

National Competition Policy Review of Northern Territory Fisheries Legislation

Discussion Paper

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1. The purpose of this Discussion Paper

ACIL Consulting has been commissioned by the Northern Territory Department of Primary Industry and Fisheries to undertake a National Competition Policy (NCP) review of the Northern Territory *Fisheries Act*, Regulations and management plans.

Rules and regulations should be removed unless their benefits outweigh their costs

Under the NCP agreements, all Australian Governments have committed to reviewing their legislation in accordance with the main guiding principle that legislation should not restrict competition unless it can be demonstrated that "the benefits of the restriction to the community as a whole outweigh the costs". Where it can be demonstrated that there are net benefits from the restrictions, it is necessary as well to assess whether there are more cost-effective ways of achieving the same outcomes including non-legislative ways.

This review asks whether there are restrictions that cost more than they are worth

ACIL is therefore reviewing the restrictions under the NT fisheries legislation to assess whether the benefits they generate outweigh the costs they impose, and whether there are more cost-effective ways of gaining the benefits. The benefits and costs need to be assessed in terms of what they mean for all stakeholders including commercial, amateur and indigenous fishers processors, sellers, consumers, other users of the marine areas and the general community.

This review as a result covers all activities and fisheries covered by the legislation:

We invite your views on any of the matters addressed in this Discussion Paper.

- Commercial, amateur and indigenous fishing, other uses of the marine areas and habitat protection, and
- The coastal line fishery, coastal net fishery, bait net fishery, Spanish mackerel fishery, NT shark fishery, pearl fishing and pearl culture industry, demersal line and trap fishery, Timor Reef fishery, barramundi fishery, mud crab fishery, mollusc fishery, aquarium fishing/display fishery, trepang fishery, development fisheries, processing and sale of fish, aquaculture, special licences.

Most particularly we seek your views on the potentially anti-competitive issues coming from either the content of the legislation or the way it is managed.

The purpose of this paper is to describe the review process and to identify some of the more important issues that stakeholders may wish to address in their submissions to this review.

Ways of contacting ACIL are set out on the cover page.

This Paper is structured as follows:

- We first of all explain why competition is important;
- To help put this in context and to provide stakeholders who wish to make submissions with essential information, we briefly:

- summarise the steps that are normally taken in these types of reviews including what governments generally try to achieve when they regulate fisheries, and what those regulations usually involve, and
- describe the sorts of restrictions that are used in the NT to achieve the objectives of the legislation,

2. Why is competition so important?

Competition refers to the process of independent rivalry between market participants (fishers, processors, retailers, consumers, aquaculturalists etc). In general the more participants in the market, the more intense the rivalry will be.

Competition ensures markets operate efficiently...

...thereby promoting community benefit

Competition is crucial to markets operating efficiently. In competitive markets, suppliers will vie with each other for customers, and customers will be able to choose the type and quality of goods and services they desire at the lowest price on offer. The free operation of competitive markets will promote community benefit by ensuring that:

- resources will go into producing goods and services consumers want;
- consumers pay the lowest possible prices for goods and services;
- the best use is made of the community's scarce resources by forcing out the less efficient, higher cost suppliers of a given standard of good or service, and
- technological innovation and improved service provision is encouraged as producers vie for sales and increased profits by developing new or improved production processes, or better quality products.

These are the reasons why competition is important. If regulations interfere with competition (or more generally with the rights of individuals to make free choices in their market dealings), then we need to be sure that the regulation is justified and that the community is made better off because of the interference, not made worse off. That is the objective of undertaking NCP reviews such as this one.

Regulatory restrictions can impede competition

The legislation under review contains a range of restrictions on the activities of fishers, commercial, indigenous and amateur. It also restricts the activities of processors and retailers to some extent. Regulations will nearly always translate into restrictions of one form or another, but these do not necessarily restrict competition (for example, the *Trade Practices Act* prohibits certain practices that would lessen competition). Only those restrictions or controls that have an impact on the operations of markets and the decisions of individuals and firms operating in those markets are potentially restrictions on competition.

