



# Compliance and Enforcement for Coastal Fisheries Management in Fiji

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## EXECUTIVE SUMMARY

Fiji's inshore marine environment, and in particular the reef ecosystem, is unique for its abundance and diversity of life. Fijians have a strong tradition of connection to the coastal environment. As recognised in the 2005 Pacific Islands Regional Ocean Policy, "[t]hroughout the region, customary association with the sea forms the basis of present day social structures, livelihoods and tenure systems and traditional systems of stewardship governing its use." Inshore fisheries are also an essential component of the economy. In the recent past, inshore fisheries have contributed an amount roughly equivalent to the contribution of the offshore fishery.

## LEGAL AND INSTITUTIONAL FRAMEWORK

The primary piece of legislation for coastal fisheries management is the *Fisheries Act (Cap. 158)*. The *Fisheries Act (Cap. 158)* recognises customary fishing rights within the *qoliqoli* for native Fijians. For the purposes of this report, native Fijians with a customary fishing right to a particular *qoliqoli* are referred to as resource owners. The recognition of customary fishing rights is intertwined with the establishment of a permit system, such that all non-resource owners wishing to fish for any purpose (including subsistence) require a permit, notwithstanding a few exemptions. People wishing to fish for "trade or business" require a licence in addition to a permit.

The Act also imposes restrictions on size limits, species and methods of fishing, as well as creating a power to designate "restricted areas" where fishing is heavily restricted, (with the exception of certain fishing methods). The Act creates the role of "fish warden" which is filled by trained community members to undertake monitoring, surveillance and inspection to determine compliance with the *Fisheries Act (Cap. 158)*. The offences under the Act are relatively comprehensive in their coverage of fisheries crime however, the maximum penalties are inadequate.

## KEY LEGAL AND INSTITUTIONAL ISSUES

The Fiji Locally Managed Marine Areas (FLMMA) network has been pivotal in aiding communities in the implementation of management tools utilised within the *qoliqoli*. Most notable is a growth in the use of *tabus*, traditional no-fishing zones. Whilst community-imposed *tabu* areas are not explicitly recognised in the legal framework for coastal fisheries management, there is limited potential to use mechanisms within the *Fisheries Act (Cap. 158)*, such as licence conditions, permit conditions and gazettal of restricted areas to protect *tabus*. However, compliance with, and enforcement of, these mechanism and fisheries law in general, is a major obstacle in the effective management of the inshore marine environment.

The major legal and institutional issues related to compliance and enforcement include:

- Permits: non-implementation of the statutory permit scheme
- Licences:
  - Uncertainty about the term "trade or business" makes it unclear when a licence is required;

- Inadequate licence conditions
- Breach of licence conditions
- Community-imposed goodwill payments may act as an incentive for people to fish without a licence
- Restricted areas:
  - Exemptions for certain fishing methods means that it is not currently possible to create a complete fishing prohibition
  - Long delays in achieving gazettal of a restricted area
  - Perceived loss of community ownership once an area is gazetted as restricted
- Internal compliance:
  - Breach of *tabus* by resource owners
  - Lack of community education about fisheries law and reef ecology
- Fish wardens:
  - Lack of certified fish wardens
  - Inadequate training of fish wardens
  - Inadequate resourcing of fish wardens
  - Lack of recognition of fish wardens
  - Conflict and aggression between fish wardens and fishermen
- Police:
  - Possible inadequacies in implementation of law
  - Police reluctance to investigate and prosecute fisheries crime
  - Unfamiliarity with fisheries law
  - Mischaracterisation of their role in prosecution
- Prosecution:
  - Rarity of prosecution of fisheries crime
  - Lenient sentencing when prosecution occurs

## RECOMMENDATIONS

Following analysis of legislation and interviews with key stakeholders, the paper makes the following recommendations which are divided into recommendations relating to (1) the improved administration of the Act (2) adoption of policy or subsidiary legislation and (3) legislative amendment:

### Recommendations for the improved administration of the Act:

<b>Rec. 1</b>	Implement statutory permit scheme.
<b>Rec. 3</b>	Develop and implement a community-based warning and permit or licence non-renewal system for repeat offenders.

<b>Rec. 4</b>	Include a plain language summary of restrictions with all licences issued.
<b>Rec. 5</b>	Accurately map <i>tabu</i> areas on licences.
<b>Rec. 8</b>	Develop of an information sheet for communities detailing issues that could be considered when deciding whether to establish a restricted area.
<b>Rec. 13</b>	Increase the number of certified fish wardens receiving adequate training.
<b>Rec. 14</b>	Establish internal governance structures for fisheries management within communities.
<b>Rec. 15</b>	Develop a comprehensive training program for fish wardens
<b>Rec. 16</b>	Develop a compliance and enforcement handbook for fish wardens.
<b>Rec. 17</b>	Develop and distribute enforcement kits to all fish wardens.
<b>Rec. 18</b>	Develop and implement an awareness program for the public.
<b>Rec. 19</b>	Develop and implement a “Train the Trainers” program for staff at the Department of Fisheries.
<b>Rec. 21</b>	Convene a high level forum between police, the Department of Fisheries and FLMMA to discuss and clarify roles and responsibilities in enforcement of fisheries law.
<b>Rec. 22</b>	Distribute the <i>Fisheries Act (Cap. 158)</i> and its associated regulations to every coastal police post in Fiji.
<b>Rec. 23</b>	Develop and implement a joint training program for fish wardens and police.
<b>Rec. 24</b>	Develop and distribute a fisheries enforcement manual for police.
<b>Rec. 25</b>	Develop a black list of convicted offenders.
<b>Rec. 26</b>	Develop and deliver Magistrates training for fisheries offences and penalties.

### Recommendations for the adoption of policy or subsidiary legislation

<b>Rec. 6</b>	Adopt guidelines clarifying the meaning of “trade or business” for licences.
<b>Rec. 9</b>	Remove exceptions for exempted fishing methods in restricted areas from regulation 11 of the <i>Fisheries Regulations</i> .
<b>Rec. 10</b>	Initiate a consultation process for formalising the role of Qoliqoli Committees through the creation of regulations.
<b>Rec. 11</b>	Create regulations to clarify and streamline the restricted area gazetting process
<b>Rec. 12</b>	Initiate a consultation process to consider the creation of by-laws to address compliance issues within the community.

### Recommendations for legislative amendment

<b>Rec. 2</b>	Initiate a consultation process regarding the removal of permit exceptions.
<b>Rec. 7</b>	Remove licence exceptions from the section 5 of the <i>Fisheries Act</i> .
<b>Rec. 20</b>	Introduce a legal requirement for fish wardens to be paid.
<b>Rec. 27</b>	Increase penalties in the <i>Fisheries Act</i> .

# COMPLIANCE AND ENFORCEMENT FOR COASTAL FISHERIES MANAGEMENT IN FIJI

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## 1. INTRODUCTION

### 1.1. Fiji's Coastal Fisheries

The marine environment holds value for Fiji from multiple perspectives. Pacific Islanders have a long history of connection to the oceans. As recognised in the 2005 Pacific Islands Regional Ocean Policy, “[t]hroughout the region, customary association with the sea forms the basis of present day social structures, livelihoods and tenure systems and traditional systems of stewardship governing its use.”<sup>1</sup> More than 80%<sup>2</sup> of Fiji’s 828,000<sup>3</sup> residents live along the coast, and most live in rural areas. 59% of the rural population is indigenous Fijian,<sup>4</sup> who comprise 55% of the total population.<sup>5</sup> Marine resources, particularly from inshore waters, are a main staple in the rural diet.<sup>6</sup> Recent estimates have shown that 50% of all rural households participate in some form of subsistence fishing.<sup>7</sup>

The coastal zones are also an important source of national income. Governments in the region have recognized through their commitment to the *Pacific Islands Regional Ocean Policy* that the oceans, properly managed, provide an important opportunity for economic development and stability in perpetuity.<sup>8</sup> In 2003, subsistence fisheries contributed over F \$48 million to the national economy, a number roughly equivalent to the contribution of the offshore fishery.<sup>9</sup> In that same year, inshore artisanal fisheries contributed about F \$28 million to GDP.<sup>10</sup> In total, the fish harvesting sector contributes an average F\$78.4 million to the Fiji Islands’ economy annually; the total economic contribution of the fisheries sector is approximately F \$91.9 million or 2.5% of GDP.<sup>11</sup> Tourism developments, of which the most profitable are naturally located along the coast, contributed 18% of GDP in 2005.<sup>12</sup>

Effective management of marine resources is integral to ensure the continuation of these values. This is particularly pertinent in the context of increasing pressures on the coastal environment. Marine biodiversity in the South Pacific is threatened by over-fishing, marine pollution and destruction of marine and coastal habitat, including coral reefs and

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<sup>1</sup> Pacific Islands Regional Ocean Policy (2005), 4. Accessed on 5<sup>th</sup> August 2008 at <http://www.sprep.org/legal/documents/PIROP.pdf>.

<sup>2</sup> World Wide Fund for Nature, “Fiji Leads the World in Marine Protection,” (Press release, 3 November 2005) WWF Oceania online: [http://www.wwfpacific.org.fj/current/news/press\\_releases/fiji/05-11-03\\_MPA.cfm](http://www.wwfpacific.org.fj/current/news/press_releases/fiji/05-11-03_MPA.cfm).

<sup>3</sup> Fiji Islands Bureau of Statistics (2007) *2007 Fiji Census: Facts and Figures*. (Suva: Government of Fiji) <online: [www.statsfiji.gov.fj](http://www.statsfiji.gov.fj)>.

<sup>4</sup> Government of Fiji (2002) “50/50 By Year 2020” *20 Year Development Plan (2001-2020)*. Parliamentary Paper No. 73, Suva: Parliament of Fiji, cited in Neelesh Gounder, “Rural Urban Migration in Fiji: Causes and Consequences,” (2005) University of the South Pacific Department of Economics Working Paper, No. 2005/12, 6.

<sup>5</sup> Fiji Islands Bureau of Statistics, above n 3.

<sup>6</sup> Asian Development Bank (2005) “Fisheries Sector Review: Republic of the Fiji Islands,” Technical Assistance Report TA4403, 1.

<sup>7</sup> Food and Agriculture Organization of the United Nations (FAO), “Fiji: Fishery and Aquaculture Country Profile” <online: [http://www.fao.org/fishery/countrysector/FI-CP\\_FJ/1](http://www.fao.org/fishery/countrysector/FI-CP_FJ/1)>.

<sup>8</sup> Pacific Islands Regional Ocean Policy, above n 1, 3.

<sup>9</sup> Asian Development Bank, above n 6, 6.

<sup>10</sup> Asian Development Bank, above n 6, 6.

<sup>11</sup> Asian Development Bank, above n 6, 1.

<sup>12</sup> Asian Development Bank, above n 6, 1.



mangroves.<sup>13</sup> Freshwater ecosystems have been affected by over-extraction and pollution which have downstream effects on the marine environment.<sup>14</sup> The islands of the South Pacific are particularly vulnerable to the predicted effects of climate change, including coral bleaching, rising sea level, altered rainfall patterns and extreme weather events.<sup>15</sup> Where the marine ecosystem is compromised as a result of threats such as pollution, habitat destruction, climate change and overfishing, there is a decreased ability of the ecosystem to withstand further stress. It is now largely accepted that without effective management, fisheries will continue to experience overfishing and stocks may become seriously depleted.<sup>16</sup> This will have flow on effects to the cultural and economic values discussed.

The Fiji Locally Managed Marine Areas (FLMMA) network has been pivotal in coastal fisheries management in Fiji. FLMMA has expanded rapidly throughout Fiji, aiding communities in the implementation of management tools utilised within the *qoliqoli* (customary fishing grounds). Most notable is a growth in the use of *tabus*, traditional no-fishing zones. Community-imposed *tabu* areas are not explicitly recognised in the legal framework for coastal fisheries management. While there is potential to use mechanisms such as licence conditions, permit conditions and gazettal of restricted areas to protect *tabus*, compliance with and enforcement of these restrictions has been a major impediment. This report seeks to analyse and address issues in compliance and enforcement by:

- discussing, in detail, the legal and institutional framework for coastal fisheries management in Fiji;
- providing an analysis of the major legal and institutional issues for community-based marine resource management; and
- providing recommendations for improving compliance and enforcement within existing laws, and through legislative reform.

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<sup>13</sup> WWF (2005) *Setting Priorities for Marine Conservation in the Fiji Islands Marine Ecoregion*. Proceedings of a workshop conducted by WWF South Pacific Programme Office

<sup>14</sup> Ibid.

<sup>15</sup> Mimura, N., L. Nurse, R.F. McLean, J. Agard, L. Briguglio, P. Lefale, R. Payet and G. Sem, (2007) "Chapter 19: Small islands) in M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson (Eds.) *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, UK), 687-716.

<sup>16</sup> Ian Cartwright, *NGO and Civil Society Workshop on Oceanic Fisheries Management in the Western and Central Pacific Fisheries Convention Area*. Summary Record and Outcomes. Tanoa Plaza Hotel, Suva Fiji. 24<sup>th</sup> – 25<sup>th</sup> April, 2007, 10.

For the purposes of this report, analysis will be restricted to the coastal marine area. The Fiji Islands, added together, feature 1,130 km of coastline and an Exclusive Economic Zone<sup>17</sup> of around 1.26 million sq. km. The coastal zone, which covers 31,000 sq. km of coastal and inshore waters,<sup>18</sup> is defined under Fijian law as “the area within 30 meters inland from the high water mark and includes areas from the high water mark up to the fringing reef or if there is no fringing reef within a reasonable distance from the high water mark”.<sup>19</sup> The coastal zone is commonly known to follow the coastline and include lands both above and below the high water mark, but not necessarily within 30 metres of the high water mark.<sup>20</sup>

## 2. LEGAL AND INSTITUTIONAL FRAMEWORK

### 2.1. Constitution (Amendment) Act 1997

Fisheries management in Fiji lies at the interface between customary law and national legislation. The national Constitution provides the framework for understanding the formal legal relationship between customary law and national legislation in Fiji.

Read in its entirety, the Constitution does not provide for general recognition of customary law. Customary law does not have any formal legal standing in Fiji unless it has been converted into, or provision for its application has been made in, national legislation. In practice, customary law continues to play an important role in coastal fisheries management. However, as customary law is not formally recognised within the national legal system, customary rules can only be enforced to the extent that they do not contravene national law. This means that communities cannot impose sanctions (for example, permanent confiscation of an alleged offender’s fishing gear) that would violate national criminal laws (for example, laws prohibiting theft, assault and unlawful arrest). Community-imposed sanctions appear to be the major point of tension between customary rules and national law in the fisheries context.

Rather than recognising the authority of customary law in general, the Constitution requires the recognition of customary law and dispute resolution processes through legislation.

Section 186 of the *Constitution (Amendment) Act 1997* requires that:

- (1) The Parliament must make provision for the application of customary laws and for dispute resolution in accordance with traditional Fijian processes.
- (2) In doing so, the Parliament must have regard to the customs, traditions, usages, values and aspirations of the Fijian and Rotuman people.

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<sup>17</sup> Fiji’s EEZ is formally declared in the *Marine Spaces Act 1978* (Chapter 158A). This Act establishes the EEZ as 200 nautical miles outwards from the baselines.

<sup>18</sup> Alifereti Tawake (June 2007), *Scaling-Up Networks of Locally Managed Marine Areas (LMMAs) to Island Wide Ecosystem Management while Decentralising the Effort of Fiji LMMA Network and its Implementation from National to Provincial Levels* [unpublished draft].

<sup>19</sup> *Environment Management Act 2005* s 2.

<sup>20</sup> Kenneth Chambers, “Coastal Zone Management Legislation and Practice in Fiji” (Paper presented to the NIREUS Environmental Protection for the Small Island Developing States Conference, February 2008) 3.

This approach is partly reflected in Fiji’s national fisheries legislation. The *Fisheries Act (Cap. 158)*, which predates the current Constitution, recognises and maintains customary rights to fish for subsistence purposes within specific *qoliqoli* (customary fishing areas).<sup>21</sup> However, it does not provide for dispute resolution in accordance with traditional Fijian processes. In this report, the holders of legally recognised customary rights to fish within a particular registered *qoliqoli* shall be referred to as resource owners for that *qoliqoli*.

In contrast to marine tenure, the legal framework dealing with customary ownership and use of land provides strong protection for customary land tenure. The Constitution identifies continued ownership of Fijian land according to Fijian custom as a central principal guiding the conduct of government. The *Native Lands Act* provides for the continued occupation and use of ‘native lands’ by indigenous Fijians according to custom. However, the Constitution does not formally recognise customary fishing rights or customary marine tenure.

