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Productivity Commission

By email: Fisheries.Inquiry@pc.gov.au

SUBMISSION ON THE MARINE FISHERIES AND AQUACULTURE ISSUES PAPER (February 2016)

Thank you for the opportunity to contribute to the identification of issues and information in relation to the regulatory burden imposed on the Australian marine fisheries and aquaculture sectors.

The Federation of Victorian Traditional Owner Corporations represents the interests of Victorian Traditional Owner Corporations, which have or are in the process of gaining statutory recognition under the Native Title Act 1993 (Cth) or the Victorian Traditional Owner Settlement Act 2010 (Vic).

We commend the Productivity Commission on raising matters of concern to Indigenous people, and while our comments are necessarily limited in focus to Victoria, many of the underlying themes and issues are of national relevance and significance.

Our overarching concern is in relation to the regulatory barriers to continuing our connection with fisheries resources¹, in a way that gives real recognition to legal and cultural obligations, rights and interests across the holistic economic, social, cultural and environmental context.

General comment

The Productivity Commission Issues Paper structures the identification of issues around (i) Commercial, (ii) Recreational, (iii) Indigenous and (iv) Illegal fishing. While we acknowledge the obvious need to consider the various regulatory regimes, we would however, point out that this somewhat oversimplifies and frustrates the interrelationship between the Commercial, Recreational and Indigenous fishing in considering Traditional Owners' obligations, rights and interests for social, cultural and economic (all of which include ecological) benefit in fishing resources, including aquaculture.

¹Victoria's commercial fisheries began at the time of European settlement during the 1840s. These fisheries have been managed under various Fisheries Acts since 1859 and fishery catch data have been collected continuously since 1911 (<http://agriculture.vic.gov.au/fisheries/commercial-fishing/fisheries-victoria-commercial-fish-production>).

Recent findings of the Courts have confirmed, in a legal sense, the ongoing relationship of Traditional Owners to fisheries resources, and the right to take those resources, including for commercial purposes.

For example, in Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia [2013] HCA 33 (7 August 2013) (a recent landmark Australian judgment of the High Court) a group of Torres Strait Islanders sought to establish a native title right to fish for sale and trade (i.e. for commercial purposes). The High Court of Australia held that the imposition of laws and regulatory mechanisms did not extinguish the relationship of the people to the land and waters nor extinguish their native title rights, including the right to fish for sale and trade. The Court found that there was a native title right to take fish for sale and trade and that that right had not been extinguished.

In light of this, it is clear that the regulatory environment and policy makers simply cannot ignore the existence and rights of Traditional Owners and their rights and interests, whether those rights and interests are practised at individual, community or commercial scale.

Fisheries

Commercial

Commercial fishery is highly regulated for both access to, and the harvesting of, the resource. The risks in relation to access (including availability of particular species across areas, time or quota) are critical factors for the industry and the commitment to investment.

Within the Victorian context, with limited quota and total allowable catch limits, and relative stability in ownership of the rights to quota, the market does not operate in a 'perfect' way with frictionless entry and exit of businesses. While the licence/quota itself has a financial element, the allocation mechanism tends to favour those where the marginal costs are significantly lower than the total average costs – those who already have the ability to add to their current capacity.

This implies that a regulatory barrier exists to building on Indigenous fishing, as it considered as a separate regulatory system to Commercial fishing.

The following extracts from the Victorian Commercial fisheries policy² provides that:

Existing wild catch commercial fisheries in Victoria are, in general, at or near capacity in terms of fishing effort.

...

New fisheries may arise as a result of environmental influences changing the geographic range of fisheries resources, changes in market trends due to consumer preferences, or from the identification of new opportunities to harvest fisheries resources, such as species perceived to be under-utilised in Victorian waters.

² Extracted from: <http://agriculture.vic.gov.au/fisheries/commercial-fishing/policy-for-new-commercial-access-to-wild-catch-fisheries-resources-in-victorian-waters>

The following matters must be adequately considered and addressed before new commercial access to wild catch fisheries resources is granted:

- Existence of a current authorisation (e.g. a current licence class) for the resource for which the application is made (additional entitlements will not be granted where one already exists)
- A fair process for interested persons to acquire or be granted any new entitlement, i.e. exclusive access will not be automatically granted on a first in / first served basis; the process should consider benefit to the community of commercial access
- Where a number of applications are received, the Department may need to prioritise the order in which they are addressed. The priority may consider commercial viability or benefit of particular proposals

...

