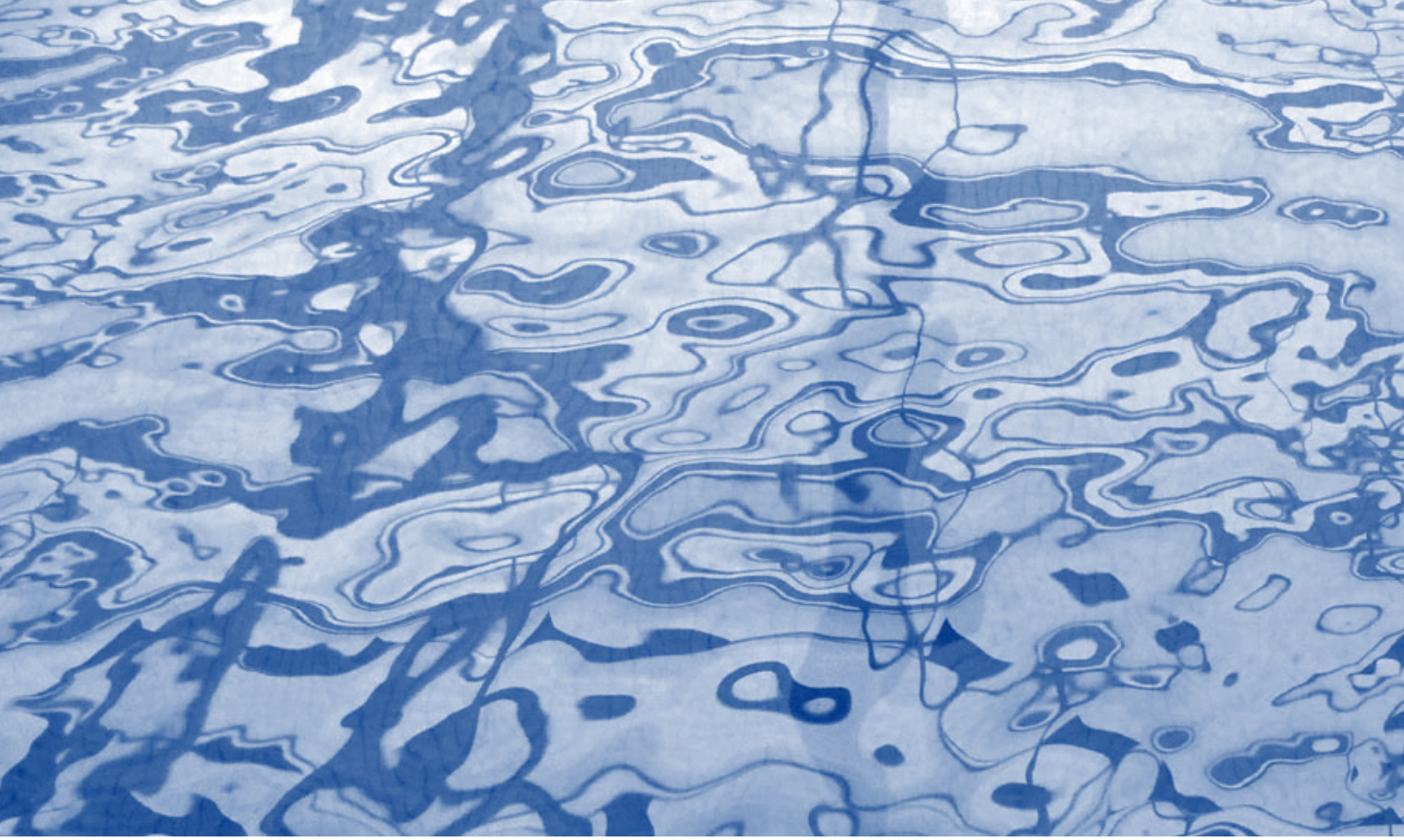
South Australia's ILUA process

South Australia's ilua process – an approach to allocation



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Abstract

South Australia's fishing industry bodies have endorsed the Indigenous Land Use Agreement (ILUA) process to establish traditional/cultural fishing access within a framework of sustainability. The ILUA process is based upon a cooperative model for developing a framework for negotiation between native title claimants, industry and government. The ILUA process has established agreed key principles for all parties under a statewide template which is then developed for each claim as a basis to establish a specific fishing ILUA. The process of negotiation at a local level involved direct involvement of representatives of both the Aboriginal group and the local fishers to ensure that the outcomes fit local conditions and also to ensure that they have a greater level of endorsement and build stronger relationships between the sectors of the community. South Australia will have an agreed statewide template by December 2005 and will have largely completed the first local level negotiations (and the subsequent ILUA) by approximately March 2006. The first specific ILUA negotiation has seen a clear delineation between commercial, cultural and recreational fishing that makes the status of participants clear to the Aboriginal community and its members, as well as the broader community. The South Australian model of negotiated ILUAs has seen a level of involvement beyond that traditionally experienced in native title matters and can bring significant benefits to Aboriginal communities, as well as the fishing industry and government.

Acknowledgements

The success of the ILUA based approach in South Australia has been due to a number of key individuals and bodies. I take this opportunity to thank Parry Agius, Executive Officer, ALRM Native Title Unit, Peter Hall, Principal Negotiator, ILUA Negotiation Team, Attorney General's Department, South Australia, Will Zacharin, Director of Fisheries Policy, PIRSA Fisheries, South Australia and Maia Ablett, Commonwealth Attorney General's Department, Legal Assistance Branch and their staff. Finally to have been able to move into an environment that has lead to stronger relationships that supports Aboriginal aspirations, I thank my staff and the industry for taking the decision to support a different approach to issues of indigenous access and native title.

Why an ILUA based approach?

The South Australian Government has sought to take an alternative approach to litigation for resolution of native title interests. This approach has offered outcomes for Aboriginal interests and industry through certainty and security for all parties. The state government initiated its Indigenous Land Use Agreement (ILUA) based approach in 1999 to facilitate negotiated outcomes between peak bodies and ultimately the claimant body and the interested / affected enterprise(s).

