

Submission to Review of Commonwealth fisheries management legislation

Associate Professor Marcus Haward
Ocean and Antarctic Governance Program
Institute for Marine and Antarctic Studies
University of Tasmania

This submission addresses Terms of Reference, with particular emphasis on:

- The legal and administrative framework as affirming the roles and relationships between the Minister, the Department of Agriculture, Fisheries and Forestry and the Australian Fisheries Management Authority.

Australian Fisheries Management: The Legal and Administrative Framework

Australia's framework of government derives from the Australian constitution¹ but sections 64 to 67 imply, rather than explicitly state, the presence of the conventions of responsible government, and of the development of an independent public service – the cornerstones of the 'Westminster' system.² The notion of the "Department" inherited from British practice.³ While the Australian public sector has always retained a strong departmental focus, Australian governments have also been masters at establishing alternative forms of public authorities. These bodies, established through law (or statute) - hence the term 'statutory authorities' – were developed to be at 'arms length' from direct Ministerial control.⁴ Statutory authorities do have built in channels of accountability -through annual reports to parliament and being subject to auditor-general oversight, even if they have been perceived as being subject to few controls by parliament.

A key element in the Australian fisheries management framework is the fact that jurisdiction over Australian fisheries is shared between the Commonwealth and the states.⁵ Commonwealth power is based on s 51 (x) of the constitution ('fisheries in Australian waters beyond territorial limits') and state legislation through provisions of each state's constitution.⁶ The question of jurisdiction over fisheries increased in salience from the late 1940s, with jurisdiction divided by a boundary established by the three nautical miles territorial sea. Resolution of jurisdictional conflicts in the 1970s saw this boundary 'entrenched' by the Offshore Constitutional Settlement (OCS).⁷ The OCS enables arrangements to be established to 'streamline' management of fisheries that transcended the three-mile boundary, following agreement between the Commonwealth and the State governments.

The current administrative framework for Commonwealth fisheries are based on reforms enacted in the early 1990s, derived from the Commonwealth policy statement, *New Directions for Commonwealth Fisheries Management in the 1990s*.⁸ *New Directions* built on the 1985 Australian Fisheries Conference and the 1982 review of the Australian Fishing Industry undertaken by the Senate Standing Committee on Trade and

¹ *Australian Constitution*, Sections 64 to 67.

² In terms of the relationship between the executive and the public services these conventions and practices (entrenched through legislation such as the *Public Service Act 1999* Cwlth) should be seen in terms of the 'Westminster-Whitehall' model, as modified by Australian practice.

³ See among others R. Wettenhall, "Parliamentary Oversight of Statutory Authorities: A Post-Uhrig Perspective" *Australasian Parliamentary Review*, (Spring 2005) 20 (2): 39–63.

⁴ R. Wettenhall, "Parliamentary Oversight".

⁵ It is a concurrent power; section 51 (x) of the Commonwealth Constitution gives the Commonwealth a rather confusing 'head of power', while the respective State constitutions provide the basis for state laws.

⁶ D. R. Rothwell and M. Haward "Federal and International Perspectives on Australia's Maritime Claims" *Marine Policy* (January 1996): 29-46.

⁷ M. Haward, "The Australian Offshore Constitutional Settlement," *Marine Policy*, (1989) 13: 334-348.

⁸ Australia, *New Directions for Commonwealth Fisheries Management in the 1990s: A Government Policy Statement* (Canberra, AGPS, 1989).

Commerce, chaired by Senator Brian Archer.⁹ The *New Directions* statement provided the basis of major legislative and administrative changes implemented in 1991. It proposed the development of a statutory body, the Australian Fisheries Management Authority (AFMA), to assume management responsibilities previously undertaken by the Australian Fisheries Service within the then Department of Primary Industry and Energy.