The Constitution recognises the right of every person to equality before the law.<sup>22</sup> Importantly, however, the Constitution states that a law, or an action taken by government under a law, may infringe this right to equality for the purpose of applying Fijian custom to the holding, use or transmission of land or fishing rights, and the distribution of the produce of those rights.<sup>23</sup>

## 2.2. Fisheries Act (Cap. 158)

The primary piece of legislation for coastal fisheries management is the *Fisheries Act (Cap. 158)*. Its long title is “an Act to make provision for the regulation of fishing.” The Act should not be mistaken as extending beyond this role into a comprehensive law for the protection and conservation of coastal marine areas. It lacks many features of such a law and has certainly not achieved comprehensive coastal marine protection. For example, it does not establish a process for a comprehensive Marine Protected Areas regime which is critical for effective coastal marine conservation. Rather, its self-professed ambit is restricted to fisheries management.

Fisheries management is largely implemented through a permit and licensing scheme.<sup>24</sup> The Native Fisheries Commission is the key body established by the Act for the purpose of establishing customary fishing rights,<sup>25</sup> which are protected through the permit scheme.<sup>26</sup> The Act provides for the appointment of fisheries officers and fish wardens<sup>27</sup> who take an inspectorial role<sup>28</sup> and creates a relatively comprehensive offence list.<sup>29</sup>

The Minister is given a very broad power to create Regulations with respect to:

- Prohibiting fishing by certain practices or methods, during certain seasons, or within certain areas.<sup>30</sup>
- Prescribing size and weight limits.<sup>31</sup>

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<sup>21</sup> *Fisheries Act (Cap. 158)* s 13

<sup>22</sup> *Constitution (Amendment) Act 1997* s 38(2)

<sup>23</sup> *Constitution (Amendment) Act 1997* s 38(8)(a)(i)

<sup>24</sup> *Fisheries Act (Cap 158)* ss 5 and 13

<sup>25</sup> *Fisheries Act (Cap 158)* s 14

<sup>26</sup> *Fisheries Act (Cap 158)* s 13

<sup>27</sup> *Fisheries Act (Cap 158)* s 3

<sup>28</sup> *Fisheries Act (Cap 158)* s 7

<sup>29</sup> *Fisheries Act (Cap 158)* s 10

<sup>30</sup> *Fisheries Act (Cap 158)* s 9(a) – (b)

<sup>31</sup> *Fisheries Act (Cap 158)* s 9(c)

- Prescribing limits to net or mesh size.<sup>32</sup>
- Regulating the procedure with respect to issuance of licences or registration of vessels.<sup>33</sup>
- Prescribing fees.<sup>34</sup>
- Regulating any other matter relating to the conservation, protection and maintenance of a stock of fish.<sup>35</sup>

Fish is defined broadly by the Act as “any aquatic animal whether piscine or not, and includes shellfish, sponges, holothurians, sea-urchins, crustaceans and turtles and their eggs.”<sup>36</sup>

### 2.2.1. Administration

The power to administer the Act is vested in the Department of Fisheries of the Ministry of Fisheries and Forests. The Department is organised into divisions: the Western Division administrated in Lautoka, the Northern division administrated in Labasa, the Central division administrated in Nausori and the Eastern division administrated in Lami. Although the Native Fisheries Commission is established under the Act, it is a major exception to the jurisdiction of the Department of Fisheries. The Commission falls under the jurisdiction of the Ministry for Indigenous Affairs.<sup>37</sup> The Commission is discussed in detail directly below.

### 2.2.2. Customary Rights

Native customary rights to fish in *qoliqoli* areas for non-commercial purposes are protected. All non-resource owners are required to obtain a permit before fishing in *qoliqoli* areas, whereas resource owners are free to fish for subsistence without government approval.<sup>38</sup> In addition, before permits are awarded, the resource owners must be consulted.<sup>39</sup> The permit and licence regime is discussed in detail below.

The Native Fisheries Commission was set up in 1958 under the *Fisheries Act* to determine the customary fishing rights and boundaries of customary fishing areas.<sup>40</sup> The Commission oversees and administers the titling system over every reef, river and lagoon in Fiji.<sup>41</sup> This mandate does not include determining proprietary rights to the foreshore and coastal seabed, only the customary fishing rights of groups. In carrying out its mandate, the Commission’s functions are twofold: it surveys, maps and registers the boundaries of Fiji’s customary fishing areas; and it investigates, arbitrates and settles all claims to said areas.<sup>42</sup> Surveys of land prior to 1958 included mangroves and reefs, and the delimitations of the *qoliqoli* from these investigations are still contained in the Register of Native Customary Fishing Rights.<sup>43</sup> When the survey and investigation are complete, the *qoliqoli* is registered at the Registrar for Titles.<sup>44</sup>

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<sup>32</sup> *Fisheries Act (Cap 158) s 9 (d)*

<sup>33</sup> *Fisheries Act (Cap 158) s 9 (e)*

<sup>34</sup> *Fisheries Act (Cap 158) s 9 (f)*

<sup>35</sup> *Fisheries Act (Cap 158) s (g)*

<sup>36</sup> *Fisheries Act (Cap 158) s 2.*

<sup>37</sup> *Fisheries Act (Cap 158) s 14*

<sup>38</sup> *Fisheries Act (Cap 158) s 13*

<sup>39</sup> *Fisheries Act (Cap 158) s 13(2)*

<sup>40</sup> *Fisheries Act (Cap 158) ss 13-14*

<sup>41</sup> *Fisheries Act (Cap. 158) s 15(1)*

<sup>42</sup> *Fisheries Act (Cap. 158) s 14*

<sup>43</sup> *Fisheries Act (Cap 158) s 19(1)*

<sup>44</sup> *Fisheries Act (Cap 158) s 19(2)*

Most inquiries undertaken by the Commission were completed in the decade after its creation,<sup>45</sup> and all inquiries as to the boundaries of customary fishing areas were completed in 1996. The titling system is however dynamic – for example, rights holding groups will change, or new groups will be created – and the Commission must continually oversee all claims to customary fishing grounds. Most of the Commission’s current work involves arbitrating disputes and conducting hearings into new claims to the demarcated *qoliqoli* areas, and maintaining the Register of Native Fishing Rights.

Disputes about the boundaries and rights of certain groups to certain *qoliqoli* are therefore dealt with administratively by the Commission in first instance. An Appeals Tribunal is constituted and appeals procedure is set out in Section 17 of the Act and the Native Fisheries Commission (Inquiries) Rules under Section 15 of the 9th Schedule to the Act.<sup>46</sup> The Tribunal’s decisions are reviewable by the High Court of Fiji.

The Commission’s powers are set out in the *Fisheries Act*, but its procedures are largely determined by policy and practice. In ascertaining the boundaries of customary fishing grounds, the Commission must gather and record customary knowledge pertaining to boundaries. The general procedure followed in the delimitation of boundaries involves first the construction of base maps from hydrographic marine charts and topographic maps; written records that may exist are consulted, and this knowledge is then supplemented with the traditional landmarks known by members of the rights holding group. A government survey is then conducted and drafted onto a map which is approved by the Commission and sent to the Registrar of Titles for registration. The rights holding group receives copies of the registered titles concurrently, and has 90 days to appeal, after which time the registration is final and cannot be appealed.<sup>47</sup>

### 2.2.3. Permits

A permit is required for any person to take fish from any *qoliqoli* registered by the Native Fisheries Commission on the Register of Native Customary Fishing Rights.<sup>48</sup> There are certain pertinent exceptions to this rule:

- Resource owners are not required to have a permit, except as a precondition to a commercial fishing licence;<sup>49</sup>
- Persons taking fish with hook and line, spear or portable fish trap which can be handled by a single person, and who do not require a licence for commercial fishing, do not require a permit.<sup>50</sup>

Permits are granted at the discretion of the Commissioner of the Division for a period not exceeding three years and expire on 31 December of the specified year.<sup>51</sup> The Commissioner must consult with the relevant Fisheries Officer and resource owners before granting a permit.<sup>52</sup> In addition, the Act allows a permit to be issued subject to restrictions on fishing

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<sup>45</sup> Joeli Veitayaki and G. South, “The constitution and indigenous fisheries management in Fiji” (1998) 13 *Ocean Yearbook* 458

<sup>46</sup> *Fisheries Act (Cap 158)* s 15 of Schedule 9.

<sup>47</sup> Kenneth Ruddle (1995) “A guide to the literature on traditional community-based fishery management in Fiji” *SPC Traditional Marine Resource Management and Knowledge Information Bulletin*, 5, 13-14.

<sup>48</sup> *Fisheries Act (Cap 158)* s 13(1).

<sup>49</sup> *Fisheries Act (Cap 158)* s 13(1)

<sup>50</sup> *Fisheries Act (Cap 158)* s 13(1)(a)

<sup>51</sup> *Fisheries Act (Cap 158)* s 13(3)

<sup>52</sup> *Fisheries Act (Cap 158)* s 13(2)

for a particular species, within a particular area or using a particular method.<sup>53</sup> The combination of the requirement for community consultation and the power to impose restrictive conditions gives the community an opportunity to nominate *tabu* areas where fishing is prohibited.

#### 2.2.4. Licences

In addition to the requirement for a permit, any person, whether a resource owner or not, must be licensed in order to take fish for the purpose of trade or business.<sup>54</sup> There are two exceptions to the requirement for a licence:

- where a person takes fish with a line from the shore or with a spear;<sup>55</sup> and
- where the Minister exempts a person or class of persons from needing a licence.<sup>56</sup>

Licensing Officers have a broad discretion to include conditions on any licence.<sup>57</sup> This also provides an opportunity for the protection of *tabu* areas. This has been utilised in the Macuata *qoliqoli* where all commercial fishing licences include conditions restricting allowable fishing areas. A map of the *qoliqoli* including restricted *tabu* areas is included on the back of every licence to ensure that fishermen are aware of the restrictions.

Licences are granted by Licensing Officers and are valid for a maximum of 12 months. All licences expire on the 31 December of the year they were issued.<sup>58</sup> Licences can be cancelled by the court where the licence holder has contravened a term of the licence or any provision of the Act.<sup>59</sup>

The effect of the permit and licensing system is to legally protect indigenous Fijians' customary rights to fish for subsistence within their registered *qoliqoli* area. Non-resource owners wishing to fish for subsistence are required to have a permit, or a permit and a licence if fishing for the purpose of trade or business. Please see part 3 for a discussion on the definition of trade or business. It is important to note that the exemption for native Fijians from requiring authorisation to fish only extends to subsistence fishing. Fishing by resource owners undertaken for the purpose of trade or business requires a permit and licence, as for non-resource owners.

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<sup>53</sup> *Fisheries Act (Cap 158) s 13(1)(b)*

<sup>54</sup> *Fisheries Act (Cap 158) s 5(3) and Fisheries Regulations r 4*

<sup>55</sup> *Fisheries Act (Cap 158) s 5(3)(a)*

<sup>56</sup> *Fisheries Act (Cap 158) s 5(3)(b)*

<sup>57</sup> *Fisheries Act (Cap 158) s 5(2)*

<sup>58</sup> *Fisheries Act (Cap 158) s 5(2)*

<sup>59</sup> *Fisheries Act (Cap 158) s 8*

Table 1. Summary of contexts in which a permit and/or licence is required.

ACTIVITY	PERMIT?	LICENCE?
Non-resource owners fishing in a <i>qoliqoli</i> for subsistence using a hook and line, spear or portable fish trap	No (Fisheries Act s 13(1)(a))	No (Fisheries Act s 5(3))
Non-resource owners fishing in a <i>qoliqoli</i> for subsistence using a method other than a hook and line, spear or portable fish trap	Yes (Fisheries Act s 13(1)(a))	No (Fisheries Act s 5(3))
Non-resource owners fishing in a <i>qoliqoli</i> for the purpose of trade or business with a line from the shore or a spear	Yes (Fisheries Act s 13(1)(a))	No (Fisheries Act s 5(3)(a))
Non-resource owners fishing in a <i>qoliqoli</i> for the purpose of trade or business using a method other than a line from shore or a spear	Yes (Fisheries Act s 5(3) and Fisheries Reg. r 4(1))	Yes (Fisheries Act s 5(3) and Fisheries Reg. r 4(1))
Resource owners fishing in a <i>qoliqoli</i> using any method for the purpose of subsistence	No (Fisheries Act s 13(1))	No (Fisheries Act s 5(3))
Resource owners fishing in a <i>qoliqoli</i> for the purpose of trade or business with a line from the shore or a spear	No (Fisheries Act s 13(1)(a))	No (Fisheries Act s 5(3)(a))
Resource owners fishing in a <i>qoliqoli</i> for the purpose of trade or business using a method other than a line from shore or a spear	Yes (Fisheries Act s 5(3) and Fisheries Reg. r 4(1))	Yes (Fisheries Act s 5(3) and Fisheries Reg. r 4(1))

Licences may be cancelled by the court upon conviction of the licence holder for any breach of the licence conditions or for an offence under the Act or regulations.<sup>60</sup>

<sup>60</sup> Fisheries Act (Cap. 158) s 8.

### 2.2.5. Restricted Areas

Although the *Fisheries Act* does not create a marine protected areas regime, it does offer scope for regulating fishing within “restricted areas”.

The *Fisheries Act* and regulations allow the Minister to designate areas where the taking of fish is restricted or prohibited.<sup>61</sup> Although generally referred to as a Marine Protected Areas regime, it is currently not possible to establish areas where all forms of fishing are completely prohibited. This is because the Fifth Schedule to the Act (regulation 11) allows for the creation of marine reserves that prohibit fishing except by hand net, wading net, spear or line and hook. The protection offered by the Act is further undermined as individuals may apply to the Commissioner of the Division for authorization to take fish from restricted areas. The Act does not outline any considerations that must be taken into account before the Commissioner can make such an authorization. As such, the Commissioner’s discretionary power appears to be unfettered.

In addition to the Ministerial power to create restricted areas, it should not be forgotten that there are two other avenues for creating restricted-fishing zones. As outlined above, communities may enforce a *tabu* site within their designated *qoliqoli* area by prohibiting fishing as a condition of a permit or as a condition of a licence.

### 2.2.6. Restricted Methods

As outlined above, the Act allows for the creation of Regulations regarding the restriction of methods employed in fishing. The *Fisheries Act* and *Fisheries Regulations* prohibit:

- Dynamite, gelnite or other explosive substances.<sup>62</sup>
- Fish fences or similar obstructive devices.<sup>63</sup>
- Nets other than hand nets, wading nets or cast nets within 100m of the mouth of a river.<sup>64</sup>
- Poisons, including:
  - any chemical or chemical compound<sup>65</sup>
  - any substance containing derris<sup>66</sup>
  - any substance containing rotenone<sup>67</sup>
  - any plant or plant extract or derivative from the genera *Barringtonia*, *Derris*, *Euphorbia*, *Pittosporum* or *Tephrosia*<sup>68</sup>
- Cast nets where the mesh is less than 30mm, wet and stretched<sup>69</sup>

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<sup>61</sup> *Fisheries Regulations* r 11

<sup>62</sup> *Fisheries Act (Cap 158)* s 10(4).

<sup>63</sup> *Fisheries Regulations* r 6.

<sup>64</sup> *Fisheries Regulations* r 7.

<sup>65</sup> *Fisheries Regulations* r 8(a).

<sup>66</sup> *Fisheries Regulations* r 8(b)

<sup>67</sup> *Fisheries Regulations* r 8(c)

<sup>68</sup> *Fisheries Regulations* r 8(d)

<sup>69</sup> *Fisheries Regulations* r 14.



- Sardine and whitebait nets where the mesh is less than 30mm, wet and stretched, and overall dimensions greater than 10.5m measured along the cork line and 1.5m from the cork line to the ground rope.<sup>70</sup>
- Wading nets and all other nets where the mesh is less than 50mm, wet and stretched.<sup>71</sup>
- Fish fences where the metal mesh is less than 50mm or the cane or reed is less than 50mm apart.<sup>72</sup>
- Use of underwater breathing apparatus, such as SCUBA gear, to collect, take or dive for fish without a special licence.<sup>73</sup>

These prohibitions and restrictions apply to all people in Fiji, including resource owners.

### 2.2.7. Size Limits

In addition, Regulations with respect to size limits have been created by the Minister. Size limits for fish,<sup>74</sup> crabs,<sup>75</sup> shells<sup>76</sup> and beche-de-mer<sup>77</sup> are given in the table below. Size limit restrictions apply to all people in Fiji, including resource owners. The only exception is fish (a) caught by children under the age of 16 years when fishing with hook and line from the shore or wading near the shore; and (b) not offered or exposed for sale.<sup>78</sup>

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<sup>70</sup> *Fisheries Regulations* r 15.

<sup>71</sup> *Fisheries Regulations* r 16.

<sup>72</sup> *Fisheries Regulations* r 17.

<sup>73</sup> *Fisheries (Restrictions on use of Breathing Apparatus) Regulations 1997* r 4.

<sup>74</sup> *Fisheries Regulations* r 18, sixth schedule.

<sup>75</sup> *Fisheries Regulations* r 19.

<sup>76</sup> *Fisheries Regulations* r 21.

<sup>77</sup> *Fisheries Regulations* r 25B

<sup>78</sup> *Fisheries Regulations* r 18.

Table 2. Fish size limits.

