

Briefing Note



Fisheries Management in NSW *The Fisheries Management Bill 1994*

by

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A INTRODUCTION

The purpose of this paper is to outline the present organisation, and possible future direction, of fishing in NSW, both on a commercial and recreational level, with particular reference to proposals for reorganisation envisaged by the state government in its *Fisheries Management Bill 1994*.

The early section of the paper looks at the present structure of fishing and the emergence of factors which have led to the government's present concern with restructuring, while the later section examines proposals formulated under the Greiner and Fahey governments for the future direction of the industry and an outline of the Bill.

B BACKGROUND

1 Commercial Fishing

Fishing in NSW is characterised by the large number of small operators in the commercial sphere and by the very large number of people engaged in recreational fishing. In 1992 there were 2,206 holders of commercial fishing licences in NSW and it was estimated that over 1 million people in the state participated in recreational fishing (or angling).¹ Because of the large number of small operators, and the very large number of anglers, fishing in NSW has been characterised by a relatively open-ended approach to production compared to a relatively ordered approach to marketing.

Commercial trawl fishing began in NSW in the early 1900s. By the mid-1980s the marine fishing fleet comprised about 870 vessels and there were 20 fishing co-operatives through which commercial fishing people operated and consigned their catch for sale. The value of the catch in NSW, in 1993, was worth \$110,589,000 million.²

¹ *Report of the NSW Fisheries, year ended 30 June 1992*, p.17. For the statistics on recreational fishing see *Fisheries and Fish Marketing in NSW* (NSW State Fisheries and NSW Fish Marketing Authority, Sydney, 1979), p.46.

² Public Works Department NSW, *NSW Marine Fisheries and Fishing Ports Study 1985*, Report Prepared for Division of Fisheries, NSW Department of Agriculture by SCP Fisheries Consultants Australia Pty. Ltd., April 1985, p.2; Parliament of the Commonwealth of Australia, *Development of the Australian Fishing Industry*, Report of the Senate Standing

The open-ended approach to involvement in, and operation of, commercial fishing in NSW, was outlined during the 1980s by the Senate Standing Committee on Trade and Commerce which, in its report on the fishing industry in Australia, noted that, "Until recently New South Wales has been philosophically and fundamentally opposed to the need for fisheries management. Fisheries administrators in that State have maintained that a resource will look after itself and that fishermen should be allowed to fish it to a level which becomes uneconomic; fishermen will move on to another resource giving the original resource time to regenerate and then will move back to it."³

While favouring an open approach to commercial access to the resource, commercial fishing people in NSW have contrastingly favoured a managed approach to marketing. The 1992 annual report of the present Fish Marketing Authority described the evolution of "orderly marketing" in the fishing industry as follows: "The existing system of fish marketing regulation was introduced into New South Wales in 1945. Prior to that time, licensed fish agents controlled the sale of fish. After claims by fishermen that agents were not passing on reasonable returns to fishermen from the ultimate sale of the product, the *Fisheries and Oyster Farms Act 1935* (the legislation governing the administration of fishing in NSW) was amended to ensure that all fish product landed in New South Wales would pass through a recognised market, operated either by fishermen's co-operative trading societies on coastal locations, or the Sydney Fish Market. The NSW Chief Secretary's Department operated the Sydney Fish Market until 1963, when the Fish Authority (later to become the Fish Marketing Authority) was established."⁴

2 Recreational Fishing

Recreational fishing is very popular in Australia and is a significant element of the tourism and leisure sector of the economy. SCP Fisheries Consultants, in a study on NSW marine fisheries and fishing ports

Committee on Trade and Commerce, November 1982, p.2.; *Fisheries and Fish Marketing in NSW*, p.49. Australian Bureau of Agricultural and Resource Economics, *Australian Fisheries Statistics 1993*, p.5.

³ *Development of the Australian Fishing Industry*, p.27.