Government acceptance of the focus of the New Directions statement led to the development of legislation that provides the basis for current management of Commonwealth fisheries. The *Fisheries Administration Act* 1991 established the Australian Fisheries Management Authority and the Fishing Industry Policy Council.¹⁰ This Act also established Management Advisory Committees (MACs) and denoted their functions. In addition to the *Fisheries Administration Act* 1991 and the *Fisheries Management Act* 1991, other legislation included the *Fisheries Agreements (Payments) Act* 1991; *Fishing Legislation (Consequential Provisions) Act* 1991; *Fishing Levy Act* 1991; *Foreign Fishing Licences Act* 1991 and the *Statutory Fishing Charge Act* 1991.¹¹

Key elements of the *Fisheries Management Act* 1991 include the development and provision of fishery management plans based on the principles of ecologically sustainable development. The Act also establishes statutory fishing rights, their registration and mechanisms for review of allocations, and establishes mechanisms for allocation of permits and licences. It also provides arrangements for management under joint authorities (see above), and surveillance and enforcement including specification of specific offences. The Act establishes machinery for collection of levies imposed by other, related, legislation. The *Fishing Levy Act* 1991 for example, gives effect to cost recovery arrangements by imposing a levy on statutory fishing rights and permits. The nexus between the *Fisheries Administration Act* and *Fisheries Management Act* 1991 should be strengthened by ensuring that common commitment to principles of ecologically sustainable development (particularly the precautionary principle)¹² and reinforcing the role of the Minister for Fisheries to be able to request, from, and to act, on advice from AFMA Commission with regard to these principles.

Sustainability and Environmental Performance¹³

The reach of Commonwealth environmental legislation on fisheries management has been one of the more significant change drivers affecting Australian fisheries policy and management. This is illustrated by the introduction of “strategic assessment” of fisheries for fisheries managed under Commonwealth legislation and state export fisheries by the Department of Sustainability, Water, Environment, Population and Communities. This process involves the assessment of fisheries, consideration of fishing impacts on protected marine species and export approval under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).¹⁴ This assessment of fisheries is made against a standard set by indicators.

The strategic assessments for Australian fisheries have focused attention on stock rebuilding, reducing overfishing and recovery of overfished stocks. A A\$220 million structural adjustment package, *Securing our Fishing Future*,¹⁵ was announced in November 2005 to address overfishing. A further action was Ministerial Direction in December 2005 that refocused attention on sustainability. The Ministerial Direction provided an example of useful policy direction: “the Australian Government considers that decisive action is needed immediately to halt overfishing and to create the conditions that will give overfished stocks a chance to recover

⁹ Australia Senate Standing Committee on Trade and Commerce, *Development of the Australian Fishing Industry* (Canberra, AGPS, 1982)

¹⁰ Interestingly, despite positive role and support for a predecessor industry liaison body in the mid 1980s – the Fishing Industry Policy Council of Australia (FIPCA) – the Fishing Industry Policy Council has never been enacted.

¹¹ M. Haward, “The Commonwealth in Australian Fisheries Management: 1955-1995” *The Australasian Journal of Natural Resources Law and Policy*, (1995) 2, 2: 313-325.

¹² As elaborated in the *Environment Protection Biodiversity Conservation Act* 1999.

¹³ The following section is derived from “State, Market and Community: Managing Australian Fisheries”, *Dialogue- the Journal of the Academy of Social Sciences in Australia*, 28, 1, (2009): 36-45.

¹⁴ *Environment Protection and Biodiversity Conservation Act 1999* Parts 10, 13 and 13A.

¹⁵ Larcombe, JL and Begg, G *op cit*: 7-8.

to an acceptable level in the near future.”¹⁶ Most importantly the Ministerial Direction was a statement of the acceptable level of risk the government was willing to take in the utilisation of Commonwealth fisheries resources. The Direction emphasised the need to take a more strategic approach to management of Commonwealth fisheries, including developing a harvest strategy for Commonwealth fisheries that addressed biomass targets in management and noted, *inter alia*, that:

1. ... AFMA must take immediate action in all Commonwealth fisheries to:
 - a. cease overfishing and recover overfished stocks to levels that will ensure long term sustainability and productivity;
 - b. avoid further species from becoming overfished in the short and long term; and
 - c. manage the broader environmental impacts of fishing, including on threatened species or those otherwise protected under the Environment Protection and Biodiversity Conservation Act 1999.

