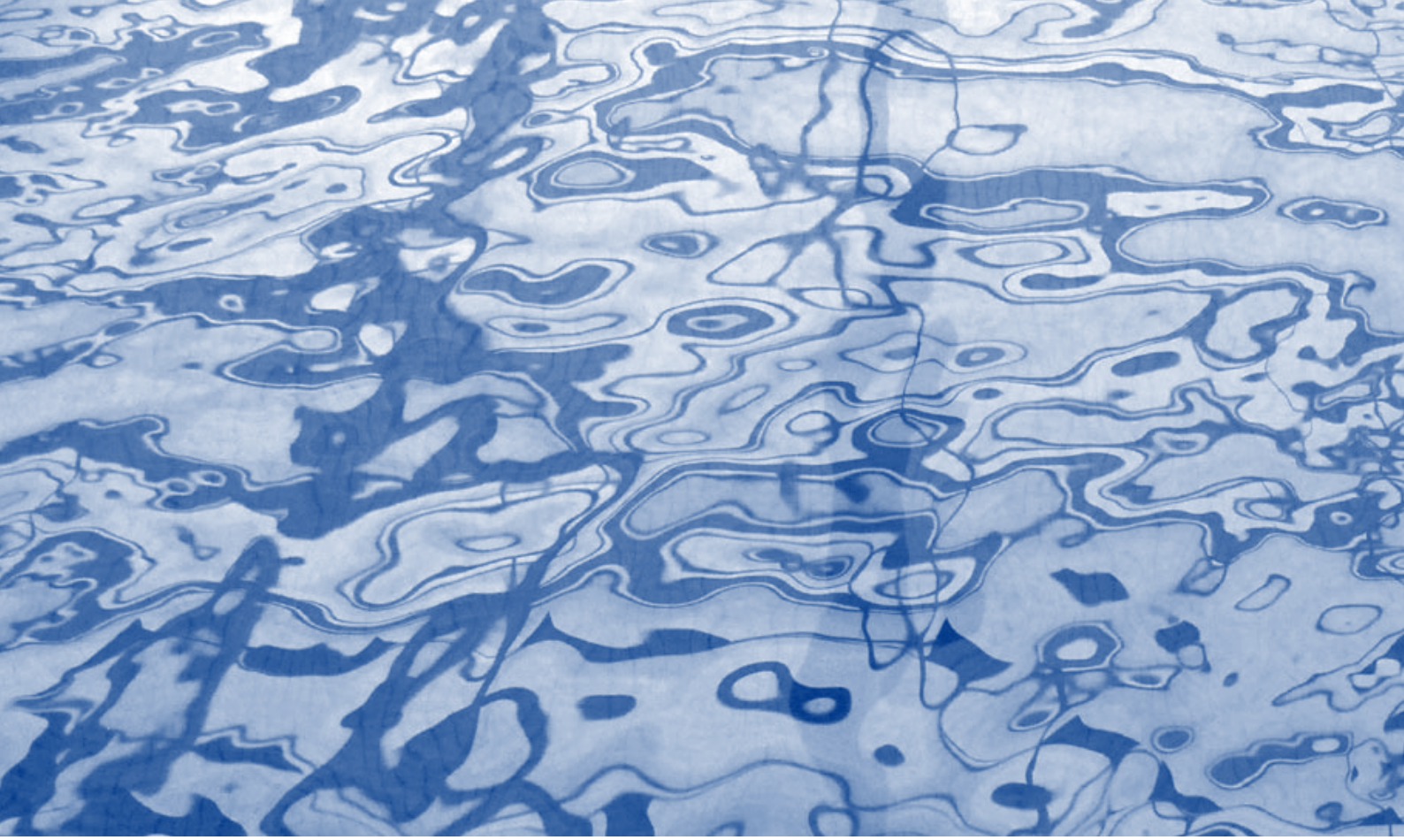
Indigenous fishing access in South Australia

Establishing a framework for ALLOCATING and managing indigenous cultural fishing ACCESS in South Australia



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Establishing a framework for ALLOCATING and managing indigenous cultural fishing ACCESS in South Australia

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Abstract

Indigenous cultural fishing is not currently recognised in South Australia's fisheries legislation. However, the South Australian Government has resolved to address native title claims through negotiation of Indigenous Land Use Agreements (ILUAs) under native title legislation. This has precipitated the development of a framework for allocating access for indigenous cultural fishing and managing those fishing activities as a distinct fishing sector.