...but they are in place to achieve the objectives of the Act.

There are different types of competition...

all of which may be affected by regulations...

and which ACIL needs to review and assess.

In the case of the fishing industry, the majority of restrictions have been put in place to achieve the general objectives of the Act: concisely stated, to conserve and sustainably manage the fisheries resources and their habitats so as to optimise the benefits the community derives from the resource.

Aspects of competition that can be affected by the legislation include:

- Competition between competing uses (and users) of marine areas (for example, competition between commercial and amateur fishing on the one hand and other recreational or commercial uses of the waters on the other);
- Competition for the resource between catching and conservation interests (that is, the greater the amount of resource allocated to fishing, the smaller the population of fish);
- Competition among commercial fishers targeting the same species to catch the available fish; depending on the extent to which a fish resource is targeted, such competition can impose significant costs on fishers as yields decline.
- Competition between local suppliers of fish to markets in the NT, interstate or overseas;
- Competition between local suppliers and suppliers from interstate and overseas (import or export competition);
- Competition between suppliers of fish and fish products and suppliers of other food products;
- Competition among suppliers of services to the commercial and amateur fishing sectors, and
- Competition between commercial fishers and other businesses for labour, capital and other inputs to production.

3. The review process

The NCP legislative review process involves five steps that ACIL must undertake which are set out here. We explain these so that those who have views about the legislation and who want to make them known to ACIL will know the issues on which the review needs to focus.

3.1 Are the objectives right and appropriately addressed?

Step 1: Clarify the objectives of the legislation and the problems the legislation is intended to address.

This Step examines the **objectives sought** by various regulations applying to the Northern Territory fishing industry. The objectives of the Act should be directed to fixing problems that arise if individuals' were free to access and use fisheries resources and their habitats without any restriction. If there were no problems arising from individuals' activities, there would be no justification for governments to restrict the activities of individuals. Fisheries legislation also seeks to allocate the available

resources among competing users, such as commercial, amateur and indigenous fishers.

Often the reason regulation is introduced in a market is that the operation of that market fails to produce outcomes desired by the general community. The market failings most likely to be associated with unregulated fishing activity include:

You may have views on the legislation and its management including:

The objectives

– are they the right ones?

The problems

– are they adequately identified?

– and appropriately addressed?

- Unregulated fishing may result in unsustainable rates of catch, threatening the continued existence of the fish population; there are many example throughout the world of fisheries resources being depleted to such an extent that previously viable fishing industries have disappeared;
- Even if the market determined catch was sustainable from a biological perspective, there is a tendency for competition among fishers to result in excessive amounts of effort and costs directed to taking that sustainable catch;
- In an unregulated fishery there may be inadequate incentives to minimise damage to fish habitats; and
- Unregulated fishing may also involve congestion, conflict between competing users and other such costs that mean the market outcomes may not maximise the benefits that the community derives from the resource.

These problems provide the reason for government intervention. Where governments do intervene, they should direct intervention at specific targets defined with respect to the problems. Targets can be specified in terms of such things as estimates of sustainable catch, measures of fishing effort, habitat and environmental standards and other relevant variables. Achieving these targets should be the objective of the Act, the Regulations, management plans and related policies. In setting targets, the amount of information available about fisheries and habitats is often a major constraint. For example, it may well be the case that regulators or the industry have little or no idea about the sustainability of different levels of catch. In such cases, whether they set effort controls or output quotas, there may be a case for conservatism (or applying the precautionary principle) when deciding such matters as the number of licences to issue and the amount and type of gear fishers may use.

The Act and the Regulations can provide a ‘toolbox’ of different controls from which managers can select the most appropriate to achieve the objectives of the Act. The Act provides the power for the Director to employ a wide range of controls on the activities of fishers. An important issue is the trade off between establishing a relatively certain set of rules upon which fishers can make longer term plans, and the need for fisheries managers to respond quickly and flexibly to threats to the resource.