⁴ *Report of the Fish Marketing Authority*, year ended 31 March 1992, p.4.

prepared for the NSW Department of Agriculture, reported that in 1984 around 4 million people in Australia had engaged in angling during the year and that \$2.2 billion had been spent on recreational fishing during the financial year 1983-1984.⁵ The report notes that recreational fishing in fact overlaps commercial fishing in two significant ways. Widespread recreational fishing adds to the pressure on fish stocks in inshore waters (rivers, estuaries, bays and open coastline) and many anglers fish for food, some not only for themselves but also to sell covertly to the retail trade.⁶

C LAW AND ADMINISTRATION

Fishing, on an overall level, is a joint concern of both the NSW and federal governments. NSW has control over fishing up to three miles out to sea, and beyond that, up to two hundred miles out, the federal government has jurisdiction. In 1973 the Commonwealth Parliament enacted the Seas and Submerged Lands Act which declared that sovereignty in respect of the territorial sea was vested in, and exercisable by, the crown in right of the Commonwealth. To obtain an off-shore constitutional settlement in relation to fisheries and petroleum mining the Premiers' Conference of 1978 agreed that the Commonwealth and the States would pass complementary legislation. The result was the Coastal Waters State Powers Act 1980 which vested a statutory title, but not sovereignty, in each State to the strip of sea-bed which is inside three nautical miles of the coast measured from the low-water mark.⁷

Administration of fishing likewise, on an overall level, is a joint responsibility of the state and federal governments. The two major policy bodies concerned are the Australia-New Zealand Fishing and Aquaculture Council (ANZFAC), which sets broad policy on fisheries issues, and the Standing Committee on Fisheries, comprising fisheries'

⁵ *NSW Marine Fisheries and Fishing Ports Study 1985*, p.35. The two volume which originally produced this figure was prepared by PA Management Consultants in 1984 entitled *National Survey of Participation in Recreational Fishing*.

⁶ *ibid.*

⁷ Carter, *op.cit.*, pp.43-47. For some general perspectives on the overall operation of resources law in Australia see D.E. Fisher, *Natural Resources Law in Australia: A Macro-Legal System in Operation* (Law Book Company, Sydney, 1987).

Ministers from all States, which ensures consistency in State and Federal administration of fishing. The essential legislation currently governing Commonwealth fisheries within the Australian fishing zone is the *Fisheries Management Act 1991*.

Within NSW the legislative basis for the state's authority is the *Fisheries and Oyster Farms Act 1935* which deals with such matters as joint federal-state authority in relation to fishing, inspection of activities in commercial fishing, the structure and operations of the Fish Marketing Authority, inspection of fish in retail outlets, prohibited methods of fishing, bag limits for anglers, closed season for certain types of fishing and other matters.⁸

The basic fee for a commercial fishing licence is currently \$200. There is an additional industry levy of \$300 and a fisheries research levy of \$75. Boats used for commercial fishing must also be licensed: the fee being calculated at the rate of \$140 for the first three metres and \$20 for each additional metre. The licence is valid for one year only.⁹ There is no requirement in force for anglers to obtain a licence.

D FISH RESOURCES AND THE INTRODUCTION OF RESOURCE CONTROL IN COMMONWEALTH FISHERIES

Fish stocks in Australia are not large by world standards. Large concentrations of fish typically collect in the colder regions of the oceans where great quantities of fish nutrient are found. Fish nutrient is not found in such substantial quantities in tropical and sub-tropical waters.¹⁰ Australian fish resources are consequently vulnerable to over-fishing. Concerns over this issue arose during the 1980s in the light of a noticeable decline in catch per unit of effort.¹¹

⁸ See *Fisheries and Oyster Farms Act 1935*.

⁹ NSW Fisheries, *A Guide to Commercial Fisherman's and Fishing Boat Licences in New South Wales* (NSW Fisheries, 1994), pp.3-4.

¹⁰ *Development of the Australian Fishing Industry*, p.5.

¹¹ *NSW Marine Fisheries and Fishing Ports Study 1985*, pp.29-30.

