Secure fishery resource access rights in Western Australia

POLICY POSITION PAPER SEPTEMBER 2020

Contents

Disclosure and disclaimer

This report has been prepared by Australian Venture Consultants Pty Ltd (ACN: 101 195 699) ('AVC'). AVC has been commissioned to prepare this report by the Western Rock Lobster Council Inc and has received a fee from the Western Rock Lobster Council Inc for its preparation.

While the information contained in this report has been prepared by AVC with all reasonable care from sources that AVC believes to be reliable, no responsibility or liability is accepted by AVC for any errors, omissions or misstatements however caused. Any opinions or recommendations reflect the judgment and assumptions of AVC as at the date of the document and may change without notice. AVC, its officers, agents and employees exclude all liability whatsoever, in negligence or otherwise, for any loss or damage relating to this document to the full extent permitted by law. Any opinion contained in this report is unsolicited general information only. AVC is not aware that any recipient intends to rely on this report or of the manner in which a recipient intends to use it. In preparing this information it is not possible to take into consideration the information or opinion needs of any individual recipient. Recipients should conduct their own research into the issues discussed in this report before acting on any recommendation.

Acknowledgements

The information and analysis in this report draws significantly from submissions made to the Western Australian Parliament's Upper House Inquiry into Private Property Rights by a range of stakeholder organisations, as well as the expertise and experience of those organisations and their leadership more generally. In this regard, the report would like to particularly acknowledge the previous work of:

- Combined Zone C Association
- Department of Primary Industries and Regional Development
- Geraldton Fishermen's Cooperative
- Fishing Families WA
- Fishing Industry Women's Association of WA
- Leschenault Fisheries
- Pearl Producers Association
- Recfishwest
- Seafood Industry Australia
- WA Farmers
- West Coast Abalone Association
- Western Australian Fishing Industry Council
- Western Rock Lobster Council Inc.

The reader should note that the acknowledgement of the work of these organisations does not necessarily imply that these organisations endorse the entirety of this report, or that this report endorses the entirety of submission made by those organisations.

1. Executive Summary

Security of access to aquatic resources is critical for Western Australian fisheries…

Western Australian commercial fishers are sophisticated, complex and modern businesses that serve extended domestic and international supply chains, delivering high quality produce at competitive price points. Like other such businesses, they have many core needs that enable longevity and profitability. Most fundamental of all, however, is security of access to the aquatic resources that these businesses rely upon – without access to fish, there can be no fishing industry.

Further, given the capital intensive nature of modern fisheries businesses, what is required is not only access to a resource today, but a high degree of confidence that that access will be available into the future. Long-term security of access rights is critical to allow the State's fisheries to make sound and rational commercial decisions and to invest in their businesses. Without this, the profitability and future growth of this foundational State industry is under threat, and the opportunities that exist in currently under-utilised fishery sectors and downstream value-adding will be left by the wayside.

The best way to provide security and sustainability is rights-based fisheries management regimes…

Historical record and practical experience demonstrate that the most effective means to manage fisheries for both maximum economic yield and long-term ecological sustainability is to adopt rights-based approaches, paired with overall catch or effort limits. Under such a system, all fishers – commercial, recreational and traditional/customary alike – hold a secure right to access a proportional amount (their quota) of the overall sustainable harvest.

These rights should be secure, indefinitely renewable, and may be traded, leased, used as collateral, ideally able to be sub-divided, and otherwise treated as akin to other forms of property. As quota is proportional, when times are good and the total allowable catch rises, all fishers share the rewards of careful ecological management and benefit from increased entitlements. When times are bad, all fishers similarly share the necessary constraint equally. Rights-based approaches also allow for market mechanisms to operate, removing much of the need for government intervention in day-to-day management, encouraging rights holders to responsibly manage the resource and natural environment.

Western Australian policy and practice in fisheries management – formerly world-class – is now contributing to the problems facing industry…

Western Australian fisheries have had a deserved reputation for excellence in fisheries management and ecological sustainability. Over 90 percent of the State's fisheries have now attained MSC certification. Meanwhile, since the 1960s government has increasingly adopted limited entry licensing and control regimes, culminating in world-leading policy positions and government-led dialogue in the late 1990s and 2000s in support of rights-based fisheries management approaches.

However, the current implementation of policy and practice under the present FRMA regime, and aspects of the transition to the new ARMA regime, are sub-optimal and no longer best support fisheries management in the State. Two recent high-profile examples of how fisheries have been endangered by decisions of the Western Australian Government include the Western Rock Lobster fishery proposals of 2018-2019 and the ongoing construction of the Ocean Reef Marina. However, industry observers would be aware of other examples over the past few decades.

Many of these issues are highly technical, not easily summarised, and discussed in more detail in the body of this report. However, in broad general terms, most of the problems relate to:

- A lack of security for fishing rights, both currently and into the future;
- Insufficient recognition of the value of those rights, including the importance of avoiding dilution of equity and other unfair treatment by government;
- A lack of clear, transparent and equitable processes to manage fisheries and ensure commercial fishers are not unfairly treated by decisions of government to allocate or re-allocate access;
- A lack of recognition in policy and principle of the potential impact that non-fishers may have on aquatic resources, including property developments, seismic surveying and other activities;
- A lack of broad recognition by the State that decisions of the State can seriously affect the rights of commercial fishers and their livelihoods, and that in principle wherever this occurs compensation should be payable; and
- A lack of clarity, certainty, transparency and fairness in existing limited compensation mechanisms.

A reform agenda to overcome these deficiencies and ensure continued prosperity…

In order to address the range of issues discussed above, industry has identified 9 immediate reform priorities, together with additional longer-term guiding principles. Taken together, this programme of reform will enhance the security of fishing access rights and provide the conditions precedent for sustainable commercial fishing to flourish in the State.

The priority recommendations are as follows:

- **Recommendation 1: State shall not be empowered to dilute rights within a managed fishery.** Measures to limit the ability of the State to disturb the equity and value of fishing rights already issued, and ensure equity amongst rights-holders.
- **Recommendation 2: State shall not hold shares in or participate within a managed fishery**. Addressing the significant sovereign risk concerns posed by the current ability of the State to act as a direct or indirect participant in commercial fisheries.
- **Recommendation 3: Primacy of fishing rights in managed fisheries not to be circumvented through exemptions**. Ensuring that a level playing fields exists between all fishers, and that the clear management regimes and licensing schemes established under legislation are protected.
- **Recommendation 4: Secure rights to be the basis for all commercial fishing.** Addressing the potential scope creep demonstrated in quasi- or fringe-commercial fishing activities, and protecting the value commercial-class fishing licences.
- **Recommendation 5: Transitions between management regimes to be on fair and just terms.** Measures to address deficiencies in the transition processes between current FRMA authorisations and proposed new ARMA regimes.
- **Recommendation 6: State to assist transitions to occur without imposing taxation burden on rights-holders.** Seeking affirmation and action by the State to ensure that new management arrangements do not result in unfairly burdensome taxation impacts on fishers.
- **Recommendation 7: Better incorporation of recreational fishers within management regimes.** Proposed measures to facilitate the administrative processes of applying rights-based approaches to recreational fishers and management of their collective catch effort.
- **Recommendation 8: Where actions of the State affect the rights and livelihoods of fishers, compensation should be payable**. Ensuring that the principles of compensation are at the forefront of fisheries management actions, allow market-based mechanisms to function, and follow processes that are clear and equitable.

- **Recommendation 9: Security of resource access represented by fishing rights to be enhanced and protected.** A range of measures required to further address the current status of fishing rights in Western Australia, that bear many of the attributes of property rights, ensuring that operation of the new legislation is comprehensive in its recognition of more secure resource access rights.

2. Introduction

Predictable security over access to natural resources and transparency and certainty regarding regulatory processes that pertain to the management of rights to natural resources are fundamental to the viability of all primary industries. Despite being a world-leader in other aspects of fisheries management, deficiencies in this regard have been episodically problematic for the Western Australian commercial fishing industry for decades and have been bought to a head in recent times by actions of the Western Australian Government and an ongoing inquiry into private property rights being conducted by the Legislative Council of the Western Australian Parliament.

This policy position paper endeavours to provide detailed, evidence-based analysis as to the extent to which:

- General principles pertaining to 'property' rights should apply to security of resource access for the Western Australian fishing industry;
- The extent to which the current legislative and regulatory framework facilitates the protection and management of these rights; and
- Drawing on this analysis, recommends practical solutions to addressing current deficiencies.

The discussion contained herein draws significantly from submissions made to the abovementioned Inquiry from a range of stakeholders (see Acknowledgements), and analysis pertaining to the issue that has been undertaken by the Western Australian fishing industry and other stakeholders (referenced throughout).

The purpose of this policy position paper is to inform and explain the need for legislative change to address deficiencies with respect to resource access rights that are contained in the existing regulation. Unless adequately addressed, these deficiencies will carry through to fisheries management regulatory change that is currently in motion - the transition from the *Fisheries Resource Management Act 1994* (WA) (FRMA) to the *Aquatic Resources Management Act 2016* (WA) (ARMA).

The reader should note that the paper frequently uses the terms 'property' and 'proprietary' rights in discussing fishing resource access rights. The use of these terms is in reference to the legal context in which fishery resource access rights are derived. As discussed in detail later in this paper, rights to the fishery resource are not absolute as in the sense of the rights to a proprietor over say, fee simple tenure. In fact, 'Property' rights exist on a continuum of proprietary rights. Fishery resource access rights demonstrate a history of evolution and contemporary characteristics that elevates them above a mere license.

3. Fishery resource rights in context

3.1. The Western Australian fishing industry

The Western Australian aquatic resource (including its fish stocks) has been of fundamental importance to the State and its peoples for thousands of years. Before colonial times, fish resources were of great importance to the customary practice, subsistence and trade of Western Australia's First People's for at least 65,000 years. Over the course of the more recent history of the State, aquatic resources have remained fundamental to the Western Australian identity and economy. Recreational fishing is a major pastime in Western Australia, with an estimated one-third of Western Australians participating[1], with this growing sector also performing a significant function in the State's tourism industry. The commercial fishing industry too has a long and proud history as a foundational industry of the Colony and then later the State, and has demonstrated a world-leading track record of innovation, environmental stewardship and economic success.

The commercial fishing industry makes an important and unique contribution to the State's economy and regional communities...

While there are around 40 commercial wild-catch fisheries across Western Australia, the major non-Commonwealth commercial fisheries – western rock lobster, pearl oyster (*Pinctada maxima*), abalone, Exmouth and Shark Bay prawns and Shark Bay scallops - are low-volume, high-value fisheries, together accounting for about 90 percent of industry Gross Value of Product (GVP). Of these, the western rock lobster fishery accounts for a majority of value, on its own producing some 4 percent of non-mining State GVP. Targeting a range of finfish and crustacean species, the other commercial fisheries in Western Australia are relatively small. However, collectively, the Western Australian Fishing industry is a vitally important sector of the State's economy.

The Western Australian commercial fishing industry:

- Produces annual GVP of approximately AUD $550 million, accounting for 6 percent of State non-mining primary industry GVP;
- Delivers gross value added of approximately AUD 1.0 billion
- Is comprised almost exclusively of small family and other small-to-medium (SME) style businesses, the majority of which are Western Australian owned;
- Employs approximately 10,000 people across its catching, processing, exporting and retail sectors; and
- Is an important regional industry, with around 85 percent of its commercial activity occurring in regional coastal towns from Wyndham to Esperance[2].

However, some fisheries within the State are under-utilised, with catch and fishing effort below (in some cases well below) the supported ecologically sustainable yield the underlying aquatic resource could support. To varying degrees, examples include the octopus, squid and Australian salmon resources, as well as the nascent bycatch sector. To a large degree, the lack of investment by industry in developing the fishery has come about as a result of a lack of resource access security (discussed below), which unless addressed, will continue to hamper growth.

[1] Department of Primary Industries and Regional Development (2017), *State-wide survey of boat-based recreational fishing in Western Australia – 2015-16,* Western Australian Government, Perth

[2] Department of Primary Industries and Regional Development; Western Australian Fishing Industry Council (2019), Western Australian Fisheries and Aquaculture Industry 2017-18 Economic Contribution Study

Western Australian fish stocks are a shared resource in which the commercial sector is a key stakeholder and economic enabler...

The commercial fishing industry has long recognised that their operations do not occur in isolation from other interests in the aquatic environment. The aquatic resources of Western Australia are shared by commercial fishers, recreational fishers, communities and other partners in the marine environment, and are impacted by maritime logistics, the resources and energy sector, developers and other industrial users. Importantly, the historic rights of the First Peoples of Australia are too increasingly being recognised and given new life and security through both litigation and legislation. Since 1979, Western Australians of Aboriginal descent have had traditional or customary fishing rights protected under State legislation[3], while since the early 2000s it has become clear that native title may extend to sea country and the intertidal zone, carrying and conveying non-exclusive rights, including to take fish[4].

Further, recreational fishing is one of the most popular pastimes in Western Australia, with around one-third of Western Australians participating in recreational fishing[5] with some degree of regularity. The resource also underpins a charter fishing sector, which forms an important element of the tourism sector in many regional Western Australian economies. Both the commercial and recreational sectors make significant contributions to the economic and social wellbeing of Western Australians, and there is substantial value to be found in a well-managed and harmonious balance between the interests of commercial and recreational fishers. Indeed, by enabling access to high quality locally caught seafood that would be too difficult, time-consuming or capital-intensive to catch personally, such as abalone, scallops or prawns, commercial fishing operators deliver significant community benefit and allow citizens and tourists alike to experience all that the State's seafood has to offer.

While recognising the importance of cultural and leisure values supported by the State's aquatic resources, however, the commercial fishing industry accounts for a majority of the direct economic impact, with gross value of production estimated at around $550 million[6]. Beyond the direct impact, commercial fishing produces very significant indirect effects, stimulating economic activity and employment in related sectors. While this will differ across individual sectors, a recent prominent ACIL Allen case study suggests that for the rock lobster fishery, every dollar of gross value added within the sector leads to a further 66 cents of activity in the broader economy, while each Full Time Equivalent (FTE) position supports a further 1.9 FTE jobs outside of the sector[7].

Although subject to regulation and control by State and Commonwealth governments, State territorial waters are therefore a public space which can and must support a multitude of competing uses. The overall principle for managing rights in aquatic resources is clear: in managing and controlling shared aquatic resources, the needs and interests of multiple stakeholders must be balanced and protected to arrive at the most equitable outcome for all.

---

[3] While early fishing rights legislation in WA (the *Fishing Rights Act 1905* (WA)) explicitly disclaimed application to subsistence takings of fish by "the aboriginal inhabitants of the State", traditional and customary fishing was not brought within the ambit of fisheries regulation and therefore afforded explicit protection and recognition until much later.

[4] Commonwealth v Yarmirr [2001] HCA 56; Gumana v Northern Territory [2007] FCAFC 23

[5] Department of Primary Industries and Regional Development (2017), *State-wide survey of boat-based recreational fishing in Western Australia – 2015-16,* Western Australian Government, Perth

[6] Department of Primary Industries and Regional Development; Australian Bureau of Agriculture and Resource Economics

[7] ACIL Allen (2017), Economic Contribution of the Western Rock Lobster Industry, Western Rock Lobster Council Inc., Perth

The Western Australian commercial fishing industry is a sophisticated, outward facing industry and custodian of the State's aquatic resource...

