26 October 2012

Mr David Borthwick AO PSM
Review of Commonwealth fisheries management legislation
c/- Department of Agriculture, Fisheries and Forestry
18 Marcus Clark St.
Canberra. ACT 2600

Dear Mr Borthwick

Tuna Association submission to Review of Commonwealth fisheries management legislation

Note that we support the submission by the Commonwealth Fisheries Association (CFA) and we directly mirror here a lot of CFA's points. Where we can add value, we have done so.

Summary of our main points

The Australian Southern Bluefin Tuna (SBT) industry straddles a range of Commonwealth, State and international natural resource and environmental legislation and management. This is because SBT is an international RFMO fishery, is export-driven, and because utilisation in Australia covers both wild (AFMA) and ranching (State aquaculture).

ASBTIA represents the Australian SBT quota holders in policy, research and other issues with Commonwealth and State governments and overseas industries. Over 90% of the Australian quota is owned in Port Lincoln, making industry cohesion much easier.

We have a very robust relationship with Commonwealth authorities, especially AFMA at a domestic management level and DAFF at an international level. Despite the inevitable controversy over quota changes and the unlevel international playing field – the broader outcome is a recovering stock, and increasing quotas (set by science).

Therefore, our conclusion is that the AFMA legislation and DAFF role have worked well in general. However, the core legislation is over 20 years old. Our view is the Commonwealth legislation driving Commonwealth fisheries management (including the EPBC Act) needs updating to reflect :

(1) Changes are required to allow the Minister for Fisheries to have more flexibility and discretion in decision-making. The Minister is the elected representative and, with safeguards, the process must give the Minister the opportunity to examine all the issues. While we believe the current FMA and FAA largely achieve that, it appears they need to made clearer.

(2) To make the legislation more consistent with best current public sector practice, including a more national approach to cost-effectiveness, and rationalisation between the EPBC and AFMA Acts.

To put this into practice, we recommend:

(1) The TOR requires the FMA to be the prime instrument in Commonwealth fisheries management – and we agree with that. To do this, the EPBC Act needs to be amended to accredit the AFMA processes required to achieve what is intended by the current Parts 10, 13, and 13A of the EPBC Act. Currently the EPBC Act potentially gives the Minister for the Environment Act the powers to determine the management of Commonwealth fish species. This is not consistent with the TOR for this Review.
(2) At the same time, the current EPBC Parts 10, 13 and 13A need to be rationalised into a single assessment. The Government has already agreed to that in principle in its response to the Senate Committee.
(3) The EPBC Act needs to be amended to provide for any species covered by the HSP to not be eligible for EPBC listing
(4) The Minister for Fisheries already has substantial powers under the FAA Section 91 with powers to direct AFMA. This direction power has only ever been exercised once, and in that case it was to ensure that all aspects of the "Securing our Future" package were seen as a coherent package. However, in the recent controversy the Minister may have been constrained by a lack of powers – and this has to be addressed. The solutions to this are suggested later in this submission.

Our concerns on this issue

Despite our view that the Minister should have the right powers for the elected representative, our concern is that the record of political decisions in fisheries management is a bad one. It was this record which led Minister Kerin to establish AFMA in 1991.

Since then we have seen a number of fisheries management decisions which were based on political interference. These included:

(1) A major allocation decision
(2) A recent decision on a management system in an important Commonwealth fishery
(3) A recent decision to override a unanimous MAC decision on a TAC in an important Commonwealth fishery
(4) A recent decision to override the unanimous advice of scientists from a range of institutions.

Some of these decisions were made in response to community concerns – and it is the Government's right to do that. The problem is the temptation to dress that up as science – as this results in devaluing science.

This reminds us of the 1990's when industry and scientists were very often at loggerheads. Industry often tried to bring political pressure, and import any scientist they could find to try to stall inevitable quota cuts. Industry now recognises that the scientists were correct.

Whatever is changed in the FMA, fisheries can't be allowed to return to the dark days when lobbying (and now social media) replaced sound science.

Performance of the current system

We very often disagree with AFMA in areas such as compliance and risk assessment. We also disagree with them on the intent of key clauses in the SBT Management Plan. Most of all, we have a fundamental disconnect on the way that AFMA runs its research program.

We also disagree strongly with the DAFF strategy on international SBT negotiations

However, the more important thing is the bigger picture performance of the current system – and it is hard to argue that it has not been successful by global standards. The foundations have been:

(1) The general commitment of AFMA to science-driven fisheries management, and their parallel commitment to resisting political decision making.
(2) The foresight of DAFF to make the Harvest Strategy Policy (HSP) mandatory as part of the 2005 Direction to AFMA on the "Securing our Future" package.
(3) AFMA's major progress on ecosystem management through the Ecological Risk Assessments (ERA's), Threat abatement Plans (TAP's), and tough policy decisions.