In 1982 the Senate Standing Committee on Trade and Commerce, in its report on the Australian fishing industry, recommended the development and implementation of a "national fisheries policy defining the objectives and strategy for the rational utilisation of Australia's fisheries resources and . . . guidelines for the management and conservation of those resources."¹² This led in 1984 to the federal government introducing a management plan to limit the extent of exploitation of southern bluefin tuna based on long term individual transferable quotas.¹³

In 1991 the federal government introduced a new approach into its own fisheries by giving the Australian Fisheries Management Authority (AFMA), a statutory authority set up under the Fisheries Management Act 1991, the responsibility for establishing an individual transferable quota system.¹⁴

In NSW warnings continued to be voiced throughout the decade about the issue of resource depletion. In the NSW Fisheries *Biennial Report of Fisheries Research 1989-1991*, the director of research, Dr. Robert E. Kearney, wrote that "Even though NSW fisheries were thought to be suffering from excessive fishing effort for a number of years, it is only in the last two years that the magnitude of the declines in key species, such as gemfish, redfish, teraglin, snapper, silver perch and Murray Cod, have been documented adequately."¹⁵

E INTRODUCTION OF CHANGE TO THE ORGANISATION OF FISHING IN NSW

Following its assumption of office in 1988 the Greiner government established the Commercial Fishing Advisory Council (CFAC) and the Recreational Fishing Advisory Council (RFAC) as a preliminary to embarking on significant changes to the operations of commercial

¹² *Development of the Australian Fishing Industry*, p.19.

¹³ Australian Bureau of Agricultural and Resource Economics, *Use of Economic Instruments in Integrated Coastal Zone Management* (ABARE, 1993), p.31-32.

¹⁴ *Use of Economic Instruments in Integrated Coastal Zone Management*, p.29.

¹⁵ NSW Fisheries, *Biennial Report of Fisheries Research 1989-1991*, p.5.

fishing people and anglers in NSW. CFAC and RFAC, as representatives of the main user groups, were consulted by the government in the course of developing a new policy of de-regulation which would include different resource management policies, new methods of operation in commercial fishing and the state government's relinquishing control of the Fish Marketing Authority.¹⁶

In November 1992 the Hon. Ian Causley, Minister for Natural Resources, introduced a Bill to amend the *Fisheries and Oyster Farms Act 1935* with the aim of introducing management plans by species, and statutory (quantified) fishing rights, into the realm of commercial fishing. The bill also referred to the introduction of a "total allowable catch".¹⁷ Essentially, in resource management terms, the government intended to look to a system of "output control" to manage fishing in NSW (focusing on the amount of fish caught), rather than "input control" which would focus on the means used to catch fish (size of the boat, size of tackle and other items).¹⁸

Although the bill subsequently lapsed, the Government has continued with its policy of change. In May 1993 the Minister met with a large group of commercial fishing people to discuss the government's continued intention to introduce a property rights-quota system into commercial fishing in NSW. In early 1994 the details of these proposals were outlined in the NSW Fisheries' publication *Sharing the Fisheries of NSW*. With regard to commercial fishing the principal recommendation of the department's Fishing Property Rights Working Group were as follows:

- Commercial fishing people would engage in the industry by obtaining shares in fisheries. These shares would be proportional to the person's catch history.
- Shares would be valid for ten years, with a guaranteed right of

¹⁶ ibid, p.14; *Report of the Fish Marketing Authority*, year ended 31 March 1992, pp.29-30. CFAC and RFAC were legally established through the *Fisheries and Oyster Farms (Advisory Council) Amendment Act 1989*.

¹⁷ See Second Reading Speech, *Fisheries and Oyster Farms (Management Plans) Amendment Bill*, Hansard 24-27 November 1992, p.9789.

¹⁸ *Use of Economic Instruments in Integrated Coastal Zone Management*, p.3.

renewal every five years.

- Shares would be fully transferable and recorded in a fashion similar to Torrens-title.
- A minimum number of shares would have to be held in order to operate in a fishery.
- Total Allowable Catches (TACs) would be set for specified fish by an independent committee with allocations for both the commercial and recreational sectors.
- Monitoring and compliance programs would enable the catch to be tracked from point of landing to point of sale.
- Charges envisaged would cover the costs of running the system and give a return to the community.¹⁹

With regard to recreational fishing the Working Group proposed the following:

- Total Allowable Recreational Catches (TARCs) would be established and recreational and commercial fishing people would be prevented from taking each other's share.²⁰

F RESPONSES FROM THE COMMERCIAL AND RECREATIONAL SECTORS

Reactions to the government's proposals from the commercial fishing sector have, in the main, tended to endorse the government's plans. Some commercial fishermen, however, have queried how the proposed total allowable catches would be determined. Anglers have voiced concerns based on their perception that a resource seen as publicly owned would become a resource which was now privately owned.