Long-gone are the days of an industry dominated by direct-to-consumer sales on the beach or wharf. As with other sectors of the State economy, commercial fisheries have evolved to serve national and international markets via sophisticated supply chains. Western Australian fisheries exports in 2019 were valued at over $535 million, dominated by rock lobster – over 95 percent of which, worth some AUD $488 million, was air-freighted to seafood market and restaurant customers in the People's Republic of China (PRC). Asian markets and especially the PRC take the overwhelming majority of Western Australian seafood exports, with the Chinese-Australian Free Trade Agreement concluded in 2016 increasing the competitiveness of Western Australian produce. Outside of lobster, other significant wild-catch sectors such as prawns, crabs, abalone and finfish fisheries service supply chains into North America, a range of Asian and European Union markets, as well as local and national domestic markets.

As competitors in a global marketplace, Western Australian fisheries have thus had to make significant investments in their businesses, securing and underpinning competitiveness and their ability to provide a high-quality product at a competitive price. This includes investment in research and development, people, equipment, infrastructure, market development and working capital to ensure viability in an industry that is characterised by significant market and production variability. A sophisticated and integrated logistics, warehousing, exporting and broader supply chain has emerged to support and serve industry and consumers, meeting and in many cases exceeding world's best practice in swiftly and safely delivering high quality and premium produce to meet increasingly stringent market specifications.

In doing all this, the State's commercial fisheries have also maintained or set world's best practice standards of ecological sustainability. As a seafood producer, Western Australia has some of the most sustainable wild-catch fisheries in the world, underpinned by decades of broad agreement and hard work by government, industry and the scientific sector. In 2000, the western rock lobster fishery was the first in the world to attain Marine Stewardship Council (MSC) certification, followed in 2018 by another world first with the abalone fishery and in 2019 by the sea cucumber fishery, joining the seven other MSC certified commercial fisheries now operating within the State[8].

It is no exaggeration to say that Western Australian commercial fisheries have become world-class, modern, highly sophisticated and complex businesses that have commercialised the natural resource in accordance with the highest standards of environmental sustainability.

Sustaining competitiveness in production and environmental stewardship requires confidence in investment decisions...

To continue to achieve these world-class outcomes into the future, and build upon current successes, industry requires certainty – certainty to allow producers to plan, develop and respond to changing consumer preferences, have confidence to invest or attract investment from others, to secure finance and funding for business models, and simply to maintain operations. With most commercial fisheries in the State family-owned and small-to-medium enterprises, the ability to plan and the confidence to invest is critical to their continued survival and further industry development.

[8]Marine Stewardship Council (2019), *Western Australia Octopus earns the blue fish tick for sustainability,* press release, 19 November 2019

Confidence in investment decisions and markets that supply capital require certainty...

Capital market requirements for certainty are no better demonstrated than by the case of Western Australia's mining industry. Each year the Fraser Institute[9] undertakes a survey of global mining industry participants to determine the most attractive resources industry investment destinations across the globe. The resulting analysis takes into consideration the extent of investment barriers including the administration of existing regulation, certainty around environmental regulations, duplication across government, underlying legal system, taxation, infrastructure, socio-economic agreements, trade barriers, availability of labour and, of course, security of resource access. Western Australia has ranked in the top 5 most attractive resources industry investment destinations in the world for at least each of the past five years, including two years as the most attractive[10].

Like the Western Australian minerals industry, the Western Australian fishing industry is underpinned by a world-class natural resource that, in its case, is renewable and provides for the sustainable harvest of high value, premium wild-caught species and increasingly produce that is derived from marine-based aquaculture systems. In many instances this renewable resource and commercialisation activities are internationally accredited by the Marine Stewardship Council (MSC) – the highest certification level of environmentally sustainable production, and for which industry has received over $14 million in State government support since 2012 to apply for and attain[11].

However, despite a sustainably harvested natural resource of similar calibre, the Western Australian fishing and aquaculture industries continue to struggle to attract the investment required to grow and maintain its competitiveness in international markets.

The main cause of this is comparative uncertainty in the regulatory environment, particularly as it pertains to an absence of security in resources access – if seafood industry investors do not have comfort that access to the resource that underpins value creation is secure, a proposition is typically not investable. In such a context, it is critically important that Western Australian fisheries obtain more secure rights to the aquatic resources of the State that underpin their businesses. Any potential disruption to this access represents an existential threat to modern commercial fishing enterprises in their current form.

Balancing this negative outlook, and as discussed in more detail later in this document, improved resource access security will also provide significant upsides to the commercial fishing industry, and thus the State - security and certainty to invest and develop existing resources to their full maximum economic yield[12], maintain the quality of aquatic resources, incentivise the development of new fisheries, and deliver the greatest economic return to the State and social benefit to the wider community.

[9] www.fraser.org.au

[10] Fraser Institute (2020), *Fraser Institute Annual Survey of Mining Companies 2019,* Fraser Institute, Calgary

[11] WA Marine Stewardship Council partnership, http://www.wamsc.com.au/, website accessed June 2020

[12] As defined by the Australian Fisheries Management Authority, attaining maximum economic yield should be the end-goal for all fisheries management efforts. This represents circumstance where catch limits and restrictions result in maximum profits within a single species fishery, or optimised profits for multi-species fisheries as a whole at levels that are at or below (usually below) ecologically sustainable limits as determined by scientific evidence. A more detailed explanation of Maximum Economic Yield is contained in Appendix 2.

3.2. Integrated fisheries management and aquatic resources access rights in Western Australia

While strong principles of integrated fisheries management apply to the Western Australia aquatic resource, adherence to their implementation has been wanting…

As noted above, the aquatic resources of Western Australia are a shared resource, with access to this resource managed and controlled by the State. The nature of this management and control is examined in more detail later in this document, however the overarching principle is one of integrated fisheries management – utilising an allocation system to ensure the needs of all user groups are properly considered and equitably balanced, within an ecologically sustainable framework.

Following a sustained process of community and industry consultation in the early 2000s, the current guiding framework for fisheries management within Western Australia are found in the 2009 *Integrated Fisheries Management Policy*[13] (IFMP), which outlines nine broad guiding principles summarised below in

Table 1.

Table 1 - Guiding principles of integrated fisheries management

	Guiding principles for management
1	Fish resources are a common property resource managed by the Government for the benefit of present and future generations.
2	Sustainability is paramount and ecological impacts must be considered in the determination of appropriate harvest levels.
3	Decisions must be made on best available information and where this information is uncertain...a precautionary approach adopted to manage risk...[absence or uncertainty of] information should not be used as a reason for delaying or failing to make a decision.
4	A harvest level...should be set for each fishery and the allocation designated for use by the commercial sector, the recreational sector, the customary sector, and the aquaculture sector should be made explicit.
5	The total harvest across all sectors should not exceed the allowable harvest level. If this occurs, steps consistent with the impacts of each sector should be taken to reduce the take to a level that does not compromise future sustainability.
6	Appropriate management structures and processes should be introduced to manage each sector within their prescribed allocation. These should incorporate pre-determined actions that are invoked if that group's catch increases above its allocation.
7	Allocation decisions should aim to achieve the optimal benefit to the Western Australian community from the use of fish stocks and take account of economic, social, cultural and environmental factors…
8	It should remain open to government policy to determine the priority use of fish resources where there is a clear case to do so.
9	Management arrangements must provide sectors with the opportunity to access their allocation. There should be a limited capacity for transferring allocations unutilised by a sector for that sector's use in future years, provided the outcome does not affect resource sustainability.

[13] (2009), Department of Fisheries, Western Australian Government

Further, and most relevant to the subject matter of this paper, two additional guiding principles in specific sub-sectors are addressed by the IFMP – allocation and compensation:

- *Allocation processes*: An Integrated Fisheries Allocation Advisory Committee has been established…to investigate resource allocation issues and make recommendations on optimal resource use…[including relating to] allocations between sectors…specific principles to provide further guidance around allocation and reallocation decisions for individual fisheries…
- *Compensation*: Where a reallocation of resources from one sector to another results in demonstrable financial loss…in principle there should be a consideration of compensation…priority will be given to investigating the potential development of market based systems to achieve reallocations…no compensation should be payable where adjustments are made for sustainability reasons.

These principles are discussed in more detail later in this document, as are their implementation in historic and current Western Australian fisheries legislation, Ministerial decisions and departmental decisions. However, from the perspective of the commercial fishing industry, five key points relating to aquatic resource access may be derived from these broad principles under the IFMP:

- For each fishery within Western Australia, allocations of that aquatic resource should be made and divided between commercial, recreational and other users of the resource.
- Allocations represent a proportional share of the overall ecologically sustainable harvest level, and the exact allowable take or harvest may fluctuate up and down over time with that ecological threshold.
- Holders of allocations must be provided with the opportunity to effectively access their allocated share of an aquatic resource, and management arrangements should reflect this entitlement.
- The State reserves to itself the right to order and reorder priorities of access to aquatic resources – in effect, to make or alter allocations. However, the State should be guided by expert advice and principles in making these decisions.
- Where a reallocation occurs, other than to maintain ecological sustainability, and financial loss is suffered, compensation should be payable, following an agreed methodology and process.

These principles of allocation and re-allocation of aquatic resources are clear. However, the implementation of these principles into practice has, over the medium term, been fraught. The Integrated Fisheries Allocation Advisory Committee provided three reports by 2009, remained inactive for a lengthy period, and was reconvened to report on the pearl oyster (*Pinctada maxima*) fishery in 2018 in preparation for the implementation of ARMA. It has since been inoperative. To date only four fisheries have seen a formal resource allocation between all users (the western rock lobster, metropolitan roei abalone, West Coast demersal scale fish and *Pinctada maxima* pearl oyster fisheries). At a practical level, and given the growth in State population and industry, most other fisheries are fully utilised, with these others implicitly managed on a relatively ad-hoc basis to maintain a perceived status quo between recreational and commercial fishers. Meanwhile, over the medium term several examples have illustrated the relative weakness of the rights that Western Australian commercial fishers hold in their resource allocations. While various events since the 1990s have been publicised, two most recent examples (discussed in greater depth below) highlight current deficiencies in the application of access rights-based management of fish resources within Western Australia.

Example 1: Attempted part-nationalisation of the Western Rock Lobster fishery…

Following record low levels of juvenile recruitment and significant concerns as to the long-term viability of the fishery over the late 2000s, industry and government took action to protect the fishery and its world-class MSC certification. With industry demonstrating leadership in initiating calls to halve catch levels from historic ten-year averages, fishers at the time were confident that these measures were needed to build the sustainability of the resource and secure the future of the western rock lobster fishery for all users.

Although a difficult transition period, with many individuals and businesses suffering financial losses or leaving the fishery entirely, a tightening of quota limits and new management controls under the West Coast Rock Lobster Managed Fishery Management Plan 2012 proved successful. With strong demand from premium international markets, combined with forward-looking industry strategic direction and investment, the fortunes of western rock lobster fishers rebounded markedly over the period following these management changes, while equally ensuring that population levels supported one of the most successfully-managed recreational lobster fisheries globally.

With a current annual Total Allowable Commercial Catch (TACC) of 6,615 tonnes, the western rock lobster fishery is now highly sustainable, and population levels have stabilised. As a result, industry has over several years engaged with successive State governments to work towards conservatively increasing this TACC so as to maximise GVP, aiming to reach a position of maximum economic yield whereby the returns to individual businesses, the State through economic rents, and the community at large through social benefit and access to rock lobster product are all balanced with the long-term sustainability of the resource.

Against this background dialogue and advocacy efforts, in late 2018 the West Australian Government via dialogue with peak industry bodies proposed legislative amendments to the West Coast Rock Lobster Managed Fishery Management Plan 2012. From an industry perspective, the most salient elements of the proposal involved creating new units in the fishery from total units equivalent to 6,300 tonnes up to total units equivalent to 8,000 tonnes. It was also proposed that the TACC automatically and progressively increase to match the 8,000 tonnes in total units within a three to five year period. 315 tonnes of this TACC increase would be allocated to existing fishers on a pro-rata basis. However, 1,385 tonnes of this new quota – over 80 percent of the increase, or 17 percent of the new total - would be held by the Western Australian Government and used for various purposes, including to generate revenue, potentially through lease-backs to industry or future sale.

During an at-times heated dialogue between the State Government, industry peak bodies, industry groups such as Fishing Families WA and national and international interested parties over the following three months, the nature of fishing rights, principles of rights-based management and the security of access to Western Australian aquatic resources were well-ventilated in the media. As a result of this very significant attention, damage was caused to the reputation of Western Australia and the State Government as a fisheries regulator, with the elevated sovereign risk setting the treatment of Western Australian fisheries further apart from that of its minerals resources (as discussed earlier in this document, a policy that has served the State in good stead).

The earlier draft policy was ultimately withdrawn in February of 2019, with a small increase in TACC limited to domestic supply only instead being offered on a trial basis. Agreement as to the scope of this domestic supply trial and the terms of reference of the proposed task force was not reached, and by May 2019 all negotiations had ceased.

Despite the lack of any concrete outcome, this abortive process has served to highlight the continuing lack of clarity, certainty and security that many commercial fishers feel characterises what is perhaps the most crucial tool of their trade – their legal right to sustainably harvest fish. It is not without merit to suggest that the proposal of the Western Australian government amounted to a part-nationalisation of an iconic State industry, an unprecedented approach in Australia's fisheries management. From an industry perspective, to increase quota in this way – assigning out the increased fish stock that the efforts (and earlier pain) of industry has created through strict compliance with principles of ecological sustainability – to new entrants, *and especially the State government itself,* fundamentally devalues and dilutes the equity that license-holders possess in their own industry and caused revaluation of risk by debt providers.

Following principles of rights-based management discussed further below, fishing rights convey title to a proportional share of the overall catch or effort applied. Rights-holders should share equally and proportionally in any necessary reduction in overall catch that supports the ecological sustainability of the fishery, *but equally so should share in any increase* that may accrue from all fishers utilising the resource responsibility and as a guardian of that resource. The actions of the Western Australian Government have left a cloud of uncertainty over all commercial fisheries within the State that unless addressed through mechanisms that provide for more secure rights will continue to discourage investment and cause loss of confidence with financial institutions that finance the industry's investments and cashflows.

Example 2: Regulatory approvals and planning processes strip commercial fishers of access rights and devalue the underlying aquatic resource…

As a major new development in the northern suburbs, the Ocean Reef Marina redevelopment will significantly upgrade the existing Ocean Reef Boat Harbour, and support recreational fishing and boating, charter fishing, fishing tours and other recreational and tourist use and enjoyment of the marine estate. An election commitment of the McGowan government, initial promises of around $40 million resulted in a final budgetary allocation of approximately $120 million by the Western Australian Government to support the construction of the Marina, with DevelopmentWA (formerly LandCorp) developing the project in collaboration with the City of Joondalup[14].

Construction of the Marina has been a long-running process, first seriously progressed in the mid-2000s but mooted for years earlier. However, reflecting the election commitment character of the project, progress has accelerated significantly since 2018 and received notable State government support, including in addition to budgetary support the passage of legislative amendments in late 2019 to amend planning schemes and enable works on the waterfront development[15].

