the following steps might be taken.
- **Publicly available information** on fisheries and Sea Country interests may be utilised to develop an understanding of what the likely rights and interests of a nation or community are in a fishery. This may be found in, for example, published research literature, Sea Country plans, IPA management plans, community fisheries strategies/plans, corporate and strategic organisational plans of Indigenous organisations.

- **Default principles** that are considered most likely to result in outcomes of relevance to Indigenous groups may be used to help guide a strategy development or review process, in particular, in circumstances where Indigenous participation is not forthcoming or feasible at the present time. These can be found in Section 3 of this document.
- **Maintenance and protection of Indigenous cultural, environmental and fishing knowledge:** While any strategy should take into account the knowledge, innovations and practices of Indigenous people, clear agreements ensuring free, prior and informed consent, the protection of intellectual property held by Indigenous people, the maintenance of Indigenous cultural relationships to Sea Country and associated fishing activities in the context of strategy development, and equitable benefit sharing of efforts that utilise this knowledge, should be implemented prior to any strategy development process that seeks to utilise or incorporate Indigenous knowledge, innovations and practices.

### ***Phase 1 – Pre-strategy development***

Prior to a specific strategy being developed, or prior to a review of an existing strategy being undertaken, proponents must undertake the following activities.

- Initial, open-ended discussions with a wide range of potentially impacted Indigenous groups, with the aim of building familiarity, relationships and understanding between different parties.
- Proponents should be mindful of the fact that there may be multiple communities, organisations or nation groups impacted by a fishery level strategy. In most communities and organisations, representative organisations and key individuals within them act as brokers who can often connect a process to those who are most likely to have an interest. Relationships with these organisations and individuals should be prioritised to maximise the chances that a future engagement process will reach the right groups and individuals.
- Proponents should convene information provision and two-way capacity building processes aiming to:
  - Assist Indigenous groups to build understanding of the nature and extent of the relevant fishery and its operations, how management processes work, and what opportunities for dialogue or collaboration may be upcoming. This includes providing accessible information on what a harvest and bycatch strategy is, and when strategy development or review processes are likely to occur. This should include an articulation of what are the anticipated benefits for both parties that may come from the development of a strategy in partnership with Indigenous groups.
  - Ensure proponents have a clear understanding of the historical, legal and cultural situation of Indigenous groups likely to be a party to a strategy development process, and their stated interests in fisheries and Sea Country management.
  - Support the development of appropriate agreements related to knowledge, intellectual property and equitable benefit sharing, where these are considered by Indigenous groups to be a necessary precursor to formal engagement between parties.

## ***Phase 2 – Engagement to support strategy development***

Once a strategy is due to be developed or reviewed, then the following steps should be followed.

- Notification and engagement should occur as early as possible to ensure that adequate time is given for Indigenous groups to familiarise themselves with the opportunity.
- All potentially affected Indigenous groups are required to be notified of the strategy development or review process in writing. For community-controlled/representative organisations, rights holders, and groups/individuals with specific involvement in, knowledge of and interests in fisheries and Sea Country, proponents should follow up on written notifications verbally and/or in person wherever possible to ensure these groups have received notification and may clarify the purpose and intent of engagement.
- Initial notifications should be accompanied with plain language explanatory material on the strategy being developed and the intended benefits of a strategy to potentially impacted Indigenous groups.
- All potentially impacted Indigenous groups may nominate whether and in what ways they wish to be engaged in the strategy development process. This may include:
  - Having high level input into strategy design through identifying species and ecological processes of interest, and broad objectives and outcomes related to these, that can assist in guiding strategy development.
  - Through detailed involvement in the technical development and design of the strategy via leaders, representatives or nominated experts where this capability and willingness exists. One example could be their participation in Management Advisory Committees for fisheries, however this should not be expected as a rule and separate engagement processes may be required.
  - Facilitating processes of feedback and consultation to wider community, to feed into a technical development and design process that is shouldered by the proponents.
  - Maintaining a watching brief and being regularly updated on progress to respond if necessary.
  - Choosing not to participate in the strategy development in any way.
  - Utilising a combination of the above methods.
- In the case that no responses are received or Indigenous groups decline the opportunity to participate in the strategy design process, the proponents should utilise publicly available information to generate an understanding of the likely Indigenous interests in the fishery. This may be found in, for example, published research literature, Sea Country plans, IPA management plans, publicly available information on legal rights and tenure held by Indigenous groups in overlapping Sea Country or adjacent coastal areas, community fisheries strategies/plans, corporate and strategic organisational plans of Indigenous organisations.
- Based on the responses received, a proposed process for engaging Indigenous groups in the technical process of strategy development, and for achieving outcomes relevant to Indigenous objectives must be produced by the proponents of the strategy. This should include the following information:

