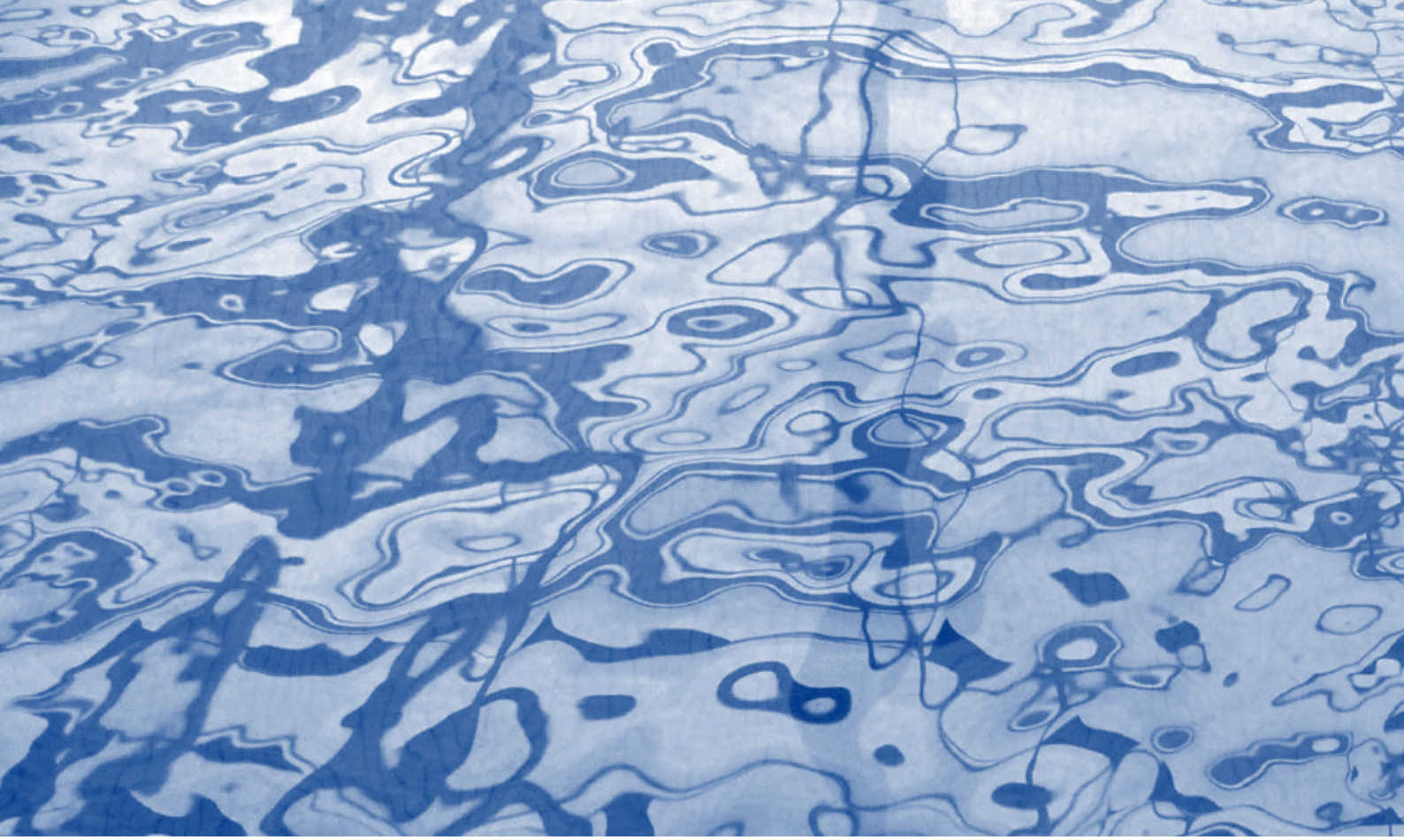
Running head: Indigenous fish allocations in WA

Allocating fish resources to indigenous Western Australians



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Allocating fish resources to indigenous Western Australians