While a positive for the broader community, aspects of the Marina development have had a detrimental impact on recreational and commercial fishers utilising the local resource. Unsurprisingly for such a significant development, as identified in the process of public environmental review[16] the construction process will require dredging and consequential silting of reef platforms off Burns Beach, and hence have a significant impact on commercial and recreational abalone divers dependent on the

[14] Brown, T (2017), *Ocean Reef Marina: State government commits $120 million to project*, Joondalup Times, 3 September 2017

[15] Hon. Rita Saffioti (2019), *Another milestone reached for Ocean Reef Marina redevelopment*, press release, WA government, 17 October 2019

[16] Ocean Reef Marina – assessment number 2012, process and submission documents published https://www.epa.wa.gov.au/proposals/ocean-reef-marina, Environmental Protection Agency, Western Australian Government

resource. While noting significant uncertainty regarding the full potential impact, around 40 percent of abalone habitat in the area is expected to be lost, thereby reducing the potential catch of the Burns Beach abalone fishery by a full third and, due to the high productivity and population count in the area, removing approximately 15 percent of the ten-year average metropolitan catch[17]. With the project obtaining environmental approvals and set to proceed, decisions of government to grant these approvals will thus remove access of commercial and recreational fishers to the underlying aquatic resource they have relied upon.

In recognition of this, the State Government has directed the Department of Primary Industries and Regional Development (DPIRD) to facilitate a Voluntary Fisheries Adjustment Scheme (VFAS) under the *Fisheries Adjustment Schemes Act 1987* (discussed in more depth later in this document). However, the process followed to date in implementation of this scheme has been opaque and notably uncertain from the perspective of abalone fishers dependent on the affected resource.

An independent Committee, formed to advise the Minister as to a fair and equitable compensation process to follow, has been empanelled, but affected fishers have not been informed as to the composition of this Committee or the relevant experience of its members. Further, the potential for industry and stakeholders to make submissions to the Committee to assist its deliberations is not clear, nor is – as again identified later in this document – any formal process prescribed by the Act or subsidiary legislation. As a result, industry is left at the whim of the government of the day in following this process to where it might lead. Indeed, it is only by forbearance of government that any process at all is followed.

In the meantime, while this process continues, the local abalone fishery is left facing very significant uncertainty as to what their operations and businesses will look like six months down the track, and little confidence as to the outcomes of a 'black box' process. Meanwhile, as a result of the uncertainty, licence holders have faced devalued licences for the nearly a decade the project has been under serious consideration. Fishers have been unable to sell their stake without significant discounting, unaware of what compensation might be payable or when and under what circumstance any compensation may accrue, and therefore unable to effectively plan and sensibly and rationally operate their businesses.

Other examples

While the above two examples note recent events that illustrate the concerns held by industry and the issues that resource security poses to the Western Australian commercial fishing sector, other concerns have been raised over the years. These include prior managed fisheries transition processes (including the South Coast Crustacean and Demersal fisheries), increasing restrictions fishers face in estuary and beach access, the ongoing uncertainty and potential impacts on productivity and recruitment from seismic surveying, port developments across the State and particularly in Broome and Cockburn Sound, a perceived ongoing 'shifting of the dial' to advantage recreational fishers, and other related issues.

As the above examples illustrate, Western Australian commercial fisheries are at a crossroads. While the recent attempts to nationalise a significant portion of the western rock lobster commercial fishery stands-out as an extraordinary heightening of sovereign risk and undermining of certainty with respect to resource access, poor resource access security frameworks have hampered the Western Australian fishing industry's growth potential for some time. Unless this critical issue is adequately addressed in the new *Aquatic Resource Management Act 2016* (WA) prior to its full proclamation, there is a very

[17] Stratagen Environmental/City of Joondalup (2016), *Ocean Reef Marina – Public Environmental Review*, EPA

real risk that poor resource access security will become a characteristic for which the Western Australian fishing industry is known, detracting from investment and significantly restraining sustainable growth of the industry, including in post-harvest capacity.

3.3. The need for greater resource access security and predictability

There is a clear and critical need to take advantage of the opportunity presented by the transition to the *Aquatic Resources Management Act 2016* (WA) to reset the state of play across all Western Australian fisheries - adopting and heightening the agreed principles underlying integrated fisheries management, providing clarity and certainty to industry through greater resource access security, and protecting the value underlying those rights through adequate and equitable compensation measures. A failure to achieve this will hamper the growth and future development of State commercial fisheries, stifle new industry from emerging, depress investor and business confidence, expose the State to reputational damage and, through heightened sovereign risk, threaten the survival of existing fishing businesses and communities.

Further, the notion of achieving this outcome is consistent with the general principles and ethos that are typical of Australian economic development policy; there is strong precedence for ensuring resource access security and certainty in primary industries; demonstrated derived economic, social and environmental benefits thereof; and importantly, a clear legislative pathway for achieving this.

4. Property rights, aquatic resources and Western Australian law

While not in the same mode as rights to real property or a fishing boat, the nature of resource access rights held by commercial fishers in Western Australia is far more than a mere license. As discussed below, the rights of licence-holders are rooted in a deep historical tradition of fishing access, and through decades of evolution in domestic law and international best practice are fundamental to the ability of industry to operate with confidence in long term access. Properly applied, more secure fishery resource rights also result in enhanced industry competitiveness, environmental and social outcomes.

4.1. Property rights and aquatic resources

Property rights are a fundamental pillar of society and its economy…

Property rights underpin economic development and social justice, promoting rational behaviour of individuals and efficient market outcomes, driving wealth creation at both a personal and state level.

Historically, the increasing recognition and protection of private property rights of the individual as against all others, including the State itself, has been one of the fundamental driving forces behind democratic reforms. Property rights may therefore fairly be said to be one of the foundational principles of modern liberal democratic states. Within Australia, the fundamental importance of property rights is recognised in the *Commonwealth Constitution*, with s51(xxxi) stipulating that property rights may only be restricted or disturbed for a proper purpose, and requiring that the State must provide compensation on just terms if the property rights of its citizens are interfered with. Unfortunately, such a provision does not appear within the *Constitution Act*[18]of Western Australia, instead relying on inherited common law principles.

Conceptually, this focus on property rights as the focus of legal systems may be seen to be tied to the historical primacy of real property as the core generator of wealth. By contrast, the rivers, seas and associated aquatic resources were seen as essentially limitless, capable of neither control nor needing any restriction (a concept discussed further below). Other than broad riparian access rights, fishing rights and access to the sea were not adequately recognised or protected. While modern fisheries management principles and enabling legislation are slowly shifting these perceptions, the underlying legal system is still less suited to recognising, protecting and giving scope and effect to the numerous ways in which the rights of fishers to access the one thing fundamentally essential to their trade. To overcome these difficulties, it is essential that rights-based regimes are well-drafted and based on clear fundamental principles that respect and enhance the security of access rights to fish and other aquatic resources.

Property rights are not absolute, existing on a continuum of proprietary interests over a range of asset types…

The concept of property is influenced by prevailing legal philosophy, economic theory and social and political attitudes, and as such does not remain static. While from a lay perspective property is often considered to be binary – either something is mine or it is not – from a legal perspective the true situation is somewhat more complex. Often referred to as a 'bundle of rights', property rights can

[18] 1889 (52 Vict. No. 23)

more properly be considered as a continuum of proprietary interests ranging from mere personal permissions to absolute ownership.[19]

As a result, while property rights are typically thought of in relation to real, tangible goods (such as real estate) capable of exclusive physical possession, property and proprietary rights exist in various forms, including rights to more intangible assets such as intellectual property, pastoral leases, mining tenements, various forms of Indigenous land rights, and other forms of economic rights derived from legislation or legal doctrine. As described by the High Court in the case of *Yanner v Eaton*[20], licenses issued by government under regulations are 'a description of a legal relationship with a thing' and can be used 'to describe all or any of very many different kinds of relationship between a person and a subject matter'[21]. What will be crucial in every instance is the context in which the analysis takes places and the legislation creating the particular right being examined.

In accordance with Western Australian common law doctrine, naturally occurring stocks of fish are not capable of being owned…

Despite the existence continually practised and sophisticated First People's legal traditions dating back tens of thousands of years, at the time of colonisation Australia was classified by the British as a land without any pre-existing social order or regulation (*terra nullius*), a wrongful and factually inaccurate state of affairs later remedied by the Mabo High Court decision[22]. As a result, the new colonies were considered 'settled colonies', and hence from the date of settlement the Colonies (later States) inherited the English common law system and Imperial legislation in effect at the time[23]. Under this legal tradition, fish found in the territorial waters of the State were considered not capable of being owned by any one individual until lawfully caught[24], and hence every person was entitled to fish. Despite the passage of time, this common law position with respect to ownership of fish has not been altered in Western Australia by either State or Commonwealth statute[25].

However, the right to fish has and continues to be regulated by the State in accordance with legislation…

Supplementing this common law position, the right to fish – or, in other words, the process by which fish may be 'lawfully caught' - has been to varying degrees regulated, restricted or limited by statute. Living natural aquatic resources are not owned by the State, but rather managed by the State in accordance with laws controlling access to what is a shared public resource. These mechanisms of State control reflect 'the importance to its people that a State has power to preserve and regulate the exploitation of an important resource'[26]. This principle is reflected in the primary objective of the

[19] Department of Fisheries (2005), *Fisheries Management Paper 195*

[20] (1999) 201 CLR 351

[21] (1999) 201 CLR 351 at [16]-[20] per Gleeson CJ, Gaudron, Kirby and Hayne JJ

[22] (1992) 175 CLR 1

[23] *An Act to Provide for the Administration of Justice in New South Wales and Van Diemen's Land 1828,* 9 Geo IV, c.83

[24] The term 'Common Property' used in this instance and generally hereafter is in vernacular sense and not in a technical economic or legal parlance to refer to property incapable of private ownership

[25] In contrast, the Tasmanian and Victorian parliaments have vested property in fish in the State by statute (see *Living Marine Resources Management Act 1995* (Tas) *and Fisheries Act 1995* (Vic)).

[26] *Yanner v Eaton* (1999) 201 CLR 351 at [28] per Gleeson CJ, Gaudron, Kirby and Hayne JJ quoting Vinson CJ in *Toomer v Witsell* (1848) 334 US 385 at 402.

FRMA – to conserve, develop and share the fish resources of the State for the benefit of present and future generations.[27]

This legislation confers rights of usage and access to stakeholders in the fish resource…

Stakeholders in State fisheries include commercial, recreational, Aboriginal/customary, aquaculture, pearling, conservation and ecotourism user groups but also encompasses other beneficiaries such as consumers, tourism, oil and gas, regional authorities and communities and the broader Western Australian community[28]. Under State legislation, the interactions between all these users are regulated via a licensing and permitting system that endeavours to manage overlapping and sometimes competing uses of the aquatic domain. The rights that are conferred by this system are thus rights of priority of aquatic resource usage and ocean access, rather than exclusive possession or ownership by either the State or private entities.

4.2. Aquatic resources legislative landscape

The regulatory response to a clear tragedy of the commons has seen Western Australian commercial fishing rights evolve to rights that are more than a mere license…

As discussed above, the Western Australian system of integrated fisheries management is underpinned by the desire to strike the right balance between ecological protection and commercial, recreational and traditional use. Fisheries management efforts have steadily evolved from the unregulated exploitation of un-owned resources over which the common law legal system recognised no proprietary rights, creating a tragedy of the commons, through a middle state of implied or arms-length controls via gear and temporal/spatial restrictions, and now are in the process of arriving at a rights-based regime under which fishers hold tradeable entitlements to a proportional share of the ecologically sustainable catch.

In Western Australia, fisheries management policy has evolved from initial gear and vessel limitations and restrictions, designed to overcome overfishing through artificially limiting the catch effort that could be brought to bear. Since the 1960s, there have been four clear periods of change, representing the State reaching and then setting international best practice:

1960s: Emergence of limited entry regulatory regime…

With a burgeoning State population and increasingly urban palate, illegal and unregulated fishing within key fisheries became a more significant problem due to rising demand. With a loss of community and industry confidence in validity of catch and effort data and commercial viability, combined with at the time world-leading efforts to stimulate resource development along ecologically sustainable lines, limited entry fisheries regimes were enacted for the Western Rock Lobster and Shark Bay Prawn fisheries ahead of a Royal Commission inquiry in 1964[29]. Over the following decades, the *Pinctada maxima* pearl and abalone fisheries were established as quota fisheries.

[27] Section 3(1), *Fish Resources Management Act 1994* (WA)

[28] *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee* (2002), Department of Fisheries, Western Australian Government, Fisheries Management Paper No. 165

[29] Baxter, N.E et al (1964) *Report of the Honorary Royal Commission appointed to inquire into and report upon the Fisheries Act 1905-1962 in its application to the Crayfishing Industry in particular*, Western Australian Parliament

1980s: Regulation of limited entry fisheries steps up, first recognition of right to compensation...

The freeze on the issuance of Licensed Fishing Boat licences in 1982 was followed in 1987 by a new management regime which saw an increase in the number of Limited Entry Fisheries paired with a buyback of fishing licences from other fisheries to reduce fishing effort. New legislation, the *Fisheries Adjustment Schemes Act 1987* (WA), enshrined the principle that compensation would *prima facie* be payable where the State compulsorily or voluntarily acquired licenses.

The 1989 High Court decision in *Harper v Minister for Seas Fisheries*[30] provided key jurisprudence in to the nature of fishing rights, holding that rights-based systems of management such as quotas constituted 'an entitlement of a new kind' which converted what was formerly in the public domain into the 'exclusive and controlled preserve of those who hold licences'. In Western Australia, the Supreme Court[31] considered whether fishing licences could be considered 'property' such that stamp duty was payable on its purchase, and held that, while not conferring a proprietary interest over any particular fish or fishing ground, licenses were valuable, and could fairly be considered to meet a layperson's definition of 'property' for the purposes of stamp duty.

1990s: Growing recognition of rights in fish resources…

The 1994 *Fish Resources Management Act* further codified and recognised an integrated fisheries management approach, reflecting categories of fishing rights with corresponding strength of access for rights held in managed fisheries such as the western rock lobster fishery. Parliamentary debate noted the economic, social and sustainability benefits of strong tenure and access rights in mature and settled fisheries management approaches. The earlier *Pearling Act 1990* and guidelines achieved the same outcomes for the *Pinctada maxima* pearling industry, setting allowable annual quota and individual take. In 1997, the principles of compensation were further extended via the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*, which recognised that compensation would be payable where government action to create marine reserves extinguished or interfered with the access rights of commercial fishers.

In November 1999, Western Australia hosted the *FishRights99: Use of Property Rights in Fisheries Management* conference in partnership with the Food and Agriculture Organisation of the United Nations, with 352 participants from 49 countries exploring the spectrum of rights-based management strategies. The then-director of Fisheries WA noted that the conference provided an opportunity for the Western Australian government to 'push the boundaries' of using property rights to achieve a more durable and secure platform for the ecologically sustainable and prosperous management of fisheries[32].

2000s: Western Australia leads the world in integrated fisheries management…

Much of the present policies informing and governing fisheries management approaches and access rights have been set over the past two decades. In addition to the 2009 IFMP detailed above, particularly relevant have been the Ecologically Sustainable Development[33] and Ecosystem Based

[30] (1989) 168 CLR 314

[31] *Austell Pty Ltd v Commissioner for State Taxation* (1989) 4 WAR 235

[32] Rogers, P (2000), *Preface*, in *Proceedings of the FishRights99 Conference, Fremantle, Western Australia 11 - 19 November 1999*, ed. Shotton, R, Food and Agriculture Organization of the United Nations, Rome

[33] *Policy for the Implementation of Ecologically Sustainable Development for Fisheries and Aquaculture within Western Australia* (2002), Department of Fisheries, Western Australian Government, Fisheries Management Paper No. 157

Fisheries Management[34] principles, the Aboriginal Customary Fishing Policy[35], the Toohey Report[36], and, while not an official policy statement, the Report into the Nature and Extent of Rights to Fish[37].