- Who did you notify and proactively pursue engagement with?
- What response did you receive?
- What additional steps will you take to identify the likely interests and associated objectives of impacted Indigenous groups, and outcomes that can meaningfully meet those objectives?
  - a) Through direct engagement and partnerships with Indigenous groups (if so, describe)
  - b) Through utilising existing publicly available information and applying default principles (if so, describe)

In describing these steps, the proponent must ensure they specify:

- What species and ecological processes are understood to be of importance to Indigenous groups? Are any species identified considered to be or listed on the relevant policy schedule as of “exceptional significance”? Are any ecological processes identified known to have a functional connection to species of “exceptional significance”?
  - What objectives that relate to Indigenous interests will be included in the strategy?
  - How will the strategy produce outcomes that meaningfully meet these objectives?
  - How were these species and ecological processes identified, and objectives and intended outcomes selected, and what level of confidence do you have that these are reflective of impacted Indigenous communities’ interests?
  - How will you undertake assessments in the strategy development process to ensure that your strategy will deliver stated outcomes for Indigenous groups?
  - How are these outcomes and progress towards objectives going to be monitored and assessed over time?
- Proposed process for meeting Indigenous objectives must be shared with all potentially impacted Indigenous groups, and through actively following up on written notifications to ensure that groups and individuals with specific knowledge of and interests in fisheries have received the proposed process.

### ***Phase 3 – Risk and impact assessment***

- In the course of strategy development, broad risk assessments must be undertaken. The aim of this risk assessment is to determine whether a scheduled species is at risk of impact from the commercial fishery.
- Where a scheduled species identified as of exceptional significance to an Indigenous group is identified as being at risk of impact from commercial fishing, an impact assessment on identified Indigenous values must be undertaken.
- This assessment should aim to assist in developing insight into the different options for how a fishery may be managed, and their relative impacts on Indigenous values.
- Risk and impact assessments should be developed, undertaken and applied within the decision-making process with the participation of impacted Indigenous parties who have chosen to engage in the strategy development process, noting the principle of self-determination should guide how and in what ways this participation occurs.

- Particular reference should be made to the UN CBD *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities.*

#### **Phase 4 – Circulation of draft strategy and statement on Indigenous rights and interests**

Once a draft strategy has been produced, proponents should follow the following steps.

- All draft strategies must be accompanied by a statement on Indigenous interests which states the following:
  - Were there any variations to the intended process for identifying species and ecological processes of importance, and developing Indigenous specific objectives and outcomes?
  - What species, ecological processes, objectives and outcomes were ultimately incorporated in the strategy?
  - What are the results of assessments of the proposed strategy in relation to Indigenous outcomes? What trade-offs between Indigenous and non-Indigenous sectors were identified in these assessments?
  - Why was the final strategy chosen?
  - Were there any learnings from the strategy development process that may assist others in meeting indigenous outcomes in commercial fisheries management?
- All potentially affected Indigenous groups are required to be notified of the draft strategy development and associated Indigenous impact statement in writing. For community-controlled/representative organisations, rights holders, and groups and individuals with specific involvement in, knowledge of and interests in fisheries and Sea Country, proponents should follow up on written notifications verbally wherever possible to ensure these groups have received notification and may input into the draft strategy should they so wish.
- All final strategies and associated Indigenous impact statements must be housed on a common web page hosted by the proponents that allows for ease of access and also sharing of lessons and building knowledge over time.

#### **Phase 5 – Implementation**

Once a strategy has been adopted and is in implementation, the following should occur.

- Potentially impacted Indigenous parties should be provided with an annual update on the status of the fishery or species of specific interest to them, the success of the strategy in delivering outcomes for Indigenous groups, and any other relevant developments. For community-controlled/representative organisations, rights holders and groups/individuals with recognised involvement in, knowledge of and interests in fisheries and Sea Country, proponents should follow up on written notifications verbally and/or in person wherever possible to ensure these groups have received notification.

- Ongoing open-ended discussions with potentially impacted Indigenous groups should be maintained, and where specific opportunities to develop initiatives with Indigenous groups connected to the fishery arise, these should be taken up as positively aligned initiatives that will support the long term social and cultural license of the commercial fishery. Examples include:
  - Working with ranger groups on training and upskilling in fisheries science, monitoring, and surveillance.
  - Supporting increased Indigenous fisheries leadership capacity.
  - Developing Indigenous fisheries planning processes internally within Indigenous organisations.