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Table of contents

Abstract	v
Introduction	1
Western australia's aboriginal fishing strategy	3
Integrated fisheries management	5
Setting a policy framework for customary fishing allocations in western Australia	7
Issues for future customary fishing allocations	11
Conclusions	15
References	17
Appendix 1	19

Abstract

Unlike countries such as Canada and New Zealand, Australia has not been required to address allocations of fish resources to indigenous peoples as a result of legal decisions or treaties. However, Western Australia is now compelled to address allocations to all sectors, including its customary fishing sector, to meet the challenges associated with Integrated Fisheries Management (IFM). IFM is a shift from sectoral-based fisheries management to a framework that manages the aggregate effects of fishing.

Western Australia's Aboriginal Fishing Strategy (AFS) has been developed in parallel with IFM and provides for comprehensive recognition and inclusion of indigenous people in the protection, management and use of fish resources. The AFS gives specific policy focus to the recognition and inclusion of customary fishing within the IFM framework. Key focus areas are:

- defining and managing customary fishing – without which allocations for customary fishing are not possible.
- assigning priority to customary fishing – within any allocation framework adopted in WA.
- capacity and process for indigenous people to engage in fisheries management – and particularly IFM.
- allocating commercial fishing access to indigenous people – by utilising market processes.

Initial customary fishing allocations in Western Australia have been approached with significant uncertainty. The AFS is yet to be implemented and as a result there is not yet clarity around what practically constitutes customary fishing, limited capacity within the indigenous community to engage in IFM, and very little information on customary fishing catch. Implementation of the AFS will need to remain focussed on these challenges if IFM is to succeed.

Introduction

Context

Countries such as Canada and New Zealand have addressed indigenous allocation issues in response to legal decisions or treaties[1]. Australia, however, does not have a treaty and has not had a significant legal decision requiring fisheries regulators to allocate fish resources to indigenous people. Australia has a Native Title Act (1993) (Commonwealth) that has raised the profile of indigenous people in relation to land and sea management and resulted in several native title decisions relating to the sea (e.g. the Croker Island case[2]). However, none of these decisions to date have required state fisheries management agencies to significantly change their operations, management or policy development processes. Regardless, many state / territory fisheries agencies[3] have developed, or are in the process of developing, specific programs to give recognition to indigenous people in the management of fisheries. These include indigenous fisheries rangers to assist with fisheries compliance, indigenous aquaculture initiatives to promote economic development, and options for recognising customary fishing activity.

At the national level, a set of principles for indigenous fishing in Australia has been formally endorsed by the Commonwealth Government, most state and the Northern Territory Governments, peak national indigenous, commercial fishing and recreational fishing bodies. A copy of the National Indigenous Fishing Principles can be found at Appendix 1. These national principles were informed by approaches taken by each of the states / Northern Territory, and most significantly by Western Australia's development of an Aboriginal Fishing Strategy (AFS) and Integrated Fisheries Management (IFM).

1 For example, in Canada s. 35(1) of the Constitution Act 1982; R v. Sparrow; R v. Marshall [1999] 3 S.C.R. 456 and in New Zealand as a direct result of the Treaty of Waitangi.
2 Commonwealth of Australia v Yarmirr (2001) 184 ALR 113.
3 In Australia, the states and Northern Territory have jurisdiction for fisheries out to three nautical miles.

Western Australia's Aboriginal Fishing Strategy

In 2000, the Western Australian Department of Fisheries initiated a comprehensive response to ongoing concerns from indigenous people about their involvement in the protection, use and management of fish resources. Government is currently considering the final recommendations of the Aboriginal Fishing Strategy [unpublished] that address:

- recognition and inclusion of customary fishing in fisheries policy and legislation;
- involvement of indigenous people in fisheries management; and
- economic development opportunities in the fishing sector.

The AFS was developed after several years of face-to-face consultation with indigenous communities and organisations, and lengthy engagement with commercial fishing, conservation and recreational fishing interests. A working group, chaired by a retired supreme court judge, developed the AFS recommendations.