This paper describes:

- the legislative and policy framework, and the model used by the government to bring together Aboriginal communities and commercial fishers to develop local management plans;
- the principles that have been developed by the state in negotiating access and establishing management arrangements.

The framework outlines a number of principles for cultural fishing access and fisheries management. An agreement is close to finalisation on the first local management plan, to be implemented in 2006. This plan outlines the management tools that will be applied to manage the unique mix of individual and community fishing activities that characterise cultural fishing.

Using the ILUA process to negotiate cultural fishing claims allows local issues to drive the development of local management plans. This approach maximises the likelihood that cultural fishing access arrangements will receive greater acceptance by local regional communities. The process has also led to the robust consideration of fisheries management implications of integrating cultural fishing with other fishing sectors.

Overall, negotiation provides the opportunity to make agreements about the use of fisheries resources in the future. This offers better long-term outcomes than litigation.

Aboriginal fishing and the fisheries management framework

Current framework

Fisheries in South Australia are managed pursuant to the Fisheries Act 1982, which provides for management of commercial and non-commercial fishing. The legislative framework does not recognise Aboriginal fishing as a distinct sector and management arrangements apply either to commercial or recreational fishers. Nevertheless, several coastal and inland Aboriginal communities maintain fishing activities and identity as fishing communities.

In the absence of specific fisheries legislation, Aboriginal fishing rights in South Australia are therefore set out in the Commonwealth native title legislation. The Native Title Act 1993 (Clth) contains two separate mechanisms for the recognition and protection of native title fishing rights. The first is the lodgement of native title claims. There are ten claims in South Australia that are likely to involve fishing issues. The second mechanism establishes a defence to criminal prosecution under fisheries legislation.[1] It essentially provides that if an Aboriginal person undertakes fishing activities that are otherwise illegal, it is a defence if the fishing was undertaken for the purpose of satisfying their personal, domestic or non-commercial communal needs and in exercise or enjoyment of their native title rights and interests.

This current framework, comprised of fisheries legislation and native title law, is inadequate for managing extractions of fisheries resources by all legitimate user groups. It does not recognise an existing fishing sector and therefore does not allow for management arrangements to be developed and applied to that sector. Further, the existence of fishing rights that can only be tested and formalised as a defence to a prosecution leads to uncertainty for Aboriginal fishers, the fisheries management agency and other fishing sectors. It also puts Aboriginal persons in the untenable position of having to be charged with an offence before they can assert their fishing rights. This situation means that the sector is not only unmanaged, but its management is not integrated with the management of other fishing sectors. Allocation of

1 Section 211 Native Title Act 1993 (Cth). See Yanner v Eaton (1999) 201 CLR 351.

access between each sector is therefore not explicit, and not determined with reference to sustainable levels of fishing, notions of social equity or allocative efficiency.

Although there are approximately ten native title claims that relate to fishing activities in South Australia, the resolution of the native title claim process through the courts does not offer any solution to the problems with the existing framework. Native title claims can take years to resolve and the test cases involving fisheries claims have so far maintained the status quo – that fisheries resources are common property owned by the community and managed on behalf of the community by the government, and that rights to use fisheries resources that are allocated by the government are non-exclusive. The courts have determined that whilst Aboriginal communities may establish access rights for non-commercial purposes, no claim group has yet established a commercial right to fish or an exclusive right to access any waters.[2]

Therefore, the resolution of native title claims through the courts does not provide any fisheries management outcomes in the short term, and in the long term only offers *ad hoc* recognition of some traditional fishing rights based on historical benchmarks rather than contemporary fishing practices. This process is ultimately most likely to lead to ongoing conflict between resource users and community groups, greater pressure on fisheries resources and an erosion of the recognised access rights of other user groups, due to the unregulated and unmanaged access by another user group. Further, the adversarial nature of a native title claim closes any avenue for the South Australian Government to pursue other social and economic objectives in addition to fisheries management objectives, such as employment opportunities in the fishing industry and ownership of commercial fishing licences by Aboriginal communities.

Proposed framework

Two separate processes are currently underway in South Australia that have provided a way of addressing the inadequacies with the existing framework for managing Aboriginal fishing activities. The first process stems from the government's commitment to resolve native title claims by negotiation in preference to litigation and involves the implementation of a negotiation strategy and timetable. The second is the drafting of new fisheries legislation, to replace the current act.

The government has a policy of encouraging the resolution of native title claims through the negotiation of Indigenous Land Use Agreements (ILUAs).

