

PAPER No. 5: Negotiating Commercial Access to waters over Aboriginal land

Executive Summary

In the spirit of cooperation the NTSC is committed to developing a workable negotiated outcome with the key stakeholders affected by the High Court decision in the Blue Mud Bay (BMB) matter. This commitment is contingent on the principle that the seafood industry or any individual operators not bear the costs involved with developing the agreement or any impact of the agreement.

NTSC Policy Position:

The NTSC believes there are several key principles that must be addressed to ensure an effective process and resulting workable agreement, including:

- Industry requires a firm commitment that fair and adequate compensation or adjustment assistance will be provided for any unavoidable impacts such as those associated with the loss of access to fishing grounds and/or the value of their fishing licences as a result of any agreement;
- That Government commit to funding the process of agreement development, including industries involvement in the process;
- That a clear statement is made of what is meant by the wording used in the high court's orders of "without more" and options to deal with this provision are provided;
- That only a single industry wide agreement will be considered;
- That each stakeholder group must clearly enunciate their aspirations in an open and transparent manner;
- That any agreement recognizes the validity of the Fisheries Act and the licences already issued;
- That any agreement will seek to minimise the impacts on the commercial fishing industry;
- That all parties support the fact that time is of the essence in reaching an agreement due to the uncertainty created by the current situation;

- That any agreement provides for secure long term access to the commercial fishing industry; and
- That a dispute resolution process be agreed up front.

Background

In March 2007, the Federal Court ruled in the Blue Mud Bay (BMB) Case, stating in part, that the Northern Territory Fisheries Act did not apply in the intertidal waters over Aboriginal land. This in turn meant that fishing licences for this area were also invalid. This decision was appealed to the High Court by the Territory, the Commonwealth and the Northern Territory Seafood Council.

At this time the Land Councils agreed to allow commercial fishing activity to continue under current arrangements until the matter was resolved.

The appeal was heard by the High Court in December 2007 and a decision was handed down on 30 July 2008. The Council and the Governments appeal was upheld in part.

Importantly, the High Court found that the Fisheries Act is valid in all Territory waters, which includes waters within aboriginal land grant boundaries. In effect this means that the management arrangements put in place by the NT government for commercial fishing are still valid. This includes licensing and enforcement arrangements in all fisheries.

An important aspect of this decision is that current commercial licences are valid and the limited entry regimes put in place by government can be maintained. In short commercial fishing licences can only be issued under the Fisheries Act. The management of commercial fishing is still the responsibility of the government and controlled by the Fisheries Act.

Where the appeal failed was in relation to how water over aboriginal land be treated. The court held that the water lying over aboriginal land should not be treated differently from the land itself.

People have always had to get permission from the traditional owners or the Land Council to go onto aboriginal land and the Court has made it clear that this permission is also needed to go onto water over that land.

The Court has said that a licence granted under the Fisheries Act does not authorise people to go into these waters and therefore they need to have permission to go into these waters.

The High Court's decision was not about who owns the fish or native title. It is about access to the waters lying over aboriginal land. Commercial fishing licences are still valid and management arrangements including enforcement remain unchanged. To access water above aboriginal land commercial licensees need additional permission. Without a legislative change this permission can only be granted by the Traditional Owners or the relevant Land Council.

Area of application and affected fisheries

The decision affects any area of water which is landward of the boundary of Aboriginal land. Because coastal Aboriginal land was granted down to the low water mark, the intertidal

zone is generally considered inside the boundary. Rivers and estuaries over aboriginal land are also affected by the decision.

Broadly speaking the decision therefore applies to the strip of water between high tide and the low water mark adjacent to aboriginal land (including Arnhem Land, the Tiwi Islands and Groote Eylandt). The decision also applies to tidal and non-tidal waters over these lands (rivers, billabongs etc).

Rationale

The NTSC is fully committed to maintaining the spirit of cooperation adopted between stakeholders in this matter. The development of a workable negotiated outcome is dependent on this cooperation. It must be made clear from the outset that the seafood industry does not have either the capacity or the obligation to pay for the costs of developing the agreement or any long term impacts on the value of commercial fishing licences.