In 2006, Western Australia again hosted a major international conference in partnership with the FAO – *Sharing the Fish '06: Allocation issues in fisheries management*. Building on the earlier *FishRights99* outcomes, the conference further explored issues of rights allocations, and in particular, the principles that should guide re-allocation and diminution of harvest levels in response to ecological sustainability pressures.

Starting in 2000, successive Western Australian fisheries have been recognised by the Marine Stewardship Council (MSC) - a not-for-profit organisation administering an international scheme widely recognised as representing best practice in fisheries sustainability – as meeting all the three core principles of sustainable fish stocks, minimal environmental impacts and effective management arrangements.

In March of 2000, the Western Rock Lobster Fishery became the first fishery worldwide to receive MSC Standard certification on the back of strict forward-thinking policy controls. As of December 2019, with the southern sea cucumber fishery gaining recognition, ten Western Australian fisheries are now MSC certified[38], representing the vast majority of State fisheries by value. The State government, in partnership with WAFIC and Recfishwest, continues to encourage all WA fisheries to obtain MSC certification, and provides support to enable this to occur.

The current legislative framework remains at conflict with the resource access rights and integrated management approach that has been established over the past four decades…

The FRMA continues to be the principal Act regulating the management of fisheries in Western Australia, with the exception of *Pinctada maxima* pearl oyster resources which are regulated by the *Pearling Act 1990* (WA). Currently most fisheries fall under the FRMA, which provides for implementation of management plans.

Broadly, the FRMA presents eight objectives in managing the fish resources of the State "for the benefit of present and future generations", encompassing the expected criteria of supporting and encouraging commercial, recreational, aquaculture and other users while preserving ecological sustainability. The Act provides a range of powers to achieve these objectives to the Department and Minister, and over time a wide variety of tools have been utilised to implement management strategies, including regulations, orders, Gazetted notices and exemptions, policy statements, internal guidelines and formal and informal management plans. FRMA explicitly addresses a range of rules for fisheries, including access criteria and entitlements, grants of licences and the rules governing them, catch, gear and bag controls, and fishing seasons and closures. Regulations under the FRMA further address ecological protection matters, including protected fish, size, take and other protection criteria, and other biological controls.

[34] *Conceptual models for Ecosystem Based Fisheries Management (EBFM) in Western Australia* (2009), Department of Fisheries, Western Australian Government, Fisheries Research Report No. 194
[35] 21 December 2009, Department of Fisheries, Western Australian Government
[36] *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee* (2002), Department of Fisheries, Western Australian Government, Fisheries Management Paper No. 165
[37] (2005), Fisheries Management Paper No. 195
[38] Marine Stewardship Council (2019), *Western Australia Octopus earns the blue fish tick for sustainability,* press release, 19 November 2019

While the FRMA has been a significant improvement over earlier fisheries management regimes in Western Australia, there are nonetheless aspects of the legislation that time and experience have shown to be less than ideal, and which have formed the impetus for the ongoing and still incomplete process of legislative reform and transition. As discussed further below, the FRMA is to a large extent deprecated, with fisheries transitioning to new arrangements under the new *Aquatic Resources Management Act 2016* (WA) (ARMA). However, it is worth noting the broad thrust of points raised, summarised in the Toohey Report[39].

First, the underlying principles and objectives of FRMA are potentially conflicting, and offer no guidance as to the process managers of fisheries should follow in determining priority of usage in setting allocations, overseeing re-allocations, or in the event of conflict between fishers (recreational or commercial) and other users of the marine estate. While FRMA provides an aspiration 'to achieve optimum economic, social and other benefits from the use of fish resources', no indicia, priorities, policy rationale or other assistance is provided on how an 'optimum' may be assessed or determined. Further, traditional or customary fishing by First Peoples is not textually given the same degree of primacy or consideration as other uses, limiting the recognition and support of traditional and customary fishing rights[40]. Due to the difficulty of obtaining reliable data as to traditional or customary fishing effort and catch volumes, and the nature of that traditional and customary fishing activity as a 'blurring of the lines' between recreational and commercial in character, formal recognition is particularly challenging for this this sector. As a result, there have been few explicit decisions to allocate the available catch to various users in a systemic manner, with implied, informal agreements covering a significant proportion of the overall fishery, if not a majority.

Second, regimes under FRMA result in a separate management plan for each fishery, regulating fishing activity by various users as deemed necessary or required. However, in most cases these boil down to technical compilations of rules governing the legalities and practicalities of fishing and on-water activities, and do not include overarching management objectives, performance indicators and key metrics, or outlooks and visions. Thus, effective management is bereft of strategic direction, and can become adrift and dependent upon informal, ad-hoc, and 'good enough' compromises.

Changing these circumstances has clear multi-stakeholder support and the legislative pathway to achieving this is clear…

As part of the ongoing dialogue surrounding the shift to a more explicit rights-based management framework noted above, extensive consultation with industry and key stakeholders identified the need for a new framework to respond to changing economic and environmental conditions, population growth, coastal development and increased competition for space and resources. Guided by an initial 2010 concept paper[41], the development of ARMA was intended to address industry concerns raised, and through a harmonised framework better implement the principles of rights-based integrated fisheries management. Once fully implemented, the Act will replace the FRMA and the *Pearling Act 1990* as the primary governing legislation for the management and conservation of Western Australia's fisheries and aquatic resources.

[39] *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee* (2002), Department of Fisheries, Western Australian Government, Fisheries Management Paper No. 165

[40] See eg. Nationally endorsed *Principles Communique on Indigenous Fishing* (2004), National Native Title Tribunal, Australian Government, Canberra ACT

[41] (2010) Fisheries Occasional Paper No.79

Design of the ARMA was based on three key tenets of fisheries management[42]:

- Resource-based – the new Act was to recast its focus to instead holistically address the concept of aquatic resources, incorporating both fish and other living aquatic organisms. The Act was to be outcomes-based, providing for the sustainable use of aquatic resources, ensuring transparency in resource use planning, and achieving a balance between economic usage, conservation and where appropriate biosecurity.
- Risk-based – the new Act was to adopt the precautionary principle, utilising formal and codified risk-based assessment processes to determine management principles and arrangements.
- Rights-based – recognising that secure and stable fishing rights are in the long-term interests of both industry and the State, the new Act was to ensure those rights were given structure and stability within a fit-for-purpose legal framework, facilitating investment, innovation and stewardship.

ARMA achieves these goals through a new Managed Aquatic Resource framework consisting of an Aquatic Resource Management Strategy (ARMS) and Aquatic Resource Usage Plans (ARUP). The ARMS is a high-level internal policy document for the aquatic resource establishing the main management objective for the resource, inter and intra sectoral allocations and identifying the number of shares in the resource that are to be made available under the ARUP for the resource. Shares under an ARUP thus represent a proportion of the total allowable catch (TAC) for the resource. ARUPs will be implemented via subsidiary legislation sitting under the ARMA to give effect to the ARMS and the objectives of the Act as a whole.[43] Other key features include explicit recognition of customary fishing priority access and public benefit use, commercial and recreational sector allocations and strengthened fishing access rights. Elements of the design of ARMA, and the manner in which they support rights-based principles, are summarised in Appendix 1.

Enacted in November 2016, ARMA was scheduled for commencement on 1 January 2019, however full implementation has been delayed. Amendments designed to allow for the seamless transition of existing fisheries managed under the FRMA to management by an ARMS and ARUP under the ARMA were passed by the Legislative Assembly in June 2020[44], while industry expects full application of the Act to commence in 2022.

4.3. A rights-based system is the only way to avoid tragedy of the commons

Whenever a public or common good is relied upon by industry – that is, a resource that is both non-excludable and non-rivalrous, or in other words a resource with unlimited access and which can be used simultaneously by more than one party – there is a risk of poor outcomes often termed the 'tragedy of the commons'. In the case of fisheries, this has historically been seen in excessive vessel numbers, overcapitalisation, economic wastage and eventually overfishing and population crash. Outcomes are poor for all parties concerned. Individually, fishers are forced to invest more and more resources into vessels and equipment merely to keep up with competitors and new entrants to the fishery. Meanwhile, the State economy as a whole suffers from wasted effort and eventual industry

[42] *Submission to the Legislative Council Committee on Public Administration – Inquiry into Private Property Rights* (2019), Department of Primary Industries and Regional Development, published Western Australian Parliament

[43] Explanatory Memorandum, Aquatic Resources Management Amendment Bill 2020 (WA)

[44] Explanatory Memorandum, Aquatic Resources Management Amendment Bill 2020 (WA)

collapse, while the ecological damage is typically severe and long-lasting, with generations needed for recovery.

To avoid these outcomes, it is critical to ensure proper management of catch shares of all users of the resource – commercial, recreational and traditional/customary alike. The only way to sustainably achieve this over the long term is to embrace and fully commit to rights-based fisheries principles, so that all parties know what their fair share of the resource is. Without this, and in the context of several recent examples of negative outcomes for the commercial fishing sector, the ills of the past risk reoccurring.

Intermediary systems of limited-entry regimes, gear and vessel limitations, not paired with individual allocations of overall catch effort, were progressively a feature of Australian fisheries since the 1970s. While somewhat effective in reducing overfishing, the benefits of such measures proved to be temporary, with existing participants and licence holders now incentivised to increase their individual take by working around the restrictions in place – for example, by upgrading individual vessels where numbers of such were capped. Individual fishers were still in a position of being potentially 'crowded out', and hence concerns remained as to overcapitalisation and, even where fisheries are highly restricted, the potential for overall effort to exceed ecologically sustainable limits.

By contrast, rights-based regimes, under which an overall sustainable harvest is determined (total allowable commercial catch; TACC), of which every fisher is entitled to either a volume of catch or proportion of effort used (individual transferable quota; ITQ) proportional to the rights allocation they hold, have several advantages, and represent current global best practice in integrated fisheries management.

Rights based systems motivate a focus on maximum sustainable economic yield…

Secure entitlement to a proportion of overall ecologically sustainable harvest shifts the motivations of fishers from pursuing maximum possible exploitation – a zero-sum, 'race-to-fish' to secure as much of the harvest as possible before others do the same and risk being left with nothing – towards maximum economic yield.

With certainty as to the individual volume or effort that they are free to take up (or otherwise), fishers are able to make commercially rational decisions as to their activities during a season, suiting business practices, investment decisions, and operational tempo to market forces or individual needs and desires.

As a result, the development and exploitation of fisheries proceeds along economically rational lines, with market forces driving adjustments in response to changing market and environmental conditions. Regulators may pursue a 'hands-off' approach, for the most part responsible only for determining the ecologically sustainable harvest level, stepping in only where necessary or desired to ensure specific outcomes or address emerging public policy issues, in contrast to the regular monitoring and tweaking required to ensure gear or vessel limitations are producing desired outcomes. Further, by focusing on the 'fair share', rights-based approaches support fishery management both by output (tonnes landed) and input (effort applied) controls for those fisheries where quotas are impractical or do not represent best practice (for example, fisheries with highly variable recruitment targeting short-lived species).

Appendix 2 contains a detailed analysis of the way in which Maximum Economic Yield works to optimally protect the natural resource, maximise profitability and improve international competitiveness.

Rights based systems allow market forces to determine economic resource access priorities…

High quality, secure and tradeable access rights enable market mechanisms to operate in determining priority of usage or impact of aquatic resources. In the absence of compelling public policy arguments (such as the community benefit to be obtained from recreational fishing activities), the ideal user of an allocation is the fisher able to make most economic usage of that proportional share. In circumstances where multiple parties are utilising the same shared aquatic resource, tradeable allocation rights thus allow a 'values free' process of reallocation to occur, reducing political risk and ensuring optimum outcomes for the State. Such a process can even accommodate non-fishing activities that may impact upon the aquatic resource (for example, coastal developments or seismic testing) through requiring proponents to purchase quota equal to the proportion of the resource they will be impacting, shifting the onus for providing compensation to affected fishers from the State to private industry and allowing for 'user pays' models.

In short, market-based approaches will always arrive at a more internally efficient allocation of economic effort than external control or input-based management systems that invariably require costly administrative based interventions.

Rights based systems align fisher interests with environmental sustainability interests…

Fishing licences under a rights-based regime support the long-term sustainable use and development of a resource and the fishers that utilise it - clear and stable rights align the interests of fishers and the State. With fishing rights decoupled from on-water activities every season, licenses represent instead a *potential proportional share* of the overall harvest or effort – and therefore their value is determined by reference to the value of the fishery as a whole. Licenses can thus be very valuable indeed, with fisheries such as the western rock lobster fishery reporting total license value of approximately $4 billion[45]. As a result, individual fishers and the broader industry as a whole are incentivised to ensure that the fishery is well managed and sustainable, in so doing ensuring the value of their allocation is retained if not enhanced.

4.4. The nature of fishing rights within Western Australia – how strong are they (or should they be?)

It is clear that rights-based regimes provide benefits to fishers, industry, government and the wider community. However, the question remains open as to exactly what those rights constitute, and how they may be legally classified. At a practical level, this question is often framed as: are fishing rights property rights?

Western Australian fishing rights are more than a mere license – they are a unique type of right on the continuum of proprietary rights…

The question of, legally speaking, what fishing rights are exactly has been the subject of intense industry and academic debate for over a decade, and remains unresolved. Without entering into an in-depth analysis of scholarly opinion, the most authoritative treatise on fishing rights within Western Australia is to be found in the State Government-authored 2005 *Report into the Nature and Extent of Rights to Fish* and the 2011 *Improving Commercial Fishing Access Rights in Western Australia*[46] working group report. Broadly, the most accurate statement of the position of fishing rights in Western

[45] *Western Rock Lobster Council Submission to the Legislative Council's Standing Committee on Public Administration* (2019), Western Rock Lobster Council, published Western Australian Parliament
[46] (2011), Fisheries Occasional Paper No.102

Australia is likely to be that, while not rising to the level of a full proprietary interest, fishing rights *bear many characteristics* of property rights, and are *more than a mere licence*.

These characteristics include:

- A recognition of the importance of accurately recording their ownership – similar to the Torrens system of land title registry, a formal register is maintained by the Western Australian government;
- Again, in similar vein to land title, the registry of fishing rights is capable of noting a wide variety of dealings with and encumbrances to fishing licences on that register, including interests of lessors, mortgagors and other third parties;
- Freedom of dealings on the part of a licence holder, with the ability to transfer, sell, lease, exchange, will and otherwise deal with in a similar manner to real property, including temporary transfers, supported by government-facilitated markets[47];
- For fisheries with compatible management arrangements, an ability to subdivide or recombine individual units of effort or catch quota and transfer these between licensees;
- The treatment of fishing rights as 'property' for the purposes of liability for stamp duty in effecting transfers[48];
- Many characteristics of permanence through statutory protections for renewal, with decision-makers obliged to approve applications for renewal correct in all particulars and where no breaches of licence conditions have occurred, and licenses typically renewable indefinitely[49];
- Historical treatment by industry, and the associated financing and investing ecosystem, as good collateral for loans or secured debt facilities;
- Protected by the State, with holders of a fishing right empowered as against the general public to exert their right to priority of access to the resource, enforced through criminal and civil offences; and
- Are clearly treated as a distinct and more secure class of right from recreational fishing rights, which are not transferable, are not limited in number, and lack statutory protections.

As of 2019, the position of the Western Australian Government, as expressed by the Department of Primary Industries and Regional Development[50], remains broadly that fishing rights represent a right of access, rather than ownership, noting that commercial fishers are not required to pay fees for grants of authorisations or licences that, in the view of the State, would reflect a property-like value[51].