2 Commonwealth v Yarmirr (2001) 208 CLR 1; Lardil Peoples v State of Queensland [2004] FCA 298.

ILUAs are a mechanism created by the Native Title Act 1993 that can, upon agreement by the parties, codify fishing rights (among other things) and deal with issues of suppression or extinguishment of native title. The statewide ILUA negotiation strategy has been developed and implemented by the Attorney General's Department and came into operation in early 2000. It has focus in a forum called the main table which has a broad mandate and is not confined to fishing issues and around which sit representatives of the Aboriginal Legal Rights Movement,[3] government, industry peak bodies and the Local Government Association. Specific negotiations are controlled by side-tables in the various sectors, including mining, pastoral, national parks and fishing. The Fisheries and Aquaculture Side Table (FAST) was established to deal with issues relating to fishing and aquaculture and comprises representatives of the state, native title claimants and the fishing and aquaculture industries. Typically, the parties to a negotiation relating to fishing will involve the claim group, the government, the commercial fishing industry and possibly local governments. PIRSA Fisheries (the South Australian fisheries management agency) provides fisheries management advice to the state negotiating team.

The second process that is being undertaken at the same time is the drafting of new fisheries legislation. The existing legislation has been comprehensively reviewed and a draft of the proposed new legislation has been released for public consideration. This has provided an opportunity to establish a tool (indigenous fishing management plans) in the fisheries legislation for managing fishing rights that have been recognised and codified in an ILUA. The proposed management plans have a very specific focus in that they may only deal with matters contained in an ILUA. They effectively link the fisheries legislation with the native title legislation and law to ensure that Aboriginal fishing activities can be protected and managed. Importantly, these management plans provide a way for integrating management of these activities with commercial and recreational fishing activities that relate to the same fisheries resources.

3 ALRM is the recognised representative body for South Australian native title claimants.

Recognising and managing aboriginal fishing

Allocation

The first step that was undertaken in the negotiation process was the establishment of the FAST, as described above. This provided a forum for addressing some fundamental issues and providing a framework within which to negotiate local claims. This process set some initial boundaries in relation to allocation of access to fisheries resources.

When determining changes to the current access to fisheries resources, governments must first assess the ecological status of the fisheries resources and determine if they are fully utilised by existing user groups (i.e. are fish stocks over-fished, fully fished, under-fished or uncertain). Governments must also clearly identify all user groups and understand their aspirations. Once this has been determined, governments can make allocation decisions and implement management arrangements to adjust access shares to accommodate other user groups and ensure resource sustainability.

The primary allocation issue that was bedded down by the FAST was that cultural or traditional fishing was to be defined as non-commercial. In other words, fish taken pursuant to cultural fishing activities could not be sold or exchanged for profit. At the same time, it was agreed that any access to the commercial sector would be on a commercial basis (i.e. purchase of licence on the open market) and that no new licences would be created in existing fisheries. Therefore, if the government decides to pursue social and economic development objectives by assisting Aboriginal communities to enter the commercial fishing industry they can do so, but on the basis that an Aboriginal holder of a licence is subject to the same management framework as every commercial fishery licence holder.[4]

4 The FAST made a distinction between existing fisheries and potential exploratory or developmental fisheries. It was determined that new fisheries provided an opportunity for the allocation of access to Aboriginal fishers and that a specific policy should be determined in relation to exploratory and developmental fisheries.

Confining cultural fishing to non-commercial activities is fundamental to the ability to address issues associated with the allocation of access to fisheries resources. It means that practical management arrangements can be developed to establish the share of the resource that each sector has, and how that share is taken. Within this context, the parties have been able to establish three fundamental principles for negotiating access:

1. Biological sustainability of fish stocks is the primary concern in all fisheries management arrangements.

2. Any issues associated with allocation of access to fisheries resources must be dealt with explicitly.

3. Any cultural fishing over and above recreational limits must be closely regulated to ensure that catch and effort information can be collected and to ensure that PIRSA Fisheries and all fishing sectors can have confidence in the access arrangements.

With these principles in place, access rights have been able to be negotiated within clear boundaries. The process has involved a number of considerations:

1. The traditional fishing activities of the relevant Aboriginal community.

2. The ways in which fish and fishing activities are used and undertaken by the Aboriginal community including for food, ceremonies, education and other cultural purposes.

3. The size of the community and the number of people that undertake fishing activities within that community.[5]

4. The quantities of fish likely to be taken by various fishing activities.

5. Whether any proposed access arrangements will result in more fish being taken, or able to be taken, compared to current access arrangements.

6. Any sustainability constraints that exist in relation to relevant species or fisheries and restrictions that may need to be made to other sectors to accommodate new access arrangements for the Aboriginal community.

