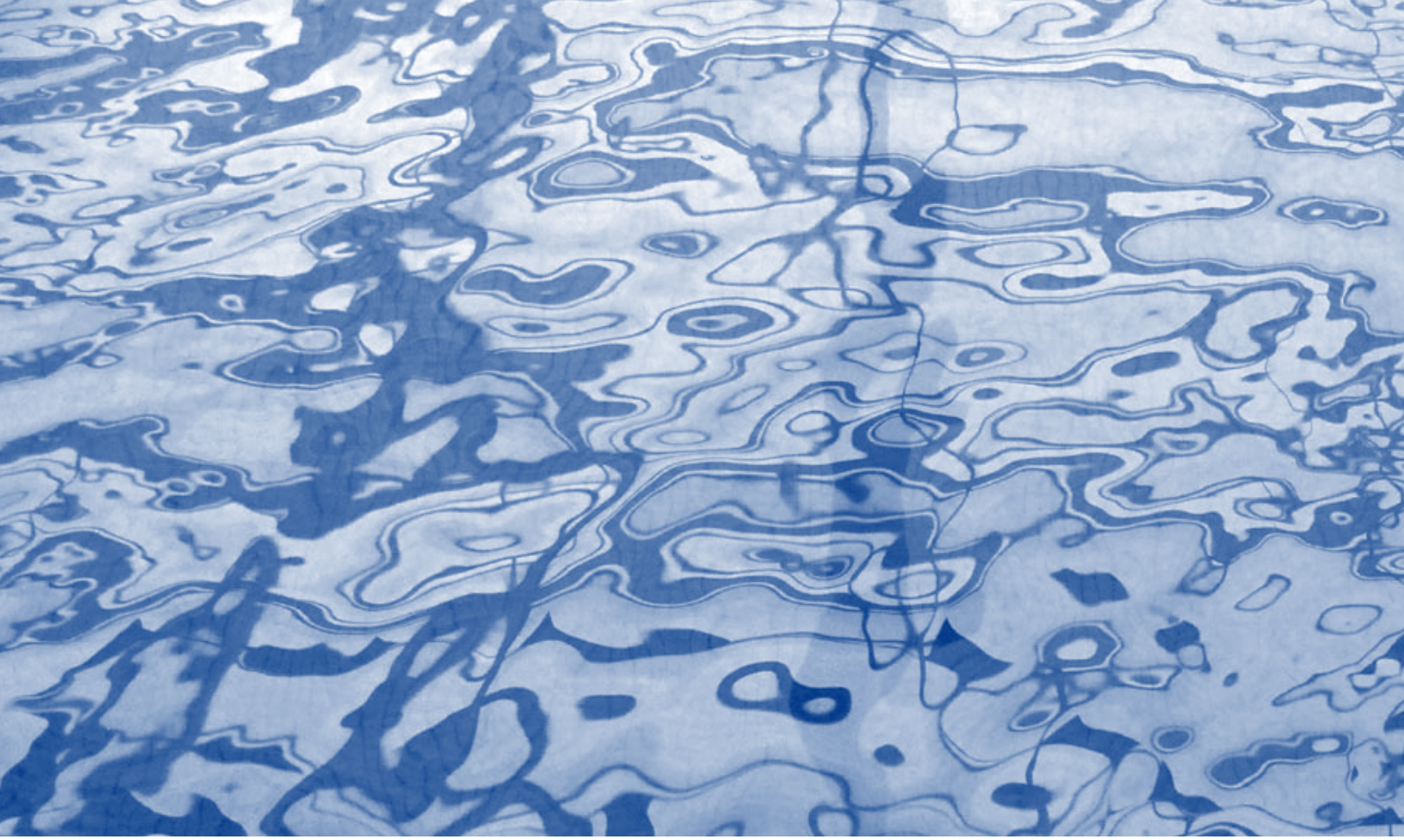

Indigenous Negotiations in South Australia

Sharing the Process: Statewide Fishing and Aquaculture Indigenous Land Use Agreement Negotiations in South Australia

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Abstract

This paper endeavours to outline the experiences of the Aboriginal Legal Rights Movement – Native Title Unit's (ALRM-NTU) involvement in unique Statewide Indigenous Land Use Agreement negotiations with the South Australian Fishing Industry Council, Seafood Council SA and the South Australian Government.

The statewide negotiation process, in relation to fishing and aquaculture, took place under the banner of the Fishing and Aquaculture Side Table (FAST). The FAST was established in South Australia as part of a wider statewide framework developed to bring stakeholder groups together in an attempt to resolve native title matters by negotiation rather than litigation. In particular the FAST was set up to: (1) Develop a statewide fishing and aquaculture Indigenous Land Use Agreement template; and (2) Assist in the identification of issues for each party involved in negotiations.