<b>Fijian Name</b>	<b>Common Name</b>	<b>Scientific Name</b>	<b>Minimum Length (mm)</b>
Ogo	Barracuda	<i>Sphyrna</i>	300
Saqa (excluding vilu saqa)	Crevally, Trevally, Pompano	<i>Caranx</i>	300
Kanace	Grey Mullet	<i>Mugil</i>	200
Ika Droka	Glassperch, Aholehole	<i>Dules</i>	150
Nuqa	Ketang, Spinefoot Rabbitfish	<i>Siganus</i>	200
Salala	Long-jawed Mackerel	<i>Rastrelliger</i>	200
Saku Busa	Longtom, Garfish, Greengar	<i>Belone</i>	300
Yawa	Milk Fish	<i>Chaos</i>	300
Matu	Mojarra	<i>Gerres</i>	100
Ulavi	Parrotfish	<i>Scarichthys</i>	250
Kaikai	Pouter, Slimy, Soapy, Peperek	<i>Gazza</i>	100
Donu, Kawakawa, Kavv (Excluding small red Spotted cod)	Rock Cod, Grouper, Salmon Cod	<i>Serranus</i>	250
Kawago, Dokonivudi, Musubi	Sea Bream, Pig-faced Bream	<i>Lethrinus</i>	250
Kabatia, Kake	Small Sea Bream	<i>Lethrinus</i>	150
Sabutu	Small Sea Bream	<i>Lethrinus</i>	200
Balagi	Surgeon Fish	<i>Hepatus</i>	200
Ki, Ose	Surmullet, Goatfish, Whiskercod	<i>Mulloidichthys</i> <i>Pseudopeneus</i> <i>Upeneus</i>	150
Damu	Snapper	<i>Lutjanus</i>	300
Ta	Unicorn-Fish, Leather jacket	<i>Naso</i>	300
Qari dina	Swimming Crab	<i>Scylla serrata</i>	125
Trocas shell	Trocas shell	<i>Trochus niloticus</i>	90
Pearl Oyster Shell	Pearl Oyster Shell	<i>Pinctade margaritifera</i>	100
Sucuwalu, Dri	Beche-de-mer	<i>Holothuria scabra</i>	76

## 2.2.8. Protected Species

Fiji's protected species regime spans and intersects multiple pieces of legislation. It is thus necessary to appreciate the connection between the *Fisheries Act (Cap 158)* and accompanying regulations, the *Endangered and Protected Species Act 2002* and the *Birds and Game Protection Act (Cap. 170)*.

Pursuant to the *Endangered and Protected Species Act 2002*, it is an offence to possess or control, offer or expose for sale, or to display, a protected species without being registered. The penalty on conviction a fine of \$5,000 or two years imprisonment<sup>79</sup> and the forfeiture of any equipment, including money, used to commit the offence.<sup>80</sup> Where a protected area has been established for the purpose of protecting endangered plant or animal species, the offence provisions of the *Endangered and Protected Species Act 2002* may be used to prevent hunting and trapping of listed endangered animals, and harvesting (including logging) of listed endangered plants. Please see the table below for a list of protected marine species. The Director of Environment may appoint any person as an authorised officer. Authorised officers have the power to enter, seize and detain. Any person detained must be immediately presented to a police officer.<sup>81</sup> It is an offence to stop an authorised officer from carrying out their role.<sup>82</sup>

All native birds, including sea birds, are protected by the *Birds and Game Protection Act (Cap. 170)*. It is an offence to wilfully kill, wound or take any protected bird; take, remove, injure or destroy any nest or egg; possess, expose for sale, export or attempt to export<sup>83</sup> any protected bird, nest or egg. The Permanent Secretary has unfettered discretion to authorise any person to kill, take, keep, remove the nest of, and export the skins or any other part of any protected bird.<sup>84</sup>

With respect to turtles, the *Fisheries (Protection of Turtles) (Amendment) Regulations 2004* directly prohibits molesting, taking, or killing turtles of any species.<sup>85</sup> It also prohibits selling, offering or exposing for sale any turtle shell or flesh,<sup>86</sup> or digging up, using, taking or destroying turtle eggs of any species.<sup>87</sup> Fisherman may lose their fishing licence for contravention.<sup>88</sup> The Permanent Secretary may exempt any person from this prohibition.<sup>89</sup>

Shell of the *davui*<sup>90</sup> and giant helmet shell<sup>91</sup> are protected by the *Fisheries Regulations* from being taken, sold, offered or exposed for sale or export. It is prohibited to export flesh of the giant clam.<sup>92</sup> It is prohibited to kill, take, sell or offer or expose for sale any porpoise or dolphin.<sup>93</sup> Fishermen may lose their fishing licence for contravention.<sup>94</sup>

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<sup>79</sup> *Endangered and Protected Species Act 2002* s 23.

<sup>80</sup> *Endangered and Protected Species Act 2002* s 28.

<sup>81</sup> *Endangered and Protected Species Act 2002* ss 25 – 26.

<sup>82</sup> *Endangered and Protected Species Act 2002* s 23(5).

<sup>83</sup> *Birds and Game Protection Act* s 3

<sup>84</sup> *Birds and Game Protection Act* s 5

<sup>85</sup> *Fisheries (Protection of Turtles) (Amendment) Regulations 2004* r 20A(a)

<sup>86</sup> *Fisheries (Protection of Turtles) (Amendment) Regulations 2004* r 20A(b)

<sup>87</sup> *Fisheries (Protection of Turtles) (Amendment) Regulations 2004* r 20A(c)

<sup>88</sup> *Fisheries Act (Cap 158)* s 8.

<sup>89</sup> *Fisheries (Protection of Turtles) (Amendment) Regulations 2004* r 20A(2)

<sup>90</sup> *Fisheries Regulations* r 22.

<sup>91</sup> *Fisheries Regulations* r 23.

<sup>92</sup> *Fisheries Regulations* r 25A.

<sup>93</sup> *Fisheries Regulations* r 25.

<sup>94</sup> *Fisheries Act (Cap 158)* s 8.

Table 3. Protected Species.

Common Name	Scientific Name	Regulatory Instrument
<b>Fish</b>		
Species of goby	<i>Bryanninops diannoea</i>	<i>Endangered and Protected Species Act 2002</i>
Species of blenny	<i>Ecsenius figiensis</i>	<i>Endangered and Protected Species Act 2002</i>
Reve	<i>Mesoprisles kneri</i>	<i>Endangered and Protected Species Act 2002</i>
Species of blenny	<i>Plagiotremus laudandus flavus</i>	<i>Endangered and Protected Species Act 2002</i>
Species of sea bass	<i>Plectranthias fijiensis</i>	<i>Endangered and Protected Species Act 2002</i>
Species of common wriggler	<i>Rotuma lewisi</i>	<i>Endangered and Protected Species Act 2002</i>
Species of filefish	<i>Thamnaconus fijiensis</i>	<i>Endangered and Protected Species Act 2002</i>
	<i>Bathygobius petrophilus</i>	<i>Endangered and Protected Species Act 2002</i>
Humphead wrasse	<i>Cheilinus undulates</i>	<i>Endangered and Protected Species Act 2002</i>
Giant Grouper	<i>Epinephalus lanceolatus</i>	<i>Endangered and Protected Species Act 2002</i>
Spotted seahorse	<i>Hippocampus kuda</i>	<i>Endangered and Protected Species Act 2002</i>
	<i>Lairdina hopletupus</i>	<i>Endangered and Protected Species Act 2002</i>
	<i>Meicanthus bundoon</i>	<i>Endangered and Protected Species Act 2002</i>
	<i>Parmops echinites</i>	<i>Endangered and Protected Species Act 2002</i>
	<i>Redigobius leveri</i>	<i>Endangered and Protected Species Act 2002</i>
	<i>Redigobius sp</i>	<i>Endangered and Protected Species Act 2002</i>
	<i>Signus uspi</i>	<i>Endangered and Protected Species Act 2002</i>
<b>Reptiles</b>		
Green turtle	<i>Chelonia mydas</i>	<i>Fisheries (Protection of Turtles) (Amendment) Regulations 2004</i>
Hawksbill turtle	<i>Eretmochelys imbricate</i>	<i>Fisheries (Protection of Turtles) (Amendment) Regulations 2004</i>
Leatherback turtle	<i>Dermochelys coriacea</i>	<i>Fisheries (Protection of Turtles) (Amendment) Regulations 2004</i>
Loggerhead turtle	<i>Caretta caretta</i>	<i>Fisheries (Protection of Turtles) (Amendment) Regulations 2004</i>
Flatback turtle	<i>Natator depressus</i>	<i>Fisheries (Protection of Turtles) (Amendment) Regulations 2004</i>
Olive Ridley turtle	<i>Lepidochelys olivacea</i>	<i>Fisheries (Protection of Turtles) (Amendment) Regulations 2004</i>
<b>Mammals</b>		
Dolphin	<i>Phocaena spp.</i>	<i>Endangered and Protected Species Act 2002</i>
Porpoise	<i>Delphis spp.</i>	<i>Endangered and Protected Species Act 2002</i>
<b>Invertebrates</b>		
Davui shell	<i>Charonia tritonis</i>	<i>Fisheries Regulations</i>
Giant helmet shell	<i>Cassis cornuta</i>	<i>Fisheries Regulations</i>

### 2.2.9. Enforcement and Offences

The Act gives power to the Permanent Secretary to appoint fisheries extension officers and fish wardens for the purpose of prevention and detection of offences and the enforcement of provisions of the Act.<sup>95</sup> Fish wardens are usually harvesters appointed by their communities. Fish wardens, fisheries officers, police officers, customs officers and any other officer appointed by the Minister have powers of examination and detention including:

- Requiring any person engaged in fishing to exhibit their licence, apparatus or catch.<sup>96</sup>
- Boarding a vessel reasonably believed to be engaged in fishing.<sup>97</sup>
- Searching and examining fishing apparatus on a vessel.<sup>98</sup>
- Where there is reasonable suspicion that an offence has been committed, taking the alleged offender, vessel, apparatus and catch to the nearest police station or port. A summons or warrant is not required to exercise this power.<sup>99</sup>

It is clear from the fourth power listed above that the role of fish wardens is in inspection and detection of offences and does not extend to bringing cases to prosecution. The Act specifically requires that offenders be delivered to the nearest police station or port,<sup>100</sup> at which time responsibility transfers to the police.

There are numerous offences under the *Fisheries Act*. For ease of viewing, details of relevant offences and penalties are tabulated below. Note that section 10(2) of the Act provides a penalty for any offence under the Act which does not specify its own penalty, and for any breach of any provision of the Act's associated regulations.

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<sup>95</sup> *Fisheries Act (Cap 158) s 3*

<sup>96</sup> *Fisheries Act (Cap 158) s 7(1)(a)*

<sup>97</sup> *Fisheries Act (Cap 158) s 7(1)(b)*

<sup>98</sup> *Fisheries Act (Cap 158) s 7(1)(b)*

<sup>99</sup> *Fisheries Act (Cap 158) s 7(1)(c)*

<sup>100</sup> *Fisheries Act (Cap 158) s 7(1)(c)*

Table 4. Offences and penalties in the Fisheries Act (Cap. 158)

Section	Offence	Penalty
10(1)	Taking fish without a licence	Prison: 3 months Fine: \$500, or both
10(1)	Possessing apparatus for the purpose of taking fish without a licence	Prison: 3 months Fine: \$500, or both
10(2)(a)	Failure to comply with the conditions of a licence	Prison: 3 months Fine: \$500, or both
13(1), 10(2)(b)	Failure to obtain a permit or comply with the conditions of a permit	Prison: 3 months Fine: \$500, or both
10(4)	Fishing with, attempting to fish with, possessing, or selling fish killed with dynamite, gelignite or other explosive substance.	Severity depends on prior convictions. Prison: 6 months to 2 years Fine: \$1000 - \$5000 Licence cancellation
10(5)	Failing to supply an officer with information regarding the source of illegally caught fish	Prison: 3 months Fine: \$500, or both
10(2)(b)(c)	Catch-all offence: violation of any provision of the Regulations, or of any offence under the Act for which a penalty is not specified.	Prison: 3 months Fine: \$500, or both

In addition to monetary and imprisonment penalties, the court has the power to cancel a fishing licence upon conviction of an offence.<sup>101</sup> The court has no equivalent power to cancel a permit.

<sup>101</sup> Fisheries Act (Cap 158) s 8

### 2.3. Environment Management Act 2005

The *Environment Management Act 2005* is relevant to the extent that it gives the Department of Environment, environment inspectors<sup>102</sup> and the general public the power to enforce the *Fisheries Act (Cap 158)* as a scheduled Act.<sup>103</sup> This manifests in a number of ways:

- The Department of Environment has power to appoint lay persons to prosecute offences under the *Fisheries Act (Cap 158)* in the Magistrates Court.<sup>104</sup>
- Environment inspectors have the power to conduct examinations or enquiries to ascertain whether there has been compliance with the *Fisheries Act (Cap 158)*.<sup>105</sup>
- Environment inspectors have the power to issue improvement notices to any Ministry, department, statutory authority, local authority or facility that the inspector believes is contravening the *Fisheries Act (Cap 158)*.<sup>106</sup>
- Any person has the power to bring court proceedings compelling any ministry, department or statutory authority to perform any duty imposed on it by the *Fisheries Act (Cap 158)*.

These powers are broad and potentially far-reaching, particularly as they relate to enforcement of government responsibilities. Of particular note are the powers of inspectors to issue improvement notices to government agencies requiring them to come into compliance with the Act, and the power of the general public to bring an action against a government agency to compel them to perform their legislative duties.

*Prima facie*, the power of environment inspectors to conduct examinations and enquiries to ascertain compliance with the *Fisheries Act (Cap 158)* strengthens fisheries enforcement. However, given that the power of inspection is currently centralised with fish wardens, there is the real potential that introducing a new set of inspectors would cause fragmentation and confusion. It is particularly relevant that fish wardens are usually resource owners and thus may be better placed to understand local fisheries issues.

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<sup>102</sup> Compliance officers are appointed under the *Environment Management Act 2005*.

<sup>103</sup> The *Fisheries Act (Cap. 158)* is a scheduled Act to the *Environment Management Act 2005*

<sup>104</sup> *Environment Management Act 2005* s 11(3)(c)

<sup>105</sup> *Environment Management Act 2005* s 19(1)(a)

<sup>106</sup> *Environment Management Act 2005* s 21(1)

## 2.4. Fijian Affairs Act (Cap 120)

The *Fijian Affairs Act (Cap 120)*, administered by the Ministry of Indigenous Affairs, is relevant to the extent that it authorises Provincial Councils to create by-laws on fisheries issues.

The Act requires the establishment of Provincial Councils in every province whose function it is to “promote the health, welfare and good government of Fijians resident in the province...”.<sup>107</sup> In order to carry out this function, Provincial Councils are authorised to create by-laws on any matter relevant to the health, welfare and good government of Fijians.<sup>108</sup> Notwithstanding this broad power, the regulations specifically prescribe the power to make by-laws with respect to “...the promotion of fisheries...”.<sup>109</sup>

*Qoliqolis* are registered under a village, district and province.<sup>110</sup> The legal definition of the *qoliqoli* is recorded with the Native Fisheries Commission and for the purposes of administration by the Provincial Council, is considered an extension of the land boundary.<sup>111</sup>

Once the district or village has informed the Provincial Council of the by-laws it wishes to establish, the Provincial Council must then seek permission from the Fijian Affairs Board to establish the by-laws. All by-laws must be approved by the Fijian Affairs Board, whose purpose it is:

“...in addition to any powers or duties especially conferred upon it, to submit to the Minister such recommendations and proposals as it may deem to be for the benefit of the Fijian people, to consider such questions relating to the good government and well being of the Fijian people as the Minister may from time to time submit to the Board and to refer such questions to the Council or to take decisions or submit recommendations thereon.”<sup>112</sup>

By-laws may include offences. However, the maximum penalty that may be imposed is a fine of \$50 or imprisonment of two months, or both.<sup>113</sup> Thus, by-laws may only be appropriate for regulating matters that are not serious. The *Fijian Affairs Act (Cap. 120)* describes by-laws as being enforceable before Fijian Magistrates.<sup>114</sup> Please see part 3 for a detailed discussion on issues in the enforcement of by-laws.

Importantly, the Act defines a Fijian as “every member of an aboriginal race indigenous to Fiji and also includes every member of an aboriginal race indigenous to Melanesia, Micronesia or Polynesia living in Fiji who has elected to live in a Fijian village.”<sup>115</sup> As such, by-laws created by Provincial Councils can only be made for the health, welfare and good government of that group of people.