The statewide ILUA "template" approach was developed for the mining sector to assist exploration and has been further developed to assist pastoralists to give certainty over issues for traditional access.

The fishing industry in South Australia, through the South Australian Fishing Industry Council (SAFIC), first recognised the need to build a relationship with Aboriginal communities by involving the Aboriginal Legal Rights Movement (ALRM) - the state's peak indigenous representative body, in an advisory committee established in 2000. The building of a relationship with ALRM was seen as important by SAFIC to assist in identify future issues for the industry.

What does an ILUA based approach offer?

The principles for sharing access effectively relies upon a number of key considerations that the ILUA based approach offers, these include a negotiation process; clearly defined users; and willing partners.

A negotiation process

Traditional involvement in fisheries management has seen industry's opinions and views compromised by the philosophy that says advisory committees and management committees should be based upon a "consultative" approach. This consultative approach seeks, but often fails to achieve, "consensus" between competing user groups and does not bind agencies to comply with agreed arrangements. This management approach is endemic within fisheries institutions in Australia and represents the classic command and control approach of bureaucracies.

The ILUA approach taken by the state government through the Office of the Attorney General seeks to achieve certainty and lasting outcomes that meet the needs of all parties. It is unfortunate that the underlying threat of litigation is required to encourage governments to engage users in a process that takes the views of all parties seriously and requires those parties to be engaged in working towards the best outcomes for them and other users and in the case of fisheries the fish stocks.

Clearly defines users

Fisheries management in South Australia has still not developed to the extent that the users, other than commercial fishers, are able to be accurately identified, measured and controlled in their level of effort, catch and impact on our fishery resources.

To the fishing industry, the ILUA process provides a clearly defined user group which can be effectively monitored and engage in self management of their access, within agreed limits, under arrangements that recognise their role and will reward their involvement in effectively managing their agreed share.

A WILLING PARTNER

Fisheries management is largely undertaken in an environment of competition and at times confrontation. The ILUA process effectively achieves lasting outcomes as it requires all parties to engage in an environment of acknowledgement of the rights of all users and the need to reach agreement that will be binding, thus eliminating the politicisation of the process.

Co-management is an over used term in fisheries that often fails to achieve co-operation between the various parties. The ILUA process truly delivers an environment of co-operation.