### 3. Recommendations on default principles for developing Indigenous aspects of strategies, and relevant precedents

The following section has been developed based on the assumption that recommendations in Sections 1 and 2 have been adopted.

**Recommendation 3.1** Insert the following text into the Harvest Strategy Policy and Bycatch Policy and guidelines.

The following principles provide a set of broad options for managing commercial fisheries that:

- Are considered to be those principles most likely to meet fishery objectives relevant to Indigenous groups, based on existing knowledge and progress in Indigenous-led fishery management.
- May be utilised by proponents as a default where sustained or detailed input into a specific harvest or bycatch strategy from an Indigenous group to identify their preferred objectives and outcomes is not forthcoming. They may also assist Indigenous groups participating in strategy development to ensure their interests are appropriately considered.

These principles and values are structured around 3 broad categories

1. Access and allocation
2. Species population levels including biomass limits and targets
3. Culturally sensitive species and areas

For each section, principles provide broad statements that should be met. Precedents that inform the development of these principles and values are noted in each case as relevant guidance in applying these principles.

The following two sections provides relevant principles that should be incorporated into the Harvest Strategy Policy and associated guidelines, and the Bycatch Policy and associated guidelines, respectively.

### Default principles for the development of harvest strategies.

	Principles	Relevant precedents that may provide guidance
<p><b>Access and allocation</b></p>	<p>1.1. Ensure that fisheries management arrangements and resource allocation processes secure Indigenous fishing rights and access to fish resources.</p>	<p><i>With respect to ensuring commercial fishing does not unduly impact non-commercial Indigenous fishing:</i></p> <p>Use of customary spatial management measures in the Torres Strait Beche-de-Mer (TSI BDM) fishery.</p> <ul style="list-style-type: none"> <li>The TSI BDM harvest strategy includes provision for the use of community-regulated spatial or temporal closures where appropriate – for example a proposed 10 nm ban on fishing for some species around home reefs, implemented through acknowledging and incorporating customary and traditional laws, and with devolved responsibility to native title holders. In this regard “it is recognised that there are differing cultural laws for individual nation groups which may be applied by communities to supplement fishery management measures. These include but are not limited to Malo ra Gelar (Malo’s Law) of Kemer Kemer Meriam Nation, Saabi Law of Maluilgal Nation, Saabi Law of Gudumalulgal Nation, Kulkalgal Nation and Saabi Law of Kaurareg Nation.”</li> </ul> <p>See Plaganyi et al., 2020, 2019b.</p> <p>Allocation of catch for traditional fishing and food purposes under Torres Strait fisheries management arrangements</p> <ul style="list-style-type: none"> <li>In the Torres Strait Finfish fishery, Torres Strait Islander representatives work in partnership with fisheries managers and scientists to allocate a sufficient amount of the Recommended Biological Catch for <i>kai-kai</i> (food), and to the traditional inhabitant commercial sector, where there is commercial take of those species. It is important to recognise that this process is underpinned by high level legal agreements that govern the Torres Strait fisheries, which enable a partnership approach with TSI fishers who have cultural authority with respect to these species.</li> </ul> <p>See <a href="https://www.pzja.gov.au/advisory-committees/pzja-committees">https://www.pzja.gov.au/advisory-committees/pzja-committees</a></p>