---

[47] Entitlement Exchange – FishEye (http://www.fish.wa.gov.au/Fishing-and-Aquaculture/Commercial-Fishing/Fish-Eye/Pages/Buy-Sell-Entitlement-Exchange.aspx), Department of Primary Industries and Regional Development

[48] *Austell Pty Ltd v Commissioner for State Taxation* (1989) 4 WAR 235

[49] *Aquatic Resources Management Act 2016* (WA) s58(2) (and similar sections for aquaculture licences); *Fish Resources Management Act 1994* (WA) s68 (and similar sections for aquaculture); *Pearling Act 1990*, Schedule 3

[50] *Submission to the Legislative Council Committee on Public Administration – Inquiry into Private Property Rights* (2019), Department of Primary Industries and Regional Development, published Western Australian Parliament

[51] In this context, it should be noted that while it is true that at the time of establishment most fishing licences were worth very little, the economic value of a fishery will increase substantially over time as a result of the ongoing development efforts of industry and individual fishers. Hence, the value of a share in that fishery will increase proportionately, and as already identified may become very valuable indeed for well-managed, prosperous fisheries.

However, the State affirms that fishing rights bear many of the indicia of property rights listed above. In particular, the State points to four broad areas in which Western Australian legislation – particularly so in regard to new regimes proposed under ARMA - can be said to support rights-based fisheries principles and create strong and stable fishing rights:

- Exclusivity, the impact or potential impact of others on the right to fish;
- Durability, or the degree of permanence, temporal duration and renewability;
- Transferability, including the divisibility of the right and the ease of temporary leasing and permanent transfer; and
- Security, representing the quality of the right, ease of cancellation and change, and degree of legal protection.

Further, while reserving the right of the WA Government to enact measures in aid of public policy principles (such as ensuring community access), the State also recognises that *"Providing commercial fishers with certainty regarding their ongoing access to the resource is important for encouraging long-term investment in the industry. This in turn creates an incentive for commercial fishers to support sustainable fishing practices."*[52]

In summary, fishing rights are in principle best thought as a unique type of proprietary right, which – unlike most other forms of property – do establish not exclusive possession, but instead rather determine priority of access. These rights do not arise 'naturally', but rather are created by the passage of legislation, whereby an Act or series of Acts will determine the order of priority between holders of varying types and kinds of licences, including fishers (commercial, recreational or traditional/customary) and other entities using or impacting upon aquatic resources (such as the resources sector). Legislation or regulation will also determine the access priority order between holders of licences and 'passive' uses of the marine estate, such as marine protected areas or proponents of coastal developments (see example 2 in Section 3.2).

Accordingly, the 'strength' (or otherwise) of fishing rights is dependent upon the drafting of the legislation which creates them, and therefore the policy platform and priorities of the government of the day. In Western Australia, fishing rights bear many of the characteristics of property, while the stated position of the State Government is that they should be strong and stable to best benefit industry. The extent to which this has been borne out in practice is doubtful and discussed further below.

[52] *Submission to the Legislative Council Committee on Public Administration – Inquiry into Private Property Rights* (2019), Department of Primary Industries and Regional Development, published Western Australian Parliament

5. Ensuring security in aquatic resource rights

The principles of rights-based fisheries management outlined above are clear – secure, clear, divisible, and tradeable rights benefit all users of aquatic resources and the State alike. However, as foreshadowed earlier in this document, the recent experiences of industry have highlighted that significant issues remain under current management arrangements. Further, while the principles underlying the new ARMA are fundamentally sound, the practicalities of the transition process create the potential for significant detriment to commercial fisheries and undermines the stability and prosperity of those industries.

5.1. Allocation and re-allocation of resources should occur on a just and equitable basis

In accordance with the principles of rights-based fishery management, ideally all entities using or impacting upon an aquatic resource should hold well defined rights to do so. For non-recreational users, such rights should be secure, tradeable and enduring. As aquatic resources are a public good, fishing rights are thus a creation of government, rooted in the system of laws for a jurisdiction and conveying rights of priority as against all those not holding such rights.

However, as creations of government, the process of allocating or re-allocating those rights between users is beholden to and determined by the policy platform and priorities of government. In a democratic system, governments unquestionably hold a mandate to give effect to the expressed will of the population in setting and determining questions of access to aquatic resources. At times, this will involve altering rights allocations, which – in a fully allocated fishery – will inevitably cause detriment to some parties. While a valid exercise of power, such an act must be balanced by the fundamental obligations of government to deal fairly with its citizens. As noted above, recognition of property rights – of which fishing rights may be said to be a type - are at the heart of both the traditions of parliamentary democracy and the common law system of Australia. In disturbing those rights, governments must act justly, reasonably and fairly to ensure equitable outcomes for all.

Where this is not the case, the decisions of government in setting or altering rights allocations risk appear capricious, arbitrary or unfair, and bring damage to individuals, businesses, communities and the fishing industry as a whole.

State action and policy can dramatically affect the security and value of fishing rights and aquatic resources…

As discussed earlier in this paper, and ably demonstrated in the aftermath of the 2018 proposed management changes to the western rock lobster fishery, one of the core principles emerging from national and international best practice in rights-based fisheries management approaches is the concept of the *proportional share* – fishing rights are rights to access *a proportion of an aquatic resource* howsoever determined. For some fisheries it may be appropriate to determine this limit by reference to an Individual Transferable Quota (ITQ) of harvest as a proportion of the Total Allowable Commercial Catch (TACC) ('output controlled'). Whereas, for other fisheries a proportional entitlement may instead be determined by reference to effort applied ('input controlled'). In both cases fishing rights represent a proportional share of an independently determined overall sustainable catch level.

The TACC can and should be varied from time to ensure the ecological sustainability of the underlying resources is maintained, and – conversely – that the benefits of any improvement in fish stocks are

shared by all who hold fishing rights, including commercial, recreational and traditional/customary fishers. However, while TACC is mutable by design and will regularly be subject to management actions by government as regulator, allocations of ITQ should *prima facie* remain sacrosanct absent strong and compelling public policy reasons to disturb them. To do otherwise risks significant negative consequences for the entire system of management.

Effective fisheries management relies on the concept of negotiated mutual consent…

In an absence of industry 'buy-in', coercive control by the State is exceedingly difficult to enact across the wide expanse of the marine domain. As a general principle, best outcomes are assured when a broad consensus is achieved between users of the aquatic resource and regulators as to how that resource should be protected for the long term and for the mutual benefit of all, resulting in 'policing by consent'.

As already identified, conceptually a reduction in TACC will trigger a reduction in the effort each fisher can apply, or harvest they can land, proportional to their ITQ. Any financial burden is borne equally by all parties; market-based mechanisms can operate to accommodate exits from the fishery and a new optimum economic equilibrium is reached at the new catch level. While this may result in significant hardship on the part of some fishers, the conceptual basis of the system remains sound; while the *present market value* of fishing rights may be lowered the *equity* that holders of those rights have in the overall aquatic resource remains undisturbed and the confidence of industry, financiers, investors and all affected parties is retained.

However, if this confidence is shaken - if holders of fishing rights instead feel that when stock levels recover they will not benefit *in equal proportion to their earlier detriment*, the relationship of mutual trust and consent between industry and regulators breaks down. If newly created 'spare capacity' in a fishery is instead assigned to new entrants, the experience of rights-holders is thus that *the value of their rights only declines* over time. Thus, fishers may feel that there is no incentive to support or abide by catch limits during times of degraded stocks or poor recruitment. The dilution of equity in fishing rights similarly threatens the ability of industry to draw on that equity, stifling innovation, investment and access to finance.

The system should motivate pursuit of sustainable maximum economic yield…

If fishers feel that they must 'use or lose' their fishing rights – that is, that in order to secure priority of access to a share of the aquatic resource, they must not only hold quota but demonstrate that they have actually fully exploited all the potential of that quota – the value of the entire fishery is reduced. Such an approach - fishing just for the sake of fishing - results in wasted sub-economic effort being applied, thereby distorting the value of fish landed and removing any incentive to ensure product quality is maintained. Such outcomes benefit neither industry, the State, nor consumers.

Accordingly, the State holds significant power to affect the value and prosperity of commercial fisheries. While recognising that public policy reasons may exist that compel action, these powers should be used only sparingly and, as far as possible, should not disrupt the fishing rights of individual licence-holders or the principles of rights-based fisheries management. To do otherwise risks significant negative externalities.

5.2. Making good loss inflicted where rights are disturbed - principles of compensation

As noted above, actions of the State may have a dramatic effect on fishing rights and the proprietary interests of those that hold them in their priority of access to aquatic resources. While the State acting for proper purposes unquestionably holds a democratic mandate to legislate in pursuit of public policy objectives, these powers should be exercised cautiously. Further, the foundational principles of the Australian legal system militate that, where actions of the State impinge upon the property rights of citizens, *prima facie* the State should be liable for compensation.

From the perspective of industry, the fundamental principle is that the rights of fishers to access aquatic resources are as noted above, a form of property right. Hence, government action that results in the loss or diminution of those rights should result in compensation being payable to the affected parties. Simply because fishing rights are not absolute should be no barrier to the recognition that they are valuable and should be protected. While a simple statement of principle which is in accord with international best practice (and is at least partly supported by historical practice in Western Australia, discussed further below), at an implementation level three sub-principles are important to note.

The party acquiring a right from an existing right holder should be liable to the existing right holder for fair value of the acquired right…

In a fisheries management regime under which fishing rights are freely transferable, the State itself is not necessarily liable to directly fund compensation arrangements. Where priorities in usage of the marine environment are altered such that one group of users sees a proportion of their rights transferred to another, conceptually the party obtaining the benefit should be responsible to make good the consequential loss suffered. By purchasing a level of quota (ideally on the open market, attracting competitive bids from rights-holders willing to sell) equivalent to the proportion of the aquatic resource that will be re-allocated, fishers are fairly compensated entirely through the operation of market-based mechanisms without any financial exposure to the State. Such a process may even accommodate non-fishing uses of the marine estate.

However, there may be circumstances under which the State, for a variety of public policy reasons, decides that it is appropriate to bear all or part of the fiscal burden. Typically this would occur when government feels that a public benefit has been obtained such that it is appropriate for the public purse to be burdened, for example in the declaration of marine parks or re-allocation to recreational or traditional/customary fishers, or where new management arrangements are imposed on a fishery that reduce existing entitlements across the board, as was the case with changes to quota limits and management controls in the Western Australian West Coast Rock Lobster Fishery in 2012. Existing Western Australian legislation and practice at least partly already reflects such arrangements.

The holder of a right should bear normal primary industry risk…

No compensation would be payable in the event of a reduction in TACC due to poor seasons, a lack of recruitment, natural disasters or other events that would mandate a lower level of take to ensure the ecological stability of the fishery. As discussed above, providing that reductions are borne equally by all holders of fishing rights, such a process *is not a reallocation*.

Under the principles of rights-based fisheries management, fishing rights grant priority of access to a proportion of the total ecologically sustainable take. If the sustainable take declines, so too will the *amount* of that resource that the individual quota held by each fisher represents, even while the

proportion remains the same. In other words, compensation would only be triggered if the State has disturbed the proportional share each fisher holds of the overall resource, either by reallocating quota away from those who hold it or by issuing new licences that dilute the proportional share of existing rights-holders, as would have been the case if the changes to the West Coast Rock Lobster Fishery proposed by the Western Australian Government in 2018 had been implemented.

Compensation should not be payable where rights have been undermined by the holder of the rights…

Compensation would also not be payable in circumstances where necessary management actions are required on the part of government as fisheries regulator to address maladministration or other abuse of fishing rights. Such decisions, while not to be taken lightly, would be made by normal comparisons to expected community standards

However, where management actions are taken, fisheries management plans should be updated to ensure that the effort or quota that has departed the fishery is properly accounted for.

5.3. Compensation in Western Australia – initial steps to recognition

Since the early 2000s, independent expert opinion and State fisheries policy has broadly recognised and supported the principles of compensation recommended by industry. One of the earlier statements of principle, the 2002 Toohey Report recommended that:

- 'Where a reallocation of resources from one user group to another results in demonstrable financial loss to an individual, in principle there should be an entitlement to compensation';
- 'Compensation may take various forms and does not necessarily involve any payment of money'; and
- 'No compensation should be payable where allocations are reduced for sustainability reasons'.[53]

As part of the consultation process followed in the preparation of the Report, input and recommendations were sought from commercial fishers and other key stakeholders. Consistent with the principles of compensation outlined above, fishers submitted that if a government decision shifts access to resources from one sector to another (i.e. results in a reallocation) compensation should apply. Compensation, ideally achieved through market-based mechanisms, is required to provide incentives to maintain or enhance the value of the significant investments of commercial fishers in licenses and capital. The Integrated Fisheries Management Committee (IFMC) further accepted that administrative changes in allocations can have a significant impact on the commercial fishers, both in terms of investor confidence and providing incentives to protect a resource to preserve their investment[54].

Drawing on the findings and recommendations of the Toohey Report, and against the background of other significant developments in State fisheries practice outlined earlier in this document, the State

[53] Recommendation 13, *Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee* (2002), Department of Fisheries, Western Australian Government, Fisheries Management Paper No. 165

[54] See for example Paragraph 7.4, *Integrated Fisheries Management Allocation Report – Western Rock Lobster Resource*, Fisheries Management Paper No.218, February 2007; Paragraph 7.1, *West Coast Demersal Scalefish Allocation Report*, Fisheries Management Paper No.249, July 2013

Government in 2009 formalised the *Integrated Fisheries Management Policy*[55] (IFMP). Broadly, the IFMP adopted many of the principles recommended by the independent panel and fishers, stating that:

- 'Where a reallocation of resources from one sector to another results in demonstrable financial loss to a licensed commercial fisherman or licensed aquaculture operator, in principle there should be consideration of compensation';
- 'Cases for compensation should be assessed on their merits';
- 'Priority will be given to investigating the potential development of market-based systems to achieve reallocations, along with due consideration of social equity considerations … consideration of [which] will be based on its merit'; and
- 'No compensation should be payable where adjustments are made for sustainability reasons'.

Compensation was also addressed in the 2012 *Western Australian Government Fisheries Policy Statement* (FPS), albeit less explicitly and only in a limited context. In the marine planning sphere, the FPS states that where future policy changes result in further restrictions on commercial fishing in marine reserves, the Government will consider amending the *Fisheries and Related Industries Compensation (Marine Reserves) Act 1977* (discussed below) to reflect the policy and 'reinforce the principle that compensation should be payable in the case of detrimental impact'.

Further, under the FPS, the stated position of the Western Australian Government is that it will ensure that impacts on all fishers and fishing communities (whether direct, indirect or cumulative) are taken into account in the assessment and approval processes for non-fishing related proposals and developments, while confirming that 'major project proponents would normally be expected to compensate or mitigate impacts on fishers and fishing communities'. To facilitate compensation for impacts of non-fishing activities, amendments to the *Fisheries Adjustment Schemes Act 1987* will be considered to provide a mechanism for creating agreements with authorisation holders for reasonable compensation, either funded by Government or a third party.

As a result, there is a clear alignment between the principles of rights-based fisheries management as consistently advocated for by fishers, independent experts and international best practice – as summarised in this document – and the stated policy position of the State government. However, these policies, while admirable, have remained at the level of non-binding statements of intent and internal working documents. They have not resulted in concrete action secured by legislative reform. Hence, as noted below, the compensation mechanisms that are presently enshrined in Western Australian law are unclear, limited in scope, clearly insufficient for purpose and need to be changed.