The objective of the Act is stated as:

“An Act to provide for the regulation, conservation and management of fisheries and fishery resources so as to maintain their sustainable utilisation, to regulate the sale and processing of fish and aquatic life, and for related purposes.”

In comparison to other States’ fisheries legislation, this is a rather limited statement of objectives and the Review will need to spell out the objectives in greater detail. This will involve looking at second reading speeches and other public documents. The objectives of management plans provide more insight. As stated in the Act (Part III, Section 22):

(1) The purpose of this Part is to conserve, enhance, protect, utilize, and manage the fish and aquatic life resources of the Territory to -

(a) promote, develop and maintain commercial and amateur fishing;

(b) provide for optimum yields from a fishery and maintain the quality of the yield;

(c) ensure that the fisheries of the Territory are not endangered or overexploited;

(ca) encourage tourist and scientific interest in fish and aquatic life; and/or

(d) ensure that the habitats of fish or aquatic life and the general environment is not detrimentally affected.

Some of these objectives match up with the market failures of unregulated fisheries, but not all. The objectives also tend to be somewhat repetitive. Since regulations can impose significant costs on individuals they must be justified in terms of the objectives they seek, it is important that the objectives be precisely stated and worth pursuing.

Should ESD be an explicit objective included in the Act?

While it is implicit in the above stated objectives and in the restrictions actually adopted under the Act, the Act does not mention the principle of ecologically sustainable development. This concept is not new to fishers and is central to sound fisheries management. However, there is a case for explicitly including sustainable development as an objective of the Act, if not as the primary objective (since it encompasses things such as maximisation of economic and social benefits (over time) and protection of the fisheries environment or habitat).

3.2 Are restrictions unreasonable, unfair or inefficient?

Step 2: Identify the nature of the restrictions on competition arising from the legislation or from its administration, and

Step 3: Analyse the likely effects of the restrictions on competition and on the economy in general

In conducting the review, we need to find the primary reasons for each restriction and how it works in practice

ACIL seeks your help in doing this.

These two Steps are undertaken to **identify** and **analyse** provisions that may involve potential or actual **restrictions on competition**.

Fisheries management, by definition, involves restricting what fishers can and cannot do in relation to the fisheries, and imposes costs on users. These costs are in a variety of forms and include such things as the costs of complying with the regulations, higher fishing costs that arise because fishers are restricted in their choice of target species, gear, fishing methods, boat sizes etc.

Many restrictions commonly applied in fisheries legislation can be used to achieve a number of objectives and the importance of these objectives varies across jurisdictions. For example restrictions on gear could be designed to restrict fishing effort, to protect the fisheries habitat or to reduce conflict between different groups using the main resource. While there are many restrictions in the Act and the regulations, most are minor in their effects and would be required under almost any regulatory framework or approach to managing the fisheries resource.

This review intends to identify and assess any provisions of the Act, the Regulations and management plans that could:

- give rise to important restrictions on competition;
- reduce the efficiency of fishers,
- reduce the potential for amateur fishers to gain enjoyment from fishing;
- reduce the potential for indigenous fishers to benefit from fishing; or
- contribute to undesirable impacts on fisheries habitats.

We will examine restrictions that have anti-competitive effects and restrictions that raise industry costs, reduce industry's ability to maximise profits or in any other way interfere with efficient decision making. There will be restrictions that disadvantage and restrictions that advantage commercial, indigenous, and amateur fishers and other users of the resource. We are also concerned with restrictions on amateur fishing and other activities that diminish the public benefits.

The nature of the effect on competition can take a variety of forms. These are canvassed in the following sections.

We want to hear your views on the effects of restrictions:

– do they unreasonably stop you doing things?

– or force you to do things inefficiently?

– do other competing user/users have unfair advantages?

Do restrictions on numbers of licences affect you?

Do restrictions on buying and selling licences affect you?