ILUA PROCESS

Main table

When the fishing industry entered the ILUA process, it was based upon a key forum for the peak bodies – Aboriginal, industry and government. This body is referred to as the "main table".

The main table is supported by a series of key sector or issue specific committees refereed to as "side tables". The forum the fishing industry works through is referred to as the Fisheries and Aquaculture Side Table (FAST).

Each side table provides the operational framework for the key stakeholders to identify the issues and develop strategies for managing those issues that will facilitate agreement making.

Fisheries & Aquaculture Side Table (FAST)

The FAST can be comprised of:

- independent chair/facilitator;
- support services (provided by government);
- peak fishing body representatives (peak body officers and native title officers);
- industry representatives;
- industry legal representatives;
- peak Aboriginal body representatives (ALRM);
- Aboriginal representatives
- Aboriginal legal representatives;
- state government representatives (fisheries agency);
- state government legal representatives (Attorney General's office)

The FAST has been involved in identifying and developing the key issue to all parties and developing an agreed understanding of the principles that define

the issues. The key issues were then presented in a discussion document that was taken to industry, through a series of regional port meetings, to seek input and advice prior to entering into a final agreed "FAST template" that sets the framework of any subsequent claim specific negotiation.

The concept of agreement of key principles seeks to reduce the need for extended negotiation on a claim by claim basis. It also provides a framework for each negotiation to guide it on the local and regional issues that should be addressed to meet the needs of all parties.

NIFTWG

Subsequent to the Seafood Directions Conference in 2002 the national industry body, the Australian Seafood Industry Council (ASIC), engaged the indigenous community, the National Native Title Tribunal (NNTT) the statutory body responsible for facilitating and endorsing ILUAs, and governments nationally in establishing a set of core principles that would influence the seafood industry's engagement with Aboriginal communities on issues of native title.

The National Indigenous Fishing Technical Working Group (NIFTWG) was established in October 2003 incorporating peak bodies for fishing interests. The NIFTWG principles where they had not already been captured in negotiations have been integrated into the development of a number of issues within the South Australian template process.

The NIFTWG principles represent a commitment by stakeholders to:

- recognise customary fishing as a sector in its own right;
- integrate and protect customary fishing within the fisheries management framework;
- provide assistance strategies to engage indigenous people in fisheries related businesses; and
- expedite processes to increase indigenous involvement in fisheries management and vocational training.

Industry engagement

The FAST provided a forum for representatives to develop key issues and to put a perspective to them that would enable industry and indigenous parties to understand those issues and the principles behind them.

To facilitate industry recognition of the key issues and principles for future negotiations an "Issues for consultation fishing & aquaculture" booklet was produced and provided to all commercial licence holders and marine based aquaculture operators.

This booklet was followed by a comprehensive series of port meetings around the state that presented the key issues and provided for discussion to clarify issues and address concerns that fishers may have had. Fisher input was sought prior to finalisation and endorsement of the issues and principles in the template.

The agreed position on the key issues now forms the basis of the template ILUA that will be used to guide each specific ILUA negotiation. By each party having clarified and sought agreement on key issues it is expected that negotiations will be quicker and all parties will come to the negotiation in a position to better understanding the needs and expectations of other stakeholders.

Key ILUA issues

- recognition ;
- traditional fishing – definition;
- traditional fishing – quantum;
- traditional fishing - methods;
- traditional fishing – who;
- traditional fishing - protection of culturally important areas;
- traditional fishing - management of traditional fishing;
- traditional fishing – species;
- marine protected areas;
- new and developing fisheries;
- commercial access – aquaculture;
- current legal parameters;
- aboriginal aspirations;
- commercial access - wild catch;
- current legal parameters;
- Aboriginal aspirations;
- commercial access - charter boat licences;
- current legal parameters;
- aboriginal aspirations;
- partnerships;
- sustainability;
- resolution of native title;
- consent determination;
- intertidal zones; and
- draft indigenous traditional fishing management plan.

Claim / area agreements

Under the FAST ILUA framework there will be a number of specific agreements based upon individual claims for determination of native title or for combined regional claims that seek to bring a regional cross community/ claim approach to resolution of Aboriginal access to fisheries resources.