5.4. Existing compensatory mechanisms are fragmentary and insufficient

As noted above, Western Australia does not have constitutional guarantees comparable to the Commonwealth, requiring acquisitions of property on just terms. Therefore, in the absence of a statutory right to compensation, the State has no obligation to pay compensation for acquisitions of property beyond *ex gratia* payments contemplated by and arising out of common law principles of good governance and proper purpose. Beyond the rebuttable presumption of statutory interpretation applied by Australian courts that legislation shall not interfere with vested property interests without

[55] Department of Fisheries, Western Australian Government

express intention[56], the general position at Australian law is that States are under no compulsion to provide compensation when compulsorily acquiring land or other property rights, albeit historical practice and ethical imperatives have resulted in compensation at market value being the norm.

In the context of fishing rights, despite broad agreement for over a decade as to the need for fisheries management to better provide security for rights-holders, within Western Australian there are only currently two pieces of legislation that provide for compensatory mechanisms:

- The *Fisheries Adjustment Schemes Act 1987* (WA) (FASA) provides for the State to initiate voluntary and compulsory acquisition process of authorisations and entitlements held under the FRMA. A person who holds an authorisation that is to be cancelled or an entitlement that is to be reduced under a compulsory (or voluntary) fisheries adjustment scheme, is entitled to apply for 'fair compensation', assessed as the market value on the day before the Minister publishes notice of a scheme.[57]
- The *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (WA) (FRICMA) provides for the payment of compensation to holders of leases, licences and permits under the FRMA and *Pearling Act 1990* under circumstances where marine nature reserves and marine parks constituted under the *Conservation and Land Management Act 1984* (WA) impact on fishing access. A person is entitled to fair compensation for any loss suffered as the result of a 'relevant event'.[58]

Outside these limited examples there is no broadly applicable right to compensation, exposing licenses to cancellation or amendment by the State without due cause or compensation and thereby affecting the value and security of fishing rights. Further, significant issues remain with the ability of these Acts to fulfil the role required to best give effect to the principles of rights-based fisheries management.

Nothing in the legislation compels the Western Australian Government to follow process…

While the FASA establishes a process that the State *may* follow to reduce fishing effort through licence acquisition, there is nothing in the Act or the FRMA that imposes a *positive obligation upon government to do so*. Indeed, the FASA is explicit in stating that nothing in the Act is to be read as limiting or affecting the operation of the FRMA, or requiring that an adjustment scheme be established, or that compensation be payable in respect of anything done under the FRMA[59]. As such, while government and Departmental policy and practice may be to utilise adjustment schemes under the FASA, under current legislation there is nothing to prevent an alternate process – or none at all - being adopted to reduce fishing entitlements.

Application of the legislation is constrained to a narrow set of circumstances…

The processes established under the FASA and FRICMA are constrained to a relatively narrow set of circumstances:

- FASA voluntary or compulsory acquisition schemes establish a top-down approach via which the Minister may decide that the size of a fishery should be reduced via the cancellation of authorisations or the reduction of entitlements. While there are provisions for industry consultation (and for voluntary buybacks, negotiation and counteroffers), the Minister retains absolute discretion to utilise any process they see fit when determining which, if any,

[56] See eg *Greville v Williams* (1906) 4 CLR 694, *Durham Holdings Pty Ltd v NSW* (2001) 177 ALR 436

[57] ss 3, 10C & 14G, *Fisheries Adjustment Schemes Act 1987* (WA)

[58] s4, *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (WA)

[59] s3A, *Fisheries Adjustment Schemes Act 1987* (WA)

individual licence-holders will be affected and to what degree. There are no provisions requiring equity amongst rights-holders, and there are no provisions allowing for differential compensation to be negotiated as between rights-holders or rights-holders and the State.

- FRICMA is limited to marine reserves and parks declared under the CALM Act, and only provides compensation on the basis of a lack of access to defined geographic areas. No compensation would be payable for loss derived from any other nexus with a marine park, for example through increased recreational fishing effort or altered ecosystems balance. FRICMA is also reliant upon correct assessment data being collected and properly collated in order to arrive at correct outcomes, a process which is not adequately established in the Act or regulations and which, in the view of industry, has been poorly managed to date.

Broadly, the two Acts governing compensation for injurious affectation of fishing rights by government within Western Australia are fragmented and insufficient for purpose. They are restricted as to funding options, permit only a binary set of re-allocation decisions, and fail to address the broad range of circumstances under which government may affect fishing rights.

5.5. Regulatory takings and other interference with aquatic resources

Although cancelling or re-allocating fishing rights and authorisations is the most direct example, and likely to have the most immediate impact on the value of fishing rights, there are many other ways in which the actions of government and the processes it oversees and permits can negatively affect rights-holders. This is particularly so in the unique context of the marine and aquatic domain. As discussed earlier in this document, there are a very large number of users, with a very broad range of potential impacts, including the resources and energy sector, seismic testing and surveying, ports, freight and logistics, coastal and marine developments, wastewater management and discharge, recreational use (both involving fishing and otherwise), marine parks, conservation and protected endangered and threatened species policies, defence, and so on.

The totality of these potential users – and the activities they are permitted to undertake by government, including under broad Ministerial exemption powers– poses significant risks to the ability of fishers to utilise their access rights to aquatic resources. Granting a new use or access, permitting an intensification of an old one, or failing to sufficiently accommodate and regulate new uses enabled by new technologies will *ipso facto* impact on existing users of those resources, even if at the end of the day no additional fish are taken out of the water (i.e. less fish may be taken as the result of reduced productivity or access).

Regulatory takings injuriously affect aquatic resource security and access rights and should be compensated…

While to date not well recognised under Australian law, in a primary producer context it is becoming clear that State actions may injuriously affect holders of property without necessarily amounting to 'acquisition' of that property[60]. Although still an emerging area of law, in the view of industry the grant of exploration licenses, development approvals, conservation or environmental protection conditions and other permits that change the marine environment all have the potential to devalue fishing licences through interference with or degradation of the underlying aquatic resource. A prime contemporary example of this occurring is discussed earlier in this document in relation to the Ocean Reef Marina development.

[60] *Spencer v Commonwealth of Australia* (2010) 241 CLR 116; *Spencer v Commonwealth* [2015] FCA 754.

Although the potential for negative impacts to commercial fishers are clear, it would be overly restrictive, unfairly burdensome to other users of the aquatic domain, and at odds with the broader incentives of the State to encourage development and community usage, to privilege the interests of fishers above all other parties. In accordance with broader principles of fisheries management, fishers share the underlying aquatic resource with multiple parties, and consensus and compromise are to be encouraged. However, this must be balanced against the fact that fishing rights are a type of proprietary right, and the need for fishers to have certainty in the security and value of the rights that they hold discussed above, rights which represent a significant financial investment on the part of the licence-holder.

Accordingly, the position of industry is instead that where government intervention - while not amounting to an outright cancellation or clawback of fishing rights - results in an impact on aquatic resources or the value of fishing rights, *prima facie* fishers should be compensated to the extent of the loss inflicted. Reflecting the shared user nature of the marine and aquatic domain, and the need for all parties to compromise and work together to assure best outcomes, only loss that is real and consequential, not trivial or easily mitigated, would attract compensation.

As discussed above, in a system where the proprietary aspects of fishing rights is respected and secured through permanence and free transferability, there is also no explicit presumption that the State will always be financially liable to provide this compensation. As with a forced transfer of fishing entitlements outright, conceptually the party obtaining the benefit should be responsible to make good the consequential loss suffered. Often the party benefitting from regulatory action will be the public (for example, by the declaration of a new marine park) and by extension the State, and hence use of public money for compensation would be appropriate. However, this will not always be the case, as in the issuance of permits and approvals for a marina development or for a seismic surveying by resources and energy companies. Under these circumstances, market mechanisms may be utilised to effect compensation, with the grant of approvals paired with a requirement to purchase quota from affected fishers under a 'forced sale/forced acquisition' model to effect necessary rights transfers. In all circumstances, regulators should face a positive obligation to amend management plans or harvest strategies to take into account these changes to preserve the ecological sustainability of the fishery and maintain catch and effort at appropriate levels.

5.6. Future imperfect – risks posed by the transition to ARMA

As previously summarised, fisheries legislation in Western Australia is in a state of transition. While most fisheries remain regulated and managed pursuant to management plans set under the FRMA, the passage of ARMA in 2016 and its phased entry into force from 2018 until a final operative date (i.e. once fully proclaimed) expected in 2022 will progressively see fisheries transitioned to ARUPs/ARMS under the new Act.

Broadly, this has the potential to improve and modernise fisheries management. Thanks in part to an extensive and productive engagement process with fishers and other stakeholders, the views and needs of industry have been heard and have resulted in the conceptual basis and stated aims of ARMA hewing more closely to the principles of rights-based fisheries management. While recognising these positive developments, however, there remain some outstanding concerns as to the potential of the transition process to further undermine the security of fishing rights providing access to aquatic resources.

The stated intent of the State government is that all existing management arrangements under FRMA will transition to arrangements under ARMA following a 'negotiated process'[61]. While noting that the new risk-based approaches under ARMA will require fisheries facing significant sustainability issues to be moved to new management frameworks rapidly, broadly the stated intent is to avoid displacing existing management arrangements until all key issues of sectoral allocation have been resolved, rather than using the transition process "as [a] catalyst to resolve these"[62].

Considering that outstanding issues and unresolved community and industry concerns remain as to the future resource allocation of some Western Australian fisheries, this statement of intent reflects admirable caution. However, as with the position regarding compensation, industry remains concerned that this statement of intent has not transitioned into a legislated position that would give industry comfort that there will be no repeat of unfortunate recent historical events.

In particular, while sections 17, 18 and 19 provide for a consultation process in setting a new ARMS, and section 24 requires appropriate consultation in making an ARUP, no such consultation nor engagement process is stipulated in the powers reserve to the Minister to amend or revoke an ARMS or ARUP[63]. Further, while in the process of developing an initial ARMS or an ARUP under it consultation is required, the Minister retains discretion as to the final form of that plan, and there is no legislated requirement, or even a rebuttable presumption, that when transitioning existing fisheries to new management arrangements the existing rights of fishers will be retained[64].

Noting that guidelines and policies may be formally published to guide the actions of decision-makers in performing functions under the Act[65], it is disappointing that, to the knowledge of industry, despite the stated intent of the State government to preserve the security of existing fishing rights no concrete action to assure that this will eventuate has resulted[66].

From the perspective of industry, the fundamental failure of ARMA is thus that, despite the past history of the State in setting and exceeding international best practice, and the historic opportunity to further secure its leadership and reputation into the future, the Act provides little scope for this to occur. Unless the recommendations outlined below are given serious consideration and result in meaningful reform, and the Act is amended to securely embed principles of a compensatory rights-based framework, there exists a real possibility that the uncertainty already faced by commercial fishers in Western Australia will continue under the forthcoming transition to new management schemes under ARMA.

---

[61] *Submission to the Legislative Council Committee on Public Administration – Inquiry into Private Property Rights* (2019), Department of Primary Industries and Regional Development, published Western Australian Parliament

[62] *Ibid*

[63] ss 21, 28 & 29, *Aquatic Resources Management Act 2016* (WA)

[64] While s26(2) of the Act provides that a method of allocating resource shares 'may' include converting previous entitlements, the section specifically notes that the methods of determining shares are not limited to this process, and hence may be as desired by the CEO or Minister.

[65] ss 254-257, *Aquatic Resources Management Act 2016* (WA)

[66] It is worthy of note that prior to commencing the transition of the Pearl Oyster Fishery Management and Pearling Framework into the ARMA Framework, the Minister for Fisheries provided a Ministerial Transitional Policy Statement that was predicated on the transfer of all rights into the ARMA framework in an "unaltered" state and "on a like for like basis."

The fundamental breach of the already eroded but still significant trust which formerly existed between fishers and the government, developed over the past 60 years, will continue to have repercussions unless urgent action is taken to restore the reputation of the State and heal the divisions caused.

6. Recommendations for reform

More secure commercial fishing rights will not only provide the certainty that is required for industry to continue to invest, but will ensure more effective and efficient management of the natural resource, greater certainty and rights for the recreational sector and enhanced environmental and community outcomes overall.

In pursuit of these outcomes, industry has identified 19 recommendations and areas for reform, consisting of 9 immediate short-term priorities and 10 longer-term reform measures. Taken together, this programme will enhance the security of fishing access rights, create the conditions for increased and sustainable investment in fishery, promote long-term ecological sustainability and provide the conditions precedent for commercial fishery to flourish in the State.

6.1. Immediate priorities for reform

Drawing on the principles of rights-based fisheries management and informed by the history of resource access security for the commercial fishing sector in Western Australia discussed above, these 9 recommendations address matters that require urgent reform.

Shaped and refined through consultation with and between industry, including peak bodies and individual fishers, **action is sought on these recommendations as a matter of priority over the next twelve to eighteen months.**

Suggested legislative amendments to give effect to these 9 Recommendations, together with concepts for a statutory compensation scheme (Recommendation 8) and a draft form of Ministerial commitment in the form of a statement of expectation to the CEO (Recommendation 5(d)), have been drafted by Quinn Emanuel lawyers and are set out in Appendix 3 to this paper.

Recommendation 1: State shall not be empowered to dilute rights within a managed fishery

To ensure that the value of fishing rights is retained; that rights-holders have the necessary certainty to operate their businesses as normal, including to grow and invest; that rights-holders are treated as partners in the management of aquatic resources and are motivated to equally protect it; and that industry and international perception of sovereign risk is reduced, it is critical that the State Government should not have the power to issue new units or shares within a fully allocated managed fishery such that the rights of existing licence-holders are diluted, including the issue of new rights to third parties on non-equivalent terms.

To that end, the broad powers currently held by the CEO and responsible Minister to issue new units or shares under fisheries management legislation should be removed or narrowed. In the case of larger fisheries that span multiple habitats and ecosystems and are hence are zonally managed, issuance of units or shares should reflect those zonal boundaries and be capped within them.

Noting that the intent is to preserve the value of existing licenses, nothing within this recommendation should be interpreted as preventing the evolution over time of management regimes, such as the conversion of units held under FRMA to new entitlements under ARMA, or other means of conversion of one form of units to another on an equally proportional basis, such as a conversion of licenses with attached input controls to a quota of output-controlled harvest share. Further, in light of ongoing industry developments, this recommendation should also not be read as preventing consideration of

a new category of entitlement (eg research, market development) to existing licence-holders within the TACC, providing this is done on an equitable pro-rata basis that does not distort the value of existing rights held.

To this end, it is recommended that:

a) **Broad powers of the CEO and the Minister to issue new units (shares under ARMA) within a managed fishery be removed or narrowed. Where zonal allocations operate, total shares within a fishery to be allocated by zone.**
b) **The ability of the Minister to issue new units in a managed fishery by Gazettal be removed, except in the case of issuing new unit allocations on equivalent terms to all existing unit holders.**

Recommendation 2: State shall not hold shares in or participate within a managed fishery

In order for a rights-based management regime to work effectively, all rights-holders must be treated equally in principle and in practice, be provided with equal opportunity to access their underlying resource entitlement, and have confidence in the fair and equitable management of the fishery and the impartial judgement of the State Government as regulator. The participation of the State Government in the fishery, whether as active participant or indirectly through sub-leasing arrangements (or similar) is at odds with all these principles, and carries significant sovereign risk implications.