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<sup>107</sup> *Fijian Affairs (Provincial Councils) Regulations* r 22(1)

<sup>108</sup> *Fijian Affairs Act (Cap 120)* s 7(2)

<sup>109</sup> *Fijian Affairs (Provincial Councils) Regulations* r 22(2)(h)

<sup>110</sup> Personal communication with Mr Alivereti Bogiva, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 9 October 2008

<sup>111</sup> *Ibid*

<sup>112</sup> *Fijian Affairs Act (Cap 120)* s 4(4)

<sup>113</sup> *Fijian Affairs (Provincial Councils) Regulations* r 22(5)

<sup>114</sup> *Fijian Affairs Act (Cap 120)* s 17(1)

<sup>115</sup> *Fijian Affairs Act (Cap 120)* s 2



### 3. KEY LEGAL AND INSTITUTIONAL ISSUES

#### 3.1. Permits

##### 3.1.1. Permit System

The *Fisheries Act* explicitly requires the establishment and implementation of a permit system for the authorisation of fishing by non-resource owners. The relevant provision is section 13 which states:

**13.** (1) ... [I]t shall be an offence for any person to take fish on any reef or on any kai (cockle) or other shellfish bed in any area ... registered by the Native Fisheries Commission in the Register of Native Customary Fishing Rights unless he shall be a member of such mataqali... who does not require a licence under section 5 to take such fish **or shall first have obtained a permit to do so** from the Commissioner of the Division in which such area is situated:

Provided that-

(a) such permits shall not be necessary in the case of persons taking fish (other than by way of trade or business or as the employee of a person carrying on the trade or business of a fisherman) with hook and line or with a spear or portable fish trap which can be handled by one person; and

(b) any such permit may exclude fishing for particular species of fish, or may exclude fishing in any particular areas, or may exclude fishing by any particular methods, or may contain any combination of such exclusions.

(2) The grant of a permit shall be in the discretion of such Commissioner who shall consult the Fisheries Officer and the subdivision of the Fijian people whose fishing rights may be affected thereby, prior to granting the same.

(3) A permit may be granted for any period not exceeding three years, but every such permit shall expire on the 31st day of December in any one of such years.  
*(Section substituted by 26 of 1964. s.6.)*

In other words, it is an offence to take fish from a *qoliqoli* area, unless:

- the fisherman is a resource owner who is not fishing for the purpose of trade or business (i.e. is fishing only for subsistence); or
- the fishermen has a permit to fish.

This means that permits are required to be held by:

- non-resource owners (non-indigenous people or Native Fijians from other communities) who are fishing in a registered *qoliqoli* for any purpose; and

- resource owners fishing in their own *qoliqoli* for trade or business.

If fishing is conducted for trade or business, a licence is required in addition to the permit<sup>116</sup> (discussed below). Permits are granted by the Commissioner of the Division<sup>117</sup> for up to 3 years<sup>118</sup> and the community must be consulted before a permit is issued.<sup>119</sup>

Exceptions to the requirement for a permit exist for specific methods of fishing. Where the method of fishing is via hook and line, with a spear or with a portable fish trap, a permit is not required. Notably, this exception does not apply in the commercial context.<sup>120</sup> For example, a person fishing with a portable fish trap for the purpose of trade or business does require a permit in addition to the normal commercial fishing licence (discussed below).

The Act allows for the inclusion of conditions on the permit. These conditions are broad and may relate to any species, any area or any method.<sup>121</sup> The requirement for community consultation before a permit is granted gives resource owners an opportunity to request the incorporation of conditions into the permit. This feature of the process is particularly important as it gives the community the opportunity to create conditions prohibiting fishing in *tabu* areas as restricted areas.

### 3.1.2. Current Application of the Permit System

Currently, the permit system described above is not implemented by the Department of Fisheries. Instead, permits are only ever issued as a precondition to the issuance of a licence.<sup>122</sup> There are a series of factors suggesting that the practice currently adopted is inconsistent with the *Fisheries Act*.

Firstly, the wording “...it is an offence for any person to take fish in ... any area in respect of which the rights of any mataqali or other division or subdivision of the Fijian people have been registered ...unless he shall be a member of such mataqali who does not require a licence to take fish under section 5 or shall have first obtained a permit...”<sup>123</sup> seems relatively clear in its requirement that all non-resource owners require a permit to fish within an *qoliqoli*. Resource owners fishing for commercial purposes are clearly also required to obtain a permit.

Given its contorted drafting, it is possible to interpret the provision slightly differently as: it is an offence for a person to take fish unless he is a resource owner who does not require a licence, or if he does require a licence, has obtained a permit to fish. It is the author’s opinion that this interpretation is incorrect. The effect of this interpretation would be that the only group of people required to have a permit would be resource owners who wish to fish for commercial purposes. This interpretation is nonsensical particularly with respect to customary rights, as it would put a greater onus on resource owners wishing to fish for commercial purposes, than non-resource owners wishing to do the same. That is, resource

<sup>116</sup> *Fisheries Act (Cap 158) s 5 and Fisheries Regulations (Cap 158) r 4*

<sup>117</sup> *Fisheries Act (Cap. 158) s 13(1)*

<sup>118</sup> *Fisheries Act (Cap. 158) s 13(2)*

<sup>119</sup> *Fisheries Act (Cap. 158) s 13(3)*

<sup>120</sup> *Fisheries Act (Cap 158) s 13(1)(a)*

<sup>121</sup> *Fisheries Act (Cap 158) s 13(1)(b)*

<sup>122</sup> Personal communication with Mr Sunia Waiqanabete Department of Fisheries.

<sup>123</sup> *Fisheries Act (Cap 158) s 13(1)*

owners would require a permit and a licence whereas non-resource owners would only require a licence.

Secondly, section 13(1)(a) envisages a situation in which a person may need a permit when fishing for a non-commercial purpose. Section 13(1)(a) states: “such permits will not be necessary in the case of persons taking fish (other than by way of trade or business or as the employee of a person carrying on the trade or business of a fisherman) with hook and line or with a spear or portable fish trap which can be handled by one person...”. Thus, the provision envisages that:

- in “normal” situations a permit is not required when fishing with a hook and line, spear or portable fish trap; but
- if fishing for the purpose of trade or business, a permit is required for fishing with a hook and line, spear or portable fish trap.<sup>124</sup>

By the nature of there being an exception for trade and business, there must be a normal situation which covers non-trade and non-business fishing. That is, the provision envisages that permits are required for fishing other than for trade and business. This is not reflected in the current practice of issuing permits only for commercial fishing vessels.

In its current manifestation, this permit scheme is more accurately characterised as an aspect of the licensing process for commercial fishers, rather than a discrete and separate scheme of its own. In addition, it appears that the processes and procedures for issuing a permit have been absorbed into, and amalgamated with, the procedure for issuing a licence, resulting in a process that is a confused mix of the two. The attainment of resource owner consent provides a good illustration of this mischaracterisation. The Act requires that community consultation be sought before issuing a permit.<sup>125</sup> In contrast, the parallel licence provisions<sup>126</sup> do not explicitly require community consultation or consent. However, the current practice is to consult the resources owners and seek their consent before issuing a licence, not a permit.<sup>127</sup> This confusion is a direct result of the non-implementation of the full permit process.

Arguably, it is immaterial whether consent is attained under the name of a licence or a permit, so long as the resource owners are consulted and have the opportunity to assert their native fishing rights in the *qoliqoli*. However, on closer inspection, full functionality of the permit system would result in far broader community input. Consent would be required for all non-resource owners to fish in a *qoliqoli* area, except when fishing via the exempted methods listed above. This is in contrast to the current situation where only commercial fishers require consent under the licence system. Implementing the broader requirements for community consultation may also aid in alleviating conflict and anger at outsiders fishing in *qoliqoli* areas without first showing respect by seeking permission from the Chief.<sup>128</sup>

The extent of community involvement in the consent process is dependent on the community’s organisational structure for decision-making with respect to fisheries issues. This organisational structure is strongly correlated to whether there has been FLMMA

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<sup>124</sup> Please see the specific exemptions for licences.

<sup>125</sup> *Fisheries Act (Cap 158)* s 13(2)

<sup>126</sup> *Fisheries Act (Cap 158)* s 5 and *Fisheries Regulations* r 4.

<sup>127</sup> Personal communication with Mr Sunia Waiqanabete, Department of Fisheries.

<sup>128</sup> Interview conducted with Mr James Comley, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 7 August 2008.

involvement in managing the *qoliqoli*. At FL MMA managed sites, it is common for *qoliqoli* committees to have been established.<sup>129</sup> *Qoliqoli* committees are constituted by community members who make collaborative decisions about fishing access. In non-FL MMA managed sites, it is common for fishing access decisions to be made exclusively by the Chief at his own discretion. In this latter situation, broader community involvement is limited.<sup>130</sup>

In summary, in its current manifestation, the permit system is absorbed by and subordinated to the licence regime. This is based on a mischaracterisation of the permit scheme as a step in the licence process rather than a discrete system of its own. The current system utilises community involvement through a consent system for commercial fishers. There exists some tension between resource owners and subsistence fishers because of the absence of a functioning consent system that respects the traditional resource user's native rights to the *qoliqoli*. An additional issue is that in most areas, the broader community has limited opportunity to contribute to fisheries decision-making. This is not an issue at sites with established *qoliqoli* committees. The current permit system constitutes part compliance with the requirements of the Act. However, the absorption of the permit system by the licence regime has suppressed the full functionality of the permit scheme.

### 3.2. Licences

In accordance with section 5 of the *Fisheries Act*, any person fishing for trade or business is required to first obtain a licence to fish within a particular area. The licence system is a very positive feature of inshore fisheries management in Fiji and has been effectively used to protect *tabu* areas. As described above, the Macuata community's use of licence conditions to protect *tabu* in their *qoliqoli* is an excellent example of this.

However, there are also numerous issues with the functioning and enforcement of the current licensing system that require attention. Firstly, the term "trade or business" is ambiguous and creates confusion as to who needs a licence and ultimately, who can be prosecuted for not having a licence. Secondly, the requirement of good will payments to the community may be acting as a disincentive for compliance by fishermen. Thirdly, licence conditions are often breached. Each of these will be discussed in turn in the context of the licensing process.

#### 3.2.1. Licensing for "Trade or Business"

Pursuant to section 5(3):

*No person shall take fish in Fiji fisheries waters by way of trade or business or as an employee of a person carrying on the trade or business of a fisherman unless such person is authorised by a licence to take fish.*<sup>131</sup>

"Trade or business" is not defined by the Act and there is no readily available case law interpreting the phrase in the fisheries context in Fiji. This is problematic given the diverse range of activities that potentially fit within the common meanings of these terms. Certain activities would clearly be included. Examples include fishing for the sole purpose of selling the catch to a company or at the market, and fishing trips conducted by tourist operators.

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<sup>129</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Fisheries Act (Cap 158) s 5(3)*

However, the status of other activities is less clear. For example, have local fishermen who sell their small catch by the side of the road undertaken fishing for the purpose of business? Even more difficult is whether a fisherman who sells the surplus of his catch after meeting the requirements for his family's subsistence has fished for the purpose of trade or business? And if so, the question of whether it is appropriate for the licence system to extend this far, arises.

Enforcement and compliance becomes difficult when such crucial terms in the Act are ambiguous and left undefined. Both fishermen and fish wardens are unclear about their respective responsibilities. Fishermen are unsure about whether they need a licence and face the potential of prosecution for an offence they couldn't reasonably have known they committed. The common use of the term "commercial" to describe fishermen holding licences amplifies the confusion. Many may not consider themselves to be "commercial" fishermen, although their activities may fall within the plain and ordinary meaning of "trade or business".

Fish wardens are unsure as to their powers and are placed in potentially dangerous and volatile situations when attempting to enforce the Act. A fish warden in Suva was badly beaten whilst trying to confiscate an unlicensed fisherman's catch. The fish warden had warned the fisherman to get a commercial licence after he was seen selling his catch. When the fisherman claimed he was not a commercial fisherman and proceeded to sell the fish, the fish warden attempted to confiscate the catch and was beaten in the process.<sup>132</sup> Clearly, the ambiguity of the term "trade or business" is inflaming tensions between fishermen and fish wardens and as such clarification is sorely needed.

### 3.2.2. Good Will Payments

Although the licensing provision of the *Fisheries Act* doesn't explicitly require community consultation before the granting of a licence for trade or business,<sup>133</sup> the current practice is to not issue a licence without community consent. This is most likely a result of the amalgamation of the permit and licence processes, as described above.

Communities generally impose good will payments before granting their consent. This is a payment to the community as a sign of respect and gratitude for allowing fishing in the *qoliqoli*. The goodwill payment is in addition to the government imposed licence-fee. The government licence fee is very low and not onerous.<sup>134</sup>

The amount of the goodwill payment is determined and received by the decision-making body within each community. At managed sites this is usually the *qoliqoli* committee; otherwise it is the Chief. The amount of the payment differs between communities. For example at Macuata goodwill payments are:

- \$1,000 for Native Fijians
- \$5,000 for Indo-Fijians
- \$20,000 for businesses.<sup>135</sup>

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<sup>132</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

<sup>133</sup> *Fisheries Act (Cap 158)* s 5

<sup>134</sup> *Fisheries Regulations* r 3.

<sup>135</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

That the amount of the payment is based on racial grounds potentially violates the constitutional right of equality. As discussed above, the Constitution prohibits discrimination based on race.<sup>136</sup> An exception exists allowing violation of that right for the purpose of maintaining customary fishing rights, but this exception only applies to laws and administrative actions of government. Thus, while the law recognising customary fishing rights is not unconstitutional, charging payments by community members based on racial grounds may be.

The relatively high amount of this payment potentially creates a disincentive for fishermen to obtain a licence. This is particularly true in the context of low penalties for fisheries offences. The penalty for fishing without a licence is \$500 or 3 months imprisonment.<sup>137</sup> Given that the goodwill fee is significantly higher than the penalty, there is an incentive for fishermen to take the risk of prosecution by fishing without a licence. This incentive is amplified by the very low risk of prosecution and the socio-economic status of some fishermen which may make the goodwill payment impossible to pay. The socio-economic issue is particularly relevant if the definition of “trade or business” is interpreted and implemented broadly. A broad definition will undoubtedly capture fishermen who do not conduct highly profitable fishing businesses, for example roadside sellers, and for whom the goodwill payment is a significant impediment to their continued livelihood.

The quantum of goodwill payments received also creates an incentive for over-issuing of licences by village decision-makers. Not only does this increase pressure on fish stocks and reef health, but it creates a potential compliance and enforcement issue. The higher the number of fishermen, the more difficult it becomes to effectively monitor and patrol the *qoliqoli*. There is also the possibility that the community is encouraged to be lax about monitoring in order to attract more fishermen and more payments. This problem seems more likely in communities where *qoliqoli* committees have not been established and the Chief receives all payments personally. It must be noted that this is a hypothetical possibility only. The author is not suggesting that this situation occurs commonly and is not aware of any specific past or current occurrence.

### 3.2.3. Licence Conditions

In accordance with the *Fisheries Act*, licensing officers may endorse any condition on a licence that they think fit and which is in accord with the *Fisheries Act* and associated regulations.<sup>138</sup> This empowers licensing officers with a very broad discretionary power. This power is most often used to endorse conditions set by the community when giving their consent. For example and as discussed above, this condition-making power has been successfully used by communities to restrict licensed fishing in *tabu* areas. Given its breadth, it is possible for the use of the licensing officer’s condition-making power to be expanded into any area of fisheries management and regulation.

In practice, the Commissioner of the Division also imposes standard conditions on licences. This is somewhat of an anomaly as the Commissioner has no statutory power with respect to licences, all power being vested with the licensing officers.<sup>139</sup> Rather, the Commissioner’s power relates to issuing permits and imposing conditions on permits.<sup>140</sup> The Commissioner’s role in licensing is another example of the confused fusion of the licensing and permit

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<sup>136</sup> *Constitution Amendment Act 1997* s 38(2)

<sup>137</sup> *Fisheries Act (Cap 158)* ss 10(1) and 13(1)

<sup>138</sup> *Fisheries Act (Cap. 158)* s 5(2)

<sup>139</sup> *Fisheries Act (Cap 158)* s 5

<sup>140</sup> *Fisheries Act (Cap. 158)* s 13.

systems. Given that the issuance of a permit has simply become a step in the licensing process rather than retaining integrity as a distinct process, the Commissioner's role appears to have been confused and related to licences. Notwithstanding the legality of the conditions, the Commissioner generally imposes what is termed "standard conditions" that are printed on all licences. For example, in the Northern Division, four standard conditions are imposed:

- No fishing on Sundays
- Net size restrictions
- No fishing using SCUBA gear
- No use of chemicals or poisons.<sup>141</sup>

Apart from the prohibition on Sunday fishing, the other conditions are actually a selection of prohibitions contained in the *Fisheries Act* and associated regulations.<sup>142</sup> This suggests two things. Firstly, fishermen are not otherwise aware of the prohibitions and restrictions on fishing contained in the Act and regulations. Secondly, standard licence conditions that are imposed for the protection of fish resources in addition to the already existing protections within the Act are being under-utilised as a method of fisheries management.

Logbooks and catch records must be kept by all offshore fishermen.<sup>143</sup> Although not a statutory requirement for inshore fishermen, they are asked to keep a logbook, and this practice is strongly encouraged by FLMMA.<sup>144</sup> If used and monitored, log books aid fish wardens in assessing compliance. There is no formal enforcement mechanism for logbooks.