Note that the above matters will generally not arise for the following:

- Reissue of existing general permits
- Renewal of existing fishing licences
- Issue of aquaculture licences

This tends to suggest that unless a new species is added to the Commercial fishery, there is unlikely to be a shift in the Traditional Owners' participation in Commercial fishery, without some other form of regulatory or non-regulatory intervention. This of course will be a matter requiring broader policy consideration of the interests and benefits that would arise. It also suggests that the value of quota is implicitly bound with the value of the licence.

However, we note that international experience shows that there are numerous ways in which Indigenous fishing interests – including commercial activity – have been recognised. In New Zealand, for example, there was a capital injection (under the 'Sealords deal') and also a Regulatory response to ensure that a proportion of any new species added to the Commercial fisheries regime would be available to Maori.

One potential approach could be the separation of quota from the licence to operate. This approach could have a positive impact on the transferability of quota enabling investment and joint ventures for best economic outcomes, with a better reflection of the value of the quota. The separation provides a mechanism that could overcome the lack of capital for Indigenous groups seeking to enter the industry, including through joint venturing with others.

We recommend that consideration be given to:

1. options to recognise and promote the interests and rights of Traditional Owners to enable participation in the fishing industry, to better enable cultural connections and participation in the industry and recognise the economic growth potential
2. mechanisms that will set aside or provide an avenue to access the resources available to Traditional Owners, including options for separation of quota from licences that will better reflect the value of the resources and capital requirements

Indigenous

The regulatory system needs to be coherent, consistent and well understood. Currently the Indigenous fishery is:

- Not well understood (there are many misconceptions about the nature and extent of the current rights and aspirations, and complexities in practical application)
- Not well targeted (a focus on using Recreational fishing to replace communal interests)
- Disproportionate (small relative to the interest in maintaining an economic base)
- Discriminatory (based on resources that originally were harvested and used by Traditional Owners but which they are now excluded from accessing)
- Does not support participation (except within the mainstream Recreational regime).

In Victoria Indigenous fishing is recognised under the Traditional Owner Settlement Act (alternatively to the Native Title Act). However, in effect this provides the same rights (catch limits and methods) as Recreational fishing but without the costs of the licence fees. While this reduces the regulatory requirements under s.211 of the Native Title Act which requires specific authorisations for each occasion, arguably it is not a mechanism enabling Indigenous fishing.

A more streamlined approach, for example using a 'cultural take permit' system for pre-authorised groups, would better enable practical and efficient practices and processes and reduce the regulatory burden and could be implemented under fisheries legislation rather than under the 'fraught' legal recognition requirements under Native Title and a case by case approach.

While it is acknowledged, in the context of sustainability of the fishery resource, that sound scientific information is required to set total catch limits, whether imposed on the Commercial and/or Recreational sectors, there is a strong imperative that such limits should not be at the expense of Indigenous access to the resource and take limits for the purposes of cultural and personal take.

The regulatory framework currently provides no priority for Indigenous fishing. By comparison, in the New Zealand regime, where limits on the take are reduced, the equivalent 'Indigenous' fishery has a priority security status (ie any reduction is firstly applied to Commercial and Recreational fishing).

Options could include the ability to have a cultural take with arrangements in place for the measurement and reporting of the take.

We recommend that consideration be given to:

3. adopting more streamlined approaches to enable Indigenous fishing to meet cultural requirements
4. ensuring recognition of the underlying interests and cultural obligations of Traditional Owners through a baseline or priority security status in relation to Indigenous fishing

Aquaculture

Aquaculture is recognised as an important factor in meeting the global market for food, as an efficient means of food production, and a way to contribute to the sustainability of the wild fish harvest. Globally aquaculture is a growth sector, potentially outstripping wild harvest over the coming decades. An underpinning regulatory system to support further investment is required.

The opportunity to increase the productive use of aquaculture and contribute to employment, particularly down-stream and localised employment, would benefit many communities, as aquaculture has a very significant indirect employment contribution and very strong exporting growth potential.

Case study

In NZ it has been recognised that there is a connection of local Maori tribes as 'traditional owners' of their specific geographic areas. In 2004 legislation was passed that set aside 20% of all new aquaculture space for Maori (with implementation from 2011), with the aim of providing economic, employment and social benefits, as well as recognising the impact of the loss of access to traditional resources.