As such, it is recommended that:

a) **the State or an agent of the State be prohibited from applying for a managed fishery licence (or shares in the fishery); and**
b) **the CEO or Minister be prohibited from granting a managed fishery licence (or shares in the fishery) to the State or an agent of the State.**

Recommendation 3: Primacy of fishing rights in managed fisheries not to be circumvented through exemptions

To ensure their effectiveness, fishing rights and authorisations given under and managed by Western Australian fishing regimes must remain the sole legitimate means by which aquatic resources in a managed fishery may be commercialised. To do otherwise is to effectively bypass the principles of rights-based management that underpin fisheries within the State, and risks creating parallel, less secure and less controlled systems that endanger the ecological sustainability of the fishery and the economic stability of industry and coastal communities.

While recognising that the power of the Minister to grant limited exemptions from the management regime established by the ARMA may be appropriate to achieve specific public policy purposes, such as research, public health and safety or environmental protection, industry does not view it as appropriate that an acceptable category of exemption is to enable ill-defined and unlimited 'commercial purposes'. Without more, this provision risks allowing the establishment of an entirely discretionary alternate process for commercialisation of aquatic resources, thus enabling access to managed fisheries by persons who are not licence holders and who have no other entitlement to that resource. If a 'commercial purposes' exemption from controls under ARMA relating to a managed fishery is to apply, it must not disturb the requirement for fishers to hold a fishing licence, quota, unit

entitlement or similar, and must be framed as a general exemption for all licence holders as a class of persons.

As such, it is recommended that:

The power of exemption under section 7 of ARMA for commercial purposes cannot be applied in a managed fishery or ARUP to any person other than a unit holder in the prescribed fishery and applied as a general exemption for all fishing licence holders as a class of persons in that fishery.

Recommendation 4: Secure rights to be the basis for all commercial fishing

Increasingly, multiple users of the marine estate and aquatic resources are being recognised by and brought within fisheries management regimes. This process has the strong support of industry and should be continued, such that all users of an aquatic resource have clarity and certainty as to their priority of access to the resource. Of all these classes of fishing licence and entitlement, commercial fishers are rightly called upon to make contributions towards meeting the costs of implementing, monitoring and enforcing the management regimes in place through licence fees and other associated costs. By doing so and in exchange, they are granted priority access rights to that resource, rights that should be secure and enduring to ensure fair value is retained.

However, equally important to underpinning the value of fishing rights and ensuring the continued prosperity of industry is the unique grant of commercialisation rights to commercial fishers. With more individuals and users of aquatic resources potentially involved with and operating on the fringes of quasi-commercial activity (such as charter fishers, fishing tour operators, and traditional and customary fishers), it is important that the basis of commercialisation of a managed fishery is and remains the holding of a commercial fishing licence. Those wishing to sell fish stemming from a managed fishery should be required to purchase sufficient units of entitlement in that fishery to meet minimum commercial holding thresholds, to be determined on a case-by-case basis in the specific Fisheries Management Plan or ARUP.

It is therefore recommended that:

Non-commercial fishers, charter fishers and indigenous fishers seeking the ability to sell fish may only do so in an existing managed fishery by the acquisition of shares from that fishery.

Recommendation 5: Transitions between management regimes to be on fair and just terms

As highlighted earlier in this document, the conceptual underpinnings of the new ARMA regime are sound and are broadly supported by industry and fishers. However, in order to deliver on this potential, operate as a secure and stable foundation for fisheries policy into the future, and restore the trust between industry and government, several aspects of the transition between management plans under FRMA and new ARMS/ARUPs under ARMA must be carefully managed to ensure equitable treatment of all fishers, commercial and recreational alike, provide continued certainty necessary for commercial fishery to continue to operate and have the confidence to invest and grow, and avoid disruption and potential endangerment of the ecological sustainability of aquatic resources.

While continued recognition of prior policy statements and management assurances by government will go some length towards addressing these concerns, in some instances legislative changes will be required. Along these lines, industry thus recommends measures to ensure that:

a) **Units (shares under ARMA) within a fishery must transition in equivalent terms from a management plan to an ARUP;**
b) **Existing allocation of commercial and recreational shares in managed fisheries to be maintained in any new management arrangements under ARMA. Where allocations presently operate on an informal basis stemming from historical catch shares, allocations splits to be explicitly formalised in documentary form.**
c) **Where feasible, the total shares allocated between the recreational sector and the commercial sector to be set in percentage terms of the total allowable catch and expressed in equivalent units for the commercial and recreational sectors.**
d) **Industry reiterates its qualified support for the implementation of ARMA at the earliest date, conditional upon Government provides a binding commitment (legislative or otherwise) not to proceed with the further development of ARMS and ARUPs for a commercial fishing sector until that sector has been adequately consulted and has expressed support.**
e) **The principles to be practically applied to fisheries managed by Regulations or Orders under the FRMA continue to apply, on a like-for-like basis, into the future under ARMA and subsidiary legislation.**

Recommendation 6: State to assist transitions to occur without imposing taxation burden on rights-holders

The classification, regulation and management regimes that apply to the activities of industry have resulted in a variety of authorisations, permits, licences and other quasi-property legal creations created under them to give effect to public policy purposes. The fishing industry is no different, and unfortunately actions of government in effecting transitional arrangements between classes of authorisations under management regimes have in the past resulted in potentially unfairly burdensome taxation implications, such as income and capital gains taxes levied on the tuna and Northern Prawn fishery as a result of management changes. This required an act of intervention to seek a taxation treatment ruling from the Commissioner of Taxation, a process that introduced a further protracted period of uncertainty.

While tax levies are outside the legislative scope of ARMA, and to an extent beyond the direct control of the Western Australian Government, the possible taxation implications of State government actions in transitioning fisheries management regimes should be recognised by the State. Further, to the maximum extent possible, government should work with industry to minimise any one-off impacts resulting to industry that may arise as a consequence of the transition process.

It is thus recommended that:

The potential taxation implications stemming from creation of new management arrangements under ARMA are minimised, and State government assistance provided to ensure that no heightened taxation burden is felt by the existing commercial fishing sector.

Recommendation 7: Better incorporation of recreational fishers within management regimes

Under principles of rights-based fisheries management discussed earlier in this document, and in furtherance of other Recommendations, conceptually the use of and impact from recreational fishers on aquatic resources should be explicitly recognised, formalised and accounted for through fishing rights and an allocation of quota or other unit of effort or harvest.

To avoid overly burdensome administrative complexity and overhead, these fishing rights could be collectively held on trust and may be administered by a recreational peak fishing body (e.g. Recfishwest). Doing so will also allow for and centralise consultation, advocacy and coordination between holders of fishing rights in other sectors and the recreational fishing sector.

Accordingly, it is recommended that:

The shares for the recreational sector may be held in trust and administered by a peak body.

Recommendation 8: Where actions of the State affect the rights and livelihoods of fishers, compensation should be payable

Commercial fisheries, and the individuals, businesses and communities they support, are built on foundations of strong and secure fishing rights. Where those rights are taken away or injuriously affected by the actions of government, compensation should be payable.

While not applying in situations where a reduction of quota is borne by all fishers equally, for example to maintain ecological sustainability of the fishery, or where individual fishers have seriously transgressed licence conditions, as a general principle the State should thus ensure the loss or disruption of fishing rights is compensated, through either legislative arrangements (for example, via consequential amendments to FASA, FRICMA or other Acts) or market-based mechanisms. Depending on circumstances, the costs of doing so may not necessarily be borne by government. Where a private party is to obtain a benefit at the expense of holders of fishing rights – for example, seismic surveying or oceanfront development – the preferred role of the State in ensuring compensation flows is instead to enable market-based mechanisms to operate via forced purchases of rights by impacting the party or similar measures. As some activities with the potential to adversely affect a fishery may be undertaken in Commonwealth waters, a Federal legislative response may also be warranted.

Such an approach, under which the party obtaining a benefit compensates the party suffering a detriment, is also to be preferred in ensuring that re-allocations between sectors are adequately compensated.

As such, it is recommended that:

a) **The removal of shares from the fishery shall only occur where:**
    i) **compensation (including where appropriate compensation reflecting injurious affection) has been paid through commercial (market based) or legislative arrangement; or**
    ii) **by provisions of legislation under specified offences.**
b) **In the absence of public policy concerns that would militate the State provide compensation, resource reallocation between sectors shall be effected via market-based transfer mechanisms that ensure the party suffering a detriment is compensated.**
c) **Further changes are to be proposed to the Fisheries Adjustment Schemes Act covering matters to be taken into account and procedures for determining levels of compensation, and where appropriate injurious affection, in the absence of market solutions.**

Recommendation 9: Security of resource access represented by fishing rights to be enhanced and protected

To prevent circumstance that detract from investment, industry growth and optimal natural resource management, ensuring optimal certainty with respect to resource access and the processes that ensure that certainty should be a fundamental and obvious tenet of the ARMA legislation.

To best recognise, protect and enhance the inherent value of fishing rights, and thus the commercial fishing industry built on them, reform to underlying legislation is essential. As discussed earlier in this document, several aspects of existing management regimes and their practical implementation in Western Australia create uncertainty and have led to poor outcomes for industry.

Addressing these weaknesses with the current status of fishing rights, that bear many of the attributes of property rights, has been the focus of a substantial body of work informing industry and stakeholder submissions to the Public Administration Committee's *Inquiry into Private Property Rights*. It is thus recommended that:

a) **The development of fishing licences as secure access rights as per the Western Rock Lobster submissions covering changes to ARMA and the Fisheries Adjustment Schemes Act be adopted.**
b) **Proposed resource access security and allocation of resource shares relating to fisheries managed under ARMA within the Part 3 framework should also apply to existing managed fisheries, regardless of whether defined by instrument of policy or legislation.**
c) **To avoid administrative inadvertence unduly affecting the desired secured property character of fishing rights, current provisions resulting in licence cancellation for non-payment of fees to instead grant discretion to the CEO to suspend a licence for as long as deemed necessary to resolve outstanding disputes. With appropriate consultation and dialogue, industry would support the introduction of similar formalised suspension and cancellation guidelines as apply to licence cancellation and suspension by AFMA[67, 68].**

6.2. Longer-term reform agenda

Beyond the immediate priorities for reform outlined above, a deeper and more comprehensive reform agenda is proposed in a further four recommendations below. Representing longer-term proposals that would more securely embed international best practice principles of fisheries management into the foundations of Western Australian law and practice, **ongoing dialogue and action on these recommendations is sought over the next two to five years**.

	Proposal
10[69]	That fishing licences be recognised in the ARMA legislation as property for the purposes of compensation.

[67] S134 *Aquatic Resource Management Act 2016* (WA); s38 *Fisheries Management Act 1991* (Cth)
[68] Australian Fisheries Management Authority (2016), *Procedure for the recovery of outstanding debts and other monies*, Fisheries Management Paper Number 6, Australian Government, Canberra
[69] This matter was raised by the Western Australian Fishing Industry Council and Western Rock Lobster Council in their respective submissions to the Upper House Standing Committee on Public Administration Inquiry into Private Property Rights. However, a comprehensive discussion on this matter is beyond the scope of this paper.

11[70]	The establishment of a single authority by the Western Australian Government to centralise the procedural requirements around compensation by Government into a single agency for claims covering loss of property and injurious affection arising from the assertion identified by the Committee's terms of reference (d). That is fair and reasonable compensation must be paid to the owner of private property if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit.
12[71]	Broadening of scope covering a range of private and public funding and market mechanisms to facilitate commercial fishing adjustment by the Fisheries Adjustment Schemes Act 1987 be enacted as proposed below and to be further developed:
12(a)	A provision under the Fisheries Adjustment Schemes Act or ARMA, that where circumstances apply within the terms of reference (d) of the Public Administration Committee's Inquiry into Private Property Rights to commercial fishing access rights, the Minister be required to establish a committee of advice under the Fisheries Adjustment Schemes Act.
12(b)	The provision of powers to open funding explicitly from a range of sources, outside of Government sources, inclusive of corporate and sponsorship funding to facilitate adjustment schemes.
12(c)	The ability of the advisory committee appointed under the legislation to appoint an independent person to directly negotiate the possible terms of settlement of a contract of sale with an individual fishing authorisation holder or group of authorisation holders, in particular circumstances. This could be applied to situations where coastal development directly and significantly impacts on commercial fishing access rights, involve the developer whether private or government, a requirement to meet costs of compensation with costs to be met by the developer, whether through a negotiated outcome or contractual settlement or through a voluntary adjustment scheme. The Ocean Reef Marina development example provided to this inquiry is a case in point, especially given the complexity of issues and significant impact on the abalone fishery.
12(d)	An ability for the advisory committee to report on any arising issues of injurious affection to be met in just terms in its advice to the Minister under the Act, where a case for this form of compensation beyond loss of fishing access rights ought to apply.
12(e)	To provide scope to the advisory committee and the Minister, within the legislation, enabling different pathways for compensation to apply, such as Act of Grace payments for temporary loss of resource access in particular circumstances. For example, an inability to fish by licence holders due to coastal developments. The Wheatstone developments at and near Onslow and the likely loss of visibility to fish for abalone during construction of Ocean Reef Marina are examples.
12(f)	Where an adjustment scheme is implemented under the provision of this legislation that is known to result in a re-allocation of resource use to different sectors or reduce directly overall resource harvest levels, a requirement for the resource management agency responsible (DPIRD currently) to amend the harvest capacity of the management plan or aquatic resource use plan under the FRMA or ARMA legislation (whichever is applicable at that time). Without this requirement, resource

[70] This matter was raised by the Western Australian Fishing Industry Council and Western Rock Lobster Council in their respective submissions to the Upper House Standing Committee on Public Administration Inquiry into Private Property Rights. However, a comprehensive discussion on this matter is beyond the scope of this paper.

[71] Giving effect to recommendations 12 through 12(f) requires amendment to the *Fisheries Resource Adjustment Schemes Act 1987* (WA).

	sustainability could be placed at risk and a penalty for non-compliance by the management agency within reasonable time should apply.
13[72]	Possible changes to WA Constitution at least equivalent to the Commonwealth Constitution on protection of access rights and compensation that may arise from the Western Australia Legislative Council Public Administration Committee report into Private Property Rights.

[72] This matter was raised by the Western Australian Fishing Industry Council and Western Rock Lobster Council in their respective submissions to the Upper House Standing Committee on Public Administration Inquiry into Private Property Rights. However, a comprehensive discussion on this matter is beyond the scope of this paper.