#### 3.2.4. Licence Breaches

Licence breaches appear to occur in two main manifestations. Firstly, there is the issue of breach of community-imposed restrictions on fishing in *tabu* areas, both deliberately and accidentally. By the nature of *tabu* areas being no-fishing zones, it can be expected that they will have a higher abundance and diversity of fish and as such are desirable fishing areas.<sup>145</sup> Violation may in some cases be deliberate and therefore the issue is one of monitoring and enforcement. However, in other cases, the violation of the *tabu* may be accidental. Prohibited *tabu* areas are drawn on a map of the *qoliqoli* on the back of the licence. GPS locations for accurate demarcation of the *tabu* are not given on the licence, nor would many fishermen have the resources to purchase GPS equipment. In addition, on-site demarcation of the *tabu* is generally non-existent. Thus, it is possible that in some situations non-compliance may be the result of a miscalculation of the location of the *tabu* within the *qoliqoli* or inaccuracy and inconsistency in the diagram of the *tabu*. This is not so much an issue of enforcement but rather an issue with communication to fisherman about the *tabu* boundaries. Issues with both deliberate and accidental non-compliance with *tabu* boundaries need addressing.

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<sup>141</sup> Telephone interview conducted by Mr Semisi Meo with the Office of the Commissioner of the Northern Division, 26 August 2008.

<sup>142</sup> *Fisheries Act (Cap. 158)* Part III

<sup>143</sup> *Fisheries Regulations* r 4B(5)

<sup>144</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

<sup>145</sup> Interview conducted with Mr James Comley, Mr Alivereti Bogiva and Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 21 August 2008.

Secondly, there is the issue of breach of licence boundaries. FLMMA representatives have identified this as a major problem.<sup>146</sup> For example, fishermen licensed in the Suva area have been known to fish as far as the Lau group of islands.<sup>147</sup> In some situations it is possible that violation of licence boundaries is accidental and due to a lack of clear demarcation. However, when fishermen are travelling such long distances as Suva to the Lau group, it would appear that the boundary violation is deliberate. Thus the issue appears to be one of enforcement rather than lack of demarcation. Enforcement becomes very difficult in these more remote areas.

These breaches are in addition to the issue of fishing without a licence which was detailed above in the discussion of the ambiguity of the term “trade and business”.

### 3.3. Restricted Areas

Pursuant to regulation 11 of the *Fisheries Regulations*, the Commissioner has power to designate areas where fishing is restricted. This occurs through an application and gazettal process. There are four major issues with the restricted areas regime: its limited scope, its inflexibility, difficulties in gazetting and lack of community ownership once gazettal has occurred. Although the final issue is the one most related to compliance and enforcement, the others will be mentioned to provide context to the situation.

Firstly, the restricted areas regime is often described as creating a Marine Protected Areas system. However, this is a mischaracterisation of the scope of the power as it is not currently possible to prohibit all forms of fishing in restricted areas. Fishing by hand net, wading net, spear and hook and line is currently allowed within restricted areas, pursuant to the *Fisheries Regulations*.<sup>148</sup>

Secondly, the restricted area regime has been criticised as being too inflexible.<sup>149</sup> Once an area has been gazetted, any person, including a resource owner, is prohibited from fishing within the restricted area without authorisation from the Commissioner of the Division. This means, for example, that a local resource owning community would need to apply to the Commissioner for permission to harvest for traditional ceremonies.

The third major issue with the restricted areas regime is the time taken to achieve gazettal. In some situations it has taken years for a site to become gazetted. This is largely an issue of political will and resource allocations by government.

Finally, once gazettal of a site is achieved community involvement in the management of the area has been reported to decrease.<sup>150</sup> The reason for this appears to be entrenched in the functioning of the tenure system in Fiji. As described previously, the Crown owns the seabed and reef and Native Fijians have customary rights to fish.<sup>151</sup> It has been suggested that removal of fishing rights causes communities to feel distanced from the area as a result of a

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<sup>146</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

<sup>147</sup> Ibid.

<sup>148</sup> *Fisheries Regulations* r 11

<sup>149</sup> Interview conducted with Mr James Comley, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 7 August 2008.

<sup>150</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

<sup>151</sup> *Fisheries Act (Cap 158)* s 13



perception that their traditional connection has been severed.<sup>152</sup> They are thus less likely to be involved or interested in monitoring and enforcement. Continuing community involvement in managing the restricted area is paramount to ensure compliance with and enforcement of the restrictions.

Thus, although a great deal of emphasis is placed on the importance of restricted areas, its limitations must not be overlooked. Restricted areas should be utilised in appropriate contexts and other forms of marine protection should be used where more flexibility in management is required.

### 3.4. Breach by Resource Owners

Breach of community imposed *tabus* by resource owners presents particular legal and enforcement issues. Although resource owners generally comply with *tabu* restrictions, multiple interviewees reported cases of breach of *tabus* by resource owners and community members.<sup>153</sup> Under the currently implemented system, the only legal mechanisms for enforcement of *tabus* are through the designation of a restricted area or licence conditions. The permit system offers a potential enforcement mechanism for the broader community, but is not implemented; and the restricted areas regime is generally not utilised for areas requiring temporal flexibility and geographically small fishing prohibitions. While licences are generally relied upon for legal protection of *tabus*, they are a limited regulatory tool, as they apply only to persons fishing for trade or business.

One potential legal option for regulating fishing activity by resource owners is the development and implementation of by-laws under the *Fijian Affairs Act*. By-laws are made by the Provincial Councils, and may apply to the whole province, or a particular area within the province (for example, a village or *tikina*). The *Fijian Affairs Act* empowers Provincial Councils to make by-laws for the 'health, welfare and good government' of Fijians.

Councils are specifically empowered to make by-laws for the 'promotion of fisheries'.<sup>154</sup> It is reasonable to assume that 'promotion' of fisheries would include the promotion of fisheries health and sustainability. Indeed, the long-term sustainability of fisheries is paramount to the long-term health and welfare of Fijians, given that fishing forms the basis of a high proportion of Fijian livelihoods. On this basis, it would appear that Provincial Councils are empowered to make by-laws to regulate fishing within *qoliqolis*, including prohibitions on fishing by resource owners within *tabu* areas.

A major issue with the use of by-laws is their enforcement. The *Fijian Affairs Act* states that Fijian Magistrates have jurisdiction to enforce by-laws.<sup>155</sup> The *Fijian Affairs Act* establishes a Tikina Court in each Tikina<sup>156</sup> and a Provincial Court in each province,<sup>157</sup> each of which is to be presided over by Fijian Magistrates. Despite their establishment under the Act, Tikina Courts have been abolished, although this has not been reflected legislatively, and Provincial Courts do not exist.

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<sup>152</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

<sup>153</sup> Interviews conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008; and Mr Shatish Sharma, Station Officer Fiji Police, 19 September 2008.

<sup>154</sup> *Fijian Affairs (Provincial Councils) Regulations*, r 22.

<sup>155</sup> *Fijian Affairs Act (Cap 120)* s 17(1)

<sup>156</sup> *Fijian Affairs Act (Cap 120)* s 16

<sup>157</sup> *Fijian Affairs Act (Cap 120)* s 19

Given that the *Fijian Affairs Act* designates enforcement of by-laws to Fijian magistrates, prosecution of by-laws could be heard at the Magistrates Court.<sup>158</sup> However, the Magistrates Court is arguably not the appropriate forum for the prosecution of by-law offences. There are a number of reasons for its unsuitability:

- The Magistrates Court is already overrun with cases and long waiting periods apply.
- The Magistrates Court is not geographically accessible for many Fijian villages.
- Communities may lose ownership over the process.
- The impetus for enforcement may be lost because of the process involved.
- Magistrates may react negatively to having court time taken up by small village-based matters.

Magistrates Courts have been used sparingly in the past for prosecution of by-laws. However, these have generally been larger, provincial level health-related by-law infringements<sup>159</sup> and not small-scale village-based infractions. It is not feasible for every village by-law infraction to be taken to a Magistrates Court.

Provincial by-laws gazetted to the *Fijian Affairs Act* include a provision for enforcement by the Roko Tui, Assistant Roko Tui or other appointed person.<sup>160</sup> These are office holding figures at the Provincial Council level, the Roko Tui being the executive head of the Provincial Councils. Fish wardens do not have legal powers to enforce by-laws.

Despite the issues with enforcement, provincial by-laws remain a potentially important tool for the regulation of internal compliance issues within resource owning communities. Involvement of resource owners in the creation of by-laws would help to create a sense of community ownership. It may be that group pressure, particularly from individuals of high standing within the community, is sufficient to ensure compliance with the laws without the need for formal enforcement. For serious breaches of by-laws, prosecution before a Magistrates Court may deter future breaches. Although the financial penalties for breaching by-laws are very low, the magistrate may impose a short term of imprisonment.

By-laws have proven to be a successful regulatory tool for fisheries management in other Pacific island nations. The most notable success has been achieved in Samoa where the government introduced by-laws to address the problem of members from other villages fishing in taboos (*tabus*).<sup>161</sup> This method has been very popular and successful within Samoan communities. Once created, communities erect signboards along roadsides and beaches to promulgate their by-laws.<sup>162</sup> Patrol houses are built and patrol canoes and

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<sup>158</sup> *Fijian Affairs Act (Cap 120) s 17(1)*

<sup>159</sup> Personal communication with Alivereti Bogiva, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network 17 October, 2008.

<sup>160</sup> For example *Ba Province (Public Health)(Village) By-laws s 24*; *Bua Province (Public Health)(Village) By-laws s 24*; *Kadavu Province (Public Health)(Village) By-laws s 24*.

<sup>161</sup> Posa Skelton and Robin South (2004) 'Case Study 4: Fisheries bylaws in Samoa' *SPC Traditional Resource Management and Knowledge Bulletin #17*, 19-20.

<sup>162</sup> U Fa'asili and I Kelekolio (1999) Information Paper 17: The use of village by-laws in marine conservation and fisheries management' Secretariat of the Pacific Community 1<sup>st</sup> SPC Heads of Fisheries Meeting, Noumea New Caledonia 9 – 13 August 1999.

watchmen are employed to monitor the regulated areas.<sup>163</sup> By-laws are enforced by the village *fono* using traditional penalties such as the provision of pigs and taro.<sup>164</sup>

### 3.5. Monitoring and Surveillance

#### 3.5.1. Fish Wardens

Fish wardens are the key figure in monitoring and surveillance of inshore fisheries.<sup>165</sup> As described previously, fish wardens are community members appointed under the *Fisheries Act* to take on monitoring, inspection and, to a more limited degree, enforcement functions under fisheries law. To fulfil this role, fish wardens have relatively wide powers of entry, inspection and arrest. The legal establishment of the position of fish warden is sound and represents an important step towards effective enforcement of fisheries law. The fact that fish wardens originate from the community ensures they have a close understanding of local fisheries issues. It also gives the community a stronger sense of ownership over and responsibility for their marine resources. However, a number of factors undermine the effectiveness of the position of fish warden as a mechanism for enforcement.

##### 3.5.1.1. Uncertified Fish Wardens

The effectiveness of the fish warden position is limited from the outset by a deficiency in the number of fish wardens so far certified by the Department of Fisheries. A rough estimate provided by FLMMA suggests that less than 50% of FLMMA sites have certified fish wardens.<sup>166</sup> An example of the scale of the problem is the northern Lau group where there is only one certified fish warden for the entire area.<sup>167</sup> In response to this shortage, some communities are appointing their own uncertified wardens.<sup>168</sup> Although the communities' efforts to adopt an enforcement mechanism should be commended, uncertified fish wardens are not legally empowered with the same rights as certified fish wardens. That is, they do not have the powers of inspection or arrest belonging to their certified counterparts. Without legal empowerment, uncertified fish wardens are at risk of being prosecuted for assault, trespass or theft for attempting to exercise fish warden powers under the Act. Unfortunately, this issue can only be remedied to the extent that the training of new fish wardens is prioritised and allocated resources to by the Department of Fisheries.

##### 3.5.1.2. Training

Once certified, fish wardens face a number of challenges in fulfilling their role. Firstly, a lack of effective training is a major issue. The Department of Fisheries is responsible for all fish warden training and in some cases assistance is given by non-government organisations. For example, WWF has assisted with fish warden training in Macuata.<sup>169</sup> Training duration is two days and covers:

- fish biology;

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<sup>163</sup> Ibid

<sup>164</sup> Ibid

<sup>165</sup> Fish wardens are appointed in accordance with *Fisheries Act (Cap 158)* s 3.

<sup>166</sup> Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

<sup>167</sup> Interview conducted with Mr James Comley, Mr Alivereti Bogiva and Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 21 August 2008.

<sup>168</sup> Ibid

<sup>169</sup> Interview conducted with Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

- the *Fisheries Act* and regulations including fish warden powers, size limits, species restrictions, licence requirements, the requirement for evidence and some offences;
- some techniques for conflict management; and
- techniques for boarding vessels.<sup>170</sup>

Two days is not adequate to cover all the relevant topics comprehensively. Thus, the necessary amount of detail is not provided. In order to carry out their role effectively, it is important that fish warden training not only outlines the Act, but examines the detail of the Act and provides practical skills for its implementation. This is particularly pertinent with respect to offences. As compliance and enforcement officers, it is integral that fish wardens know the specific elements of each offence. The elements of the crime then inform the type of evidence that must be gathered. Successful prosecution is much more likely where the evidence matches the elements of the crime to be proved. Currently fish wardens are not provided with this degree of detail. This is a significant factor contributing to the dearth of fisheries prosecutions. Although disinterest on the part of the police has also been a major obstacle, when interviewed, police identified a lack of useable evidence as the major barrier stopping them from bringing a case to prosecution.<sup>171</sup> Indeed, police officers interviewed showed a strong interest in prosecuting fisheries cases. Fisheries training for police is also pertinent in this context and will be discussed further below.

The need for capacity building within the Department of Fisheries is also evident. Fish wardens inevitably approach the Department for guidance in difficult situations. The advice given by the Department is often inconsistent and at times inaccurate. This is well illustrated by an example from Macuata. The community fish warden identified an offender and confiscated his fishing gear. Unsure about how to proceed, the fish warden approached the Department of Fisheries, who told him to impose a penalty that the community deemed appropriate in accordance with traditional ways. The community imposed a \$2000 fine, burnt the gear and distributed the catch.<sup>172</sup> Despite this advice, there is no scope for community-imposed penalties under the Act. Rather the correct procedure was for the warden to take the offender, with gear and catch, to the nearest police station or port.<sup>173</sup> As administrators of the *Fisheries Act*, it is integral that all employees at the Department of Fisheries are familiar with the procedures given by, and requirements of, the Act.

### 3.5.1.3. *Resourcing*

Fish wardens are severely limited by the resources available to them. Given that the average size of a Fijian *qoliqoli* is relatively large, adequate monitoring is very resource intensive. Fish wardens require boats, fuel and income substitution at a minimum. However, there is currently no legal requirement or policy commitment to provide government support, financial or otherwise, for fish wardens or community based compliance monitoring. Fish wardens are not provided with any monetary remuneration, nor does the Department of Fisheries provide necessary equipment. Thus, it is left to the communities to fund themselves, or NGOs to provide support. This situation is highly problematic as communities rarely have adequate resources and NGOs should not be relied upon as the sole resource providers. The Department of Fisheries advised the author that they did not have the funding to provide equipment and they encourage the communities to provide their own.<sup>174</sup>

<sup>170</sup> Interview conducted with Mr. Qilioni Raunibola, Training Assistant, Department of Fisheries. 19 September 2008.

<sup>171</sup> Interview conducted with Mr Shatish Sharma, Station Officer Fiji Police, 19 September 2008.

<sup>172</sup> Interview conducted with Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

<sup>173</sup> *Fisheries Act (Cap 158) s 7(1)(c)*

<sup>174</sup> Interview conducted with Mr. Qilioni Raunibola, Training Assistant, Department of Fisheries. 19 September 2008.

When questioned further, the Department recognised that in most cases communities do not have the resources to purchase boats, fuel and equipment, or to financially support fulltime fish wardens.<sup>175</sup> Because there is a lack of institutional support, fish wardens undertake their role only when resources are available. Consequently, a fragmented and sporadic monitoring regime is created. Without consistent and reliable monitoring, enforcement is very difficult.

