

INQUIRY INTO COMMERCIAL FISHING IN NEW SOUTH WALES

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Review of the NSW Commercial Fishing Industry

Supplimentary Public Submission – DN Brown

The legislative & therefore legal framework for fisheries management is the Fisheries Management Act .

The Act identifies the objectives of fisheries management & creates Harvest Shares for Commercial Fisheries as a mechanism to administer sustainable resources in an equitable & efficient manner to achieve viable fisheries.

A principle objective of NSW fisheries management since 1994 has been to implement a management structure that enables Industry to autogenously adjust its affairs in response to ever changing situations instead of repetitive arbitrary action by fisheries administration & provide security to Industry with certainty over their individual economic situations through harvest entitlements attributed to possession of Fishery Shares. Virtually all NSW fisheries have been issued Class1 fisheries shares.

The administrative mechanism of harvest entitlement attributed to shares is contained in clause 50 & Clause 82 of the Act, wherein when a TAC (Cl 82) is established for a fishery it must be administered in proportion to the shares issued in that fishery (Cl 50). **The legal precedent inherent here is that any mechanism that establishes an administrative limit on commercial harvest levels , whether called a TAC or not, but acts in the same manner as a TAC is a TAC for the purpose of the Act.**

The EIS approvals for NSW Fishery operations provided by both NSW & the Commonwealth under the NSW Fishery Management Strategies & Performance Objectives identified in those Strategies establishes upper harvest levels for those fisheries to achieve resource sustainability . ie

a form of Total Allowable Catch (TAC) has been established .

Similary the ITCALs currently proposed , establish a total harvest level & an allocation of the harvest level to "blocks of shares" in most fisheries. It is inherent in the Act that NSW Fisheries provide meaningful relatively equitable resource access to stakeholders in proportion to the shares issued.

Unfortunately NSW Fisheries has not administered the provisions of Clause 82 since 2002 & serious distortions have resulted within the fisheries.

An example is in the Trap & line Fisheries where an effective TAC is identified in the FMS & EIS for the Fishery , but NSW Fisheries is not providing relative equity in any meaningful way to stakeholders in that fishery in proportion to their stakeholding. (whilst trap numbers are allocated they are neither proportional to effective achievement of sustainability (ie they are over-allocated) & effective harvest is biased grossly towards the operations of small stakeholders (providing them with more than adequate trap numbers to achieve virtually unrestrained harvest whilst larger stakeholders are allocated trap numbers they cannot effectively operate under the interim arrangements proposed.....whilst it is obvious that the total number of traps allowed to the stakeholders is excessive in ever achieving sustainability objectives & very reduced real access per share is required in the longer term.

NSW Fisheries has repeatedly pandered to small stakeholders who have been repeatedly harvesting in excess of their equitable entitlement relative to their shareholdings in breach of fundamental principles of shares administered by the C'wealth Securities Commission.

It must be noted that NSW legislation creates & issues statutory shares under the Fisheries Act but oversight of those share entitlement distributions (along with all "shares" issued under Australian Law) is administered by the C'wealth Securities Commission & every issuer of Shares is required to observe the same principles in share attribution & distribution.

It must be noted that only one class of share is issued in each fishery & sharetrading conditions MUST be equitable in all respects for all stakeholders . The concept of active & inactive shareholdings introduces an effective preference share to assigned active & a financial benefit in their trading in share acquisitions under the proposed trading scheme to restructure the NSW Fisheries, whilst the concept of preference shares is not available in the enabling legislation issuing the shares.

It is an established fact the most NSW Fishers are diversified .(average 3+ fisheries). This is in response to highly variable seasonal environmental situations & fishers frequently hold shares in some fisheries they access only in times of major environmental events (eg floods & drought & major changes in oceanic environmental conditions), to enable those fishers to diversify activity & be economically viable during such times . The intent of share fisheries is to enable individual fishers to hold sufficient shares for their needs (annual or infrequent) to provide security of access. . In many cases these fishers find that infrequent use (despite necessary for their economic viability in changing environmental conditions) renders them assignment as inactive stakeholders & do not qualify for allocation of additional shares under the proposed sharetrading protocols of the NSW regime to enable participation in the fishery.....thereby reducing their economic viability in the longer term & more reliant on Govt support in times of environmental change.