In deciding what to change, it is important that the Review takes into account:

(1) No Commonwealth fishery has ever failed to meet the standards set under EPBC Parts 10, 13 or 13A. Those standards include the IUCN standards on target species and ecosystem management.
(2) To our knowledge, no Commonwealth managed species has ever been CITES-listed.
(3) Australia's overall fisheries management performance has been consistently recognised as being among the world's best. For example, the 2009 University of British Columbia study ranked Australia second on meeting sustainability standards. Also in 2009, Pitcher et al (including WWF) ranked Australia as fourth in meeting the FAO Code of Responsible Fisheries.
(4) The AFMA system of MAC's, RAG's and Management Plans are increasingly the model used in Australian States and in other countries.

(5) Fisheries management remains a controversial and politically sensitive issue. Despite this, the Minister has only ever given AFMA one direction under FAA Section 91. Even this Direction did not reflect a disagreement with AFMA.
(6) AFMA has been very effective in implementing the Threat Abatement Plan for seabirds.
(7) AFMA has tried to implement transparent processes. For example, the Risk Assessment Statement (RIS) on the gillnet fishery incidental catch is transparent in assessing the ecological impacts, the options, and taking some hard decisions.

Adding to/clarifying the Minister's powers

We can only assume that in the Margiris case, the reason that the Minister for Fisheries did not exercise his direction powers under FAA Section 91 was because of the exposure to the Federal Court judgement in the 1997 Bannister Quest vs AFMA. One reading of that judgement is that the economic and social components of ESD carry no weight. This is in addition to the core judgement that the FMA did not allow AFMA to discriminate in a TAC-controlled fishery against a boat because of its size.

One of the AFMA responses has been to strengthen the legislation in requiring AFMA's policies to meet certain economic benchmarks. However, there has been no attempt by AFMA to introduce any "social" benchmarks. This is despite the changes made in 2005 to put the same ESD Objective in the EPBC and FMA legislation.

We do not think it would be wise or practical to require AFMA to take social impacts into account. They would have difficulty reconciling any social objective with the ecological and economic parts of the legislation. The current FRDC project on social indicators and their possible role in policy decision-making shows how difficult it is to legislate for social considerations.

We recommend that the legislation specifically allow for:

(1) The Minister to seek outside scientific advice on an AFMA decision
(2) A formal process which transparently requires AFMA to re-consider its decision if the Minister requests.
(3) The Minister to pursue (1) and (2) above, but as with the Water Act 2007, the Minister can't direct AFMA to change their decision based on factual or scientific grounds.
(4) If required, that FAA Section 91 be clarified to allow the Minister to base any direction on wider grounds.

In practice the way forward for a Minister if they disagree with an AFMA decision is:

The Minister appoints their scientific panel,

Panel reports to Minister, who then decides whether to put this back to AFMA.

If the Minister puts it back to AFMA, then AFMA is required to consult publicly on it.

If AFMA then keep their original position, then as with the Water Act, the Minister can't use a "factual or scientific" reason to direct AFMA to change their view.

The Minister may then consider accepting AFMA's assessment or trigger a direction for other reasons under an amended FAA Section 91.

Our view is that this workable, and appropriate. To work it must recognise very strict timelines. It must also allow for the Minister to request at any time for a Plan to be changed, not just when it is first submitted for approval.

Recommendations that clearly establish the FMA as the lead document in fisheries management

We agree with the CFA position and can't add value to their comments.

The Harvest strategy Policy (HSP) and the By-catch Policy

We agree with the CFA comments.

These two Policies effectively and properly require AFMA to impose sustainable quotas and to take effective action on wider ecosystem impacts.

Existing management measures in Commonwealth fisheries

The CFA submission is similar to the points we would make.

We have a wider interest in natural resource management, and compare the current AFMA/DAFF fisheries outcomes with other areas – eg soil erosion, water flows, etc. We believe that Commonwealth fisheries have progressed more than areas such as water and erosion because the AFMA rules and requirements are very clear.

We have been in the position where we strongly resisted scientific advice on quota changes, but now recognise that they were correct. The 2009 reduction was a mistake, and applied inequitably, but this was based on false data from Japan – and scientists can only use the data they are given. The subsequent correction of the mistake by restoring the quota lost could have led us to take legal action. Our respect for the system is such that we did not do that.

Exercise of the ESD Principles and the Precautionary Principle

We endorse the CFA comments. In our experience, AFMA takes the precaution approach, and uses a risk-weighted approach.

Role of MAC's and RAG's

We endorse the CFA's submission on this point. Our only extra points are:

(1) The dilemma is how to get the best science at a cost-effective level. When you look at the high quality of the scientific advice in RAG's and MAC's, and at the Commissioner and CEO levels – how could we afford this advice under any other framework?
(2) The HSP and ERA's have largely been generated from within the AFMA scientific advisory structure, with assistance from DAFF. We may not like some of the results from that work, and often resent paying for it – but the reality is that it is generally very high quality.
(3) HSP, ecosystem management and ITQ's are very data-demanding so that doing the basic stock assessment takes a lot of the research funding that might have been required for more innovative work. In the case of SBT the quota holders have increased their cash contribution just to get this innovation.