#### 3.5.1.4. *Community Recognition*

Both FLMMA and WWF have identified a lack of community recognition of fish wardens as an issue within the communities they work.<sup>176</sup> Lack of community recognition creates a significant barrier for fish wardens in asserting their authority over offenders. This is amplified when offenders are highly ranked community members. WWF recognised this as a significant problem for communities in Macuata. This issue is being overcome in that area through the development of internal governance structures. WWF has identified a strong correlation between effective enforcement by fish wardens and a developed and structured internal governance system for fisheries management within the community.<sup>177</sup> Good internal governance includes strong leadership by the Chief, an active and transparent *qoliqoli* committee and organised fish warden meetings. Fish wardens from the Macuata region meet regularly to discuss issues they face and ways to resolve them. This process is strongly supported by the Chief, which is a major reason for its success.<sup>178</sup>

#### 3.5.1.5. *Conflict*

Finally, a significant and very serious issue is violence between fish wardens and fishermen. This occurs in both directions: fish wardens being assaulted by fishermen, and fishermen being assaulted by fish wardens. The latter situation has occurred on numerous occasions, most notable of which was the spearing of a poacher by a fish warden at Navakavu.<sup>179</sup> Violent behaviour by fish wardens is largely a product of frustration at continual breaches and lack of support from the police. As enforcement officers it is essential for fish wardens to remain disinterested parties to any criminal behaviour. However, fish wardens are rarely objective third parties. As community members they have a strong personal interest in the protection of native customary fishing rights. Thus, while the employment of community members is an important mechanism for ensuring effective monitoring of inshore fisheries, measures must be put in place to guard against impassioned behaviour and over-zealous policing. More comprehensive and extensive training is an important first step and will be discussed in more detail in the recommendations.

The former situation of fishermen assaulting fish wardens is equally serious and represents a threat to effective enforcement. Violence appears to be a result of a combination of factors including lack of respect for and recognition of the fish warden role, and a lack of understanding in the wider community of the *Fisheries Act* and legal establishment of the fish warden role. As discussed above, organised internal governance structures are needed within communities to establish the authority of fish wardens. This will be discussed in more detail in the recommendations.

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<sup>175</sup> Ibid

<sup>176</sup> Interview conducted with Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008; personal communications with Mrs Sukulu Rupeni, Fiji Locally Managed Marine Areas, 16 September 2008. 17/09/2008

<sup>177</sup> Interview conducted with Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

<sup>178</sup> Ibid

<sup>179</sup> Interview conducted with Mr. Qilioni Raunibola, Training Assistant, Department of Fisheries. 19 September 2008.

### 3.5.2. Fisheries Extension Officers

Fisheries extension officers are the arm of the Department of Fisheries in the field. They have the same powers as fish wardens, as discussed above. In addition, fisheries extension officers should provide the role of a contact for fish wardens to the Department of Fisheries. The potential for extension officers to be effective in their role is undermined by their low numbers. There are approximately 17 extension offices for all of Fiji.<sup>180</sup> Each extension office has one extension officer empowered with surveillance and monitoring functions under the Act.<sup>181</sup> Each office employs approximately five other staff, including a licensing officer, who largely undertake administrative roles.<sup>182</sup> Arguably, seventeen extension officers for the entirety of Fiji's coastal waters is inadequate to make a significant contribution to surveillance and monitoring. This can only be rectified if the Department of Fisheries is prepared to allocate significant resources towards funding and training of more extension officers.

## 3.6. Investigation and Prosecution

Investigation and prosecution represent major hurdles to the successful enforcement of Fiji's coastal fisheries management laws. Each will be discussed in turn.

### 3.6.1. Investigation by Police

The police are an essential gateway between the identification and apprehension of offenders by fish wardens and the successful enforcement of fisheries law through prosecution. All non-police stakeholders that were interviewed identified disinterest on the part of police as the major impediment to successful prosecution.<sup>183</sup> There appear to be two major factors contributing to police reluctance in becoming involved with fisheries issues: unfamiliarity with fisheries law and a mischaracterisation of their role.

The most important factor impeding police involvement is their lack of familiarity with the *Fisheries Act*. For example, police at Lami reported that they did not have a copy of the *Fisheries Act* and were not well-versed on its provisions. This has two implications: a misconstruction of customary rights and an inadequate understanding of the Act's offence provisions. Firstly, police apply a confused interpretation of customary rights for fishing in the *qoliqoli*. Police assumed that if a community member breached a *tabu*, size limit or species restriction, there was no legal recourse. However, immunity from legal recourse is much more complex than a simple determination of whether the fisherman is a community member. For example, size limits and species restrictions are enforceable against all people including community members, and customary rights are only protected for resource owners in their *qoliqoli* areas and not for the broader community. The current practice represents a broad and inaccurate conception of the legal status of customary rights. Secondly, police are not familiar with the offences in the *Fisheries Act*. As enforcement officers, it is impossible to overstate the importance of the police's detailed understanding of offences. Police must be able to determine whether the accused's behaviour satisfies the elements of the alleged crime and gather evidence to that effect.

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<sup>180</sup> Personal communications with Mr. Qiloni Raunibola, Training Assistant, Department of Fisheries. 17 October 2008.

<sup>181</sup> Ibid

<sup>182</sup> Ibid

<sup>183</sup> Interviews conducted with Mr James Comley, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 7 August 2008; Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008; and Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

The second factor contributing to police reluctance to investigate fisheries crime is a mischaracterisation of their role in preparing cases for prosecution. The Police Commissioner has previously taken the view that it is not the role of the police, but rather the role of the Department of Fisheries to investigate and prosecute fisheries offences. There is no legal support for an abdication of the Police's responsibility as Fiji's enforcement officers to another government department in the case of fisheries offences. In fact, subsection 7(1)(c) of the *Fisheries Act* requires fish wardens and fisheries officers to take an apprehended person to the nearest police station. The Department of Fisheries do not have the infrastructure to function as an enforcement agency and the provisions of the *Fisheries Act* indicate that the Parliament did not intend the Department of Fisheries to take on such a role.

### 3.6.2. Prosecution and Sentencing

Successful prosecution of fisheries offences is very rare. This is largely due to the issues with police involvement discussed directly above. For example, over the last four years an estimated 15 cases of suspected violation of fisheries law by external fishers were reported to the Lami police from one site, Navakavu.<sup>184</sup> That number rises to more than 50 when internal compliance issues are included.<sup>185</sup> None of these reported cases proceeded to prosecution.<sup>186</sup> In addition, any cases that are prosecuted are generally not recorded in a way that is accessible to the public, nor are judgments written. As such, it is very difficult to conduct any kind of legal analysis on how fisheries offences are interpreted and applied by the Court.

With respect to sentencing, a Lami police officer provided some second hand information about fisheries offences that had been prosecuted in Korevou.<sup>187</sup> Although he was unable to identify the nature of the offences, he was able to confirm that the sentences passed by the court ranged between FJ\$10 – FJ\$50.<sup>188</sup> This is grossly inadequate and well below the maximum penalties provided for in the Act. The maximum penalties themselves under-represent the gravity of the crimes and generally do not achieve any type of deterrent effect. Indeed, the penalty for fishing without a licence is considerably lower than the goodwill payment to be paid to communities for the issuance of a licence. In this context, there is a strong monetary incentive for fishermen to risk prosecution rather than obtain a licence. A review of penalties in the Act is sorely needed.

## 4. RECOMMENDATIONS

### 4.1. Permits

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<sup>184</sup> Interview conducted with Mr James Comley, Mr Alivereti Bogiva and Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 21 August 2008.

<sup>185</sup> *Ibid*

<sup>186</sup> *Ibid*

<sup>187</sup> Interview conducted with Mr Shatish Sharma, Station Officer Fiji Police, 19 September 2008.

<sup>188</sup> *Ibid*



#### 4.1.1. Improved Administration of the Act

##### **Rec. 1: Implementation of the statutory permit scheme.**

The non-implementation of the permit scheme provided for under the *Fisheries Act* is a major impediment to the fair and effective operation of coastal fisheries law in Fiji. It represents a significant departure from the will of the legislature in creating the Act. Beyond this, it undermines community efforts to manage the *qoliqoli* and has contributed to ongoing conflict between resource owners and non-resource owners fishing in the *qoliqoli*. It is strongly recommended that the statutory permit system, established by section 13 of the *Fisheries Act*, be implemented as prescribed.

The permit system creates an opportunity to foster community involvement in fisheries management and to manage fishing quotas as appropriate to each *qoliqoli*. Every non-resource owner will require a permit before fishing in a *qoliqoli*, except if fishing with hook and line, spear or portable fish trap. Community consultation is required before a permit is issued. This gives the community the opportunity to limit the amount of fishing conducted in the *qoliqoli* by denying their consent once a quota is reached. The request for consent functions as a substitute to traditional *sevusevu* and may assist in allaying tensions and conflict between resource owners and outsiders fishing for non-commercial purposes within the *qoliqoli*.

The opportunity to request the imposition of conditions on the permit creates a significant management opportunity. This will most notably be valuable for imposing restrictions on fishing in *tabus*. Given that every person fishing in the *qoliqoli* who is not a resource-owner requires a permit, the potential for protecting *tabus* from fishing is potentially very far-reaching, so long as conditions are applied universally and consistently.

Communities must be aware that race cannot be used as a ground for deciding whether to give their consent to a permit, or as to the conditions placed on a permit. Discrimination in treatment based on a person's race constitutes a violation of the Constitutional right to equality.<sup>189</sup>

The potential impact of implementing the permit system should not be understated, particularly at the initial stages. Great care in planning must be taken to ensure that communities and fishermen understand the changes. An awareness program is required as a minimum. The principles of procedural fairness require that the system be phased-in, allowing time for fishermen to apply for and be issued with permits before imposing sanctions for non-compliance. It is important that distinct timeframes that are fair but efficient are designated. Most importantly, a reasonable end time must be designated and enforced, after which prosecution for non-compliance is available.

It is recommended that a publicly accessible register is kept which records all permits attaching to each *qoliqoli*. This will allow for effective monitoring of quotas, which should eventually be developed for each *qoliqoli*.

#### 4.1.2. Legislative Amendment

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<sup>189</sup> Constitution (Amendment) Act 1997 s 38(8)(a)(i)



## **Rec. 2: Initiation of consultation process regarding the removal of permit exceptions.**

Permits are currently not required for fishing with a hook and line, spear or portable fish trap.<sup>190</sup> This exception undermines the potential value of the permit scheme as a mechanism to manage non-resource owner use of the *qoliqoli*. Removal of the permit exceptions has several advantages:

- Permits would be required for all non-resource owner use of the *qoliqoli*. Thus the permit system would become an initial catch-all tool for managing non-resource owner activities within the *qoliqoli*.
- Conditions, such as prohibition on all fishing in *tabu* areas, could be placed on all permits thus legally prohibiting all fishing in *tabu* areas by non-resource owners. No-take zones are an important aspect of contemporary fisheries management practice and part of the LMMA practice.
- Given that community consultation is required before a permit is issued, all non-resource owners would be required to seek consent from the resource owners. This would ensure community control over their *qoliqoli* and remove tensions associated with fishermen fishing without community permission.
- Requiring that all non-resource owners fishing in a *qoliqoli* be authorised through permit would greatly assist in reducing the current confusion about breaches of the Act. Simply, if anyone other than a resource owner is found fishing in the *qoliqoli* without a permit, they will be committing an offence and liable for prosecution.

On the basis of these preliminary observations, it is recommended that a consultation process be initiated to discuss the implications and value of removing the permit exceptions.

## **4.2. Licences**

### **4.2.1. Improved Administration of the Act**

## **Rec. 3: Development and implementation of a community-based warning and licence non-renewal system for repeat offenders.**

Multiple interviewees suggested that cancellation or non-renewal of licences was a better deterrent from offending than prosecution and penalties.<sup>191</sup> This is because the risk of prosecution is very low, as are the maximum penalties that can be imposed. In contrast, loss of licence has far greater economic repercussions. In many cases, loss of licence means loss of livelihood. Thus, linking licence renewal to compliance is potentially a very effective enforcement mechanism.

The author recommends the establishment of a community-based warning system for breaches of the law and community-imposed *tabus*. The system would be implemented through the *qoliqoli* committee as an informal community-based response to non-compliance, using the following process:

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<sup>190</sup> *Fisheries Act (Cap 158) s 13(1)(a)*

<sup>191</sup> Interviews conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008; Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

- **A breach occurs** (for example, size limit breach)
  - **Breach is not serious:** Community gives first warning
  - **Breach is serious:** Licence not renewed at next application and/or engage police and proceed to prosecution
    - **Fisherman has opportunity to respond to warning**
  
- **A second breach occurs**
  - **Breach is not serious:** Community gives second warning
  - **Breach is serious:** Licence not renewed at next application and/or engage police and proceed to prosecution
    - **Fisherman has opportunity to respond to warning**
  
- **A third breach occurs**
  - **Qoliqoli committee refuses to give consent to the next licence renewal during the community consultation process;** and
  - **Engage police and proceed to prosecution**

Central to this process is the giving of warnings and the opportunity for the offender to respond. After each breach, the *qoliqoli* committee has the option to choose non-renewal or referral to the police in the case of serious breaches, or a warning in the case of less serious breaches. In addition, the community can revoke the warning if the fisherman can show that they did not commit the breach. It is important that the *qoliqoli* committee decides collaboratively and democratically the gravity of the offence and whether a warning, decision of non-renewal or referral to the police is ordered.

For the sake of consistency between offences and offenders, an informal system of precedent should be developed. This could consist of a form that is completed by the *qoliqoli* committee outlining who committed the breach, the nature of the breach, any response from the offender and the decision of the committee. It will also be necessary for the *qoliqoli* committee to keep a record of warnings for each offender.

It is recommended that a warning and non-renewal system be established within communities with *qoliqoli* committees. This system will give communities a mechanism for dealing with non-compliance and by doing so, it is hoped that conflict and the issuing of extra-legal community-imposed sanctions will be minimised.

**Rec. 4: Inclusion of a plain language summary of licence restrictions with all licences issued.**

Licences are currently issued with “standard conditions”. These standard conditions are a selection of statutory prohibitions under the Act. There is the danger that fishermen infer the “conditions” included form an exhaustive list and no other restrictions apply.

It is strongly recommended that all licences are distributed with a plain language booklet summarising the prohibitions and licence restrictions contained in the Act as well as a section at the beginning for the inclusion of any specific conditions imposed by the resource owners or licensing officers.<sup>192</sup> This is pertinent in order to give fisherman the opportunity to comply. It will reduce accidental and ignorant non-compliance and assist in targeting deliberate non-compliance.

A plain language summary booklet should include:

- Size limits
- Species restrictions
- Method restrictions, for example SCUBA, explosives, minimum fish net sizes
- An outline of offences and penalties
- An outline of fish warden powers of examination, entrance, inspection and arrest
- Specific conditions imposed by the community or licensing officer.

**Rec. 5: Accurate mapping of *tabu* areas.**

Accurate mapping of the *tabu* area is critical to give fishermen the opportunity to comply. As with **recommendation 4**, accurate mapping will assist in targeting deliberate offenders by removing accidental non-compliance. Fishermen are currently notified of *tabu* areas through a diagram drawn on the back of each licence. This is arguably not a reasonable or accurate portrayal of the position of *tabus*. Ideally, GPS data would be provided and used. However, it is entirely unrealistic to require all fishermen to obtain GPS equipment. Space for a more accurate map of the *qoliqoli*, with *tabu* areas highlighted, could be included in the summary booklet recommended in recommendation 6.

In addition, foreshore signage including a large map with *tabu* areas clearly demarcated is also recommended. Public signing has been criticised as advertising the position of *tabu* areas and by doing so promote fishing in those areas. The rationale behind this argument is that dishonest fishermen will choose to fish in *tabus* for their higher abundance of fish. However, this is more properly characterised as an issue of adequate monitoring and surveillance. Indeed, use of signage may help to direct effort towards targeting deliberate offenders rather than accidental non-compliance.

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<sup>192</sup> Specific conditions should also be printed on the licence.

#### 4.2.2. Adoption of Policy or Subsidiary Legislation

##### **Rec. 6: Adoption of guidelines clarifying the meaning of “trade or business.”**

In order to remove confusion about who needs a licence and who can be charged for not having a licence, it is essential that the terms “trade or business” be clarified. The simplest way to achieve this is through the adoption of guidelines by the Department of Fisheries that clearly outline the definition to be used. The disadvantage of adopting guidelines is that they are not provided for in the *Fisheries Act* and as such the adopted definition could be challenged in court. In order to ensure its legitimacy, it is recommended that ordinary principles of statutory interpretation used by courts in interpreting terms are utilised when developing the definition. The alternative option to guidelines is creating regulations under the broad power given in section 9 of the *Fisheries Act*.

In developing a definition, the following principles of statutory interpretation should be utilised:

**Plain and ordinary meaning:** When interpreting a term in a statute, courts are *prima facie* required to invoke the plain and ordinary meaning of the word(s). The Oxford English Dictionary defines:

- “trade” as “the buying and selling of goods and services.”
- “business” as “a person’s regular occupation or trade” and “commercial activity.”

These definitions are very broad and include both formal commercial activities and informal selling of goods. In accordance with these definitions, any fishing that is conducted for the purpose of selling fish or which is conducted regularly as a form of occupation or source of income, falls under the definition of “trade or business” and requires a licence.

**Stated purposes of the Act:** In guiding the definition, the court should look to the stated purposes of the Act. The *Fisheries Act* does not state its intended purposes. The full title of the Act, “an Act to make provision for the regulation of fishing”, confirms that the broad aim of the Act is the regulation of fishing. This can also be implied from the structure of the Act. This provides little guidance as to how fishing should be regulated, or the primary principles for regulation.

