

Review of Commonwealth Fisheries Management Legislation Submission

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Introduction

Indigenous fisheries have been, until recently, largely been ignored in Australian fisheries governance systems. This is even though a number of government inquiries over the last 20 or so years have highlighted many of the issues related to the lack of recognition and acknowledgement of Indigenous fisheries (see Coastal Zone Inquiry Chapter 10, 1993). The result of this has been subsequent development of fisheries policies, strategies and regulatory mechanisms have consistently failed to protect or enhance the rights and interests that Indigenous people have in their traditional aquatic biological resources ('fish'). One consequence of this is that Indigenous people have been prevented from benefitting fully from their traditional fisheries economically, culturally or spiritually. In some cases at the state level Indigenous people have been criminalised by fisheries regulatory mechanisms that protect other stakeholder interests but fail to address Indigenous fishing rights.

Fisheries governance mechanisms including legal frameworks must also address the impacts that the various fisheries sectors (commercial and recreational) have on the traditional target species of Indigenous communities to ensure that those impacts don't impede Indigenous economic (food, barter and trade) aspirations or their cultural practices including the maintenance of traditional fishing knowledge.

The following comments are addressed toward ToR 1 and to a lesser extent ToR 2 and 3.

1 Legislation

The FM Act 1991 as it stands currently fails to address Indigenous peoples fishing rights and interests. These rights must be addressed through changes to relevant sections of the Act and in particular the objectives, in order to bring it in line with international best practice in relation to the protection of Indigenous customary access to biological resources (see for example the United Nations Convention on Biodiversity- CBD, Article 10c).

Currently the EPBC Act 1999, as a piece of Commonwealth legislation relating to management of biological resources, acknowledges in its objectives the close relationship that Indigenous Australians have with their traditional biological resources.

3 Objects of Act

...

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and **indigenous peoples**; and

(e) **to assist in the co-operative implementation of Australia's international environmental responsibilities**; and

(f) **to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity**; and

(g) **to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.**

'Environmental Protection and Biodiversity Act 1999'

The Fisheries Management Act 1991, as a piece of Commonwealth legislation relating to management of biological resources (including 'fish') makes no similar acknowledgement of Indigenous Australians and their close relationship with their aquatic biological resources. This is a significant omission, which leaves the Commonwealth government exposed to international scrutiny in this area. Unless this is addressed, the decoupling of the EPBC Act 1999 from the FM Act 1991 should not

proceed, rather the EPBC Act should continue to interact with the FMA 1991 especially given that it provides some recognition of Indigenous fishing through its acknowledgement of Indigenous customary use of biological resources.

In NSW the Fisheries Management Act 1994 was recently amended in 2010 to explicitly acknowledge Indigenous cultural fishing and create a process to develop culturally appropriate regulations. This one of the few positive outcomes of the CZI recommendations in relation to Indigenous peoples rights and interests in the coastal zone. The FMA 1994 also provides for the establishment of an Indigenous Fishing Advisory Council (AFAC) which has now met on 4 occasions since the middle of 2011. AFAC is taken a central role in the development of a better articulation between Indigenous communities and NSW DPI (fisheries). However there is a large backlog of issues for AFAC to address so it may be a while before significant changes are made to management processes that address Indigenous rights and interests.

Developments such as the one in NSW provide the Commonwealth with an example of how Indigenous fisheries can be recognised in legislation.

Recommendation 1: That Indigenous cultural fishing be recognised in the objectives of the FMA 1991.

Recommendation 2: That objective 3b be expanded to mention the impact of commercial and recreational fishing on Indigenous cultural fishing practices, for example the existing last phrase of the current objective could be expanded in the following ways

*'...in particular the need to have regard to the impact of fishing activities on non-target species and the marine environment **and Indigenous cultural fishing practices**'*

2 International Conventions and Recent Developments

UN Convention on Biodiversity (<http://www.cbd.int/convention/>)

Australia is a signatory to the UN CBD and has been actively involved in the development of work programs to help achieve the aims of the various articles of the convention including in particular Article 8(j) (<http://www.cbd.int/traditional/>) and Article 10(c) (<http://www.cbd.int/convention/articles/?a=cbd-10>) both of which refer to indigenous rights in biodiversity.

Article 8(j) says that;

'Each contracting Party shall, as far as possible and as appropriate:

Subject to national legislation, respect, preserve and **maintain knowledge**, innovations and practices of **indigenous** and local communities embodying traditional lifestyles relevant for the conservation and **sustainable use of biological diversity** and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.'

Article 10(c) states that;

Each Contracting Party shall, as far as possible and as appropriate:

(c) Protect and encourage **customary use of biological resources in accordance with traditional cultural practices** that are compatible with conservation or sustainable use requirements;

Both of these articles are addressed in the EPBC Act and **they ought be addressed** in any changes to the Fisheries Management Act 1991 that may come about as a result of the this review.

UN CBD Conference of the Parties 11

At the recent CoP11 in Hyderabad India from the 5th to the 19th of October 2012, the party states, which includes Australia adopted a new program of work addressing Article 10(c).

‘10. Agrees that the initial tasks for the first phase of the major component of work on Article 10 with a focus on 10(c) shall be:

(a) To incorporate customary sustainable use practices or policy, as appropriate, with the full and effective participation of indigenous and local communities, into national biodiversity strategies and action plans, as a strategic way to maintain biocultural values and achieve human well-being, and to report on this in national reports ;

(b) To promote and strengthen community-based initiatives that support and contribute to the implementation of Article 10(c) and enhance customary sustainable use; and to collaborate with indigenous and local communities in joint activities to achieve enhanced implementation of Article 10(c) .