There is no doubt that the Commonwealth should restore a lot of its previous funding for fisheries research. However, we also believe that it can also be done on an as needs basis, and not be automatic.

Cost recovery

We endorse the CFA points. The application of the DOF Guidelines to AFMA has markedly improved the accountability and discipline for both industry and AFMA.

We have had direct experience in SA of the new WA levy system. As we generate the major share of our GVP in the value adding growout, the Commonwealth SBT is a smaller fishery. Therefore, we would be advantaged by the WA resource access charging system – but we prefer cost recovery.

Other cost-effectiveness issues, including a Productivity Commission Enquiry

We endorse the CFA points. We particularly emphasise the importance of a reference to the Productivity Commission, and subsequent COAG action. The Report would make transparent the current waste of having so many jurisdictions, and the level of duplication. Under FRDC pressure, the rationalisation of research (eg rock lobster stock assessments) is now progressing, but the jurisdictions remain untouched.

The 2011-2012major budget cuts for fisheries management in Queensland, NSW and Victoria provide an opportunity to rationalise jurisdictions.

Strengthening access rights

We endorse the CFA points. For SBT it is especially important because:

(1) SBT was ITQ'd almost 30 years ago and so has the longest history of using quota as borrowing collateral.
(2) Despite the SBT quota cuts of 67% in 1989 and 25% in 2009, the funding institutions have maintained their confidence in SBT, because:
    (a) The quota decisions were scientific decisions
    (b) The strength of the access right.
(3) SBT has a high risk business model because all the investment in catching and ranching (feed, labour, overheads) is made January to June each year – before we know the market price. The only way this can work is that Banks fund the operating capital and quota rationalisation. They do not use the stock as collateral – they use quota.

Role of Charter/Recreational Fishing

We endorse the CFA points.

SBT is the Commonwealth fishery most affected by charter/recreational fishing. It is a resource allocation issue – and ASBTIA is proposing solutions to the Commonwealth Government, not to AFMA.

AFMA is not resourced to take direct responsibility for charter/rec fishing. The resource allocation needs to be at the inter-governmental level, and then the responsibility for contracting compliance by State Governments might be given to AFMA. The Commission has a lot of experience with SLA's with the States.

We suggest that the issue of jurisdiction over charter/recreational fishing should be part of the reference to the Productivity Commission.

Role of environmental non-government organisations (ENGO's)

We endorse the CFA submission on this issue.

To our knowledge, ENGO's are members of all the MAC's. Certainly the ENGO Member on the SBT Management Committee (SBTMAC) has had a long experience of SBT and contributes very constructively to the MAC. This often leads to more balanced outcomes.

We endorse CFA's comment that the contact in the MAC often leads to bilateral co-operation on other issues. We also appreciate the input of three ENGO's who have taken a long-term interest in SBT.

The only two disappointments we have are:

(1) SEWPaC seldom attends MAC meetings despite having a standing invitation
(2) Sometimes (not in SBTMAC), the wider ENGO groups take a different view from that taken by their MAC nominee. The most recent was in 2012 when the international head of WWF expressed views on bottom trawl, which were inconsistent with those of WWF Australia. In the end, no damage was done.

The Commonwealth role in aquaculture

To our knowledge, SBT is the only Commonwealth fishery which also grows out the catch. The tuna are caught and towed to Port Lincoln under Commonwealth management. As soon as they are transferred to the growout pontoons, they come under SA Government jurisdiction. At the end of harvest, AFMA then audits the balance sheet of fish transferred to farms, in-season mortalities, and harvests.

Currently, all aquaculture management is the responsibility of the States because all of it is in State waters. This is unlikely to change in the foreseeable future. The tuna farms are by far the furthest offshore (45km) but are still well within State waters (in a Gulf).

There are considerable problems arising from the current split jurisdiction. A high impact example has arisen in 2012 with AFMA's decision to introduce a new technology to take the weight sample of the SBT to debit the quota. Under the current sampling system the average weight is sampled before the SBT are counted into the growout pontoon. This means that a target stocking rate (kg/cubic meter of water) can be achieved by stopping the fish transfer at that point.

The SA Government has strict rules on finfish farming, including a limit on stocking rates. Under the new sampling system proposed by AFMA, the average weight will not be known until at best 3 days after the transfer. The farmer will not know whether they have breached SA law until well after the SBT are transferred.

AFMA's approach to this issue is that it is a problem for the SA Government and the industry to resolve. We anticipate that this is one of many similar issues which will arise. One option is for AFMA or the SA Government to take over the supply chain from catching to post-ranching harvest. A better option is for AFMA to better understand that adding value to a wild stock requires a different approach to compliance. An example is that when lobster made the major leap from harvesting dead product to live lobster, this required a different monitoring of the supply chain.

Yours sincerely

Brian Jeffriess