The first of the local ILUA negotiations has been underway for over 18 months and covers the waters adjacent to Yorke Peninsula in South Australia. The ILUA is now in a draft form and is expected to be signed before June 2006. The ILUA process has been effective in working towards resolution of the needs of the Narungga Community within a framework of resource sustainability.

This negotiation has seen local Aboriginal representatives sitting together with local commercial fishers while they work through practical outcomes to secure indigenous access.

Management Plans

In addition to the registered ILUA the arrangements for fishery access will also be prescribed in a fishery management plan that will define the operational arrangements negotiated between the parties. The plan could contain provisions for special access arrangements to areas or fishing devices that other stakeholders may not otherwise have access to due to temporal or spatial closures.

These management plans will be recognised within the new fisheries legislation expected to be in place in 2006. Each management plan will then become subordinate legislation bringing with it the relevant statutory protections.

Certainty

An ILUA is ultimately registered by the Federal Court through the NNTT, making it a binding agreement.

There is agreement to periodically review the management arrangements and modify them to meet any future changes negotiated between the stakeholders in the agreement.

Together with the legislative arrangements provided for by management plans there will be a greater level of certainty than is currently experienced by commercial fishers in South Australia.

A core component of the template ILUA will be the requirement to amend any native title claim to remove the threat of litigation for resolution of rights that are the subject of the ILUA.

ILUA ISSUES

The nature of the issues identified under the ILUA approach and the establishment of core principles that support an ILUA means that there will be significant progress in addressing many of the misconceptions that exist over issues of "native title".

RECOGNITION

One central issue to indigenous people is the recognition of how they have traditionally viewed their relationship to the land and water – their heritage. By establishing recognition statements from each of the key stakeholders the ILUA will seek to put each stakeholder's aspirations and interests into perspective with those of the other parties.

TRADITIONAL FISHING

While Australian law has been clear on what traditional fishing cannot be, many in the community and within the fishing industry have not understood this. The ILUA process has been instrumental in giving peak bodies the chance to again address the notion of traditional fishing and put it into a context that makes it clear it is not a threat to commercial operations.

NEW AND DEVELOPING FISHERIES

Other than entry to established fisheries, one area that provides potential for indigenous communities within the ILUA process is for the development of new fisheries by indigenous groups or enterprises.

Commercial access - fisheries & aquaculture

The harvesting and production of seafood for commercial purposes can provide opportunities for many regional groups with limited commercial and industrial potential. Clearly this access must be part of the normal commercial arrangement with its associated constraints on harvesting with established sustainability guidelines.

Entry must occur within the established commercial arrangements in order not to undermine existing rights and interests contained in management arrangements.

Partnerships

The development of partnerships between indigenous communities and local fishing communities is seem as an important outcome of the ILUA process. The ability for new Aboriginal commercial fishing enterprises to obtain mentoring and training from local fishers to enhance the skills necessary to undertake commercial fishing within a best practice approach is contained as a key obligation on industry.

Sustainability

Any fishery related decision needs to be made in the context of stock sustainability. The creation of any new form of fishing right or interest brings with it a need to redefine established shares in a resource.

In the case of the indigenous fisheries that will be created under ILUAs it was seen as critical that any re-allocation of resources must come from the existing arrangements within the recreational share.

Commercial allocations should remain as they are whether or not there are commercial interests within Aboriginal communities. Any commercial access must be within the agreed commercial management framework and subject to the same opportunities for adjustment.

Intertidal zones

The intertidal zone and near shore rocky reefs have been subject to heavy non commercial fishing pressure in many areas and so have been subject to fishery management arrangements limiting access and harvesting.

The ILUA process has recognised the potential for some key species to be accessed from the intertidal zone for traditional cultural purposes.

Allocation

In South Australia there is one component of the stock exploitation triangle that is measured and monitored – the commercial fisheries.

The determination of ILUAs will bring a further level of certainty into the fishery management process with the commercial industry and progressively indigenous fisheries being undertaken in an environment of catch reporting.

While the indigenous sector's catches are currently contained within the unreported recreational sector's catch the recognition of their access will add to better management information.

A discrete allocation or share for the indigenous sector will enhance their security and ensure better recognition of their rights.

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