		<p>Increased bag limits and Local Aboriginal Fishing Management Plans in NSW.</p> <ul style="list-style-type: none"> <li>• Since the recognition of Aboriginal cultural fishing in the NSW Fisheries Management Act 1995 the NSW government has provided for bag limits for individual Aboriginal fishers to be doubled to support larger catches for cultural fishers supplying communities. More recently work has concluded on and ministerial sign off for the first two 'Local Aboriginal Fisheries Managements Plans' in NSW. These plans provide for more flexible arrangements around setting cultural fishing bag limits that have been developed in partnership with local Aboriginal land councils.</li> </ul> <p>See <a href="https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/aboriginal-cultural-fishing-local-management-plan">https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/aboriginal-cultural-fishing-local-management-plan</a></p> <p><u><i>With respect to Indigenous fishing rights being utilised for commercial sale:</i></u></p> <p><b>Legislation and policy-based examples:</b></p> <p>Queensland Harvest Strategy Policy Indigenous commercial fishing allocation.</p> <ul style="list-style-type: none"> <li>• Up to 5% of commercial catch in a fishery may be allocated to Indigenous groups and accessed under an Indigenous Fishing Permit, where an Indigenous group is in a position to undertake commercial scale fishing and wishes to establish operations for these purposes.</li> </ul> <p>For further details see Qld Government (2021).</p> <p>NT Aboriginal coastal fishing licence</p> <ul style="list-style-type: none"> <li>• Since 1992 Indigenous community members in the NT have been able to attain a licence which allows them to catch coastal fish species for local consumption, barter and sale without needing to establish a corporate business structure.</li> </ul> <p>For further details see <a href="https://nt.gov.au/marine/commercial-fishing/commercial-fishing-licences-and-logbooks/aboriginal-coastal-fishing-licences">https://nt.gov.au/marine/commercial-fishing/commercial-fishing-licences-and-logbooks/aboriginal-coastal-fishing-licences</a></p> <p>ILSC purchase of commercial fishing quota</p> <ul style="list-style-type: none"> <li>• Since 2019 Indigenous Land and Sea Corporation has funded the purchase of</li> </ul>
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		<p>commercial fishing quota for Indigenous fishing businesses including 2 in South Australia, 1 in Western Australia (see ILSC 2019) and 1 in Tasmania (see ILSC 2022). 1 South Australian investment supports a business operating in the Commonwealth managed Southern Bluefin Tuna Fishery.</p> <p>Establishment of Indigenous commercial fishing business development programs in NSW.</p> <ul style="list-style-type: none"> <li>• NSW Fisheries 'Aboriginal Fisheries Business Development Program' and 'Aboriginal Fishing Trust Fund' to support to Aboriginal community organisations and community-led businesses to develop new economically viable fisheries businesses, with support from an Aboriginal Fishing Advisory Council advising on expenditure.</li> <li>• The N.S.W. State Aboriginal Land Council in partnership with the National Indigenous Australians Agency established a fishing fund to support the growth and development of the NSW Aboriginal commercial fishing industry.</li> </ul> <p>For further details see <a href="https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/aboriginal-fisheries-business-development-program">https://www.dpi.nsw.gov.au/fishing/aboriginal-fishing/aboriginal-fisheries-business-development-program</a></p> <p>Torres Strait Fisheries Act and associated PZJA managed fisheries</p> <ul style="list-style-type: none"> <li>• Creation of traditional inhabitant boat (TIB) licenses.</li> <li>• Transfer of ownership of non-Traditional inhabitant boat licenses to Torres Strait Islanders.</li> </ul> <p>For further details see <a href="https://www.pzja.gov.au/commercial-fisheries-management">https://www.pzja.gov.au/commercial-fisheries-management</a></p> <p>Use of community based non-transferable fishing rights within area and quota-based fisheries management systems.</p> <ul style="list-style-type: none"> <li>• <b>Chile</b> Use of Territorial Use Rights for Fisheries (TURFs) to manage catch of benthic species. These as based on area defined catch shares that are allocated to artisanal fishing groups based on non-transferable fishing rights. Currently 17,000 fishers across 550</li> </ul>
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		<p>discrete areas are managed utilising TURFs (Van Leuvan 2013)</p> <ul style="list-style-type: none"> <li>• <b>North America</b> Use of community quota and community licences to allocate non-transferable fishing rights to community fishing entities in Alaska (Carothers 2011, North Pacific Fishery Management Council 2010) California (Mamula and Kosaka 2019) and Labrador/Newfoundland (Foley et al., 2013).<sup>1</sup></li> <li>• <b>Europe</b> Use of community quota and community licences to allocate non-transferable fishing rights to community fishing and/or producer entities France (Manuel et al., 2016) and Shetland Islands (Anderson 2008).</li> </ul> <p>New Zealand/Aotearoa fisheries settlements under Treaty of Waitangi.</p> <ul style="list-style-type: none"> <li>• Allocation of 20% ownership of all commercial fisheries quota/licenses to Maori entities, and 50% ownership of the largest seafood company at the time of settlement.</li> </ul> <p>There is a large amount of academic and grey literature on this topic readily available. For a descriptive overview of the settlement itself and its relationship to Treaty processes, see Munro (1994).</p>
<p><b>Species population levels including biomass limits and targets</b></p>	<p>2.1 Ensure target stocks are managed using limit biomass levels that are highly cautious with respect to the risk of overfishing.</p>	<p>Two Torres Strait harvest strategies include limit reference points above the standard 20% limit reference point for fisheries.</p> <ul style="list-style-type: none"> <li>• Torres Strait Beche-de-Mer harvest strategy – Limit reference point of 40% biomass. (Plaganyi et al., 2020, 2019b)</li> <li>• Torres Strait Tropical Rock Lobster harvest strategy – Limit reference point of 32% unfished biomass. (Plaganyi et al., 2018, 2019a)</li> </ul>