1.

this is an abrogation of the principle of a fisheries share regime providing a mechanism of autogenous adjustment for the individual situations of the industry stakeholders

2.

this introduces an effective classification of preference shares which is not an intent of the share allocation & issue by NSW Fisheriesparticularly being in many cases specifically described as "Equal Shares Fisheries " & post issue establishing an unequal mechanism in breach of C'wealth Law with precedence over NSW Law.

This must be nipped in the bud & all shareholdings treated with relative equity in accordance with the Statutory Rights under which the shares were issued.

An alternative is that NSW can change the statutory basis of the shares into the future**but MUST compensate the stakeholders in relativity to the statutory rights the shares were issued under.**

Precedents exist in NSW in adjustments to statutory rights established in the NSW Taxi Industry licenses & in Egg production quotas , with compensation paid.

Whilst NSW Fisheries retains the right to establish relative levels of TAC (or anything that acts like a TAC).....they do not have any right to distribute share benefit other than relative equity per share 'as issued' nor to arbitrarily provide preferential trading rights to some shareholders within the shares 'as issued'.

The fundamental principle of relative equity extends to apportionment of sustainable harvest to all harvesters of fisheries resources outside NSW jurisdiction in establishing resource sharing with all stakeholders having access to a resource.

Application of sequential entry criteria periods for different classes of stakeholders creates often very significant distortions in relative equity between those classes of stakeholder. With natural resources, evolved timelines often result in reduced resource populations & sequential entry criteria periods for stakeholder assessment provided significant advantages for those stakeholders subject to early assessment & distortion to those stakeholders subject to later assessmentwith increased delay in assessment of classes of stakeholder increasing the level of distortion & relative equity (a number of examples exist in C'wealth fisheries). with NSW resource sharing only just evolving the risk to NSW is distorted & reduced relative access to harvest.

(I have provided the C'tee with example in the Small Pelagics fishery , where Tasmania achieved gross benefit by application of an entry criteria with an entry period different to all other

stakeholders.)

It is critical to apply a single common criteria period to all classes of stakeholder in the resource sharing process.

In consideration of Resource sharing:-

1.

environmental allocations are established in the TAC setting assessment process, providing risk averse resource sustainability.

2.

In the case of the recreational fishery in general , as a "sport" its relative access is secured by maintaining sustainable populations of fish. A share of harvest must be established for extractions in a common timeline to other extractions & as these extractions are personal benefit , whilst also retaining a right of access to resource thru wholesale & retail fish sales there is in effect a provision of double dipping in resource access relative to the vast majority of the population which accesses fish thru the wholesale & retail supply chain.

Relative equity is established for the Recreational Fishing sector by establishing a Recreational TAC as a proportion of the resource TAC & ongoing administration of individual stakeholder recreational harvest access by administration of Bag Limits consistent with the Recreational TAC. Catch & Release fishing has a level of mortality inherent in it proportional to the handling techniques of the individual stakeholders. An attribution to resource mortality for Catch & Release fishing must be included in the Recreational Fishery resource share . In NSW this must be relative to the NSW Commercial Fishery catch attribution criteria period (1986-93).

Much ado is made of allegations of increasing recreational fishing numbers over timethis is a spurious argument.....increase in general population is also occurring & the commercial fishery is the mechanism supplying community access to the resource in a manner that is efficient for the general population (essentially via retailers &/or restaurants).

Resource access must be administered with relative benefit to the owners of the resourcethe general public , not self interest groupsnoting the commercial fisheries are but the mechanism for the general public who either lack viable access or lack desire to access resource from the natural environment for themselves , to access their relative share of the resource as a part of the National Foodbowl.

Recreational fishers must operate within their share of resource with increasing participant increase , just the same as the general population is increasing & relative individual shares are reducing thru market forces as the commercial fishery resource share is not increasing.

The concept of a Recreational Fishery Sponge is spurious. The establishment of a Recreational Fishery TAC, as a recreational Fishery Resource share , in relative equity to the Commercial Fishery resource share (nee general public TAC) consistent with Commercial Fishery assessment period of 1986-1993) provides an administrative mechanism for the "sport" of recreational fishing & in principle..... increasing recreational participation would be accommodated within their resource share by increased Catch & Release with an increased mortality assignment & a consequent reduction in Bag Limit to manage total extractions as a "sport".

3.

A NSW State resource share must be established relative to resource shares for other jurisdictions (variously both State & C'wealth) within the range of distribution of individual species.