¹⁹ NSW Fisheries, *Sharing the Fisheries of NSW*, Proposals of the Fisheries Property Rights Working Group, January 1994, p.4.

²⁰ *ibid*, p.9.

In a special edition of the CFAC newsletter, devoted to the issue of "property rights" in fisheries management, John Stone, chairman of CFAC, wrote that while "It is the responsibility of the minister through NSW Fisheries to implement management systems to ensure the sustainability of all fish resources. It is also essential to commercial fishermen that future management permits them to conduct a successful commercial fishery venture, while at the same time sustaining our fisheries." He concluded, however, that overall "it is desirable that commercial fishermen be given long-term property rights as an equitable share in the fisheries in which they have catching history. At the present time commercial fishermen do not have this equity."²¹

On the other hand, in a submission on the proposals outlined in *Sharing the Fisheries of NSW*, the Clarence Regional Advisory Committee of CFAC raised the following questions in regard to Total Allowable Catches:

- On what basis would people be appointed to the committee which would decide TACs?
- What data would be used to determine a Total Allowable Catch?
- Upon what basis would the TAC be distributed?²²

Responses from the angling sector have, at least on the simple level of opinion, tended to be negative. Bryan Pratt, an author of books on recreational fishing, complained in an interview in *The Australian* that he was deeply concerned at the implication of the government selling off a public resource and a public right.²³

John Turnbull, angling columnist for the *Canberra Times*, has reiterated the argument that "angling tourism" should have a priority over commercial fishing in determining economic priorities in fishing in NSW. He has argued in his column, from the angler's point of view,

²¹ *C-Facts*, Newsletter of the NSW Commercial Fishing Advisory Council, May 1993, p.1.

²² Clarence Regional Advisory Committee of the NSW Commercial Fishing Advisory Council, *Property Rights Submission to Discussion Paper*, 12 January 1994.

²³ Julian Cribb, "Amateur Anglers Aim to Sink Property Plan" in *The Australian*, 12-13 March 1994, p.12.

that "There are only about 2,000 commercial fishermen in NSW compared to about 20,000 people engaged in the angling tourism industry which services the state's two million anglers. Yet those two million anglers take only about 14 per cent of the annual fish catch. So the question must be asked: Why should 0.001 per cent of fishers who are commercial fishermen be allowed to take 84 per cent of the fish?"²⁴

G PROBLEMS OF RESOURCE CONTROL IN FISHING

Moves towards the control of fish as a resource, both within Australia and overseas, have met with problems which are worth noting before the new legislation is outlined.

General control over the direction of the use of resources is exercised by the Crown. This control, however, is slightly qualified in respect of fishing. Professor Douglas Fisher, in discussing the Durham sea-coal case, comments that, "The importance of the Durham case lies in the distinction between property rights and public rights as mechanisms for controlling the use of natural resources. The Crown as holder of rights of property in the foreshore has the authority to determine the use of the resource, either by conserving it, developing it by itself or delegating the power of development to some other person. The only limitation upon the exercise by the Crown of this right of property is *ius publicum* related to fishing."²⁵ In another case, *Baggott v. Orr*, which concerned the right of a member of the public to take not only fish lying on a foreshore, but to take fish-shells also lying in the same place, Fisher has written that the Court decided that the member of the public concerned did not have the right to take the shells because "they belonged to the

²⁴ John Turnbull, "Blizzards Suspend Lake Fishing" in the *Canberra Times*, 14 April 1994, p.23. Recreational fishing organisations have commissioned research in support of their arguments. A submission prepared by Dr. Tom Bergin, in 1990, asserted that recreational and tourist fishing provided employment for around 70,000 people in Australia. The submission also cited figures from the International Visitors Survey, undertaken by the Bureau of Tourism Research, which indicated that there appeared to have been a substantial growth in visits by overseas anglers to Australia. See Tom Bergin, *The Fishing Tourism and Recreation Industry*, A Draft Submission from the Australian Recreational and Sport Fishing Confederation, December 1990, pp.1,11.