3.2.1 Regulations that restrict supply coming onto the market

Examples would include closed seasons, restrictions on imports of fish from interstate/overseas, and restrictions on taking stock in reproductive or growth phases of their lifecycle (that is, sex restrictions and minimum sizes). While closed seasons (such as used in the barramundi fishery) are designed to protect stocks, they also disadvantage consumers because supply is not regularly available and prices may fluctuate seasonally. Fishers are also disadvantaged if they have no alternative activity in which to employ themselves and their equipment. The closed season therefore must work, in terms of achieving its objective, and the benefits it delivers must exceed the cost it imposes.

3.2.2 Regulations that restrict the level of competition between participants in the industry

If licence numbers are restricted to a small number, this could encourage collusion among fishers, processors or retailers. In the NT there is a restriction on the issue of new licences for all fisheries.

While in many fisheries the number of licences is sufficient to ensure competition among fishers, in some fisheries only a few licences are available, such as the pearl fishing and pearl culture industry, Aboriginal coastal licences and the trepang fishery.

3.2.3 Barriers to entry (or exit) or regulations which raise the cost of entry into (or exit from) the industry

If licences are not transferable, as is the case in a number of fisheries in the NT, there are barriers to entry into the industry that may allow industry participants to charge higher prices persistently without eliciting a competitive response from firms or individuals outside of the industry. Barriers to entry may also perpetuate inefficient fishing practices and inhibit the adoption of new technologies that could increase efficiency and reduce consumer prices over time.

Fisheries in which licences are not transferable comprise: the coastal net fishery, bait net fishery, some licences within the Spanish mackerel fishery, the Aquarium Fishing/Display Fishery, Development fisheries, finfish trawl fishery, jigging fishery, Aboriginal coastal licence, and fishing tour operators. In most cases, licences are made non-transferable in fisheries where attempts are being made to reduce effort. The review will consider alternative means of reducing effort that may be less restrictive.

Are there less costly ways of restricting catching effort?

3.2.4 Regulations that raise the costs of inputs into the industry

From the perspective of maximising the public benefits derived from fishing it is important that fishers are free to minimise the costs of their fishing operations. Examples of such restrictions designed to restrict effort or fishing ‘power’ include limits on the type, dimensions and amount of gear (crab pots for example), restrictions on fishing method adopted, limitations on the size and number of vessels, restrictions on the choice of landing points, trip limits etc. Many of these restrictions are employed in the NT.

These restrictions, generally known as input controls, are put in place to protect the fisheries from excessive catches through the application of excessive amounts of effort. Input controls are an indirect means of achieving a sustainable catch objective. In principle output controls can achieve this objective more directly while allowing fishers to minimise their fishing costs (for example by being able to choose the right amount of gear, boat sizes, fishing times and areas etc). In practice, however, output controls may be difficult to design and enforce.

Examples of input controls apply to all fisheries and all fishers in the NT, commercial, Aboriginal and amateur, although in some fisheries they are more prevalent than others, and in a few such as the pearl industry they are minimal.

Are you unreasonably discriminated against?

3.2.5 Discrimination between operators in or with those wanting to enter the industry

While the restrictions in the Act would appear to apply in a non-discriminatory fashion to classes of fishers, there may be different treatment between some. For example amateur fishers face bag limits whereas commercial fishers do not. Aboriginal fishing licences are very restrictive compared to commercial fishing licences.

While these differences in treatment may be justified, this has to be proven in the review.

Have your risks been raised unreasonably?

3.2.6 Regulations that add unnecessarily to uncertainty and risk

If licences are granted for too short a time period and if renewal is not automatic, this can unnecessarily raise uncertainties and therefore the costs of businesses and the attractiveness of investment in fisheries relative to other activities (for example, loans may be more difficult to obtain and may have higher interests rates).

Examples of non-automatic renewal include commercial fishing licences, a fish trader/processor licence, a fish retailer licence, a fish broker licence and an Aboriginal coastal licence.

Are information-related rules too costly?

Do the rules stop you from getting ahead of the game?

Step 4: Assess and balance the costs and benefits to the whole community of the restrictions, and

3.2.7 Excessive compliance costs:

Regulators have a clear need to gather necessary information, but they should only gather information necessary to achieve the objectives of the Act and this should be done at minimum cost. In other cases, restrictions are placed on persons so that fisheries authorities can monitor catches and enforce the regulations.