<sup>1</sup> Ginter (1995) "The Community Development Quota program [in Alaska]... explicitly recognizes the special needs of communities as distinct from business firms or individuals, while achieving some of the benefits, as well as costs, of other programs such as limited licensing and individual transferable quotas." Foley et al., (2013) found the experience in Labrador/Newfoundland Shrimp fisheries demonstrates that "fisheries policies that clearly allocate resource shares to community-based organizations ... can support viable fisheries and other industries that play a crucial role in the development of socially sustainable and resilient fisheries communities."

	<p>2.2 Ensure target stocks are managed to target biomass levels that ensure sufficient abundance for cultural fishing and catch.</p>	<p>Three Harvest Strategies developed with Indigenous input utilise target reference points that are at a higher biomass level than the default of 48% which is taken to be equivalent to Maximum Economic Yield in the Cth Harvest Strategy Policy, unless otherwise estimated.</p> <p>NSW Lobster Fishery Harvest Strategy</p> <ul style="list-style-type: none"> <li>Utilises Optimum Sustainable Yield as a biomass target reference point. (NSW Dept of Primary Industries 2022)</li> </ul> <p>Torres Strait Tropical Rock Lobster Fishery</p> <ul style="list-style-type: none"> <li>Target reference point of 65% of unfished biomass. (Plaganyi et al., 2018, 2019a)</li> </ul> <p>Torres Strait Finfish Harvest Strategy</p> <ul style="list-style-type: none"> <li>Target reference point of 60% of unfished biomass. (Hutton et al., 2019)</li> </ul> <p>Further to this the Queensland Sustainable Fisheries Strategy and Harvest Strategy Policy utilises Maximum Economic yield <u>or</u> 60% of unfished biomass as a default target reference point. For further details see Qld Government (2017)</p>
	<p>2.3 Ensure that stock rebuilding processes do not unduly impact on Indigenous fishing, and in particular Indigenous fishing for non-commercial uses, in acknowledgement of the fact that overfishing of commercial stocks is typically not the result of Indigenous cultural fishing.</p>	<p>NSW Lobster Fishery Harvest Strategy (NSW Dept Primary Industries 2022). Includes following decision rule:</p> <ul style="list-style-type: none"> <li>If decision rules for determining TAC set a TAC of 0, arrangements to protect Aboriginal cultural fishing will be determined in consultation with the impacted Indigenous groups.</li> </ul> <p>Torres Strait PZJA fisheries</p> <ul style="list-style-type: none"> <li>In TSI fisheries, allocations are set for Traditional Inhabitant Boat licence holders, and for traditional fishing/local food consumption (“Kai kai”), and based on the experiences of expert group members to date, any variation in allocation is most often absorbed by the Transferable Vessel Holder (i.e. non-Torres Strait Islander) commercial fishing sector. There may be variations in this on a case-by-case basis.</li> </ul>
<p><b>Culturally sensitive species and areas</b></p>	<p>3.1 Ensure species of importance to Indigenous people impacted by commercial fisheries</p>	<p>Implemented: Wai 262 protection under NZ/Aotearoa law.</p> <ul style="list-style-type: none"> <li>Wai 262 provides specific protections and management processes for species that are <i>taonga</i></li> </ul>

	<p>are known and listed in a policy schedule.</p>	<p>for Maori. <i>Taonga</i> means “treasured possession” and in this context covers species that are important for food, cultural value, medicine, trade/economy, and where special knowledge is associated with these.</p> <p>For further details see <a href="https://www.wai262.nz/">https://www.wai262.nz/</a></p> <p>Not yet implemented:</p> <p>Proposed schedule of culturally important species under EPBC Act</p> <ul style="list-style-type: none"> <li>This has been put forward by the Indigenous Advisory Committee under the EPBC Act and Indigenous Steering Group to NESP Biodiversity Hub (see IRG TSH 2020, see also Goolmeer et al., 2022).</li> </ul>
	<p>3.2 Ensure that harvest strategies incorporate</p> <ul style="list-style-type: none"> <li>Ecological risk assessments for all listed species and impact assessments on species listed as of exceptional significance.</li> <li>Appropriate triggers and specified actions in response to triggers for species of exceptional significance.</li> </ul>	<p>Wai 262 protection under NZ/Aotearoa law.</p> <ul style="list-style-type: none"> <li>Wai 262 provides specific protections and management processes for species that are <i>taonga</i> for Maori. <i>Taonga</i> means “treasured possession” and in this context covers species that are important for food, cultural value, medicine, trade/economy, and where special knowledge is associated with these.</li> </ul> <p>For further details see <a href="https://www.wai262.nz/">https://www.wai262.nz/</a></p>
	<p>3.3 Ensure culturally sensitive areas in the offshore zone are not impacted by commercial fishing operations.</p>	<p>Various state level sacred sites and heritage protection legislation across Australia, including marine heritage protection laws in state jurisdictions.</p>

