
TORRES STRAIT FISHERIES

IN A GLOBAL CONTEXT

by Heron Loban, Susan Ciccotosto, Taha Chaiechi, Josephine Pryce and John Hamilton¹

An issue currently high on the political agenda of Torres Strait Islanders² is commercial fishing. In December, 2011, the Federal Government put out to tender the buy-back of Torres Strait commercial fishing licences for tropical rock lobster owned by non-Indigenous people.³ In announcing this latest wave of buy-backs the Federal Government made two observations: first, that it would open up greater opportunities for Islander fishermen to develop their commercial fishing enterprises; and second, it would calm the conflict over this valuable resource between Islander and non-Islander fishermen.⁴

Very little research has been conducted into commercial fisheries in the Torres Strait and how this industry will look years from now, following the buy-backs and the settlement of native title claims. This paper explores the experiences of Indigenous people in other jurisdictions where Indigenous commercial fishing has been significantly progressed to see what lessons Torres Strait Islanders can learn going into the future.

Recent decades have witnessed an increasing Indigenous role in natural resource management and participation with a number of post-colonial states seeing the development of Indigenous self-governance and co-management initiatives within fisheries management. Such changes are emerging in the Torres Strait. In parallel there has been the rise of a rights-based approach to management, characterised by varying degrees of Indigenous access. Consequently, there is a growing amount of literature, predominantly of a case study and comparative nature, which seeks to illuminate the history and nature of these newly created Indigenous governance spaces and legal access rights, and in particular the degree to which they fulfil Indigenous rights to cultural and economic self-determination.⁵

NEW ZEALAND

Whilst examples of Indigenous participation with respect to customary or traditional⁶ fisheries are numerous, Indigenous access to commercial fisheries is less well established. In this regard the success of the Maori in

securing a significant stake in New Zealand's commercial fishing sector is often highlighted as a model case. New Zealand's system has developed into a rights-based management system which provides Maori with a 30 per cent share of the total individual transferable quota ('ITQ'), as well as a 50 per cent share in New Zealand's largest fishing company.⁷ Whilst this represents a significant economic stake for Maori as a whole, an estimated figure of NZ\$336.1 million has previously been placed on the resource as at the time of colonisation.⁸

Issues of representation and equity, however, pervade discussions and have been raised as pivotal and largely unresolved.⁹ These issues revolve around the decentralised nature of Maori organisational structure. The question of who speaks for Maori can be highly divisive, with conflicts over the distribution of fisheries assets compounded by the fact that a significant portion of urban Maori no longer identify with traditional *iwi* (tribe/s)—the locus of engagement with the government.¹⁰ The primary struggle is occurring largely between *iwi* with large coastlines and populous *iwi* who argue for an equitable distribution of the sizeable assets that have been amassed since colonisation.¹¹

It has also been argued that the property rights-based regime in New Zealand has created a legal dichotomisation of Maori fishing as either entirely customary or entirely commercial—that is at odds with the Maori reality.¹² In particular, the reduction of property rights to a purely economic concept within the ITQ system is seen as ignoring the reality of the cultural, political, legal, and economic dimensions evident in all property relations.¹³ Therefore, current arrangements represent an 'uneasy compromise' in which private property and elements of common property co-exist, with neither accommodating 'Maori concrete relations of owning, and social practices of exchanging, fish'.¹⁴ It has been argued in this regard that a more detailed analysis of internal *iwi* management approaches to customary and commercial fishing is essential in realising access to emergent Maori governance spaces.¹⁵ Inconsistent legislative obligations and disparate processes between the commercial sector, customary

fishing and marine conservation have added to the spatial conflicts between competing rights that have resulted in a 'race for space'.

In an exploration of the local impact of the ITQ system on Maori fishers of Great Barrier Island, conflicts arising between various actors within the governance space are often not solely about access to resources, but rather reflect differing conceptions about the nature of the relationship between nature and society, the meaning of community, as well as sources of authority.¹⁶ A pluralistic approach has been advanced as one solution that both involves local actors and calls for all stakeholders to make explicit their underlying assumptions regarding the nature of reality.¹⁷ Albeit within a different setting, despite an expressed interest in fostering collaboration and learning, management systems often prove resistant to change when Indigenous forms of knowledge are undermined.¹⁸

CANADA

In contrast with the New Zealand context, Canada views the rights of Canada's First Nations as somewhat more tenuous, particularly with respect to commercial fisheries.¹⁹ Whilst these rights are recognised within the *Constitution Act 1982*, it was only through a number of high profile cases throughout the early 1990's that these rights were articulated, with access to commercial fishing remaining tenuous and therefore highly contested.²⁰ It is viewed that the resolution of this conflict is more likely to come from negotiated agreements and treaties than through court decisions.²¹ It is argued, however, that this process has proved long and protracted with only two treaties having been concluded since the late 1990s, although several agreements-in-principle have also been negotiated.²²

It is also noted that whilst the first treaty, concluded with the Nisga'a nation in 2000, provided the Nisga'a with rights to a significant stake in some fisheries, subsequent agreements have tended to focus on fishing for domestic uses, with only limited commercial access offered through renewable licences.²³ It has been highlighted that the resulting issue is of livelihood uncertainty in the face of such tenuous and limited access.²⁴ In a report to the Government of Canada reviewing the status of First Nation participation in commercial fisheries, the First Nation Panel on Fisheries²⁵ calls for a minimum allocation to First Nations of 50 per cent of all fisheries in order to provide for the level of certainty necessary for effective fisheries management and livelihood sustainability. The Panel argues that this share should be viewed as an interim step, with the ultimate goal being a 100 per cent share in some fisheries.