Examples include for the mud crab fishery, the licence number must be marked (with a minimum diameter or length of 80 mm) on a float attached to each pot, and under the barramundi and shark fisheries, there is a requirement to attach identification (three floats with the licence number on) to a gillnet.

3.2.8 Regulations that limit the scope to innovate

Gear and fishing method specifications can have the effect of preventing the adoption of more efficient fishing methods and gear. This is a major problem with fisheries legislation based on restricting effort: it is difficult to accommodate innovations that would reduce the cost of taking the same catch and have significant benefits for fisher profitability and lower prices to consumers.

A common example is the specification of the type of gear that may be used in a fishery and the dimensions and construction materials of that gear.

3.3 Assess and balance the costs and benefits of restrictions

The analysis involved in this Step can be complex in terms of identifying the effects, measuring their likely importance and measuring the cost of the restrictions. The benefits associated with the restrictions must be balanced against these costs.

The Review needs to establish whether the restrictions in the Act, regulations and management plans actually impose a cost on fishers and the magnitude of the costs. For example, restrictions on the length and other dimensions of fishing gear in principle impose restrictions on the choice of fishers. However, in practice the gear restriction may not be a serious constraint. This would be the case if the restrictions were set above what fishers actually need to fish. For example, a boat length restriction of 25 metres appears to be restrictive, but in practice commercial considerations would dictate the use of much smaller vessels.

In this review, we will attempt a qualitative, and where possible, a quantitative, assessment of the magnitude of the social costs likely to arise from the restrictions imposed on users of NT marine resources.

What are your views on the effectiveness of restrictions:

– do restrictions work as they were intended?

– are they worth what they cost?

The benefits flowing from the achievement of the objectives of the Act are likely to be substantial and to outweigh, in many cases, the costs imposed by the restrictions on fisheries. However, the regulations themselves will only generate benefits if they actually achieve these objectives. For example, conservation of fish stocks is likely to have a very high community benefit. However, if a regulation does not achieve this objective, its actual benefits are not likely to exceed its costs.

Regulatory or management approaches, which are demonstrated to impose little cost and to achieve their objectives, would clearly pass the competition policy test of contributing to positive net community benefits. This does not mean that they are the preferred approach, as there may be less restrictive alternatives that achieve similar benefits.

There would be doubt when a regulatory approach is likely to involve large costs and is not likely to contribute much, if at all, to the regulatory objectives. Some input controls may fall into this category. For example, the regulator may limit vessel size to restrict fishing effort and this may result in sub-optimal size vessels (from a fishing cost perspective). This restriction would not restrict effort if fishers could simply employ more vessels. Effort would not be limited, but fishing costs would be higher than they would otherwise be if larger vessels could be used.

3.4 Alternative means of achieving the same result

Step 5: Consider alternative means of achieving the same result, including non-legislative means.

The final step involves considering each fishery and comparing the existing regulatory approaches with feasible alternative options. In some cases the option actually adopted is likely to be the most efficient among the feasible alternatives. In other cases there are more efficient approaches in practice, but these are not feasible at this time, either because of uncertainty and lack of necessary information or because of high enforcement costs.

For many fisheries and fish species, in principle, a regulatory approach based on individual tradeable quotas can be shown to achieve a sustainable catch target and at lower costs than an approach based on input controls. For example, Queensland has adopted an ITQ for spanner crabs. Is such an approach feasible for mud crabs and other target species in the NT. ITQs may not be practical for all species of fish and they may have a higher enforcement cost. The latter would need to be offset against the benefits of any shift to ITQs.

Do you believe there are better or less costly ways of achieving the objectives of the legislation?

Even where the general approach adopted in a fishery is likely to be better than its alternatives, certain restrictions within this package of restrictions may be unnecessary in terms of the objectives sought or could be replaced by a less restrictive alternative which would allow greater competition and increased efficiency. That is, it may be possible to improve the efficiency of the approach adopted by amending some of its component restrictions.