



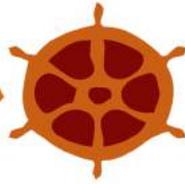
Oceans Law and Policy Services Pacific

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EDITORS' NOTES



James Sloan
Co-Editor



Kevin Chand
Co-Editor

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Each Pacific Island is unique with distinctive culture, traditions and language, but something common to each Pacific Island is the close ties they have with the ocean and indeed many have ancestors who were strong seafarers who sailed across the Pacific Ocean. Together with their large maritime boundaries and the bountiful natural resources therein, the ocean remains a very important topic for Pacific Islands. Fiji and the Pacific have played an important role in the development of Oceans law and policy from the formulation of the UN Convention on the Law of the Sea (UNCLOS) to recent negotiations on the draft text of an international instrument on the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ) under UNCLOS. In June 2017, the importance of the Pacific will be specifically recognised as Fiji hosts a High-Level UN Conference to Support the Implementation of Sustainable Development Goal 14, i.e., Conserve and sustainably use the oceans, seas and marine resources for sustainable development. This UN Conference, which is co-hosted by the governments of Fiji and Sweden, coincides with the World Oceans Day and presents a valuable opportunity for the Pacific Island states to address issues that affect them and the natural resources that their ocean contains.

Oceans law and policy is a broad topic, and our bulletin focuses on this, within Fiji's legal and governance context and with respect to its natural resources. Governance systems are important because they show how people have chosen to organize themselves collectively and how power, rights, and responsibilities are shared. They show how decisions are taken, who those decisions affect and who makes, implements and enforces those decisions, and ultimately how decision-makers can be held accountable.

By tackling important current oceans issues from a legal and governance perspective, we hope to encourage better decision making for our oceans and the people who depend on them. Embracing the unique legal and governance systems in Fiji and the Pacific is essential to achieving effective, sustainable resource management.

To kick off this first edition of our Oceans Law and Policy Newsletter we touch on changing policies within the department of fisheries; the FAO Port States Measures Agreement, a new international instrument that targets IUU fishing; and a discussion of property rights in the qoliqoli.

NATIONAL FIJI FISHERIES POLICY

Earlier this year consultations for the development of a National Fisheries Policy began. The policy was developed by the Department of Fisheries with assistance from FAO and SPC. This policy which covers the inshore, offshore and aquaculture sectors will guide the Fiji government's approach to sustainable fisheries development and management.

Ian Cartwright, a leading fisheries expert, facilitated the February consultations where stakeholders and participants were presented with a tentative vision of the draft policy that provided: *Sustainable, well-managed fisheries that provide long-term economic, social, ecological and food security benefits to Fijian communities.*

Department consultations yielded the following identified draft key policy issues/ objectives:

1. Sustainable utilization of fisheries resources while ensuring healthy ecosystems
2. Innovative and sustainable development to increase the contribution from fisheries to national food security, poverty alleviation, import substitution and employment creation
3. An adequate legal framework to cover fisheries management and development, and achieve effective compliance
4. [Transparent allocation and appropriate access to fisheries resources, and fair and accountable distribution of benefits to Fijians from that access]
5. Adequate information, including data and research results, to inform sustainable management and development
6. Fisheries managed using management plans or guidelines or other appropriate arrangements
7. Appropriate service delivery roles for the Fisheries Department, especially with respect to the private sector, the departments work at the community level, and aquaculture
8. Effective consultation and communication/ outreach or dissemination
9. Compliance with regional and international agreements and guidelines
10. Appropriate role of subsidies
11. A motivated, adequately resourced and trained fisheries staff
12. Increased importance and resourcing given to coastal fisheries

The initial consultations for the National Fisheries Policy began in February but the timeline for further consultations was soon derailed by TC Winston. The next round of consultations with stakeholders begins in September. The development of a National Fisheries Policy is a move in the right direction for the Department of Fisheries as this allows clear objectives and goals to define the evolution of the department into an entity that is responsive to the challenges of effective fisheries management. The Department of Fisheries' sister Department- the Forestry Department has had a Forest Policy since as early as the 1950s, and it has featured sustainability, and balancing landowners rights while strengthening the industry.



GOODWILL PAYMENTS

In January of 2016, the Minister of the Ministry of Fisheries and Forests made a declaration citing Section 9 (e) of the Fisheries Act, placing a freeze on goodwill payments and calling for further consultation around goodwill payments and licence fee proposals. 'Goodwill' payments refer to the longstanding practice where monetary payments are exchanged for consent to fish in customarily owned fishing grounds or 'qoliqoli' by the respective customary rights holder.

