Submission in relation to 'Traditionality'

The ALRC report in regard to the topic of recognition of rights is focused on some anomalies and/or unintended consequences of the current Native Title regime that requires traditional connection as a criteria for recognition of native title rights and interests.
WAFIC submits that the anomalies arise in relation to recognition of native title rights and interests in relation to land and waters *landward of the low water mark*, and that:

1 there is no issue requiring correction regarding native title in areas seaward of the low water mark; and

2 there is no practical benefit to be gained and significant expectation management that would need to be undertaken in relation to indigenous rights to fish seaward of the low water mark (commercial or otherwise) as such rights are regulated by relevant fisheries legislation in any event.

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A requirement of Traditional Connection can have two negative consequences on Native Title claimants which could reasonably be the subject of amendment:

1 'Forced' disconnection

There is an perverse outcome where there is disconnection from laws and customs due to the intervention of white settlement and the consequences of that is that the Court is bound to hold that there is no connection.

An example of this is the Larrakia case where the traditional connection to the area and surrounds of Darwin and Cooks Peninsula was found to be interrupted on a traditional basis, primarily due to the effect of white settlement. A further example is the Yorta Yorta people, whose claim was defeated in part by reference to a historical dispossession and resettlement by government.

It is obviously anomalous for Native Title Rights interest to be lost *because of* the fact of white settlement. Whilst we would have no opposition to an amendment that dealt with this, provided it did not have the unintended consequences below.

2 **The question of indigenous succession.**

In the case of Ngarluma Injibandi, the Court found that Native Title rights and interest to the Burrup Peninsula could not be established because the traditional owners of the area had been effectively wiped out by what amounted to genocide by white settlers. The Flying Foam massacre reduced the population below critical threshold in the late 1890s and the last traditional owner apparently died in the 1930's or 1940's. Since that time the Burrup Peninsula (which is a area rich in cultural heritage including a world heritage repository of petroglyphs has subsequently been 'managed' by adjacent groups including the Ngarluma people. Notwithstanding that, there is no potential for 'succession' to country under the Native Title system notwithstanding there would have been a system under traditional laws and customs of the groups in question whereby responsibility is taken for land that was not the subject of a population for whatever reason. Indeed, the 'kind' of indigenous populations and entitled claim groups to the lands occupied at Sovereignty probably misidentifies the nature of connection to country over time and would not properly reflect the land holding of, say, one hundred years prior to Sovereignty.

The issues identified above are potential problems which could be addressed. They are, however, issues in relation to ***land***.

The effect of the proposed amendments is to potentially identify and allow rights and interests arising from customs arising from new technological facilities and which may be contrary to traditional laws and customs.

For example, in the Single Nunga claim heard before Justice Wilcox evidence was led that the seas surrounding the South West of Western Australia were positively not used and therefore the limit of the claim was the low water mark. Likewise, in the Ngarluma Injibandi claim the evidence did not suggest traditional use beyond wading and thus the low watermark. In both cases, however, there has been a usage of an area in contemporary times through the advent of small vessels such as 'tinnies' equipped with outboard motors. Some of that use may be contrary to traditional laws and customs which included a prohibition on issues of sea and/or islands (Single Noongar) or maybe 'imported' practice (in Ngarluma Injibandi, evidence by Wilfred Hicks is that he participated in the hunting the dugongs with 'Islanders' was something he had taken up with Torres Strait islanders, who had moved to the area for work)

A more difficult example arises from the Bardi Jawi case in relation to which the Bardi and Jawi (particularly the Jawi peoples) used primitive sea-going vessels that were propelled by currents, which currents were traditionally known and 'mapped' through songlines. In that case, evidence was given of contemporary use of an area (Brue reef) which was not accessible through traditional currents and which can only be accessed using modern equipment.

In each of the above cases, the recognition of 'Traditionality' limits the area that was used including the sea area. The proposed amendment to 'Traditionality' allows succession or continuation of use. That may well be appropriate in relation to land areas as those areas have unquestionably been used in the past. However, when those principles are applied to sea, they potentially expand the area to which use applies. This is not the case in relation to the land area of Australia to which the amendments are directed.

This is, with respect, an unintended consequence and one which does have potential impact on Fisheries Management and the capacity to take resources from a managed and sensitive fishery.