An exploration of knowledge co-production in a narwhal co-management scheme in Canada's Arctic, finds that knowledge is often viewed on a continuum, with Inuit knowledge at one pole, and western scientific knowledge at the other.²⁶ The research reveals that participants view Inuit knowledge as 'oral, holistic, innumerate, moral, and long-term' while western scientific knowledge tends to be 'documented, compartmentalized, numerate, value-free, and short-term', with the latter tending to be privileged within the management process.²⁷ It is argued that a focus on knowledge co-production is central to achieving improved social, ecological, and social-ecological outcomes within a cross-cultural context.²⁸

THE TORRES STRAIT

With respect to Australia, literature concerning Indigenous commercial fisheries is all but absent. In one of the few critical studies concerning Torres Strait fisheries, a comparison was made of the relative economic benefits accruing to Islander fishers and non-Islander fishers.²⁹ Significantly, the study found that the mode of operation utilised by Islander fishers differs substantially from that employed by non-Islander fishers, making a direct comparison problematic. The study concluded however, that at least in respect of the finfish fishery, returns achieved by non-Islander fishers are higher than those enjoyed by Islander fishers. The study cited a range of reasons for these findings but notes that the ramifications of the smaller scale of operations of most Islander fishers are uppermost.

What lessons then can Torres Strait Islanders learn from the international experience? The dichotomy between customary and commercial fishing is currently bearing out in native title litigation. In 2001 a native title claim covering an area encompassing most of the Torres Strait was lodged on behalf Torres Strait Islanders. Significantly, native title rights of a commercial nature were claimed by Torres Strait Islanders in respect of fisheries. In the first instance in *Akiba v Queensland (No.2)*³⁰ His Honour Justice Finn found that the native title rights of Torres Strait Islanders did extend to the taking and using of fish for trade or commercial purposes. Viewed as a 'win' for Torres Strait Islander commercial fishing rights, the decision offered a positive platform from which to develop Indigenous commercial fisheries management strategies based in a legally recognised customary law framework.

However, as an act exemplifying the ongoing conflict between Indigenous and non-Indigenous interests the Commonwealth was swift to lodge an appeal against the decision. On 14 March, 2012, the Full Court of the

Federal Court handed down its decision in *Commonwealth v Akiba*³¹ and upheld the appeal in respect of native title fishing rights of a commercial nature determining that native title rights did not extend to taking and using fish for sale or trade. The recent successful appeal by the Commonwealth on this point highlights the complexity of this issue in an Australian context. Whilst the legal conflict continues in the courts, Torres Strait Islanders are yet to see a clear view from native title of the future of customary and commercial fishing and how the law will categorise or define their relationship to each other. In the Torres Strait context this uncertainty emphasises the need not only for interim measures to manage commercial fisheries in the Torres Strait, but an alternative means by which to resolve the conflict between Indigenous and non-Indigenous fishing interests.

Litigation and conflict to date involving Torres Strait Islander parties, both civil and criminal between Islander and non-Islander commercial fishing interests, suggests a negotiated outcome may be the best way forward and one in which all parties 'win'. This would appear to be the approach being taken in Australia by all parties facilitated by the forums created under the Torres Strait Treaty, in particular, the Protected Zone Joint Authority.³² In respect of Torres Strait Islander commercial involvement in commercial fisheries, the Australian and Queensland Governments, separate from the native title process, seem to be taking an internationally progressive approach having conducted a number of buy-back processes with a view to increasing the percentage of Torres Strait Islander commercial fishers.

The international stage highlights for Torres Strait Islanders that legal and institutional regimes can work toward securing access and management fishing rights of Indigenous peoples, but in order to affect and ensure sustainable livelihoods for Indigenous peoples in Australia consideration and respect needs to be given to Indigenous peoples as equal partners in participatory planning, management and policy-making. The rights-based management system of New Zealand emphasises the importance of preserving 'a way of life' and illustrates how individual and collective 'way of life' and ancestral territories can be integrated with sustainable livelihoods as Indigenous peoples are respected and empowered to manage their resources. The situation in New Zealand accentuates the complexity and continuing struggle for survival and preservation of cultural, social, economic and ecological relationships. Indigenous peoples should benefit, not only from the preservation of their traditional 'way of life', but also from the increased financial benefits

that can be leveraged from participation within traditional activities at a commercial level. Such is the situation with Torres Strait fishers.

