23._org_Western Australian Fishing Industry Council

Name of organisation: Western Australian Fishing Industry Council

Question 1:

We support the principles, however, given our extensive litigation experience, in practise our interest have not been adequately taken into account and often the fishing industry has been excluded by Government and native title interests. The withdraw of funding to respondent bodies such as WAFIC by the previous Government on the unjustifiable basis that the law was settled has exacerbated this.

Question 2:

There have been ongoing substantive changes in the law as reflected in Karpany and Akiba which directly relate to the recognition and scope of native title rights and interests.

Question 3:

no comment

Question 4:

The New Zealand model provides for separation between traditional or customary use and full participation in commercial fisheries. The latter was achieved through the fisheries management system

Question 5:

Note interaction with S221 following.

Question 6:

Without clear statement of the nature and structure of the rights claimed with particulars, S221 becomes a provision that merely provides for unfettered non commercial access to fish stocks. The substantial litigation and negotiation experience of WAFIC only becomes applied when claimant groups explain practical application of their laws and customs. A generalised presumption would mean that this essential information would not become part of the public record.

Question 7:

See answer to Q6. Explanation of customs and nature of rights intended to be exercised substantially eases the path to consent determinations as parties have full knowledge of what is subject to determination.

Question 8:

WAFIC believes that continuity should be one, but not the only issue that is relevant. The key issue should be the integrity of traditional law and custom. A breach in continuity may lead to a conclusion that law and custom no longer exist, but this should not in itself be determinative.

Question 9:

See Q 8 response.

Question 10:

As those laws and customs govern aspects of resource management, they need to be clear and attributable to a group capable of determination. Generally the inherent nature of a commercial system would not be appear to be consistent with traditional laws and customs, but we note that there may be exceptions where trading for commercial gain rather than ceremonial or cultural reasons form part of the native title rights. We also note however, as was observed by the High court in Akiba, that to the extent that these rights are commercial in nature they are managed in accordance within general commercial fishing arrangements.

Question 11:

Certainty can be achieved through a number of mechanisms, see previous comments on New Zealand.

Question 12:

We note Akiba, recognising that it proceeded from a specific finding of fact by the trial judge, that the rights in that particular case were for all purposes. It appears that this is a matter of fact and the Act already provides for it. The real issue is the management of commercial interests within a management system which provides for specific allocated rights. It is rights of this nature that provide value to all participants and create incentives for sustainability (Toohey Report and New Zealand experience)

Question 13:

See answer to Q 12

Question 14:

See answer to Q 12, the real question is how rights and interests are managed not how they are defined.

Question 15:

New Zealand. Native title was resolved through a system that provides both respect for traditional rights, opportunities for participation in commercial fisheries and vibrant commercial fisheries where there is indigenous participation (Toohey Report).

Question 16:

Not relevant to marine areas.

Question 17:

See above.

Question 18:

See earlier comments on the integrity of laws and customs.

Question 19:

No comment.

Question 20:

From our practical experience it is important not to set up perverse incentives where groups with strong, clear delineated customs and practises may end up with effectively fewer rights than groups that have lost that clarity over time.

Question 21:

See earlier comments on the clarity of rights. It is not for the Courts to revive customs that have fallen away.

Question 22:

Better recognition of issues in the marine domain which include multi-users, multi-functional and multi-jurisdictional. These issues cannot be resolved through the narrow terms of reference of this inquiry and are best addressed in the context of marine fisheries allocation inquiries (see Toohey report).

Question 23:

See concerns earlier on difficulties respondents have through lack of effective mechanisms to involve them in litigation from receiving notice of claims through to the closing stages of consent or judgement.

Question 24:

No comment.

Question 25:

No comment.

Question 26:

No comment.

Question 27:

No comment.

Question 28:

No comment.

Question 29:

This question is one sided as it considers only the interests of the claim group.

Question 30:

No comment.

Question 31:

Our experience is that claims are often broadly expressed in early stages and it is difficult to assess whether fishing parties will be affected. Given this there is a need for flexibility in relation to joinder provisions.

Question 32:

See above.

Question 33:

See above.

Question 34:

See response to Q31. This presumes that it is a simple matter to determine whether a third party interest will be affected or not. A process whereby parties could be provided with adequate insurance that their interests would not be affected would enable them to withdraw at an earlier phase. It is our overwhelming experience that it is the failure of claimants to specify their rights sufficiently clearly that is responsible for imposing costs on third party interests.

Question 35:

See above.

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