2. AFMA must take a more strategic, science-based approach to setting total allowable catch and/or effort levels in Commonwealth fisheries, consistent with a world's best practice Commonwealth Harvest Strategy Policy that has the objectives of managing fish stocks sustainably and profitably, putting an end to overfishing, and ensuring that currently overfished stocks are rebuilt within reasonable timeframes.¹⁷

The development of a harvest strategy, in explicitly identifying ‘target’ and ‘limit’ reference points related to biomass is also a significant development. A harvest strategy includes a process for monitoring and conducting assessments of the fishery – both biological and economic – and includes rules that control intensity of fishing effort, linked back to biological and economic conditions of the fishery. While traditional approaches to fishery management focus on the first element, a harvest strategy approach directly links the first element to the second, with the rules – ‘harvest control rules’ – being established as part of a formal management procedure.¹⁸

Use of Economic Instruments

Economic instruments and market-based tools are diverse and include transferable quotas in fisheries, user fees and charges for resource users, and the external certification of products and processes. The management framework established in the 1990s saw such instruments and tools increase in salience. One significant outcome was a policy to recover costs of management from participants in fisheries through licence fees and levies. Industry has been responsible for payments of 100 per cent of attributed costs of management for of Commonwealth fisheries, through this cost recovery model, since 1994-95. Cost recovery approach underpins a number of elements of the framework (and links this framework to contemporary public sector management principles) including funding for scientific assessments and enhancing partnership approaches to management. A key issue is how to fund science needed to support management decisions in ‘new’ or ‘developing’ fisheries with little current industry activity.

AFMA and Partnerships¹⁹

AFMA, initially a statutory authority, was re-established (following the government’s implementation of the recommendations of the Uhrig Review on statutory authorities in 2004) in 2008 as a commission, charged with management of Commonwealth fisheries. AFMA is committed to developing partnerships in managing fisheries, most notably through formalising industry input into management through Management Advisory Committees (MACs) within Commonwealth fisheries. The MACs serve several purposes; they provide a means for ‘co-management’ of the fishery, increase transparency of decision-making and increase the efficiency and effectiveness of industry-government relations. Over time the MAC model has broadened to include other stakeholder interests such as environmental groups. While the MACs have broadened the range of stakeholder

¹⁶ *Commonwealth of Australia Gazette* No 234 20 December 2005.

¹⁷ *Ibid.*

¹⁸ Smith, ADM, *et al* (2008) ‘Experience in Implementing Harvest Strategies in Australia’s South-Eastern Fisheries’, *Fisheries Research*, doi:10.1016/j.fishres.2008.06.006.

¹⁹ This section drawn from M. Haward “State, Market and Community: Managing Australian Fisheries”, *Dialogue- the Journal of the Academy of Social Sciences in Australia*, 28, 1, (2009): 36-45.

representation they have been criticised for their industry orientation. The MAC structure is replicated (sometimes in slightly different forms) in fisheries under state jurisdiction. MACs are supported by Resource Assessment Groups (RAGs) made up of scientists, fishery managers and industry, providing a forum for discussion of stock assessments including input of independent scientific advice. RAGs report to the MACs but also directly to the AFMA Commission so that it can see the scientific advice on which decisions are made.²⁰

In addition to changes in administrative arrangements reforms in the 1990s, also led to major changes in management tools and instruments. Shifts from input controls (limiting licenses, boats or gear, or season) to output controls (total allowable catch – TAC – and ITQs) marked a revolution in fisheries management and emphasises the shift towards economic instruments. It has been Australian government policy that ITQs as the preferred management tool in its fisheries since 1990, with many state fisheries also adopting quota management systems. While such systems are seen to be efficient and effective in controlling fishing effort, determining (and where necessary adjusting) an appropriate TAC, from which the ITQ is allocated, is a critical task. Economic instruments have also increased in salience through policy to recover costs of management from participants in fisheries through licence fees and levies. Industry has been responsible for payments of 100 per cent of attributed costs of management of Commonwealth fisheries from 1994-95.