NSW has not historically done well in achieving relative benefit for the NSW population, largely because it has not engaged heavily in fisheries management affairs external to the State.

A fundamental principle of NSW engagement in establishing State resource share must be relative to a common entry criteria assessment period . In most cases ITQ will have been irrevocably been established in C'wealth jurisdiction with criteria periods as early as 1985, it is incumbent to

establish equivalent NSW entry criteria periods & ensure other jurisdictions do likewise to optimise NSW fairshare of resource access.

In engaging with the C'wealth a fundamental principle of NSW engagement must be a goal of establishing transferability of catch entitlements for species which traverse the State & C'wealth jurisdictional boundaries established under OCS arrangements for dual endorsed stakeholders. Fish don't recognise lines on the water & from a stock sustainability standpoint (the primary reason for fisheries management) the location of fishing extractions has negligible differential impact on stock sustainability.

4. Resource sharing is undertaken between the individual fishery share classes relative to catch in the common criteria period & a measure of resource access transferability provided between share classes where appropriate.

5.

From that point onward stakeholders in each sector can autogenously adjust their situation within the resource sustainability process without the need for significant Government intervention beyond resource assessment & establishment of Species / Fishery TACs.

It must be noted that establishment of species TACs does not mean that individual fisheries stakeholders must operate with individual species TACs.....merely that catch arrangements within a fishery must adhere to the fishery TACs & whatever mechanism used to achieve compliance with the fishery TAC is provided in relative equity of benefit in proportion to the shares issued in the fishery..

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Input controls could be used to achieve a fishery TAC instead of output controls , but MUST be proportionate to individual stakeholder shareholdings to achieve the Certainty & Security objectives identified & inherent in the creation of the statutory shares.

Similarly where ITQ were transferred into a fishery it can be provided administration discretely from input based controls or could be provided an equivalent quantum of input access .

In moving forward with Adjustment in the Commercial Fisheries a number of currently proposed actions are contrary to good fisheries management & fundamentally breach governance of share benefit administered by the Securities Commission. These issues primarily arise in the so called "Equal Shares" fisheries.

It must be noted that in the consultation process with Industry in creating the share fishery legislation, the individual fishery MACs (Management Advisory Committees) as Industry sector representatives had the opportunity to either support the NSW Fisheries default position of equal shares on the share allocation principles for their fishery or successfully convince NSW Fisheries that a more appropriate & equitable process was available. A number of MACs were successful in achieving share allocation based on relative catch. Others chose to accept the 'default' position of equal shares .

Share allocation is a "one time" process unless a fishery is detonated by closure & compensation of shares resumed under one regime & a new class of share created which can be applied for by the original stakeholders who choose to continue to participate.

The most significant problems in Industry Adjustment lay in the "equal shares" fisheries .

We cannot in conscience, nor legally, go backwards in share allocation without very significant compensation issues under Administrative Law.

Thus, the most significant underlaying issue is that in general 20% of the fishers take 80% of the fish & with the principle objective of Industry adjustment being relative equity in harvest access per

shareholding within an overall fishery TAC concept, on average, those 20% of the fishery with high harvest will need to acquire 3 other businesses to achieve relativity in their harvest to their shareholding. (In Principle this is a fundamental requirement of relative benefit to shareholding administered by the Securities Commission) & a necessary undertaking where autogenous adjustment by industry is an objective (& it is).

The interim proposal for very modest increases in shareholding (eg 40 to 50 minimum shares to operate in the Trap Fishery) with each minimum shareholding entitled to operate 30 traps & additional shares enabling the use of 10 traps per 20 additional share holding. (basically 30 is more than a fisher can effectively operate in a day in water deeper than 20FM) fails to establish relative benefit proportionate to shareholding as greater shareholdings do not provide any effective short term benefit.

The failure to implement any other ITCAL concept into the fishery again distorts relative benefit to shareholding & provides disincentive to further adjustment by minimum shareholders as the minimum shareholding provides more than a practical level of access.

This is anomalous to other "equal share" fisheries such as Estuary General where each block of equal shares entitles an ITCAL of days work in each fishery sector.

This outcome in the Trap & Line Fisheries is the result of a small number of vociferous stakeholders who are opposed to any concept of fisheries management through relative benefit in shareholding proportionate to fishery limit catch. (in breach of the Law) & who in some instances are rorting past management interventions.