**Parliamentary documents:** The court may look to the Second Reading Speech for guidance as to Parliament’s intended purpose in passing the Act. The Second Reading Speech is usually presented to Parliament by the responsible Minister as an introduction and explanation of the Bill they are introducing. The Second Reading Speech for the *Fisheries Act* is not available.

**International law and case law from other jurisdictions:** Courts may look to other jurisdictions for guidance in their interpretation of similar terms. In Australia, the term “trade or commerce” is commonly used in consumer protection legislation. In interpreting “trade or commerce”, the Federal Court of Australia emphasised the importance of adopting the plain meaning of the terms, and emphasised that profit-making did not have to be a dominant purpose in order for an activity to fall within the meaning.<sup>193</sup> The regularity of the trading activity has also been emphasised. For example, where the once-off selling of a

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<sup>193</sup> *Re Ku-Ring-Gai Co-operative Building Society (No. 12) Ltd* (1978) 36 FLR 134 at 167 per Deane J

house was not considered trade or commerce,<sup>194</sup> the selling of audio cassettes at 12 meetings was considered to be trade or commerce.<sup>195</sup>

On the basis of these statutory interpretation principles, it is recommended that a general, plain meaning interpretation of “trade or business” be adopted. However, the potential magnitude of the impact of such a broad definition should not be underestimated. Under a broad definition, all fishermen selling fish informally, whether it be on the side of the road or at small markets, will be required to obtain a licence. In order that these people can continue to sustain their livelihoods through this means, a review of the costs associated with obtaining a licence should be conducted.

Once a definition has been developed, it is recommended that there be an awareness program, possibly incorporated with the training programs discussed below, for fish wardens and the general public.

#### 4.2.3. Legislative Amendment

##### **Rec. 7: Legislative reform to remove licence exceptions from the section 5 of the *Fisheries Act***

Pursuant to section 5(3)(a) of the *Fisheries Act*, a licence is not required for people fishing by way of trade or commerce if they use a line from the shore, or a spear. The utility of such an exception is not apparent. It is recommended that these exceptions be removed via legislative amendment in order that all trade or business fishing is captured by the licensing regime. This will provide consistency in the regulation of all trade and business fishing and provide an accurate record of the extent of inshore commercial fishing in Fiji.

#### 4.3. Restricted Areas

##### 4.3.1. Improved Administration of the Act

##### **Rec. 8: Development of an information sheet for communities detailing issues that could be considered when deciding whether to establish a restricted area.**

As discussed, compliance and enforcement is a particular issue in restricted areas when communities feel disconnected from the management of the site. In this context, it is recommended that an information sheet be developed to help guide community decision making about whether the establishment of a restricted area is appropriate.

The information sheet should outline the advantages and disadvantages of establishing a restricted area as well as recommendations about appropriate situations in which a restricted area could be imposed.

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<sup>194</sup> *O'Brien v Smolonogov* (1983) 53 ALR 107

<sup>195</sup> *Ian Rutherford Plimer v Allen Roberts & Anor* [1997] FCA 1361 (5 December 1997) per Branson J.

### Advantages:

- Creates a no-fishing zone enforceable against all people
- Offenders can be prosecuted under the Act
- Provides a sanctuary for fish to breed
- Helps to enhance the abundance of fish in the greater area
- Provides a sanctuary for environmental protection
- Helps to enhance the environmental health of the greater coastal region
- Suitable for:
  - areas requiring long term or permanent protection from fishing
  - areas where another use is designated, for example tourism or scientific research
  - areas where the community feel they can undertake monitoring and surveillance

### Disadvantages:

- Time delay in establishing the restricted area
- No-one is permitted to fish within the restricted area, including resource owners, without the written permission of the Commissioner of the Division
- Restricted areas can only be created, amended or lifted by the Minister for Fisheries
- Not suitable for:
  - areas requiring short term protection
  - areas requiring temporary or intermittent restrictions
  - areas requiring occasional lifting of fishing restrictions without external approval
  - areas from which the community may feel disconnected as a result of the removal of fishing rights, and will be unlikely to continue monitoring and surveillance.

When considering the creation of a restricted area it is important to keep in mind that while restricted areas are an important management tool, utilised in isolation they are insufficient to effectively manage coastal fisheries.<sup>196</sup> Other management measures, including gear restrictions and size limits, must also be observed and enforced.

#### 4.3.2. Adoption of Policy or Subsidiary Legislation

##### **Rec. 9: Removal of exceptions for certain fishing methods from regulation 11 of the *Fisheries Regulations*.**

There is currently no legal avenue for the prohibition of all forms of fishing in marine protected areas in Fiji. The restricted areas regime given by regulation 11 of the *Fisheries Regulations (Cap. 158)* falls short of creating a regime of marine protected areas through its exceptions for fishing with hand net, wading net, spear or hook and line. It is recommended that these exceptions be removed by amending the regulations. These amendments may be made by order of the Minister for Fisheries. This will create the option for communities to designate complete no-fishing areas that can be legally enforced against all people. Although the creation of no-fishing areas may not be suitable in all situations, it is desirable to make

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<sup>196</sup> Secretariat of the Pacific Community (2006) 'SPC Live Fish Reef Monitoring Bulletin # 16,' 39.

this option to be available to communities if they wish to establish an area of complete protection.

**Rec. 10: Initiation of consultation process for formalising the role of *Qoliqoli* Committees through the creation of regulations.**

The restricted areas regime has been criticised for effectively removing communities from the management process. This has implications for enforcement when communities feel detached from the protected site and do not participate in surveillance and monitoring. Community involvement is paramount to successful coastal management and enforcement of fisheries laws. As such, it is recommended that the role of *Qoliqoli* Committees in the management of restricted areas be formalised through the adoption of regulations.

It is recommended that *Qoliqoli* Committees be recognised as a decision-making body for fisheries management. When a restricted area is gazetted, the gazettal notice would empower the *Qoliqoli* Committee to:

- Adopt management plans for restricted areas, subject to Department of Fisheries approval; and
- Amend management plans for restricted areas, subject to Department of Fisheries approval.

Critical aspects of the recommended regulations include:

- The Commissioner and licensing officers must comply with management plans when issuing permits and licences.
- Management plans are binding on non-resource owners and resource owners.
- Implementation of the management plans would proceed through existing enforcement mechanisms.

**Rec. 11: Creation of regulations that clarify and streamline the gazetting process.**

The current gazettal process is not conducive to the efficient and effective creation of restricted areas. This has indirect consequences for compliance and enforcement. Universally enforceable restrictions, especially if imposed through a community-level management planning process, as described above, are likely to improve compliance by removing ambiguities and confusion that emerges in a fragmented regulatory scheme. However, significant delays in gazetting acts as a disincentive to the establishment of restricted areas. It is thus recommended that the gazetting process is clarified and streamlined through the adoption of regulations.

## 4.4. By-Laws

### 4.4.1. Adoption of Policy or Subsidiary Legislation

#### **Rec. 12: Initiation of a consultation process to consider the creation of by-laws for compliance issues within the community.**

A number of interviewees raised concerns about resource owners breaching *tabus*. *Tabus* are currently protected against outside fishing through conditions on licences and may also be protected in the future through conditions on permits. However licences and permits only apply to non-resource owners and resource owners fishing for trade or business. Thus, a gap in the regulatory scheme exists such that resource owners not fishing for trade or business cannot be legally compelled to refrain from fishing in *tabu* areas, unless those *tabu* areas have been gazetted as restricted areas under the *Fisheries Act*. The creation of by-laws is one potential mechanism for communities, through their Provincial Council, to legally regulate and punish community members for fishing in *tabus*.

By-laws are arguably a culturally appropriate method of regulation that provides a synergy between traditional and national law. Experience in other jurisdictions suggests that community compliance with fisheries management rules will be higher when the community has had a direct role in defining those rules.<sup>197</sup> If Provincial Councils adopt a collaborative approach to the development of by-laws, community ownership of the rules may encourage improved compliance.

It is recommended that a consultation process be initiated to consider the creation of fisheries management by-laws. The consultation process should include relevant government agencies and government legal officers, as well as communities and other stakeholders. The consultation process should carefully weigh the advantages and disadvantages, as well as the suitability of adopting by-laws. These include:

#### **Advantages:**

- Provincial Councils are closer to the community level, allowing greater community involvement in development of by-laws.
- By-laws provide an opportunity for progressive Provincial Councils to show leadership, and overcome delays in restricted area gazettal.
- Potentially greater community ownership of areas protected by Provincial Council, relative to restricted areas gazetted by national government.
- Greater community ownership may translate to a better understanding of fisheries law and greater involvement in monitoring and surveillance.

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<sup>197</sup> Michael King, Ueta Fa'asili, Semisi Fakahau and Aliti Vunisea, 'Working Paper 7: Strategic plan for fisheries management and sustainable coastal fisheries in Pacific Islands' SPC Regional Policy Meeting on Coastal Fisheries Management, held in Nadi (17 to 21 March, 2003), 14.



### Disadvantages:

- Low penalties. \$50 is an inadequate deterrent, and imprisonment is unlikely.
- The Magistrates Court is the only avenue for judicial enforcement and it is non-accessible in many situations.
- Fish wardens are not legally empowered to enforce by-laws.
- Multiple layers of regulation, inconsistency between provinces, and fragmented enforcement responsibilities may exacerbate existing uncertainty and conflict.
- The process for creation and adoption of by-laws is multi-layered, from the community to the Provincial Council and approval by the Fijian Affairs Board. This process may not prove to be any more efficient or have fewer problems with delays, than restricted areas gazettal.
- If by-laws only apply to Fijians, there is the significant potential for inconsistent rules for different ethnic groups, with associated potential for uncertainty and conflict.

During the consultation process, issues needing to be resolved will include:

- Whether the Provincial Council has jurisdiction to make by-laws with respect to fishing activities in *qoliqolis*.
- Issues with the practicalities of development and implementation of by-laws. For example, ensuring mechanisms for community consultation and input in by-law development, ensuring that all community members are aware of the existence of the by-laws, and determining how compliance with the by-laws will be monitored and enforced. It is suggested that fish wardens undertake the monitoring and surveillance role for fisheries by-laws in order to ensure consistency in enforcement between by-laws, permits, licences and statutory prohibitions.
- The introduction of by-laws will mean that fishing in *tabus* will be regulated by multiple mechanisms. As such, it will be necessary to ensure consistency in the existence and demarcation of *tabus* between licences, permits and by-laws.

The consultation process should take into account current proposals for the establishment of *tikina* or village level courts. As discussed above, prosecution for breaches of by-laws before Magistrates Courts presents particular practical challenges. In the absence of *tikina* or village level courts, by-laws may not be an appropriate mechanism for ensuring compliance with *tabu* restrictions. If by-laws are not adopted, fishing activity by resource owners may be more effectively regulated by strengthening internal governance systems within the village.

## 4.5. Monitoring and Surveillance

### 4.5.1. Improved Administration of the Act

#### **Rec. 13: Increase the number of certified fish wardens receiving adequate training.**

A large proportion of compliance issues emerge because there are not enough fish wardens to effectively monitor the *qoliqolis*. Ideally, all *qoliqolis* in Fiji should have multiple fish wardens attached to them and organised such that there is active fish warden presence every day. It is highly recommended that the Department of Fisheries invest more resources and effort into comprehensive fish warden training and certification.

An essential precondition before increasing the number of fish wardens is finding individuals from within the community who are prepared to take on a position which will potentially put them in conflict with other members of the community. This is particularly true where internal compliance is the major issue. Interviews with community members in a limited section of the Lomaiviti Group of islands revealed that much of the illegal poaching is conducted by community members either selling their catch without a licence or using prohibited methods. Community education about coastal fisheries conservation and fisheries law is essential before successful recruitment of fish wardens can occur. This is discussed below.

#### **Rec. 14: Establishment of internal governance structures for fisheries management within communities.**

Using Macuata as an example, there appears to be a strong correlation between effective fisheries management, *qoliqoli* monitoring and enforcement of fisheries law, and strong internal governance structures.<sup>198</sup> Strong internal governance is particularly important in establishing community recognition of, and respect for, the fish warden role. FLMMA and WWF have both been very effective in assisting communities to establish effective internal governance focussed around the *Qoliqoli* Committee. Strong internal governance empowers communities to take ownership over the management of the *qoliqoli* in the long term.

There appear to be three important internal governance structures for effective monitoring and enforcement:

1. Chief: Strong leadership on fisheries issues must come from the Chief who holds great influence over the activities of individuals within the community.
2. *Qoliqoli* Committee: The *Qoliqoli* Committee's role is to co-ordinate and administer all affairs relating to the management of the *qoliqoli*, including deciding whether to consent to the issuance of a fishing licence, imposing conditions on licences and setting the price for and receiving goodwill payments. The *Qoliqoli* Committee is an important institution for centralising and democratising fisheries decision-making.
3. Fish warden meetings: Established, regular fish warden meetings provide an excellent avenue for fish wardens to share knowledge. In Macuata, fish wardens from the communities meet regularly to discuss issues they face and how they can

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<sup>198</sup> Interview conducted with Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

be resolved. It represents an excellent opportunity to co-ordinate monitoring and surveillance and ensures consistency in the treatment of offences.

It is recommended that organisations and communities continue to develop and strengthen these internal governance structures.

**Rec. 15: Development of a comprehensive training program for fish wardens.**

It is recommended that the Department of Fisheries develops a comprehensive training program, building on the current training materials. It is difficult to quantify the duration of a training program, but as a minimum it is considered that training would take at least one week. The training program should include:

- Fish biology and coastal marine ecology
- An overview of the *Fisheries Act*
- A detailed discussion on the permit system including:
  - Who needs a permit?
  - Who doesn't need a permit?
  - When is a permit needed?
  - What are the permit exceptions?
  - What does the permit allow?
  - Conditions on permits
  - How long is a permit valid for?
  - What is the consequence of breach of the permit or one of its conditions?
- A detailed discussion on the licence system including:
  - Who needs a licence?
  - Who doesn't need a licence?
  - When is a licence needed?
  - What are the licence exceptions?
  - What does the licence allow?
  - Conditions on licences
  - How long is a licence valid for?
  - What is the consequence of breach of the licence or one of its conditions?
- A detailed discussion on size limits
- A detailed discussion on prohibited species
- A detailed discussion on offences under the *Fisheries Act*, including the elements of each crime and practical exercises in identifying when an offence has been committed
- A detailed discussion and exercises on the powers of fish wardens and techniques for the exercise of their powers
- A detailed discussion and exercises on principles for exercising fish warden powers, including
  - Allowable use of force
  - Conflict resolution techniques
- A detailed discussion and exercises on evidence collection and recording
- Clarification of the procedure to be taken once an offender is apprehended
- An overview of police responsibilities with respect to fisheries crimes
- An overview of the process leading to prosecution, including the role of Magistrates and the court.

It is recommended that at appropriate times, other relevant stakeholders be included in the training process as resource people and/or participants. For example, the police should be involved for discussions about offences, exercise of powers, allowable use of force, conflict resolution, evidence, police roles and procedures, and the prosecution process. This will encourage knowledge sharing and collaboration between fish wardens and police as well as helping to clarify each of their roles. Police interviewed at Lami also suggested the possibility of fish wardens undertaking short courses at the police academy.<sup>199</sup> This avenue warrants further discussion.

Part of this process will necessarily involve a review of fish warden training throughout Fiji. It is recommended that a comprehensive review of fish warden training materials be undertaken (including review by a suitably qualified lawyer) to determine consistency in training between communities and legal accuracy with respect to the *Fisheries Act*.

**Rec. 16: Development of a compliance and enforcement handbook for fish wardens.**

In order to supplement the detailed training program, it is highly recommended that a compliance and enforcement handbook is developed and distributed to all fish wardens. The purpose of the handbook is to be a quick reference for fish wardens and is envisioned for use in the field. The handbook should be written in plain language and include:

- An overview of licence and permit requirements;
- An outline of offences under the Act;
- A list of size limits and species restrictions;
- An overview of fish warden powers of surveillance, monitoring, entrance, inspection and arrest;
- Vessel boarding techniques;
- Conflict resolution techniques;
- Procedures for collecting evidence;
- Tips on important points for fish wardens to record;
- What to do once an offender is apprehended;
- Contact details for the Department of Fisheries and the police;

In addition to the handbook, fish wardens could be provided with a recording book for recording evidence, the details and circumstances of the offence and the details of the offender.

A compliance and enforcement handbook would be invaluable for minimising wrongful arrests, reducing conflict between fish wardens and offenders, and ensuring that relevant evidence is collected properly.

**Rec. 17: Development and distribution of enforcement kits to all fish wardens.**

The fish warden role is the critical first stage in the enforcement process. It is essential that fish wardens are equipped with the necessary equipment to successfully fulfil this role. It is recommended that at the conclusion of fish warden training, fish wardens are presented with an enforcement kit in addition to their certification. Enforcement kits would provide the essential basic tools for their role.

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<sup>199</sup> Interview conducted with Mr Shatish Sharma, Station Officer Fiji Police, 19 September 2008.