Partnership with the ‘community’ or external stakeholders, as a key element of the policy framework, is crucial but also problematic. Defining and identifying ‘community’ becomes a critical element, as the concept is subject to many definitions and uses – from the substantive to the symbolic. Australian fisheries embody these complexities. Fishing is clearly an activity that defines and sustains a community – a major national study indicate that at least 3.36 million Australians over five undertook at least one fishing trip in the a year prior to the study, a participation rate of almost 20 per cent.²¹ Community can also be defined in the sense of shared interests and values, giving rise to different fishing ‘communities’, and in doing so provides a rich area of exploration. These communities may reinforce, or cut across, existing cleavages. Traditional fishing activities by Australia’s indigenous peoples, for example, raise important management issues including access to resources, and may provide direct conflicts with commercial or recreational fishing interests, particularly in relation to allocation of access rights and catches.

The Science-Policy Interface²²

Scientific input is an important element in the management of marine living resources and managers require adequate and timely advice from scientists to be able to formulate effective management. While science may not be the only factor in fisheries management, it is at least a *necessary* component.²³ Effective management of marine living resources relies upon sound and well-managed data on population dynamics and the effects of fishing effort and increasingly on analysis of complex ecosystem interactions. The interface between science and policy becomes a crucial element in developing and implementing public policy. C. P. Snow’s ‘two cultures’ provide an evocative and perhaps exaggerated depiction of the differences between science and policy,²⁴ yet considerable evidence remains that the ‘science-policy gap’²⁵ emerges when scientific advice is unable to be effectively incorporated into public policy.

²⁰ Fisheries Research and Development Corporation. *Co-Management: Managing Australia’s Fisheries Through Partnership and Delegation*. Report of The FRDC’s National Working Group for The Fisheries Co-Management Initiative – Project No. 2006/068. (FRDC, Canberra 2008).

²¹ G.W. Henry and Lyle J.M. *The National Recreational and Indigenous Fishing Survey*. FRDC Project No. 99/158. (Department of Agriculture, Fisheries and Forestry, Canberra, 2003): 47. See also D. McPhee, D *Fisheries Management in Australia*. (The Federation Press, Sydney, 2008): 46.

²² This section derived from M Haward “Scenarios, science and sustainability: Addressing the science-policy gap in fisheries management”, Paper Presented at 53 Annual Convention of the International Studies Association, San Diego 1-4 April 2012.

²³ B. Fløistad, 1990. ‘Communication Between Science and Decision Makers: The Advisory Function of the International Council for the Exploration of the Sea’ *International Challenges* 10, 4: 22.

²⁴ J. Jabour and M. Haward. 2009. ‘Antarctic Science, Politics and IPY Legacies’ in J. M. Shadian and M. Tennberg (eds) *Legacies and Change in Polar Sciences: Historical, Legal and Political Reflections on the International Polar Year* Ashgate Publishing Ltd, Farnham: 101-124.

Bradshaw and Borchers define the science-policy gap as the difference in levels of confidence for a given scientific finding expressed by the scientific community and by society.²⁶ Scientific input is an important element in resource management, and is particularly important in areas such as fishing where resource stocks cannot easily be assessed. It is axiomatic that marine living resource managers require adequate and timely advice from scientists to be able to formulate effective management.

Conclusion

The Commonwealth partnership model of fisheries management, providing strong science-based input through the RAGs and opportunities to address broader based issues through the MACs, is well regarded internationally for addressing the science policy interface and for its effective partnership approach. The provision of world-class science from independent research institutions is also a key element. This approach provides robust information for independent day-to-day decision-makers, i.e. the AFMA Commission and is able to be tested. The Minister is able to provide 'Directions' to ensure that policy objectives are met, community or government concerns are addressed. In summary:

- The RAG/MAC/Commission approach provides an effective interface between science and policy and should be maintained;
- The Ministerial Direction approach should be retained and enhanced by improving the nexus between the *Fisheries Administration Act* and *Fisheries Management Act 1991*, with respect to reinforcing the power of the Minister for Fisheries to be able to request, from, and to act, on advice from AFMA Commission; and
- Cost recovery processes should be maintained and include provision to support funding to 'emergent' fisheries.

²⁵ A. May, 2002. *Creating Common Purpose: The Integration of Science and Policy in Canada's Public Service* Canadian Centre for Management Development, Ottawa.

²⁶ Bradshaw, G. A. and J. G. Borchers. 2000. Uncertainty as Information: Narrowing the Science-Policy Gap. *Conservation Ecology* 4, 1: 7. [online] URL: <http://www.consecol.org/vol4/iss1/art7/>