Integrated fisheries management

The AFS was developed during a time when fisheries management in Western Australia was moving toward an Integrated Fisheries Management (IFM) framework. IFM is a shift from sectoral-based fisheries management to a framework that manages the aggregate effects of fishing. This approach requires decisions to be made about setting broad allocations between groups within the sustainable catch limits determined for each fishery, and strategies to overcome temporal and spatial competition at a local/regional level.

A key focus of the AFS was to ensure future allocations through the IFM process were made in an environment where customary fishing was recognised and protected.

Setting a policy framework for customary fishing allocations in Western Australia

Several key recommendations of the AFS have been developed to ensure indigenous interests are recognised and included in the allocation of fish resources through the IFM process in Western Australia. These are discussed below.

Defining and managing customary fishing

Allocations for customary fishing cannot be made until customary fishing is defined and recognised in fisheries policy and legislation. Current fisheries legislation in Western Australia, the Fish Resources Management Act 1994 (FRMA), states that: "An Aboriginal person is not required to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of the person or his or her family and not for a commercial purpose."

This section of the FRMA was derived from an intent to cater for customary fishing as a subset of recreational fishing. Subject to a contrary determination of native title rights, current Western Australian fisheries legislation otherwise applies all fishing rules to Aboriginal people. The Aboriginal Fishing Strategy recommends that customary fishing applies, within a sustainable fisheries management framework, to persons of Aboriginal descent; fishing in accordance with the traditional law and custom of the area being fished; and fishing for the purpose of satisfying non-commercial personal, domestic, ceremonial, educational or communal needs. It also recommends customary fishing be articulated and clearly separated from other forms of fishing (including recreational fishing) in fisheries legislation and policy. This is to allow for the development of appropriate management arrangements that reflect customary fishing access rights, practices and sustainability requirements. To give effect to this policy shift, several actions including amendments to the FRMA, are proposed.

Once defined, management arrangements can be developed in consultation with indigenous people to ensure customary fishing is undertaken within sustainability parameters, customary fishing rights are protected and customary fishing can be managed within its allocation. The National Principles for Indigenous Fishing are consistent with these recommendations.

Assigning priority to customary fishing allocations

In considering allocations to the customary fishing sector, the question of priority within allocations was addressed by the AFS working group, based on the following rationale:

- customary fishing activity by Aboriginal people is a right expressed in Commonwealth legislation (Native Title Act 1993), which takes priority over state fisheries legislation.

- the right of indigenous people to fish in a customary manner is covered by the International Convention on Civil and Political Rights and the International Convention on Biological Diversity.

- recognition of the continuing importance of fish and fishing to Aboriginal people as a direct source of food, an integral part of many Aboriginal people's culture, a part of the educational process and passing on of information, and spiritual connection to the land and sea.

- the Western Australian Government recognises Aboriginal people as having continuing rights and responsibilities as the first peoples of the state. This includes the continuing practice of customary fishing.

- the Commonwealth Law Reform Commission recommended "As a matter of general principle, Aboriginal traditional fishing should take priority over non-traditional activities, including commercial and recreational activities, where the traditional activities are carried on for subsistence purposes. Once this principle is established the precise allocation is a matter for the appropriate licensing and management authorities acting in consultation with Aboriginal and other user groups (Footnote 4).

It was also recognised that conservation and sustainability principles represent a legitimate limitation on the rights of indigenous people to fish. Based on these considerations, the AFS recommends that customary fishing have priority over other fishing sectors (including commercial and recreational fishing) within any fisheries allocation process in Western Australia. This principle of priority for customary fishing has been recognised by the Western Australian Government and is an adopted principle of IFM.

Making initial customary fishing allocations

The Western Rock Lobster Fishery and the Abalone Fishery are the first two fisheries in Western Australia to be subject to IFM. Allocations for the commercial, recreational and customary fishing sectors are currently being considered for both fisheries.