²⁵ In 1966 a case was heard by the Court of Appeal in England regarding the competing claims of local inhabitants of a coastal town in Durham, on the one hand, and a coal company and the rural district council, on the other, to small coals washed up by the tide from submarine outcrops. The Court found in favour of the latter. See Fisher, *op.cit.*, pp.54-56.

owner of the foreshore" but that the same person "was entitled to take fish lying upon the foreshore: apparently a right ancillary to the right to fish in the sea flowing above the foreshore when the tide is in". As Fisher observes again in respect of this second case, "Fish. . .fall within the exceptional *ius publicum* recognised by the common law."²⁶

Even where a form of property rights has been introduced, attendant difficulties have followed, as in the case of the Commonwealth government's introduction of Individual Transferable Quotas, in its South East Fishery, in 1991. The plan introduced a Total Allowable Catch for each specified species that could be taken from the fishery. The TAC was to be divided into units of fishing capacity and the units allocated to individual operators within the fishery. The quota allocated was based on an operator's catch history and financial involvement. This plan, however, was challenged in 1992 in the Federal Court by Austral Fisheries, a company operating in the South East Fishery, on the grounds that the size of its quota was based on a statistical fallacy. The Court in 1992 upheld Austral's case. In 1993 the Department of Primary Industries and Energy, having overall responsibility for the plan, appealed against the decision in the Federal Court. The appeal, however, was dismissed.²⁷

Quota systems, on an overall level, have had mixed results. In Australia's case there have been contrasting results in the case of the Southern Bluefin Tuna Fishery, on the one hand, and the South East Fishery on the other. In the case of the Southern Bluefin Tuna Fishery the Australian Bureau of Agricultural and Resource Economics (ABARE) study on the Use of Economic Instruments in Integrated Coastal Zone Management reported that, "The economic survey and subsequent analysis of the fishery's economic performance under individual transferable quotas indicated that despite several reductions in the total allowable catch, the industry remained profitable, with the cost of catching a tonne of tuna falling by 25 per cent and resource rent of

²⁶ *ibid.*, pp.57-58.

²⁷ *Minister for Primary Industries and Energy v. Austral Fisheries Pty.Ltd.* (Federal Court Reports, 1993), pp.381-401. Austral's complaint in the case was supported by the evidence of Dr. D.F. Nicholls, Reader in Statistics at the Australian National University. The fallacy which Dr. Nicholls reportedly demonstrated in the statistical methodology was that instead of adding the annual factors and expressing the individual's total as a percentage of the industry's total for the same period, a percentage had been struck in respect of each year and those annual percentages had been totalled and divided by the number of years used in the determining of the operator's catch history (to be precise, the six years 1984-1989).

\$6-\$7 million being earned in 1986-87."²⁸ In the case of the South East Fishery, according to ABARE, the "introduction of individual transferable quotas has had mixed success" in the fishery's three sectors. In the south west trawl sector of the South East Fishery profitability increased one year after the introduction of the 1991 management plan. This occurred, despite the reduction in the competitive total allowable catch for orange roughy, because, according to the ABARE study, "offshore operators who owned more than one vessel were able to amalgamate their quota, offsetting the reduction in their individual quotas." Inshore boats operating in the fishery gained increased prices for their catch which offset a decline in the recorded catch and a decline in the total allowable catch for some species. In the danish seine sector of the South East Fishery, however, "the introduction of individual transferable quotas appears to have had little impact on the level of profitability. The rise and subsequent decline in the rates of return to capital for the danish sector are largely due to changes in the price for whiting rather than the effect of individual transferable quotas." In the inshore sector of the South East Fishery, however, "the introduction of individual transferable quotas has had an adverse impact. The rate of return on capital for the inshore vessels is expected to decrease from negative 11 per cent in 1991-92 to negative 16 per cent in 1992-93." While declines in the total allowable catches for some of the key species have been a contributing factor to this decreasing rate of return, ABARE has reported that other problems, such as the way quota were initially allocated and the restriction on transfers of quota, may have also played a part in the decline in profitability.²⁹

It has also been asserted that quota systems can have an adverse effect on smaller operators. In a paper on the *Economic Implications of New Zealand's Quota Management System*, Paul Maloney, of the New Zealand Fishing Industry Board, has written that after the introduction of Individual Transferable Quotas in the New Zealand fishing industry in 1986 a "major restructuring of quota holdings took place over a relatively short period of time. The overall trend was clearly towards

²⁸ *Use of Economic Instruments in Integrated Coastal Zone Management*, p.35.