Obtaining consent from the customary custodians has been, the practical first step to acquiring an inshore commercial fishing licence. The practice, rather than the law, has required the applicant first to obtain a letter of consent from the chief or leader of the-the customary grouping to which the qoliqoli is registered to. This letter of consent was then endorsed and vetted by the Roko Tui of the respective province before being submitted to the divisional commissioner who is responsible for issuing a permit. The permit once presented to the Department of Fisheries may lead to the issuance of a licence to fish inside a demarcated area subject to any relevant restrictions.

The freeze on the practice of goodwill payments presents an issue because this is often the sole impetus for qoliqoli rights holders to give consent to outsiders to commercially harvest fish in their qoliqolis. The inshore waters of Fiji are not open access but subject to central licensing controls and customary tenure where the customary fishing rights holders have the exclusive right to fish for subsistence purposes. Inshore waters are demarcated along the lines of customary tenure and registered to customary groups of Yavusa or Vanua. The Fisheries Act is the legislation that is currently being applied by the Department of Fisheries to govern the regulation of inshore fishing while the Offshore Management Decree is being applied to govern all Fiji fisheries waters beyond the qoliqoli.

The government is currently in the process of conducting consultations with communities with the aim of introducing a new licensing system that incorporates qoliqoli fees that will be allocated to qoliqoli rights holders and the Department of Fisheries.

AN INTERNATIONAL TREATY TO COMBAT ILLEGAL FISHING

On the 5th of June 2016, the FAO Port State Measures Agreement (PSMA) entered into force as an international treaty after the minimum threshold of 25 countries had agreed to it. The primary objective of the PSMA is to “prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems”. The Agreement was adopted by the FAO Conference in 2009 after several calls were made by the international community for a binding international instrument to combat IUU fishing by having a minimum standard of port State measures.

Illegal, Unreported and Unregulated (IUU) fishing is one of the biggest problems facing the fisheries industry and in the Pacific alone, IUU activity accounts for an estimated US \$616 million. The Agreement is seen as a cost-effective method of combatting IUU fishing because the necessary actions are conducted at a designated port, as opposed to the monitoring, inspecting or pursuing vessels at sea. Port State measures also act as an effective barrier for fish caught from IUU activity from access to the market. Removing this access to the market effectively removes the economic incentive to catch fish illegally thereby reducing IUU fishing activities.

The PSMA envisages that parties, in their capacities as port States, will adopt and implement laws and policies that include actions to detect IUU fishing when ships seek to come to port. As part of this, the Agreement requires that parties designate specific ports for use by foreign vessels, allowing efforts to be concentrated at select ports. Also, foreign vessels must request permission to enter ports ahead of time, and provide port authorities with information, that include details of the cargo they have on board, and allow inspection of their log book, licenses, fishing gear and cargo.

Under the PSMA, port States may deny entry or inspect vessels that have to share information regionally and globally, regarding any vessels discovered to be involved in IUU fishing. Preventing IUU fishing vessels or related vessels from landing their catch

makes it more difficult for these catches from accessing national and international markets. Compared to most monitoring, control, and surveillance schemes, port state measures can be highly successful and cost-effective deterrent to IUU fishing activities.

The application of the measures set out in the Agreement will, among other things, contribute to harmonized port State measures, regional and international cooperation and stem the flow of IUU-caught fish to international markets.

While Fiji has neither signed nor ratified the PSMA, it has implemented a National Plan of Action for Illegal, Unreported and Unregulated Fishing (NPOA IUU) as well as passed the Offshore Fisheries Management Decree in 2012 which includes some port State measures. Fiji’s National Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (NPOA-IUU) was developed in line with the International Plan of Action to prevent, deter and eliminate IUU fishing (IPOA-IUU) and this includes robust port State measures that reflect the PSMA.

The Offshore Fisheries Management Decree is the legislation responsible for regulating offshore fishing activities in Fiji and under Part 7 of the Decree there are provisions for denying vessels entry to port where there is a suspicion that the vessel has been involved in IUU related activity. Entry to port may be allowed exclusively for inspection purposes. These provisions are the extent of the port State measures included in the Decree but this coupled with Fiji’s NPOA-IUU and obligations under the WCPFC, Fiji has ad hoc adoption of the key provisions of the PSMA.