From ALRM-NTU's perspective it is argued that through cooperation the peak bodies were able to work through a variety of complex, emotive and procedural issues to produce 'documents for consultation' that all of the parties involved could use as a starting point to navigate their way through fishing negotiations at both a statewide and local level. These documents, and the consequent consultation, led to an agreement in principle to a fishing and aquaculture Indigenous Land Use Agreement template.

Through sharing the FAST process all parties were able to arrive at an alternative arrangement for fisheries management reflective of a more equitable division of the fishing resource among various sectors. Among other things this arrangement will facilitate Aboriginal access to sea and inland water resources as well as promote sustainable management of fishing resources in a manner that provides certainty and an awareness of the issues for all users of the resource. It is hoped that by presenting this paper other stakeholders around the country may discover something of value that they can apply to their own situations.

Introduction

Aboriginal South Australians assert that the recognition of the salt and freshwater components of their territories is 'crucial to the integrity of their relationships with country' (Jackson 2004: 220). This is revealed by the fact that many of the native title claims in South Australia extend over salt and freshwater areas (e.g., Barngarla Native Title Claim, Nukunu Native Title Claim and Ngarrindjeri and Others Native Title Claim – see below for more examples).[1]

Aboriginal South Australians were the first peoples of South Australia to 'manage', 'earn their livelihoods', 'congregate and recreate' on South Australia's waters (see for example Morgan *et al.* 2004: 3). Importantly, it must also be recognised that Aboriginal South Australians were the first peoples to have a law and spirituality intimately connected to those waters. Aboriginal rights to such waters can also be understood to be 'part of a holistic system of land and water management' (Morgan *et al.* 2004: 7). Indeed, as Smyth (1997) notes 'Indigenous cultures view the ocean as an extension of the land, with all the possibilities of identity, ownership, private use rights and management responsibilities that apply to land.'[2] This assertion differs from the general Australian community which regards 'the sea as a common domain, open to all, to be managed by governments in cooperation with relevant stakeholders on behalf of the whole community' (Smyth 1997). Unfortunately European systems of land and water management, and the accompanying environmental impact, have often negatively affected Aboriginal communities (see Morgan *et al.* 2004: 7). Indeed, excluding the new draft Fisheries Management Bill (which is currently in the public consultation phase[3], South Australian fisheries legislation has not included any recognition of the rights of Aboriginal people to take and use aquatic resources for their cultural and

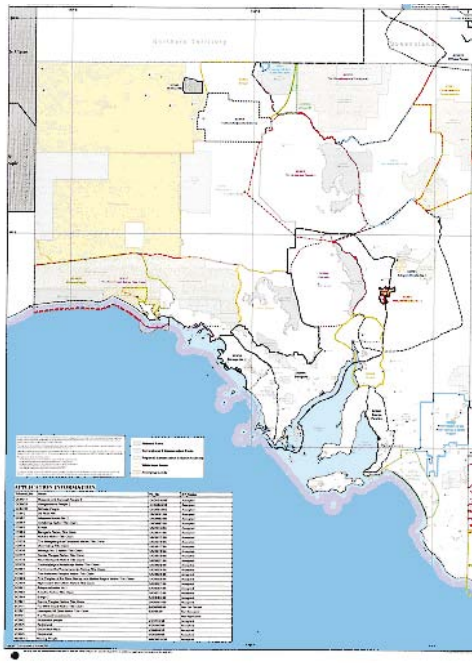
1 In addition, it must also be recognised that there are Aboriginal groups in South Australia that have not lodged claims, but nevertheless are pursuing ILUA outcomes as they relate to waters – e.g., Narungga [on Yorke Peninsula].

2 See Smyth (1997) for a more in-depth discussion of Indigenous relationships to the ocean.

3 See http://www.pir.sa.gov.au/byteserve/fisheries/comm_fishing/fisheries_management_bill_2005.pdf.

traditional needs. Despite such hurdles Aboriginal South Australians have had and continue to have complex relationships with aquatic environments which have nurtured them for thousands of years.

Figure 1. Map of South Australia, showing native title claims as per the Federal Court 30 September 2005. Source: Geospatial Analysis & Mapping, NNTT (2005). © Commonwealth of Australia, reproduced by permission.