(c) To identify best practices (e.g. case studies, mechanisms, legislation and other appropriate initiatives) to:

i. Promote, in accordance with national legislation and applicable international obligations, the full and effective participation of indigenous and local communities, and also their prior and informed consent to or approval of and involvement in the establishment, expansion, [governance] and management of protected areas, including marine protected areas, that may affect indigenous and local communities;

ii. Encourage the application of traditional knowledge and customary sustainable use in protected areas, including marine protected areas, as appropriate;

iii. Promote the use of community protocols in assisting indigenous and local communities to affirm and promote customary sustainable use in protected areas, including marine protected areas, in accordance with traditional cultural practices; ‘

(Document UNEP/CBD/COP/11/L.13)

At the same CoP meeting in relation to fisheries and biodiversity (UNEP/CBD/COP/11/L.10) recognised that;

2. ‘... fisheries management bodies are competent bodies for managing fisheries and, depending on the situations in different countries and regions, should have roles to play in addressing the impacts on biodiversity, notes the need for further improvement and implementation of the ecosystem approach in fisheries management by enhancing the capacity of these fisheries management agencies, constructive interagency collaboration, and **full and meaningful participation** of a wide range of experts on biodiversity, **indigenous and local communities**, and relevant stakeholders, as appropriate, in the fisheries management process;

Recommendation 3: That in developing any recommendations for change to the FMA 1991, a full review of the Act be made to ensure that it addresses Articles 8j and 10c of the UN Convention on Biodiversity specifically in relation to Indigenous cultural fishing.

United Nations Declaration on the Rights of Indigenous Peoples

I also draw the review teams attention to the following 2 articles from UNDRIP which are relevant to the protection of Indigenous fisheries rights;

Article 20

- (1) Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
- (2) Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 26

- (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- (2) 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.
- (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

3 FAO developments

Recent connections between UN CBD and FAO in relation to Article 10c indicate a growing awareness in the latter for the need to address Indigenous peoples rights in biological resources including species targeted by various fishing sectors. As this interaction develops it is highly probable that FAO will adjust its management of fisheries related issues at the international level to accommodate Indigenous peoples fishing rights. For example in 2011, the FAO Committee on Fisheries (COFI) requested the FAO to embark on an international consultation towards the development of 'Guidelines on Small-scale Fisheries' to complement the 'Code of Conduct for Responsible Fisheries' (CCRF). This is a result of the recognition of small-scale fisheries being a principal contributor to poverty alleviation and food security (<http://www.fao.org/fishery/ssf/guidelines/en>).

One can categorise Indigenous fisheries as a 'small-scale fishery' and so it would be beneficial for fisheries agencies in Australia to keep up to speed with the development of the guidelines and how they might influence the development of fisheries governance structures in Australia dealing with Indigenous cultural fishing.

The Guidelines will be voluntary, focus on the needs of developing countries, and relevant to small-scale fisheries in marine and inland waters covering fishing as well as related post-harvest and upstream activities. They will be in support of national, regional and international initiatives for poverty alleviation and equitable social and economic development, for improving governance of fisheries and promoting sustainable resource utilization. Their objective is to provide advice and recommendations, establish principles and criteria, and information to assist States and stakeholders to achieve secure and sustainable small-scale fisheries and related livelihoods.

Recommendation 4: That in developing any recommendations for change to the FMA 1991, a full review of the Act be made to ensure that it addresses developments within FAO Fisheries and Aquaculture Department specifically in relation to protection of Indigenous cultural fishing.

4 Research

In relation to research the Fisheries Research and Development Corporation (FRDC) are to be commended for their efforts to promote and develop research into Indigenous fisheries in Australia. FRDC have established an Indigenous Reference Group to advise them on priority areas for research. The IRG with the assistance of Indigenous cultural and commercial fishers from around Australia has developed eleven key RD&E principles for Indigenous and Torres Strait Islanders (copy of the principles can be made available to the chair of the review committee).

These principles are aimed at ensuring Research, Development and Extension (RD&E);

1. Seeks to enhance Indigenous and Torres Strait Islander recognition
2. Resolves issues around access
3. Improves governance and provides pathways to better representation and management models
4. Provides resourcing options in a user friendly and culturally appropriate manner
5. Leads to improved capacity that empowers Indigenous and Torres Strait Islanders
6. Leads to Agencies developing capacity to recognise and utilise Indigenous and Torres Strait Islander expertise, processes and knowledge
7. Leads to recognition of customary rights and knowledge, including processes to incorporate Traditional Fishing Knowledge and Traditional Fisheries Management
8. Improves knowledge and awareness of impacts on the environment and traditional harvest
9. Provides management arrangements that lead to improved access, protection and incorporation of Traditional Fishing Knowledge and Traditional Fisheries Management input to processes
10. Leads to an increased value for Indigenous and Torres Strait Islander (economic, social, cultural, trade, health, environmental)
11. Leads to benefit sharing

To date the 11 Key Principles have proved to be a valuable tool and provided general guidance for those people and organisations who have a role in Indigenous focused RD&E, giving FRDC, the National Priorities Forum (NPF), the Fisheries Research Advisory Boards (FRAB), and potential project developers sound guiding principles, and provided the basis for the development of the IRG –RD&E Draft Priorities for Fishing and Aquaculture.

Recommendation 5: That any changes to fisheries governance at the Commonwealth level as a result of this review ensure that the initiative taken by FRDC to promote and development Indigenous fisheries research in Australia is maintained and strengthened.

Conclusion

The time is now right for updating Australia's primary piece of fisheries legislation to accommodate the recognition of Indigenous fisheries in this country. There are numerous international developments that indicate that Indigenous peoples rights in traditional biological resources, which includes fisheries, are being progressively addressed around the world and Australia needs to keep pace with these developments.