²⁹ *ibid.*, pp.49-50. See also Australian Bureau of Agricultural and Resource Economics, *Fisheries Surveys Report 1993*, pp.22-25. ABARE has reported that while the rate of return to boat capital for inshore boats during financial year 1992-93 was below the 1991-92 average, it showed a marked increase on the 1990-91 average.

concentration of quota holdings."³⁰

H REINTRODUCTION OF LEGISLATION

On 21 April 1994 the Hon. Ian Causley, Minister for Agriculture, Fisheries and Mines, introduced the *Fisheries Management Bill 1994* into Parliament. This is a major piece of legislation in regard to the organisation of commercial fishing in NSW. It incorporates elements of the existing legislation but also introduces the government's new approach in the form of "share managed fisheries" with long term fishing rights. In respect to recreational fishing, however, the new Bill, with one or two exceptions, maintains the approach to recreational fishing contained in the existing legislation. The Bill would also continue the statutory existence of the CFAC and the RFAC as the bodies through which the government liaises with the commercial and recreational fishers.

The main features of the government's new policy are contained in Part 3 of the Bill ("Commercial Share Management Fisheries"). Whereas at present commercial fishers are licensed each year to take fish for sale, with accompanying legal and administrative arrangements enabling those fishers to sell their entitlements to fish, under the government's proposed new approach to commercial fishing, licensed fishers will be eligible for shares in defined commercial fisheries. These shares are intended to provide long term fishing access rights to commercial fishers in exchange for a charge which covers the cost of management and for a community contribution charge. Each share managed fishery is to be monitored by a Management Advisory Committee and will be subject to periodic public review. The Bill does not specify which fisheries will be defined as share managed fisheries or the particular management arrangements for the fishery. The Bill proposes that fisheries be defined in consultation with the industry. A fishery would be declared a share managed fishery by proclamation by the Governor on the recommendation of the Minister.

The operational elements of the plan are included in the other parts of the Bill and in other divisions of Part 3. The outline of the management

³⁰ Paul Maloney, *Economic Implications of New Zealand's Quota Management System*, paper presented at the Australian and New Zealand Southern Trawl Fisheries Conference, Melbourne, 6-9 May 1990, p.5.

plans for share managed fisheries is contained in Division 5 of Part 3. The management plan will be the vehicle which will include all operational controls for each fishery. It also contains provisions for consultation with the public and with the commercial fishing sector. Management plans for each fishery are to be made by regulation.

Participation in share managed fisheries is dealt with in Division 6 of Part 3. It limits the persons who may fish in the fishery to those shareholders (or their nominees) who have the minimum required shareholding fixed by the management plan. This division also deals with endorsements which can be placed on the fishing licences of shareholders (or their nominees) to allow them to fish in a share managed fishery. It provides for shareholders to sell, mortgage or otherwise deal with their shares. The maximum shareholding of any one person may be fixed in the management plan but, if none is fixed, the maximum is to be 15% of the shares. Shares are to be issued for ten years from the date that the management plan commences. Shares will be automatically renewed when a new management plan is made.

The introduction, determination and allocation of Total Allowable Catches (TACs) is provided for in Part 2 and in Division 8 of Part 3. Part 2 ("General Fisheries Management") contains provisions for the introduction of a Total Allowable Catch (TAC). Mechanisms would be also be established for public consultation in establishing TACs. Any TAC established would be published in the NSW Government Gazette and whenever a TAC is set the Minister responsible would be required to review the fishing controls affecting commercial and other fishing people. Division 8 of Part 3 provides that the determination of the TAC for a share managed fishery will be undertaken by the TAC Committee. The whole TAC in a share managed fishery is to be allocated amongst the shareholders in the fishery by the Minister responsible.

Provisions for management charges and community contribution charges are contained in Division 7 of Part 3. The management charge is to be an amount which the Minister considers necessary to meet the costs for the particular share management fishery. The management charge is not to exceed the amount prescribed by the management plan for the fishery and will be payable by shareholders in proportion to their shareholding. The community contribution charge is a recompense back to the community for access to a community resource and is to be based on the size of the shareholding in the fishery.