5 Most identification issues are already dealt with through the native title claim registration process so these considerations primarily relate to community fishing patterns. For example, a community may have a number of specified fishing families that undertake fishing on the community's behalf. This is relevant to estimating the fishing capacity of the community and developing practical fisheries management arrangements.

Management

The issues of allocation of access and management of that access are inextricably linked, and in reality negotiations have involved the resolution of both types of issues concurrently. The importance of the specific fisheries management arrangements is reflected in the third fundamental principle outlined above, requiring that cultural fishing rights that are different to recreational or commercial fishing rights must be closely regulated. Negotiations relating to access involving different fishing sectors can only be progressed if everyone has confidence that the rights that are allocated are adhered to.

This has been a major concern of the commercial fishing industry in negotiations, and discussions have tended to progress more positively once some practical suggestions about how to manage fishing activities and monitor catch levels have been put on the table. Similarly, actual proposals have provided focus for the claim group to assess the fishing rights that are proposed.

These types of specific fisheries management arrangements have been developed by PIRSA Fisheries in collaboration with the negotiating parties. A further two principles have been applied in this process. The following have been balanced against each other:

1. Regulatory arrangements for cultural fishing activities should be as practical as possible. Cultural fishing is not a commercial activity and is undertaken for the purposes of food, education and other cultural purposes and should not be subject to excessive red tape.

2. Regulatory arrangements should be designed so that a Fisheries Officer in the field does not have to know implicitly who is a member of the relevant Aboriginal community and who is not. Likewise, a member of the community should not have to prove their membership of that community when they come into contact with a Fisheries Officer in the field. In other words, fisheries management arrangements need to include some sort of mechanism for issuing approved gear tags or permits or similar mechanisms to make the fishing activities easily identifiable.

Although these principles are simple statements, they have been able to successfully drive the development of management arrangements. A balance between these two principles has been able to be found so that both individual fishing rights (such as daily bag limits) and collective fishing rights (such as community catch limits and cultural camp limits) can be managed.

For example, on the basis of these principles, arrangements have been formulated so that individuals may continue to take the same daily bag

and boat limits that apply to recreational fishers without any further regulation. At the same time however, annual community catch for cultural purposes (over and above individual daily limits) may be taken subject to management requirements. These requirements include providing a report to PIRSA Fisheries prior to fishing, issuing approved identification permits to those members undertaking the fishing on the community's behalf (an internal community process) and a requirement to submit catch and effort information.

Another aspect of the negotiations that has reinforced the link between allocation of access to fisheries resources and management of that access is the issue of how to establish arrangements for setting catch limits into the future. As with all fisheries management, a degree of flexibility needs to be incorporated into the access arrangements so that management can remain responsive to change. In particular, catch levels need to be able to be adjusted over time. However, some certainty is also required because the Aboriginal community needs to be assured of minimum levels of access and the other sectors need to be assured that their access will not be diminished over time.

The task of balancing certainty against flexibility is one of the fundamental challenges of fisheries management, and in South Australia the same types of mechanisms have been used to address these issues in the development of indigenous fishing management plans, as they have for other fisheries management situations. For example, to address these competing demands, the management plan for the fishery needs to establish firm decision-making processes that clarify what factors will be taken into account when setting catch and effort levels and specify who will be involved in that decision-making process.

Specifically, it is proposed that community catches (those over and above individual daily limits) will be determined on an annual basis. The considerations to be taken into account and balanced against each other are clearly specified. These include the biological status of the relevant stocks, the needs of the Aboriginal community and the equitable distribution of any increases or decreases in total catch across all sectors. Furthermore, the decision-maker (Minister or Director of Fisheries) must collaborate with the Aboriginal community and the commercial fishing industry when determining annual catch levels.

Conclusion

Using the ILUA process to negotiate cultural fishing claims allows local issues to drive the development of local management plans. This approach focuses negotiation on practical issues rather than encouraging parties to take entrenched positions to protect them from the unknown. This means that negotiations can become problem-solving forums rather than battlegrounds. This approach also maximises the likelihood that cultural fishing access arrangements, once agreed, will receive greater acceptance by local regional communities and other user groups. The process has also led to the robust consideration of fisheries management implications of integrating cultural fishing with other fishing sectors.

The negotiation process provides the opportunity to make agreements about the use of fisheries resources in the future. This offers better long-term outcomes for fisheries resources and user group interests than adversarial litigation processes. The proposed new fisheries legislation contains mechanisms for formalising these long-term arrangements and involving Aboriginal communities in fisheries management decision-making.