Indigenous fisheries: cultural, social and commercial

Paper presented at The Past and Future of Land Rights and Native Title Conference, Townsville, 28-30 August 2001 by Tony McAvoy, Barrister

This paper talks about commercial fisheries and suggests that native title is not the sharpest tool available to Indigenous people in the quest to carve out a place in the commercial fisheries industry. Everybody here recognises the essentially political nature of native title and that the inability to separate the political from the legal is the reason we are getting illogical, irrational and inconsistent decision from the Courts. It is my contention in respect of commercial fishing rights that interim settlements may be reached on purely political grounds. If we rule out any negotiated outcomes with the Commonwealth Government and concentrate on getting state and territory governments to the negotiating table, agreements are possible.

The underlying principles of the negotiations must be that the Indigenous people must operate within the existing resource management structures and, second, Indigenous people must be brought back into the industry. By starting from this position we ensure the resource managers get the certainty they require and we make allies of potential enemies.

It is clear that management of a resource such as wildstock fisheries is a complex and difficult task. The Government agencies who have the job of promoting exploitation in an environmentally sustainable manner have been remarkably unsuccessful. The wildstocks are, generally speaking, in very poor condition. The Government will not and could not cope with the introduction of some alternative system of resource management.

If you ask the commercial fishing industry they will tell you that, as a result of government ineptitude in the management of the resource, they, the commercial sector, are now being squeezed out by government. All around the country, the fisheries departments are trying to remedy thirty years of poor management by reducing the number of commercial fishing licenses. The fear of fishers in some states is that the fisheries departments are not merely seeking to reduce the number of licenses but to actually outlaw commercial fishing. The commercial sector will tell you that this is because there are more votes in recreational fishing. Alternatively, the recreational fishing lobby will say that commercial fishing in Australian coastal waters is uneconomic and environmentally unsustainable.

The commercial sector is under siege. They are looking for allies and, given the right circumstances, Indigenous people are natural allies of commercial fishermen. The commercial fishermen are being squeezed out of the industry under compulsory 'buy outs'. This may be appropriate for latent effort, but there are many genuine operators that will want to get out for market value. The hitch is that the state and territory governments are going to squeeze the industry down to something within the bounds of sustainability. The Indigenous share must come from within that component. Not in addition to it.

In most cases the fisheries are fully or over exploited and not capable of withstanding further pressure. The creation of new licenses is not feasible and the re-allocation of existing licenses must be done on an equitable basis.

The reduction in the amount of licenses and the inclusion of Indigenous interests are actions that can be achieved simultaneously. The real support that can be offered to the commercial sector is in the existence of an-

other arm that once in place will be very resistant to further attack.

Fisheries commissions

In order to get the states to the negotiating table they will want to know in general terms what structure is proposed. I would like to suggest that an appropriate framework can be developed from the following elements:

1. establishment of a singular fisheries council or commission for each state, modelled in part on the Treaty of Waitangi Fisheries Commission (TOKM);
2. through which the purchase of fishing licenses are made, subject to native title; and,
3. the funds for the purchases to be provided primarily by state governments.

Dealing with the first element, I do not believe nation based management units are feasible at this time. Not that Indigenous nations are not capable of managing their own affairs, but that governments are not capable with dealing with a range of management units that are at odds with their own management zones.

The purchase of licenses can be made by the proposed fisheries commissions and leased to communities in the same manner that the TOKM leases to the Iwi (clans) in Aeteroa. That is at 60 per cent of market value. Under such an arrangement the TOKM has been self sustaining in respect of administrative costs and increasing their holding in many fisheries related industries. I acknowledge that while there are problems with the TOKM model, the fundamental concepts underpinning the model are sound and capable of application to state based fisheries management units in Australia.

Consequently, as native title interests can be identified with certainty, a proportion of those licenses can be transferred to or allocated according to an agreed formula. Figuring out the formula will, in my view, be the most time consuming task.

If the states can be convinced of the merits of such a negotiated settlement, it then becomes a question of dollars. The dollars needed will vary greatly from state to state. New South Wales will be at the lower end of the scale. In terms of coastal fisheries NSW is not a particularly lucrative market. The northern rivers prawn trawl fisheries are also a valuable commodity.