Additional operating cost (capital or consumable) can only be economically viable with increased catch. The inevitable outcome of introducing minimum shareholdings without any other ITCAL input based control is that effort & catch must & will increaseplacing unsustainable pressure on resources.

(if a significant harvester in an equal share fishery is to purchase shares equivalent to 3 other businesses to balance his shareholding with his harvest levelhow can that be economically achieved without harvest increase while the management regime enables it in the rules applied in the interim period. To allow such a conceptual approach is unconscionable & unacceptable share entitlement which is not compliant with prevailing C'wealth law.

The current proposal to limit further ITCAL based actions in the trap fisheries until 2024 is unsustainable & unconscionable.

With other fisheries seeing increased management actions in 2017 & 2018 there is every likelihood of increased activity thru diversification of activity into the trap & line fisheries. This has occurred in the C'wealth where sequential management actions were undertaken in different fishery sectors & will be unacceptable if applied in NSW.

In the past Gov't has justified sequential management implementation on the lack of both funds & expertise to be able to implement concurrent management. The current situation of implementing interim approximate harvest rights per share (or share block) minimises the scientific & administrative workload & very necessarily remove incentives for domino effects in redistributing "last ditch" effort into fisheries with more openended management arrangements. It is a gross flaw in the current proposals for industry restructure to fail to close the door on sequential effort redistribution by failing to implement concurrent meaningful & 'share equal' conceptual ITCALs concurrently in all of the NSW fisheries.

NSW is simply not managing fisheries in accordance with the intent & objectives of the Act. This must be fixed by July 2017 & effective proportionate ITCALs applied across ALL fisheries at the same time.

Exceptional circumstances exist in Fisheries like NSW purse seine , where the intent is to move to ITQ controls. The fishery has in general catch based shares issued .

These are meaningful with respect to the nature of the fishery & species catch approved in the purse seine FMS at the time of share issue & of relevance to share entitlement.

The purse seine reference group & NSW fisheries recognised that the arbitrary implementation of a maximum shareholding in the share allocation process unreasonably affected one operator (the longest historical fisher who was entitled to approx 2500 shares based on the general criteria but was limited to 500 arbitrarily.)

In part this came about due to concerns that the operator primarily targeted Salmon, but not just that species (having large catches of other species) & issue of general shares based on his total catch would disproportionately affect catch rights allocations for other species for other stakeholders. Salmon harvest in the purse seine sector has continued almost exclusively by one operator in the NSW Purse seine fishery.

Another issue was that harvest of Sardines in Ocean waters developed significantly subsequent to the development of the Purse Seine FMS (primarily by only 4 operators having processing capability for their product).

The Fisheries "Structural Adjustment Review Ctee" (SARC chair Ian Cartright) recommended to Govt that where activity for some species within a fishery was limited to a small proportion of the fishery stakeholders & allocation of harvest rights equally across all of the stakeholders would unreasonably distort the viability of the participants..... that allocation for those species would be allocated primarily amongst the stakeholders with historical participation in their harvest.....and this principle was agreed by Government.

In recognition of that situation it was suggested that attribution of species ITQ proportionate to general purse seine shareholding would be appropriate for species other than Salmon & sardines, and a separate allocation process would be undertaken for the Salmon & Sardine species.

It was further submitted that an appropriate resource share between the pool of general purse seine shareholders & additional species specific shares to be allocated to the historical participants would be to provide 20% of the purse seine TACC for Salmon & Sardines to be allocated within the general pool of purse seine shares as this would be more than orders of magnitude greater than the general pool had ever harvested & additional shares be allocated to historical participants in Salmon (1) & sardines (4) to represent 80% of the relevant Purse seine TACC for these 2 species (separately) utilising entry criteria of a couple of years immediately prior to 2011 as a period best reflecting participation in a changing fishery , without potential for overt changes in stakeholder activity in anticipation of allocation benefit post 2010. (noting that the implementation of Restricted Fisheries in 1990 led to behaviour by a number of fishers without historical participation in the fishery , in anticipation of achieving catch allocation.....resulting in a Ministerial review of the sudden influx of product into the market system post 1990 resulting in very significant resource wastage from unsold product).

Such an action would likely prevent legal action by the purse seine stakeholder affected by the arbitrary limit on shareholding introduced unilaterally by the then DirectorGeneral of Fisheries (Mr Steve Dunn) contrary to the relative equity agreed with the MAC for share allocation across the Ocean Haul Fisheries.