Comparisons can also be drawn to the situation in Canada where progress is evident in knowledge co-production. This approach recognises that Indigenous peoples have repositories of local ecological knowledge accrued through generations of observations and experiences which can be shared with non-Indigenous stakeholders in the future management of natural resources. In the same way, Islander fishers, non-Islander fishers and other stakeholders should be able to respectfully recognise each other's interests, values, principles and rights and work toward an agreement on a coordinated management framework capable of taking responsibility as future stewards of resources.

CONCLUSION

Critical to the current status of relations in the Torres Strait, international experience shows that management activities and policies should aim to achieve the goal of eliminating conflicts between Indigenous fishers and commercial fishers, and such policies will seldom succeed if they do not reflect realistic alternatives. It is evident that the situation is complex, challenging and dynamic, but in the end securing rights, focusing on sustainable livelihoods and genuinely recognising equality will strengthen relationships between Indigenous peoples and non-Indigenous peoples in the Torres Strait so as to develop a mutually beneficial fisheries management regime.

Whilst keeping one eye on the lessons learnt by Indigenous peoples in other Commonwealth jurisdictions, Torres Strait Islanders are positively advancing valuable economic agendas for Islander commercial fisheries. As the 70 per cent buy-back scheme repositions Islander ownership³³ and while the legal community digests the *Akiba* appeal decision, what is key is that law and policy makers balance the learnings of international experience in assessing rights and opportunities and work to ensure the achievement of fair and equitable outcomes for all.

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- 1 The authors would like to thank Shelley Honeychurch for her research assistance.
- 2 It is acknowledged that both Aboriginal and Torres Strait Islander people reside in and are traditional owners of the Torres Strait. Use of the terms 'Torres Strait Islander' and 'Islander' in this paper reflects the literature and the primary interactions on this issue, particularly in the area of native title, and is in no way intended to exclude Aboriginal people or interests.
- 3 This most recent commercial fishing licence buy-back process relates to tropical rock lobster. In 2007, a buy-back scheme in respect of the finfish fishery in the Torres Strait resulted in 100 per cent of the non-Indigenous owned licences being bought out.
- 4 See Sarah Elks, 'Lobster buyback a boost for Torres Strait locals', *The Australian* (online), 21 December 2011 <<http://www.theaustralian.com.au/national-affairs/indigenous/lobster-buyback-a-boost-for-torres-strait-locals/story-fn9hm1pm-1226227123221>>; See also National Indigenous Radio Service, 'Program to buy back fishing licences in Torres Strait', *Latest News*, 21 December 2011 (Craig Wallace) <<http://www.nirs.org.au/news/latest-news/6757-program-to-buy-back-fishing-licenses-in-torres-strait>>.
- 5 For example, Robert Capistrano, 'Indigenous people, their livelihoods and fishery rights in Canada and the Philippines: paradoxes, perspectives and lessons learned' (Fellowship Paper, United Nations Division for Ocean Affairs and the Law of the Sea, 2010).
- 6 The term 'customary' will be primarily used throughout this paper. However, for the purposes of this paper the terms 'customary' and 'traditional' are interchangeable. No specific legal meaning is attached to either term. They are used according to their ordinary meaning.
- 7 Randall Bess and Ramana Rallapudi, 'Spatial conflicts in New Zealand fisheries: The rights of fishers and protection of the marine environment' (2007) 31 *Marine Policy* 719-729.
- 8 Melanie Durette, 'Indigenous Property Rights in Commercial Fisheries: Canada, New Zealand and Australia Compared' (Working Paper, CAEPR, 2007) 37.
- 9 Steven Bourassa and Ann Louise Strong, 'Restitution of fishing rights to Maori: representation, social justice and community development' (2000) 41 *Asia Pacific Viewpoint* 155-175.
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- 11 Harry Kersey, 'The Maori Fisheries Allocation Model of 2003:

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- 17 Ibid.
- 18 Aaron Dale and Derek Armitage, 'Marine mammal co-management in Canada's Arctic: Knowledge co-production for learning and adaptive capacity' (2011) 35 *Marine Policy* 440-449.
- 19 Durette, above n 8.
- 20 Ibid.
- 21 Douglas Harris, 'Aboriginal Rights to Fish in British Columbia' (Research Paper, The Scow Institute, 2007).
- 22 Ibid.
- 23 Ibid.
- 24 Durette, above n 8.
- 25 First Nation Panel On Fisheries, *Our Place at the Table: First Nations in the B.C. Fishery: A Report by the First Nation Panel on Fisheries* (2004).
- 26 Ibid.
- 27 Ibid.
- 28 Ibid.
- 29 Lindsay Fairhead and Laura Hohnon, 'Torres Strait Islanders: Improving Their Economic Benefits from Fishing' (Research Report 07.21, ABARE, 2007).
- 30 *Akiba v Queensland* (2010) 270 ALR 564.
- 31 *Akiba v Queensland* [2012] FCAFC 25 (Full FC).
- 32 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*, opened for signature 18 December 1978 (entered into force 15 February 1985).
- 33 A target of 70 per cent Islander ownership has been set in relation to the tropical rock lobster fishery which is the subject of the current buy-back process. See www.pzja.gov.au for government resources relating to the management of Torres Strait fisheries.

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