The outcomes from Maori involvement in aquaculture are significant, with business having the security of tenure over space to invest heavily in the sector (particularly oysters and mussels) and the down-stream value adding for domestic and export products, and the upstream investment in the science and technology for stock replacement and productivity improvement.³

The regulatory reform provided the certainty and stability for investment, in an industry that was under-resourced and competition was focused on cost-reduction rather than value-adding. Participation in the industry has led not only very strong Maori employment outcomes, but to increased stability and cohesion across regionally dispersed communities.⁴

In Victoria, the ability to strengthen the Traditional Owners' connection with their sea-country and to invest in the long term development of the business, is impeded by the difficulty in accessing the underlying resource. Without the certainty of access to the licensing there is no incentive to invest in the production (let alone value-adding activity).

Thus, the regulatory environment is not only an impediment to increased activity in the sector, but to the continued breakdown of the Traditional Owners' connection to the resources (and contributing to the ensuing well-known social costs).

Aquaculture, compared to wild fish harvest, lends itself to technological advancement in the pre-harvest stages (breeding, selection, growing), as well as post-harvest value adding. While wild fish high value species (eg rock lobster or abalone) are often exported with little processing, the ability to develop new marketing or prepared foods is well suited to aquaculture.

³ See for example Wakatu Incorporation and Kono (<http://www.kono.co.nz/kono/kono-seafood/marine-farms/>) as leading specialists in the industry.

⁴ Employment in aquaculture in NZ grew by 50% between 2006 and 2013, and is expected to triple by 2025 (see <http://www.careers.govt.nz/jobs-database/farming-fishing-forestry-and-mining/aquaculture-fishing/aquaculture-farmer/>)

We recommend that consideration be given to:

5. instruments that provide access to space for aquaculture development specific to local Indigenous interests
6. options to recognise and promote the interests and rights of Traditional Owners to enable participation in the aquaculture industry, to better enable cultural connections and participation in the industry and recognise the economic growth potential
7. promoting a closer integration of related sectors, such as food technology, marine science, marketing and logistics with the fisheries and aquaculture industry to support the investment required for value-adding and exporting.

Reserved areas

The system of marine parks and reserves is recognised as an intrinsic investment in the pursuit of a strong sustainable Commercial fishery industry, and for the benefit of Recreational fishing. However, Traditional Owners have through this system lost access to traditional fishing grounds.

The imposition of these regulatory mechanisms is therefore a regulatory burden on the way in which Traditional Owners gain an economic benefit from the resource.

While there is a strong argument for the use of such restrictions, the ability to use these areas for Indigenous fishing, including for bona fide cultural purposes, would relieve the burden somewhat.

We recommend that consideration be given to:

8. enabling Indigenous fishing across areas restricted/reserved areas, where these have been developed across traditional fishing grounds

Fisheries Management

The Victorian Government is increasingly consulting with Traditional Owners on fisheries matters. However, there remain significant gaps in the ability to participate in the design and implementation of the regulatory mechanisms, with focus driven largely towards the complementary areas of information, education and environmental awareness issues.

A stronger recognition of the roles and interests through embedded processes across the whole fisheries (and marine area) management is required in order to ensure appropriate participation. A stronger emphasis on involvement through statutory recognition would actively support Indigenous participation in managing their fisheries resources and to enable the holistic approach to managing the marine environment (including alternative uses for water space, reserves and other measures for sustainability).

We recommend that consideration be given to:

9. developing appropriate mechanisms (including statutory status) for embedded involvement of Traditional Owners in the management of resources

Recommendations

We recommend that the consideration be given to:

1. options to recognise and promote the interests and rights of Traditional Owners to enable participation in the fishing industry, to better enable cultural connections and participation in the industry and recognise the economic growth potential
2. mechanisms that will set aside or provide an avenue to access the resources available to Traditional Owners, including options for separation of quota from licences that will better reflect the value of the resources and capital requirements
3. adopting more streamlined approaches to enable Indigenous fishing to meet cultural requirements
4. ensuring recognition of the underlying interests and cultural obligations of Traditional Owners through a baseline or priority security status in relation to Indigenous fishing
5. instruments that provide access to space for aquaculture development
6. options to recognise and promote the interests and rights of Traditional Owners to enable participation in the aquaculture industry, to better enable cultural connections and participation in the industry and recognise the economic growth potential
7. promoting a closer integration of related sectors, such as food technology, marine science, marketing and logistics with the fisheries and aquaculture industry to support the investment required for value-adding and exporting
8. enabling Indigenous fishing across areas restricted/reserved areas, where these have been developed across traditional fishing grounds
9. developing appropriate mechanisms (including statutory status) for embedded involvement of Traditional Owners in the management of resources.

Yours sincerely

Jeremy Clark
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