Cultural, commercial and social fishing rights

Commercial fishing rights should be dealt with in isolation from cultural or non-commercial rights. The cultural right to fish for non-commercial purposes is given a degree of protection in section 211 of the *Native Title Act 1993* (Cth). It is given protection to the extent that rights holders may continue to fish regardless of the regulatory provisions imposed by government. The decision in *Yanner v. Eaton* tells us this is so even where the species in question is subject to fauna conservation measures. The decision in *Wilkes v. Johnson* tells us this is so even where the fish is under minimum size. So long as it is in accordance with the traditions and customs of those persons holding native title, the exercise of the right will not be bounded by government regulation.

I say the rights are given a degree of protection because without any procedural rights to protect the fishing grounds from development and exploitation the rights are relatively limited. If, in circumstances where native title is determined to exist, it is argued that a particular activity will have an adverse impact on the sea country, it then becomes a matter of compensation.

Turning now to the concept of social rights. These are not rights which have any legal currency at this time, but there is a moral right which ordinary people can understand. That is, fishing and eating fish features large in the activities of coastal communities.

In NSW, many of the Indigenous coastal peoples were forced to reside or were 'resettled' on reserves that just happened to be on the sandy coastal fringe. This was in order to free up the forested areas for logging and

grazing. Deprived of most of their sources of protein, many of these peoples were given fishing boats by the government. Needless to say, fish were not the commodity they are today. These peoples, removed from their homelands, having since developed an economic dependence on the generations old fishing practices, contribute significantly to their respective local Aboriginal economies. These same small scale fishers are now caught in an administrative net designed to rationalise the industry. Unfortunately the rationalisation tends to favour the larger operators in the allocation of licenses.

It can be argued, in NSW at least, that because reliance by Indigenous peoples upon the marine resources was promoted and encouraged by the government, both for commercial and domestic use, it is now inequitable and unjust to exclude Aboriginal people from the industry or to regulate access for non-commercial purposes through the use of recreational fishing licenses. It can be argued, in fact, that the principles of social equity would demand that Aboriginal people are entitled to a larger share of the recreational and commercial take. In amendments to the *Fisheries Management Act 1994* (NSW), in November 2000, this argument was accepted by most of the NSW Legislative Council, a notable exclusion being David Oldfield of the One Nation Party.

These rights are not supportable within the native title context unless within the concept of contingent rights. It is not inconceivable that a traditional owner group faced with the invasion of peoples from surrounding country extended to some or all of those people, whether expressly or impliedly, the right to fish on those lands for the benefit of the new community as it were.

That digression aside the fight for what is socially just and correct can continue, not only parallel to the native title process, but in spite of it. For it seems that giving things to Indigenous peoples in recognition of past injustices is more palatable than acknowledging rights specifically grounded in present ownership. Strategically it is important for the sea rights movement to establish the right to fish for commercial purposes.

We must all remember the native title is the tool not the finished product.

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Indigenous rights to water

News from ATSIC by Paul Sheiner.

ATSIC has entered into a partnership with Lingiari Foundation, an independent Indigenous organisation chaired by Pat Dodson, to develop a draft national ATSIC policy on Indigenous rights to waters. Waters for the purpose of the project includes both offshore (seas and oceans) and onshore waters (rivers, lakes, and the like) including artesian and underground waters.

ATSIC initiated the process for a number of reasons including;

1. the increasing focus of government on water related issues which impact upon Indigenous rights – for example, the COAG water reform agenda, the National Oceans Policy, and the like; and,
2. the ATSIC elected arm and other Indigenous representatives are attending an increasing number of water-related forums and committees without a common agenda, standards or protocols.

It is hoped that a national ATSIC water rights policy will provide a set of standards on Indigenous rights to waters which Indigenous representatives can use in various forums.

In order to develop the policy ATSIC and Lingiari have published the set of briefing papers, and the two discussion booklets (onshore waters and offshore waters). These documents are being circulated by regional and state ATSIC offices and copies have been sent to all representative bodies. The documents have been published to promote discussion and generate feedback from Aboriginal and Torres Strait Islander people, communities and organisations. This feedback should be directed to regional or state ATSIC policy officers in each state and territory by 5 April 2002.