While Fiji has not adopted the PSMA yet, it does comply with the key elements of the Agreement through a mix of laws, policies and regional and international obligations. It is yet to be seen whether Fiji will adopt the FAO Port State Measures Agreement, although no doubt the Department of Fisheries is keeping a close eye on this.



PROPERTY RIGHTS IN THE FIJIAN QOLIQOLI

This article is a summary of the paper of the same name as published in [Marine Policy, Volume 72, pages 76-81](#).

Customary marine tenure in Fiji has been a contentious issue because from the Deed of Cession and through Fiji's colonial administration there has been confusion around what qoliqoli areas and rights are. This is because during the colonial period legislation transferred ownership of the qoliqoli areas to the State while at the same time it also created and registered those qoliqoli areas and



recorded special recognition for customary groups and their rights in those same areas. To this day the ambiguity of 'ownership' and 'rights' in the qoliqoli continues, and this can be attributed to the law and practice failing to define the relationship clearly. A potential way to resolve the ambiguity is to consider how various rights are held, allocated or shared between the traditional communities and the State. A property rights theorem known the 'bundle of rights' may be applied to the current qoliqoli framework to enable a legal description of the competing rights in the qoliqoli.

The bundle of rights theory of property considers that property is comprised of various rights that together form full ownership of property. In our recently published paper entitled 'An analysis of property rights in the Fijian qoliqoli', we have applied this theory in conjunction with five constituent rights that are typical of natural resources such as fisheries. These constituent rights are the rights of access, withdrawal, management, exclusion, and alienation. These five rights were described by Schlager and Ostrom as the key rights that make up property rights with respect to the use of natural resources. The rights of access refer to the right of fishermen to enter a fishing area. The right of withdrawal refers to the right of fishermen to harvest fish. The right of management refers to the rights of regulating the harvest and use of resources. The right of exclusions refers to the right to determine who has access to the resource. The right of alienation is the right of the holder to transfer its rights of management or exclusion.

Our paper concludes that when the bundle of rights approach is applied to qoliqoli it suggests that: access rights in the qoliqoli are held by the respective registered qoliqoli rights holders, licensed fishermen and the public in so far as the limited public right to fish is applied. Withdrawal rights similarly follow that of access-right holders but subject withdrawal rules, i.e., qoliqoli rights holders can fish freely but they still need a licence when engaging in commercial fishing, licence fishermen may withdraw fish subject to the conditions of their licence, the public right to fish is limited to using only certain gear and solely for subsistence. Exclusion rights in law are held by

the State with a duty to consult with qoliqoli right holders but in practice, this right is jointly held and in fact obtaining consent from qoliqoli rights holders is the first step in obtaining a commercial inshore fishing licence. Management rights similarly in law are held by the State however, in practice, qoliqoli rights holders often are solely responsible for managing their respective qoliqolis. Rights of alienation are held solely by the State as the State has sovereignty over the inshore with qoliqoli rights holders having access and withdrawal rights. Alienation of the qoliqoli area seldom occurs but it is possible and has occurred for land reclamation or tourism projects where the State leases the area as part of a foreshore lease. But if this happens the practice is to seek the consent of the qoliqoli rights holders, who are asked to waive their fishing rights, and the practice from 1974 provides compensation in return

We believe that our paper provides a useful way of describing how the property rights in the natural resources of the qoliqoli are shared between the community and State, while ownership of the areas themselves vests in the State. This description of property rights allocation may have implications for fisheries management initiatives and therefore should factor into the process. For example, because property rights are shared between the State, qoliqoli rights holders, licenced fishermen and the public with operational level property rights held by qoliqoli rights holders and collective choice level property rights held by the State it may be important to involve all stakeholders in fisheries management initiatives. Further, what emerges from this analysis is a unique system that has evolved over time to find a way to balance rights between the State and Communities, and fisheries management initiatives that align with this local context could be best placed to harness the traditional knowledge of fisheries management. While the State under the modern and centralised legal system has ultimate control to legislate and alter the relative balance, the implications for fisheries management are important and relevant considerations for the State to consider.

CONTACT:

Oceans Law and Policy Services

(t) +(679) 331 9167

(a) 8 Holland Street
GPO Box 2025
Government Buildings
Suva, Fiji

(w) www.sas.com.fj

James Sloan: james@sas.com.fj
Kevin Chand: kevin.chand@stanford.edu

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