Due to the issues outlined above the Aboriginal Legal Rights Movement – Native Title Unit (ALRM-NTU), as the native title representative body for South Australia, has had the important goal of achieving a means by which the traditional fishing rights of Aboriginal people can be recognised and protected. As such, ALRM-NTU has endeavoured to secure South Australian Aboriginal communities with an appropriate starting point for their local negotiations relating to salt and freshwater areas, particularly in relation to fishing and aquaculture, by participating in unique statewide negotiations with the South Australian Fishing Industry Council, Seafood Council SA and the South Australian Government. These statewide negotiations took place under the banner of the Fishing and Aquaculture Side Table (FAST).

The statewide process and the fishing and aquaculture side table (FAST)

The statewide negotiation process was initiated in 1999 following discussions between representatives from the ALRM-NTU, state government, South Australian Farmers Federation (SAFF), and South Australian Chamber of Mines and Energy (SACOME). The forum for these 'peak body' discussions became known as the main table, which has since provided leadership and management responsibility to the process (Agius *et al.* 2004). For ALRM-NTU the statewide negotiations represented an avenue to rebuild the state, with native title built in (Agius *et al.* 2004), while for other parties the process offered a means of addressing the uncertainty surrounding native title. These motivations are reflected in the overarching aim of the process: "to achieve certainty over access to and sustainable use of land, water and resources through negotiated recognition and just settlement" (Dixon *et al.* 2005: 2).

While the main table forum plays a lead role in the statewide process, there are other key structural elements. Several smaller issue-based, peak body working groups have been established known as side tables. The side tables, such as the FAST, sit within and remain accountable to the main table and are responsible for identifying and developing issues and establishing template ILUAs spell out first time (Dixon *et al.* 2005). Substantive issue development also occurs in a collaborative manner through local level native title claim group, issue-specific ILUA negotiations, the first round of which are known as pilot negotiations. In addition to the peak body structures, there is also a representative forum for Aboriginal claimants known as the statewide South Australian Congress of Native Title Management Committees (congress). Congress was formed in 2000 and is a body comprising of representatives from each of native title claim groups across the state (Morrison 2001; Jenkin 2006;). While the potential role of congress in the process has not yet been fully realised due to funding constraints and various complexities (e.g., finalising appropriate structures and processes), importantly in 2000 congress endorsed the statewide process and in 2002 approved the initial pilot negotiations (Jenkin 2006).

All parties to the statewide process participate in discussions and negotiations with mutual respect, understanding, trust and good faith. By determining the 'what', 'when', 'where' and 'how', through an agreed facilitator, the parties are able to own the process. Indeed, relationship building is also emphasised across all elements of the process. ALRM-NTU's involvement in the process has been further guided by a number of principles that include: empowering and positioning Aboriginal claimants as principals in the negotiations, addressing all process matters (substantive, emotional, procedural)[4], achieving fairness in agreement making, and realising outcomes that are sustainable and recognise inter-generational equity (Agius *et al.* 2004).

Initially the statewide process was focussed on progressing native title matters in relation to the areas of mineral exploration, Aboriginal heritage, local government and pastoral lands. However, as a result of sea/inland water issues arising at the local level through pilot negotiations, peak body representatives from the fishing industry accepted an invitation in late 2002 to join the statewide process and sit at the main table. With the South Australian Fishing Industry Council (SAFIC) and the Seafood Council SA involved, the statewide negotiations moved to consider sea and fishing rights under the banner of the Fishing and Aquaculture Side Table (FAST).

Thus, the FAST was established in South Australia as part of a wider statewide framework developed to bring peak body stakeholder groups together in an attempt to resolve native title matters by negotiation rather than litigation. In particular the FAST was set up to: (1) Develop a statewide fishing and aquaculture Indigenous Land Use Agreement template; and (2) Assist in the identification of issues for each party involved in negotiations. In this regard it was envisioned that FAST would essentially provide support to 'on the ground' local level negotiations – as has been the case with recent Narungga pilot fishing negotiations – whilst also being informed by such negotiations in efforts to improve the fishing template.

In relation to FAST and advancing the interests of claimants over sea and inland waters ALRM-NTU facilitated a Congress Indigenous Fishing Reference Group. This group was comprised of nominated congress members and was established to provide input into the development of fishing and aquaculture issues at a statewide level. Some members of this group attended a two-day workshop (at which other stakeholders were also present) on traditional and commercial aspects of Aboriginal fishing (see Jenkin 2006). Members of the group were also sent correspondence during the FAST discussions. In this manner it can be argued that a 'participatory approach' has been attempted – i.e., through local level input as well as congress consultation.