### Default principles for the development of bycatch mitigation strategies.

	Principles	Relevant precedents that may provide guidance
<b>Access and allocation</b>	1.1. Ensure that fisheries management arrangements and resource allocation processes secure Indigenous fishing rights and access to fish resources.	<p>There are no specific examples yet published/implemented, however there are examples of ETP status under the EPBC Act driving protections for species of importance to Indigenous people in commercial fisheries management. In these cases, ETP status has triggered actions to reduce bycatch of these species, leading to localised increases in abundance, which may include increased availability for traditional forms of fishing.</p> <p>Reduction in sea turtle and dugong bycatch are cited broadly as examples by IFWG members, although there are no available documentation or assessments as to the impact this has had on Indigenous fishing values.</p> <p>It is plausible that in the event the Commonwealth seeks to implement protections for culturally important species then the benefits of historical efforts vis-à-vis greater availability of these species for Indigenous catch could be assessed retrospectively and pointed to as an example of the sort of improvements that could in theory occur elsewhere, where traditional owners identify bycatch species of importance to them.</p>
<b>Species population levels including biomass limits and targets</b>	2.1 Ensure that bycatch is managed at levels that do not erode the economic, social and Indigenous cultural values associated with bycatch species.	<p>There are no specific examples yet published/implemented, however there are examples of ETP status under the EPBC Act driving protections for species of importance to Indigenous people in Commonwealth fisheries. In these cases, ETP status has triggered actions to reduce bycatch of these species, leading to localised increases in abundance.</p> <p>Reduction in sea turtle bycatch and sawfish bycatch in the Northern Prawn Fishery are cited as examples, although there is no available documentation or assessments as to the impact this has had on Indigenous values.</p> <p>It is plausible that in the event the Commonwealth seeks to implement protections for culturally important species then the benefits of historical efforts could be assessed retrospectively and pointed to as an example of the sort of improvements that could in theory occur elsewhere, where traditional owners identify bycatch species of importance to them.</p>

<p><b>Culturally sensitive species and areas</b></p>	<p>3.1 Ensure species of importance to Indigenous people impacted by commercial fisheries are known and listed in a policy schedule.</p>	<p>Implemented: Wai 262 protection under NZ/Aotearoa law.</p> <ul style="list-style-type: none"> <li>Wai 262 provides specific protections and management processes for species that are <i>taonga</i> for Maori. <i>Taonga</i> means “treasured possession” and in this context covers species that are important for food, cultural value, medicine, trade/economy, and where special knowledge s associated with these.</li> </ul> <p>For further details see <a href="https://www.wai262.nz/">https://www.wai262.nz/</a></p> <p>Not yet implemented:</p> <p>Proposed schedule of culturally important species under EPBC Act.</p> <ul style="list-style-type: none"> <li>This has been put forward by the Indigenous Advisory Committee under the EPBC Act, and Indigenous Steering Group to NESP Biodiversity Hub (see IRG TSH 2020, see also Goolmeer et al., 2022).</li> </ul>
	<p>3.2 Ensure that bycatch strategies incorporate</p> <ul style="list-style-type: none"> <li>Risk assessments for all listed species and impact assessments on species listed as of exceptional significance.</li> <li>Appropriate triggers and specified actions in response to triggers for species of exceptional significance.</li> </ul>	<p>Wai 262 protection under NZ/Aotearoa law.</p> <ul style="list-style-type: none"> <li>Wai 262 provides specific protections and management processes for species that are <i>taonga</i> for Maori. <i>Taonga</i> means “treasured possession” and in this context covers species that are important for food, cultural value, medicine, trade/economy, and where special knowledge is associated with these.</li> </ul> <p>For further details see <a href="https://www.wai262.nz/">https://www.wai262.nz/</a></p>

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