Although the AFS recommends a policy framework for customary fishing allocations, there is very limited information about what constitutes customary fishing and the quantity of customary fishing catch. As a result, a strategic approach to recommending initial customary fishing allocations for abalone and rock lobster was developed in consultation with indigenous representative organisations. This approach consists of the following:

1. an acknowledgement that customary fishing is an existing activity that is not currently reported or identified. As such it will require a new allocation and not a re-allocation of recreational or commercial catch.

2. an acknowledgment that not all fishing by indigenous people is customary fishing – it may also be recreational fishing. As outlined in the definition, customary fishing only applies in certain circumstances - it is area specific and must be in accordance with traditional law and custom.

3. an indication of take by indigenous people is assumed from the known recreational take multiplied by the proportion of the indigenous population in the area adjacent to the fishery.

4. in recognition of point 2, a percentage of the indigenous take is assumed to be for customary purposes. In the case of rock lobster it was assumed to be 10% and for abalone 25%. These assumptions are based very loosely on anecdotal use and relative accessibility of the fish stocks.

5. the initial allocation may be re-adjusted when further information on customary fishing catch becomes available.

Importantly, while the above process gives an indication of customary take, decisions should be made in the knowledge that:

- if the initial allocation is too high, future adjustments can be made without any impact on recreational, commercial or actual customary fishing allocations. Because customary fishing is an existing activity that is unreported, the initial allocation does not affect initial commercial or recreational allocations. Any initial over-allocation to the customary fishing sector will not be used and simply contribute to the biomass of the fishery; and

- if the initial allocation is set too low, future adjustments will likely result in a need to re-allocate from the commercial and/or recreational sectors, with associated issues, e.g. compensation.

Issues for future customary fishing allocations

While initial customary fishing allocations can be made with relatively low risk (as long as they are accurately or over-allocated), there are several key issues that will be critical to future allocations and management of customary fishing allocations within an IFM framework. Some of these key issues are outlined below.

Quantifying customary fishing

The Integrated Fisheries Management Review Committee recommended in its report to the Minister for Fisheries (2002) "the development and funding of a comprehensive research and monitoring program encompassing all user groups is essential to provide the necessary information for sustainability and allocation issues to be addressed under an integrated framework." There is a distinct lack of information currently available about the relative impact on fish resources as a result of customary fishing.

The AFS recommends a number of strategies to address the shortage of customary fishing information, including the creation of linkages with recreational fishing creel surveys to obtain customary catch data. In addition, in the longer term it is desirable to develop the capacity of Aboriginal people, particularly in remote communities, to monitor catch, undertake compliance and actively participate in the management of customary fishing. The following criteria must be met when developing and undertaking such research:

- care must be taken to ensure information is collected in culturally sensitive and appropriate ways.
- the research methods, rationale and what the information will be used for must be transparent to the Aboriginal community.
- ownership and use of the information needs to be clearly established and understood before beginning the program.

Research will also assist in the identification of customary take by indigenous people as opposed to recreational take by indigenous people. This issue will also be partially answered as specific management arrangements for customary fishing are developed and implemented through the AFS.

Qualifying customary fishing priority

What does priority for customary fishing mean to the allocation process, how is it applied and what will be the result? Essentially, if a catch reduction is required in a fishery, commercial fishing and recreational fishing sectors will wear those reductions to a greater extent than customary fishing. The "extent" is not explicit and will likely be addressed on a case-by-case basis as or if required.

The current experience has not addressed spatial or temporal allocations. How will these affect customary fishing, given its priority? For example, the AFS recommends that specific provision should exist, within an integrated fisheries management framework, to protect from other fishing activities, areas identified by the Minister for Fisheries as important for customary fishing.

Indigenous engagement process and capacity

A practical issue directly related to customary fishing allocations is a need for adequate representative and consultative frameworks for indigenous people to engage in allocation processes. The AFS recommends customary fishing (as a separate fishing sector) should be afforded the same level of engagement in fisheries consultative and management processes as the recreational fishing sector and the commercial fishing sector. There are several initiatives proposed to address this issue, including the establishment of a Management Advisory Committee to provide advice to the Minister for Fisheries on fisheries issues as they relate to indigenous people.