4 See Williams (2002) for further discussion of these process needs and what is termed the 'Satisfaction Triangle'.

Negotiation versus litigation

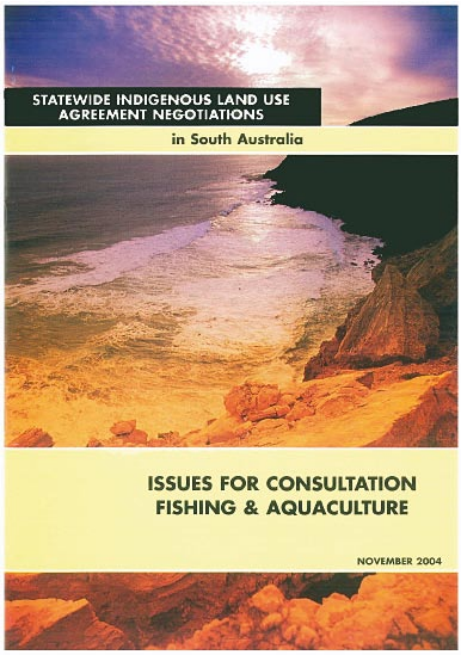
The ALRM-NTU believes that attempting to resolve native title matters by negotiation rather than litigation allows 'new sorts of relationships' to develop, 'cooperative exploration of a wide range of issues' to take place and Aboriginal self-determination to emerge (Agius *et al*. 2004: 203)[5]. Much can be achieved simply by sitting down and listening to other peoples' perspectives in a well-structured environment. Indeed, statewide ILUA negotiation processes can allow parties to learn of each other's fears, frustrations and aspirations in a manner that can be conducive to finding avenues for dealing with such emotions. Such processes are enabled through a number of factors – e.g., relationship building, a non-adversarial environment, independent chairing, ownership of the process by the parties, bi-partisan support, funding, research and capacity building (see for example Dixon *et al*. 2005). In this regard statewide ILUA processes are seen as less emotionally (as well as financially and culturally) costly for Aboriginal people in comparison to litigation – whilst still attempting to bring about long-term, equitable and sustainable outcomes.

From ALRM-NTU's perspective it is argued that through cooperation the peak bodies were able to work through a variety of complex, emotive and procedural issues to produce 'documents for consultation' (e.g., 'Issues for Consultation Fishing and Aquaculture' and 'Indigenous Traditional Fishing Management Plan') that all of the parties involved could use as a starting point to navigate their way through fishing negotiations at both a statewide and local level (e.g., Narungga). Indeed, the FAST discussions (like other side table discussions) have led to 'considerable advances in the understanding of all parties over the actual issues for negotiation, over which issues can be readily negotiated through local native title group processes' (Agius *et al*. 2004: 213).

5 See also the ATNS Project database at http://atns.net.au/biogs/A001072b.htm for more information.

Coming to the arrangement of releasing the 'documents for consultation' (Figure 2) in and of itself required the parties to agree to a number of procedural issues relating to the timing and nature of consultations, the level of information to be included in the booklets and the way in which all parties would deal with the media. Although at times seemingly time-consuming these procedural issues allowed all parties to feel comfortable, in control and ready to work with their own constituents in an appropriate manner. In this way the parties were able to direct themselves without the imposition of an external force controlling the proceedings.

Figure 2. Cover page for one of the 'documents for consultation' booklets.



Outcomes

Having undertaken consultation with their constituents (utilising the 'documents for consultation'), the peak bodies have agreed in principle to a fishing and aquaculture ILUA template – subject to drafting considerations. Attached to the template is a cultural fishing management plan. It is envisaged that such management plans will be official statutory plans of management for that particular Aboriginal fishery. In this way, the State of South Australia will ensure that the resource is managed in a manner that takes into account the impact by all users on the fishing resource – Aboriginal and non-Aboriginal – by using existing state structures for fisheries management.

One of the important realisations of the FAST was the fact that whilst Aboriginal people want to negotiate traditional rights of access, use and management of aquatic resources they also want to be involved in and benefit from the commercial use of such resources (including activities such as aquaculture, employment and involvement in new and developing fisheries) (see also Jackson 2004: 220 for similar discussions from a Northern Territory context).