Each enforcement kit should be provided in a waterproof bag and should ideally include:

- Enforcement handbook, described above
- Notebook with waterproof protective covering and pencil for recording evidence
- Template form for taking offender's details and recording important information
- Large garbage bags and smaller plastic sealable bags for storing evidence
- Measuring tape or fish size chart
- Protected fish species identification chart
- Waterproof digital camera with memory card and battery charger, for photographing evidence (subject to the availability of resources)

**Rec. 18: Development and implementation of an awareness program for the public.**

An awareness raising campaign aimed at the general public is essential. Without a change in community attitudes from resource use to conservation and sustainable use, it will be impossible to increase fisheries law compliance. A recent study conducted by Secretariat for the Pacific Community found that if the majority of users support and comply with the law, peer pressure becomes a strong deterrent against non-compliance.<sup>200</sup>

An awareness program is the crucial first step in recruiting fish wardens, and also in developing internal governance structures that are critical to successful community-based management and monitoring. Development and implementation of an awareness program for communities will also provide a forum for marrying traditional wisdom and management techniques with modern management processes to address fisheries issues.

The delivery of the program at the community level will provide an excellent opportunity for collecting information about management, compliance and enforcement issues that communities face. In order that this information is useful and accessible, it is recommended that a central database is kept, either with government or with FLMMA, where all information is recorded after each session.

It is strongly recommended that an awareness program is developed through consultation between government and NGOs, including FLMMA. The implementation of the program should be broad and comprehensive over the Fiji islands. At a minimum, it is suggested that the awareness program include:

- Fish biology and coastal zone ecology
- The need for community management
- The adverse effects of non-management, including over-fishing and its potential impacts on community livelihoods
- An overview of the *Fisheries Act* including the permit and licensing system, size limit restrictions, species prohibitions, prohibitions on methods (for example SCUBA and net sizes), restricted areas, offences and penalties and the role of fish wardens.
- The opportunity for communities to share their concerns
- A discussion on management techniques
- Options for communities to move forward in establishing processes and internal governance for fisheries management and enforcement.

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<sup>200</sup> Michael King, Ueta Fa'asili, Semisi Fakahau and Aliti Vunisea, 'Working Paper 7: Strategic plan for fisheries management and sustainable coastal fisheries in Pacific Islands' SPC Regional Policy Meeting on Coastal Fisheries Management, held in Nadi (17 to 21 March, 2003).

**Rec. 19: Development and implementation of a “Train the Trainers” program for staff at the Department of Fisheries.**

Ongoing training for fish warden trainers and general staff within the Department of Fisheries is crucial. In particular, confusion over what constitutes an offence and the procedure for fish wardens once an offender is apprehended, needs to be clarified. This recommendation is given in the context of reports of Fisheries staff providing inaccurate advice to fish wardens that offenders should be dealt with according to traditional practice and not taken to the police.<sup>201</sup>

The main purpose of the training would be three-fold. Firstly, to give an overview of the Act and regulations, highlighting the key provisions relating to permits, licences, registration of fishing vessels, size limits, protected species, restricted areas, fish warden powers, offences and penalties and post-arrest procedures.

Secondly, it would clarify the procedure to be taken once an offender has been arrested, particularly with respect to community-imposed penalties.

Thirdly, it would assist in ensuring that fish wardens receive the correct information in their fish warden training programs. These training programs do not have to be highly intensive, as Fisheries staff should be able to read and familiarise themselves with the *Fisheries Act* and its regulations.

A recent working paper released by the Secretariat for the Pacific Community made recommendations with respect to placing Fisheries employees in attachments to regional organisations.<sup>202</sup> This could provide an excellent opportunity for capacity building within government, and knowledge sharing between government and civil society. It is recommended that consideration be given to including an attachment component within the training program.

**4.5.2. Legislative Amendment**

**Rec . 20: Legislative reform requiring that fish wardens are paid**

That fish wardens are required to provide their own resources and are not provided remuneration for time spent fulfilling their role is a major impediment to their effectiveness. Because the position is on a voluntary basis, it can only be undertaken as an addition to the fish warden’s normal form of work. Thus, while fish wardens have become the most important figure in monitoring and surveillance for non-compliance by fishermen, the effectiveness of the position is undermined by the demands for a voluntary commitment.

It is recommended that the *Fisheries Act* is amended to include provision for the remuneration of fish wardens. There are a number of options with respect to the source of these funds:

1. The Department of Fisheries is solely responsible for paying fish wardens at a rate designated by the Department;

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<sup>201</sup> Interview conducted with Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

<sup>202</sup> Michael King *et al*, above n 188.

2. Communities are solely responsible for paying fish wardens at a rate designated within the community;
3. The Department of Fisheries provides an honorarium and communities contribute a small wage and out-of-pocket expenses including boat repairs and fuel.

The author recommends the third option, for the following reasons:

- It is unrealistic to expect the Department to be able to furnish the funds to pay, potentially, thousands of fish wardens. It is also important that the communities take responsibility for compliance issues within their *qoliqolis*. By requiring community contribution, it also creates an impetus for communities to ensure that fish wardens are undertaking their role properly.
- Communities do not have the resources to support fish wardens without some government support. There would also be a problem with a lack of consistency in wages between communities depending of financial capacity. It may create a situation where fish wardens migrate to communities that are able to pay a higher salary leaving poorer communities without adequate monitoring.<sup>203</sup>
- It is important that both the Department of Fisheries and the community take responsibility for compliance and enforcement. It is anticipated that the Department of Fisheries provide an honorarium. The communities would then contribute a small wage, which would be approved by the Department of Fisheries, as well as out-of-pocket expenses, for example boat repairs and fuel. The community contribution could be funded through the goodwill payments received for licences. All salaries should be administered through the *Qoliqoli* Committee.

## 4.6. Investigation and Prosecution

### 4.6.1. Improved Administration of the Act

#### **Rec. 21: Convening a high level forum between police, the Department of Fisheries and FLMMA to discuss and clarify roles and responsibilities in enforcement of fisheries law.**

It is recommended that FLMMA work together with the Department of Fisheries and Fiji Police to convene a high level forum to discuss and clarify their respective roles and responsibilities for enforcement of fisheries law. The purpose of the meeting is to cut through the political undertones that have previously informed government discussions on fisheries enforcement and help to promote co-operation and consistency in enforcement on the ground.

#### **Rec. 22: Distribution of the *Fisheries Act (Cap. 158)* and its associated regulations to every coastal police post in Fiji.**

It is strongly recommended that, as a critical first step to encouraging police response to fisheries crime, a copy of the *Fisheries Act* and its associated regulations is sent to every coastal police post in Fiji. This recommendation is based on an interview with the Lami Police

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<sup>203</sup> A similar situation was reported where fish wardens use their certification to get other jobs: Interview conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008.

which revealed that they were not in possession of the Act or regulations.<sup>204</sup> The Lami Police indicated that if they were in possession and had a better understanding of the Act, they would have a greater capacity to enforce fisheries law.<sup>205</sup> It is assumed that as a large post, Lami is most likely to have access to a broader range of legislation than other smaller stations. It is therefore assumed that smaller coastal stations are unlikely to possess a copy of the Act.

Distribution of the Act and regulations, particularly if distributed by the Fiji Police rather than the Department of Fisheries or NGOs, will send the message that fishery offences are crimes that the police, as Fiji's enforcement officers, have an obligation to investigate and enforce.

### **Rec. 23: Development and implementation of a joint training program for fish wardens and police**

Representatives at the police<sup>206</sup> and the Department of Fisheries<sup>207</sup> agreed that joint police and fish warden training is needed. It is recommended that a two-pronged approach to police training is required. Firstly, it is most appropriate that the majority of the training is implemented as part of the new fish warden training program discussed above. This will ensure co-operation and knowledge sharing between police and fish wardens. Please see **recommendation 15** above for details. In addition to the joint training, it is recommended that police receive an in-house overview of the *Fisheries Act* and regulations by senior police. It is inappropriate to conduct this aspect of the training in conjunction with the fish warden training as the same depth of detail will not be necessary. In-house training has the added benefit of instilling to police that fisheries crime falls firmly within the ambit of police work.

### **Rec. 24: Development and distribution of an enforcement manual for police.**

To assist police in the everyday enforcement of fisheries law, it is recommended that an enforcement manual be developed out of the training program discussed immediately above. The enforcement manual will highlight the key aspects of the *Fisheries Act* and regulations relating to enforcement. This will include:

- An overview of the permit and licence systems and how their interaction with customary fishing rights, including who may fish where and the legal status of *tabu* areas
- A list of size limits and protected species
- Detail of each offence under the Act and regulations, including the elements of each offence and the associated penalties
- A brief discussion on the role of the police as enforcement officers to investigate and prosecute fisheries cases.

This recommendation is based on the willingness of the police, during interview, to become involved in fisheries enforcement. It was evident during interview that a major restraint on police involvement was a lack of understanding about fisheries law.<sup>208</sup>

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<sup>204</sup> Interview conducted with Mr Shatish Sharma, Station Officer Fiji Police, 19 September 2008.

<sup>205</sup> Ibid

<sup>206</sup> Interview conducted with Mr Shatish Sharma, Station Officer Fiji Police, 19 September 2008.

<sup>207</sup> Interview conducted with Mr. Qilioni Raunibola, Training Assistant, Department of Fisheries. 19 September 2008.

<sup>208</sup> Interview conducted with Mr Shatish Sharma, Station Officer Fiji Police, 19 September 2008.



#### **Rec. 25: Development of a black list of convicted offenders.**

It is recommended that a black list of convicted offenders is developed and kept for each *qoliqoli*. The blacklist would be stored in a centralised database and regularly updated. The purpose of the blacklist is twofold. Firstly, it would provide information about past fisheries convictions to help communities in deciding whether or not to consent to the issuance or renewal of a licence or permit to a particular person. Secondly, it would act as a deterrent against potential poachers. As discussed previously, several interviewees expressed the view that threat of licence non-renewal or non-issuance of a licence was the strongest imperative for compliance.<sup>209</sup>

#### **Rec. 26: Development and implementation of Magistrates training for fisheries offences and penalties.**

It is recommended that a training course for Magistrates be developed and implemented. The purpose of a Magistrate training program is to brief Magistrates on fisheries offences and relevant sentencing principles to be applied should a fisheries prosecution be successful. Although fisheries prosecutions are currently very uncommon, it is hoped that with an increase in police involvement prosecutions will become more frequent. In that case, it would be very disappointing for the potential deterrent effect on other poachers to be lost through lenient sentencing.

It is important that Magistrates recognise that fisheries crimes and indeed environmental crimes in general, cannot be treated in isolation. Sentencing must reflect the environmental implications of the crime, and promote the integrity of the resource management framework by provide a strong deterrent against breaches.

#### **4.6.2. Legislative Amendment**

#### **Rec. 27: Legislative reform of penalties in the *Fisheries Act (Cap. 158)***

It is strongly recommended that the current penalties under the *Fisheries Act* and its associated regulations be increased through legislative reform. When penalties are set at a low rate, the incentive to violate is greater.<sup>210</sup> Low penalties are certainly contributing to compliance issues in Fiji.

A necessary step to reform will be a detailed review of the current penalties, including an economic analysis and jurisdictional comparison. A preliminary review of penalties set out in other Pacific Island States reveals that Fiji's penalty scheme is outdated:

- Papua New Guinea: Breach of prohibition on size limit, protected area, protected species and restricted methods including explosives and chemicals, attracts a maximum penalty of K100,000 for a natural person.<sup>211</sup> This is equivalent to over FJ\$64,000.

<sup>209</sup> Interviews conducted with Mr Semisi Meo, Institute of Applied Science, University of the South Pacific and Fiji Locally Managed Marine Areas network, 24 August 2008; Mr Sanivalati Navuku, WWF South Pacific Programme Office, 17 September 2008.

<sup>210</sup> Eric Kingma 'Session 12: The Implementation and Enforcement of Fisheries Regulations' Presentation given at the SPC/WPRFMC/FAO Regional Workshop on Fisheries Legislation and Community-based Fisheries Management'. April 4 – 8, 2005, Honolulu Hawaii.

<sup>211</sup> *Fisheries Management Act 1998* (Papua New Guinea) ss 30 – 32 and 58

- Vanuatu: Breach of a local licence condition attracts a maximum penalty of VT5,000,000.<sup>212</sup> This is equivalent to over FJ\$81,000.
- Samoa: Contravention of any management measure under the Act (for example fishing in a protected area) attracts a maximum fine of 50,000 tala.<sup>213</sup> This is equivalent to over FJ\$29,000.
- Tonga: Fishing in a reserved area (protected area) and breach of minimum net size or gear restrictions both attract a maximum penalty of \$50,000.<sup>214</sup> This is equivalent to over FJ\$40,000.

In comparison, Fiji's offence penalties are outdated and inadequate to have any general or individual deterrent effect on future offending. The penalties must be updated in order to reflect modern standards and the seriousness of fisheries degradation. Incorporation of an understanding of the social and environmental impact of environmental crime into the offence penalties is mandatory. The statutory maximum penalties should reflect the penalty for the most serious behaviour constituting the offence. When developing the penalties it must be remembered that the vast majority of cases will not attract the maximum.

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<sup>212</sup> *Fisheries Act [Cap. 158] (Vanuatu) s 8(4)*

<sup>213</sup> *Fisheries Act 1988 (Samoa) s 51(8)*

<sup>214</sup> *Fisheries Act 1989 (Tonga) ss 22 - 23*

## 5. CONCLUSION

Compliance and enforcement of fisheries law is a major barrier to the effective management of coastal marine areas in Fiji. As the major legislative instrument in coastal fisheries regulation, the *Fisheries Act (Cap. 158)* provides important mechanisms for fisheries management. Of most practical import are the licence scheme, permit scheme, restricted areas regime, size and species prohibitions and the establishment of the fish warden role. Non-compliance with the law by fishermen, incomplete implementation of the Act by government, inadequate training of fish wardens and fisheries officers, and non-enforcement of offence provisions by police all contribute individually and collectively to undermine the effectiveness of the Act.

In addressing these issues the following recommendations have been made. These recommendations have been written with the aim of strengthening the existing legislative framework, rather than attempting to re-draft Fiji's coastal fisheries management law. However, in some cases the need for legislative reform is critical and the recommendations reflect this. The importance of community-based management has also been central to the discussion and formulation of these recommendations, and should not be undervalued.

### RECOMMENDATIONS

#### Recommendations for the improved administration of the Act:

<b>Rec. 1</b>	Implement statutory permit scheme.
<b>Rec. 3</b>	Develop and implement a community-based warning and licence non-renewal system for repeat offenders.
<b>Rec. 4</b>	Include a plain language summary of restrictions with all licences issued.
<b>Rec. 5</b>	Accurately map <i>tabu</i> areas on licences.
<b>Rec. 8</b>	Develop of an information sheet for communities detailing issues that could be considered when deciding whether to establish a restricted area.
<b>Rec. 13</b>	Increase the number of certified fish wardens receiving adequate training.
<b>Rec. 14</b>	Establish internal governance structures for fisheries management within communities.
<b>Rec. 15</b>	Develop a comprehensive training program for fish wardens
<b>Rec. 16</b>	Develop a compliance and enforcement handbook for fish wardens.

<b>Rec. 17</b>	Develop and distribute enforcement kits to all fish wardens.
<b>Rec. 18</b>	Develop and implement an awareness program for the public.
<b>Rec. 19</b>	Develop and implement a “Train the Trainers” program for staff at the Department of Fisheries.
<b>Rec. 21</b>	Convene a high level forum between police, the Department of Fisheries and FLMMA to discuss and clarify roles and responsibilities in enforcement of fisheries law.
<b>Rec. 22</b>	Distribute the <i>Fisheries Act (Cap. 158)</i> and its associated regulations to every coastal police post in Fiji.
<b>Rec. 23</b>	Develop and implement a joint training program for fish wardens and police.
<b>Rec. 24</b>	Develop and distribute a fisheries enforcement manual for police.
<b>Rec. 25</b>	Develop a black list of convicted offenders.
<b>Rec. 26</b>	Develop and deliver Magistrates training for fisheries offences and penalties.

#### **Recommendations for the adoption of policy or subsidiary legislation**

<b>Rec. 6</b>	Adopt guidelines clarifying the meaning of “trade or business” for licences.
<b>Rec. 9</b>	Remove exceptions for exempted fishing methods in restricted areas from regulation 11 of the <i>Fisheries Regulations</i> .
<b>Rec. 10</b>	Initiate a consultation process for formalising the role of Qoliqoli Committees through the creation of regulations.
<b>Rec. 11</b>	Create regulations to clarify and streamline the restricted area gazetting process
<b>Rec. 12</b>	Initiate a consultation process to consider the creation of by-laws to address compliance issues within the community.

### Recommendations for legislative amendment

<b>Rec. 2</b>	Initiate a consultation process regarding the removal of permit exceptions.
<b>Rec. 7</b>	Remove licence exceptions from the section 5 of the <i>Fisheries Act</i> .
<b>Rec . 20</b>	Introduce a legal requirement for fish wardens to be paid.
<b>Rec. 27</b>	Increase penalties in the <i>Fisheries Act</i> .