In addition, the AFS recognises there are very few indigenous people with the experience in contemporary natural resource management to engage on strategic level fisheries policy issues such as IFM. The AFS has recommended employment and training programs for the Department of Fisheries with the view to increasing the number of indigenous people with highly developed skills and experience in natural resource management.

Allocating commercial fishing access to indigenous people

The customary fishing definition recommended in the AFS (and adopted within the IFM framework) clearly separates commercial and customary fishing.

Indigenous people have expressed aspirations to have access to fish resources for commercial gain and there is a current government mandate to assist indigenous economic development. To meet this mandate and aspirations of indigenous people, the AFS has recommended the development of mechanisms to assist Aboriginal people to access the commercial fishing and charter fishing industries. The need for such allocation mechanisms has also been recognised in the National Indigenous Fishing Principles.

The AFS has gone on to specify a mechanism to allow indigenous people the opportunity to enter the fishing sector, with allocations to be made through existing market mechanisms. In other words, transferable commercial fishing (and charter fishing) authorisations must be bought from existing authorisation holders. This process has support of the commercial fishing sector. This proposal was developed in recognition that:

- there is very limited opportunity of any new licences being granted for existing or developmental fisheries in Western Australia;
- a quasi commercial/customary fishing regime is not compatible with contemporary fisheries management or the market place;
- indigenous people expressed a desire to access "real" commercial fishing authorisations as opposed to "special" licences that do not provide the same level of security or commercial opportunity; and
- a buy back or adjustment scheme would restrict choice of licences available (and not necessarily provide for allocation decisions based on sound business principles).

The AFS proposes a fund to buy authorisations on the open market for indigenous interests. The principles of this fund include:

- allocations from the fund are to be based on sound business principles.
- the fund should not be used to purchase capital or infrastructure, or to allocate grants.
- a re-investment policy be included to strongly encourage fund beneficiaries to re-invest in fishing authorisations.

The proposal for a fund in Western Australia with joint investment from the state and Commonwealth is well advanced.

Conclusions

There are still significant challenges facing fisheries managers and indigenous people in Western Australia in dealing with fisheries allocation. However, the policy framework provided within the Aboriginal Fishing Strategy has ensured allocations of fish resources to indigenous people in Western Australia for customary, recreational and commercial purposes are recognised and enabled within a sustainable fisheries management framework.

In the broader Australian context, adoption by most governments of the National Indigenous Fishing Principles highlights the fact that while there is currently no legal imperative for fisheries regulators to take into account fish allocations to indigenous people, there is an increasing awareness of the moral obligation to do so.

References

Integrated Fisheries Management Review Committee. 2002. *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee.* Department of Fisheries, Fisheries Management Paper 165. Perth, Western Australia.

Law Reform Commission. 1986. *The Recognition of Aboriginal Customary Laws*, Summary Report Number 31. Australian Government Publishing Service, Canberra.

Appendix 1

National Principles for Indigenous Fishing

1. Indigenous people were the first custodians of Australia's marine and freshwater environments: Australia's fisheries and aquatic environment management strategies should respect and accommodate this.

2. Customary fishing is to be defined and incorporated by governments into fisheries management regimes, so as to afford it protection.

3. Customary fishing is fishing in accordance with relevant indigenous laws and customs for the purpose of satisfying personal, domestic or non-commercial communal needs. Specific frameworks for customary fishing may vary throughout Australia by reference, for example, to marine zones, fish species, Indigenous community locations and traditions or their access to land and water.

4. Recognition of customary fishing will translate, wherever possible, into a share in the overall allocation of sustainable managed fisheries.

5. In the allocation of marine and freshwater resources, the customary sector should be recognised as a sector in its own right, alongside recreational and commercial sectors, ideally within the context of future integrated fisheries management strategies.

6. Governments and other stakeholders will work together to, at minimum, implement assistance strategies to increase indigenous participation in fisheries-related businesses, including the recreational and charter sectors.

7. Increased indigenous participation in fisheries related businesses and fisheries management, together with related vocational development, must be expedited.