Many discussions were had at the FAST about what should be the suggested best approach for dealing with the two different aspects of access to aquatic resources. Commercial versus traditional discussions were a particularly emotive part of the FAST discussions. This was in part due to concerns from the fishing industry in relation to compliance in South Australian Aboriginal communities. It is understood that Aboriginal communities around Australia are also facing compliance issues. In the end it was decided that it should be recommended that traditional and commercial access be worked through separately in order to reduce confusion and improve management and compliance – although it is thought that they should be included in the one ILUA[6]. Indeed, management of aquatic resources, particularly in relation to

6 In this regard the 'Principles Communiqué on Indigenous Fishing' put together by the National Indigenous Fishing Technical Working Group (NIFTWG) was a useful resource – see http://www.nntt.gov.au/publications/data/files/Principles%20communique%202005.pdf.

environmental sustainability, remained at the forefront of the minds of all FAST members (in this regard suspension and termination provisions were also discussed as part of the ILUA in the event that there were ongoing compliance issues). The FAST process was able to effectively deal with such issues in an orderly manner.

Topics of consideration in relation to traditional fishing included: fish species, quantum, method of take, who would be able to exercise the rights negotiated, where rights could be exercised, areas of cultural importance and how future acts could be dealt with. Working through such a variety of issues was at times a complex and confusing task, however it was necessary for the parties to grapple with the extent of the issues that may arise at the local level and to consider the potential ramifications. It was acknowledged in the end, however, that issues/details such as these can and must only be resolved at local level negotiations. The FAST has, however, set the stage for Aboriginal groups to be able to 'show case' their traditions and customs in an environment of understanding and recognition.

Similarly, the potential for resolution of a claim, in terms of withdrawal of sea or inland water boundaries or certain rights claimed will also depend on local level factors such as whether the claim group has filed a native title determination application, and the prospect of success of the particular native title claim group in achieving a determination of native title by consent or otherwise.

Another outcome of the FAST concerning traditional fishing relates to current prohibitions that negatively impact Aboriginal people. For example, at present there is a blanket prohibition on the taking of benthic marine organisms (e.g., shellfish) from the intertidal zone. Where native title groups can establish that such an activity is consistent with traditional purposes, the ILUA negotiation process provides a means by which these rights can be legitimised and protected. It is hoped that this will serve to remove some of the barriers currently faced by Aboriginal people in practicing their law and culture.

Due to current commercial fisheries management arrangements, and the cost of entering the market, opportunities for Aboriginal participation in the South Australian commercial fishing industry are extremely limited. However, as a result of FAST, it is hoped that local level negotiations between claim groups and peak bodies will result in opportunities for Aboriginal people to re-enter the South Australian commercial fishing industry. The opportunity for economic development for Aboriginal communities is therefore seen as a major focus for native title claim groups entering into Indigenous Land Use Agreements for fishing and aquaculture.

Issues to consider

It is important to realise that side tables, like the FAST, are not 'forums for negotiations about agreements or outcomes that will have impacts on native title rights'. This reflects ALRM-NTU's commitment 'not to intrude on native title claimants' own responsibilities and their prerogative to negotiate about native title' (Agius *et al*. 2004: 213-214). Indeed, as Morrison (2001: vi) notes this is because 'in accordance with Aboriginal customary law, only Aboriginal people themselves, whose native title rights are unique within each claim, can talk authoritatively and make decisions about their traditional country.'

From an ALRM-NTU perspective it was important to impart to the other parties potential Aboriginal interests in relation to understanding and managing Aboriginal values associated with aquatic resources – also in reference to environmental sustainability (see also English 2002: 5 for similar discussions on the importance of incorporating such values). The FAST represents just the beginning of a commitment to cross-cultural planning and investigation that has the potential to shape the future management of South Australia's fisheries[7].

7 The importance of ILUAs in this context is currently reflected in the new draft Fisheries Management Bill (which is currently in the public consultation phase), Division 3 Indigenous Cultural Fishing – see http://www.pir.sa.gov.au/byteserve/fisheries/comm_fishing/fisheries_management_bill_2005.pdf.

Conclusions

Through sharing the FAST process all parties were able to arrive at an alternative arrangement for fisheries management reflective of a more equitable division of the fishing resource among various sectors. Among other things this arrangement will facilitate Aboriginal access to sea and inland water resources as well as promote sustainable management of fishing resources in a manner that provides certainty for all users of the resource. Furthermore, the FAST process has set up relationships between industry and Aboriginal people which will continue into the future through local level negotiations and it is anticipated that these negotiations will allow new and meaningful relationships to develop.

It is hoped that by presenting this paper other stakeholders around the country may discover something of value that they can apply to their own situations. Indeed, whilst 'we do not claim that the structures for negotiations that have been developed in South Australia' should necessarily be copied elsewhere we do believe that the 'participatory approach has ensured a level of control of the process' by Aboriginal people (Agius *et al.* 2004: 218).

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