An Independent allocation panel should be immediately constructed with terms of reference consistent with the SARC & Govt agreed principles & the harvest rights in the general pool of purse seine shares implemented not later than July 2017 as very significant distortion of relative benefit from shareholding is being undertaken by many of the small shareholders in the purse seine fishery who continue to market quantities of Blue Mackerel & Yellowtail Scad grossly in excess of their shareholding equity in the fishery & shares are not available to trade as each of the current 14 stakeholders intends to retain their shareholding , at least until there is more clarity about harvest entitlement to shares.....in other words an unreasonable situation continues unabated unless

mitigating action is undertaken & many of the smaller & medium sized shareholders are sorting the harvest arrangement whilst the system allows them to.

Another anomalous situation to relative equity arises in the actions of NSW Fisheries in creating the Marine Parks & Recreational Fishing Havens in NSW.

Commercial Fishery stakeholders in affected regions of the Ocean Haul & Estuary general fisheries in their administrative Fishery Regions (zones within the State) are unreasonably affected by loss of access to harvest in their Region based shares.

Actual active harvest relative to the areas rezoned as MP or RFH was not removed from the fishery & commercial harvest activity increased in the remaining available area (Region by Region) resulting in relatively low harvest access per share being allocated (ITCAL) in the current restructuring process. In effect the Industry stakeholders are being forced to pay to make up for the inadequacy of the original Industry buyout arrangements

This is unconscionable & specific arrangements need to be made to compensate current stakeholders for the unreasonable outcomes of the situation they have had imposed on them from MP & RFH creation.

The future of adjustment of commercial fisheries in NSW is totally dependant on the interim arrangements reasonably reflecting the likely final share linkages of completed industry restructure to meaningful operating Share Managed fisheries wherein stakeholders have the ability to autogenously adjust their harvest access situation in response to changing environmental situations. The current arrangements are interim & in some fisheries poorly reflect final adjustment to share management in those fisheries (these are primarily components in "equal share " fisheries).

Where Government funds to support restructure are known to be insufficient to fully enable completion of restructure , further restructure will primarily be autogenous with funding external to Government. It is utterly critical for the Share fisheries to retain the confidence of financial institutions & the confidence of the stakeholders themselves that the Interim arrangements instituted enable due financial diligence to be undertaken in the costs & benefits incurred with little anticipation that the harvest rights attributable to shares would change significantly in the lifetime of the restructuring process to completion to retain the confidence of the financial institution in fishery shares as an asset capable of supporting loans for share acquisition during restructuring or autogenous adjustment.

I draw attention to previous advice of serious concern regarding the proposed restructuring process in the trap & line fisheries of estuaries & ocean & the flaws in the concept of current proposals & the risks of diversification into those fisheries with more open ended interim access & risk to sustainability of their resources.

Failure to create adequate security in harvest rights attributable to shares or sequential increases in minimum shareholdings (reducing effective value of shares as assets) to force further adjustment in stakeholder numbers , will doom the fishery adjustment to stall through lack of funding external to Government to enable change & subject the resources of the fisheries to increased risk.

There is also increased risk that failure to implement meaningful harvest rights in any fishery relative to shareholding will result in review of NSW Fisheries actions by referral to the Securities Commission.

Further, those fisheries that can provide additional value to the NSW Economy & employment opportunities in value adding with significant inherent investment in capital works are unable to proceed in any meaningful way when they cannot achieve security over resource harvest access to support a business plan for the enterprise.

This applies even to the NSW Fish Market where the market moved to acquire harvest ITQ in

C'wealth fisheries to underpin its sales business plan .

Given the experience of TAC committees to date & the reliance on science based data to underpin TAC recommendations.....the availability, (or rather lack of availability) of adequate data engenders a reliance on the precautionary principle resulting in reduced TAC levels. This has been demonstrated in almost every fishery subject to a science based TAC setting process in Australia. This is a spectre of grave concern to every NSW fisher with experience of fisheries subjected to implementation of TACs (most stakeholders have not & don't factor this scenario into future fisheries access in their considerations.)

Should Standing C'tee members have any questions , please do not hesitate to contact. If necessary I would make myself available for face to face contact if the C'tee members saw that as useful.

Yours sincerely

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