Appendix 1 – Comparison of the Characteristics of Access Rights Under FRMA Management Plans and ARMA (Transitioned Management Plans and Managed Aquatic Resources)

Characteristic	FRMA Management Plan	ARMA Transitioned Management Plan	ARMA Managed Aquatic Resource
Exclusivity (the impact of others on the right)	Access to commercial fishing limited according to criteria in the management plan.	Access to commercial fishing limited according to criteria in the management plan.	Access to commercial fishing limited according to the number of shares in the ARMS and the process for allocating shares under the ARUP.
			ARMS must set out the proportion of the total allowable catch (TAC) for the commercial and recreational sectors. Obligation to monitor sector allocations increases exclusivity.
Durability (the degree of permanence, temporal duration and renewability)	Authorisations are renewable subject to an application being made within 60 days after expiry, payment of fees and good behaviour. A management plan for interim management fisheries may specify an end date beyond which the plan and associated authorisations are of no effect.	Authorisations are renewable subject to an application being made within 180 days after expiry, payment of fees and good behaviour. Management plans for interim management fisheries will transition as managed fishery management plans so will no longer have a specified end date.	Shares granted under an ARUP only need to be registered upon allocation and will exist as long as the ARUP is place. Annual renewal not required. At the start of each fishing period shares give rise to catch entitlement valid for that fishing period upon registration.
Transferability (including the divisibility of the right and ease of temporary leasing and permanent transfer)	Both authorisations and entitlements (e.g. quota units) under authorisations must be transferred upon application subject to limited grounds for refusal (see FRMA s 140(2)).	Both authorisations and entitlements (e.g. quota units) under authorisations must be transferred upon application subject to limited grounds for refusal (see ARMA s 60).	Shares must be transferred on request subject to limited circumstances where the transfer must be refused (see ARMA s 36(3)).
	Entitlements under an authorisation may be transferred independently of the authorisation to another authorisation holder only.	Entitlements under an authorisation may be transferred independently of the authorisation to another authorisation holder only.	Once registered at the start of each fishing period, shares and catch entitlement exist as separate entities and can be transferred independently (increases divisibility and flexibility)

Characteristic	FRMA Management Plan	ARMA Transitioned Management Plan	ARMA Managed Aquatic Resource
	If a management plan provides for it (most do) entitlements under an authorisation may be transferred to another authorisation holder to facilitate lease arrangements.	If a management plan provides for it (most do) entitlements under an authorisation may be transferred to another authorisation holder to facilitate lease arrangements.	
Security (the quality of the right, including ease of cancellation or change and degree of legal protection)	A court may cancel or suspend an authorisation upon application of the CEO of DPIRD if the court convicts the person of an offence.	A court may cancel or suspend an authorisation upon application of the CEO of DPIRD if the court convicts the person of an offence.	Shares are granted in perpetuity (subject to continued existence of the relevant ARUP). Can only be forfeited by court order in association with the shares having been used as surety for an authorisation
	Where three major offences are recorded against an authorisation in 10-year period the authorisation is suspended for one year.	Where three major offences are recorded against an authorisation in 10-year period the authorisation is suspended for one year.	The perpetual nature of shares and the separation from catch entitlement means that shares and non-fishing shareholders are not impacted by prosecution of the fisher. This provides greater security than under the FRMA.
	Authorisations may be cancelled, suspended or not renewed on limited grounds, including non-payment of fees, grounds set out in a management plan or poor behaviour (see FRMA s 143).	Authorisations may be cancelled, suspended or not renewed on limited grounds, including non-payment of fees, grounds set out in a management plan or poor behaviour (see ARMA s 134).	
	Upon cessation of a management plan a person is not entitled to a subsequent authorisation as of right but the CEO of DPIRD is required to take into account that the person previously held an authorisation.	NA (no new management plans under ARMA)	Upon revocation of an ARUP, share options must be granted to those who held shares immediately prior to the revocation (unless those persons are allocated shares of equivalent value under a new ARUP). The Minister must have regard for share options when determining the method of share allocation in a subsequent ARUP.

Adapted from *Submission to the Legislative Council Committee on Public Administration – Inquiry into Private Property Rights* (2019), Department of Primary Industries and Regional Development, published Western Australian Parliament

Appendix 2: Maximum Economic Yield

Maximum Economic Yield (MEY) has long been preferred in economics as the harvest target for commercial fisheries because:

- It maximises fishery profits, regardless of changes in the price of fish or cost of fishing (Maximum Sustainable Yield – MSY, by contrast, is independent of profits),
- It improves international competitiveness by improving catchability and lowering the cost of fishing,
- It is more `conservationist' than the classical MSY target. In most cases stock size will be larger than that associated with MSY – known as 'thickening' the stock.

In recent years MEY has become the preferred and recommended target for managing commercial fisheries in Australia and has grown in significance overseas as the above advantages have become recognised.

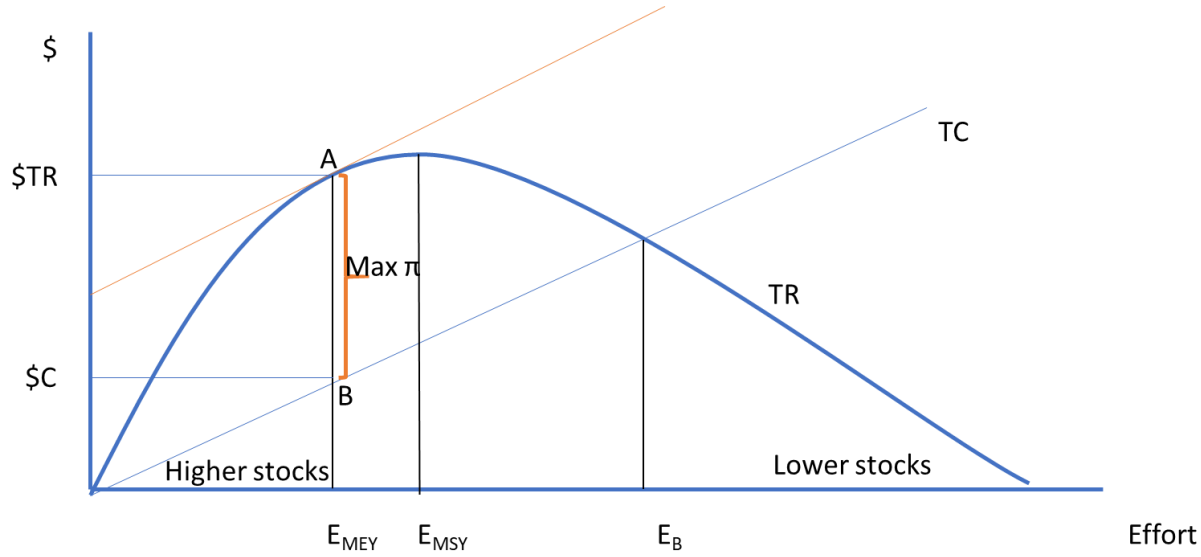
One important consideration is that MEY as a target provides resilience to economic shocks. This is because it adjusts to changes in market supply and demand conditions and changes in the underlying state of nature, to ensure that maximum profits can be achieved. In contrast operating at MSY is consistent with zero or even negative profits.

MEY is defined as a sustainable catch or effort level that creates the largest difference between (discounted) total revenues and the total costs of fishing. If the MEY outcome is to be clearly a profit maximising one, it must also be the case that the fishery operates combinations of capital and other resources that minimize the costs of harvesting the MEY catch.

ITQs are typically the preferred mechanism to ensure this operational efficiency. An important implication of this is that it discourages over-capitalisation.

The essence of the above can be seen from the classic MEY diagram.

As effort increases catch increases, and stocks decline. Every point along this curve is a sustainable effort and yield combination. Traditional management based on MSY would limit effort to E_{MSY}. This yield could be repeated ad infinitum so long as underlying biomass conditions (state of nature) do not change.



The total revenue is the yield at any level of effort multiplied by the price received in the marketplace. If we assume a constant price, total revenue exactly reflects the stock-recruitment relationship.

Economically the industry can do better than operating at E_{MSY}. A reduction of effort to E_{MEY} would increase profits. E_{MEY} is the effort level where we have the maximum difference between total revenue and total cost. The distance AB is the maximum profit. This occurs where MR=MC or the slope of the total revenue curve is equal to the slope of the total cost curve.

Significantly, maximizing profit requires less effort ($E_{MEY} < E_{MSY}$) and smaller harvests. The decrease in effort increases the stock availability and is then associated with greater catchability (CPUE). The critical thing here is that the cost of fishing decreases more than the corresponding fall in revenue when we move the catch to E_{MEY} from E_{MSY} or higher. And this fall in harvest costs depends on the increases stock density associated with the additional uncaught stock between E_{MEY} and E_{MSY}.

The value of E_{MEY} will change given a change in the price of fish, which shifts the total revenue curve up or down, or the cost of fishing, which rotates the total cost curve.

It is tempting to focus on S_{MEY} and ignore the uncaught difference between S_{MEY} and S_{MSY}. However, the uncaught stock is critical to the MEY outcome. This is the 'stock effect'.

The reduction from E_{MSY} to E_{MEY} thickens the stock. The impact of this is that:

- The cost of fishing is lower - fishing larger stocks lowers the per unit cost of catch., and
- If the market demand curve is downward sloping, lower catch rates increase the market value of fish.

Together these improve profitability.

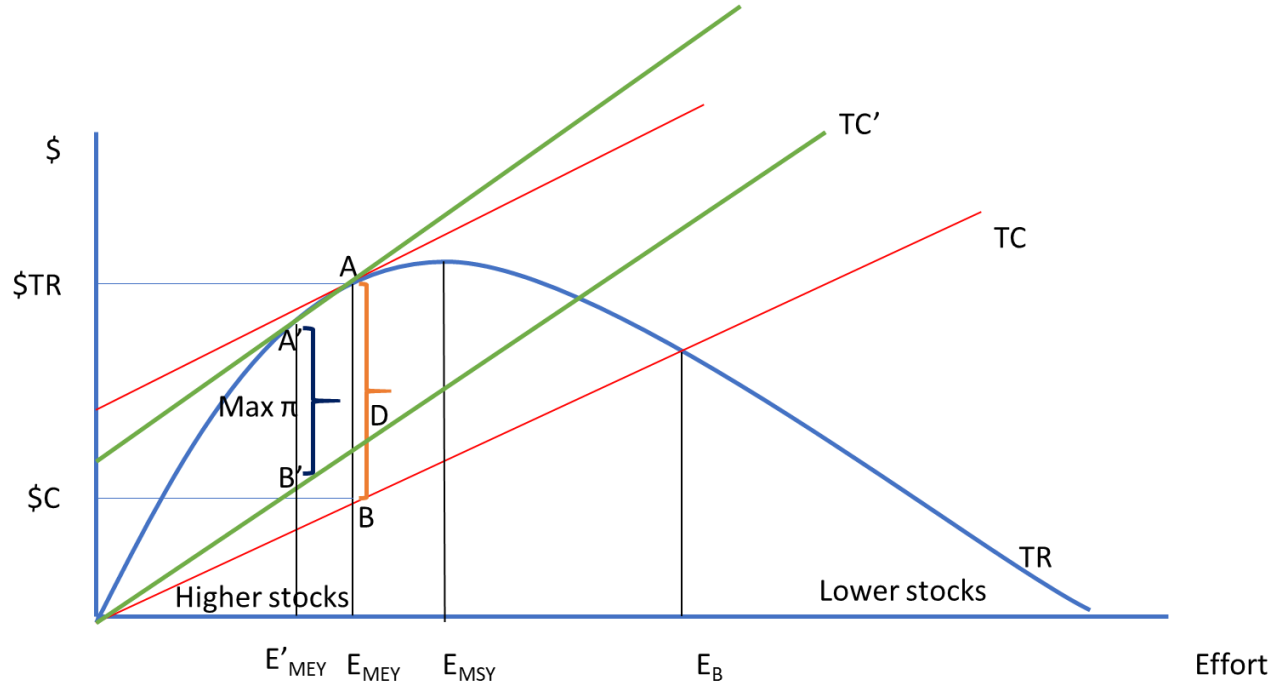
So, the stock above E_{MEY} is not a surplus but is intentionally left uncaught int the biomass to enhance profitability. It is central to the economically efficient outcome.

If the stock above E_{MEY} were available for catch it would be inconsistent with the MEY target. This can be illustrated with two simple adjustments to the basic diagram. In the diagram below we assume that the extra stock can be harvested but will not find its way back into the marketplace – that is, there is no commercial dimension to its harvest.

The starting point is an effort level at E_{MEY}. Consistent with the basic idea of MEY, the unavailability of the changes all the dimensions of the commercial harvest. The cost of harvest benefits from 'thickening' of the

stock are removed, so the marginal cost of catching increases. This is shown by the change from TC to TC'. Once the costs change, the economic optimum changes. To maximise profits with the new cost structure, requires a recalculation of the effort level at which MR=MC or the slope of the total revenue curve equals the slope of the total cost curve. In the diagram below this occurs at E'_{MEY}. And $E'_{MEY} < E_{MEY}$.

The new maximum profit is A'B'. This is less than the original E_{MEY} profit of AB but greater than the profit AD which is what would be achieved if harvest stayed at the original E_{MEY} level with the new higher cost structure.



In essence, our assumption that the stock between E_{MEY} and E_{MSY} is removed triggers a recalibration to again 'thicken' the stock and maximise profits.

One of the advantages of MEY combined with ITQs is that the harvest which maximises profits also minimises costs and achieves an optimal combination of capital and other inputs. The change outlined in the above diagram from E_{MEY} to the lower effort level E'_{MEY} will trigger appropriate adjustments. Catching capacity will be reduced and given the reduced profits ITQ values should fall.

The exact magnitude of any adjustments will depend on the exact value of key parameters. This is an empirical question for any particular fishery, but the direction of change will be consistent with that outlined above.

The above analysis assumed that the stock between E_{MEY} and E_{MSY} was removed but not returned to the marketplace. If it were sold commercially then, depending on the market demand curve, market price may fall, and this would cause a further downward adjustment in E_{MEY} and profits. [73]

Overall, reallocation of stock above E_{MEY} requires a re-assessment of MEY to a lower level and this triggers a range of negative impacts on fishery operations likely to reduce profits and the value of capital and quota.

[73] This explanation of Maximum Economic Yield has been provided by Dr Paul McLeod, Director, Economic Research Associates (www.econsresearch.com)

It should be noted that the above analysis and the original development of MEY relates to a single species fishery. Where MEY as a concept is applied to multispecies fisheries, estimating the optimal catch and biomass for any single species in the multispecies fishery is considerably more complex.

Regardless, it is clear from this analysis that managing fisheries in accordance with principles of MEY results in optimal profitability for industry, improved competitiveness of the Western Australian industry in national and international markets and optimal management of the natural resource.

Appendix 3A: Suggested legislative amendments to effect recommendations outlined in Part 6.1

Aquatic Resources Management Act 2016

7. Exemptions from Act

(1) The Minister may, by notice in writing, exempt a specified person or specified class of persons from all or any of the provisions of this Act.

(2) The Minister may only grant an exemption under subsection (1) for one or more of these purposes —

(a) research;
(b) environmental protection;
(c) public safety;
(d) public health;
(e) commercial purposes;
(f) education purposes;
(g) enforcement purposes.

(2A) An exemption for the purpose specified in sub-section (2)(e):

(a) must not be granted in respect of a person who is not:

(i) the holder of a resource share in the ARUP to which the exemption relates; or

(ii) the holder of licence in respect of the managed fishery to which the exemption relates; and

(b) must apply equally to all holders of a resource share in the ARUP or holders of a licence or class of licence in respect of the managed fishery, as the case may be, to which the exemption relates.

(3) An application for an exemption may be made to the Minister.

(4) An application —

(a) must be in an approved form; and
(b) must be accompanied by the prescribed fee, if any.

(5) An exemption may be granted subject to any conditions specified in the notice.

(6) The Minister may, by further notice in writing —

(a) cancel or amend an exemption; or
(b) delete, amend or add to any conditions imposed in relation to an exemption.

(7) An exemption is of no effect at any time when a condition of the exemption is being contravened.

(8) A person who contravenes a condition of an exemption commits an offence.

Penalty: a fine of $10 000

16. Content of ARMS

(1) An ARMS for a managed aquatic resource must set out the following things —

(a) a description of the aquatic resource that is to be managed;
(b) the main objective to be achieved by managing the aquatic resource;
(c) the minimum quantity of the aquatic resource that is considered necessary to be maintained for the resource to be ecologically sustainable;

(d) the activities that should be regulated in respect of the aquatic resource;

(e) the details of each period for which activities in respect of the aquatic resource are to be regulated (***fishing period***);

(f) the quantity of the aquatic resource that is to be available in a fishing period for customary fishing and public benefit uses;

(g) the method to be used in calculating the total allowable catch (TAC) for the aquatic resource;

(h) the proportion of the TAC that is to be available for recreational fishing for the resource;

(i) the proportion of the TAC that is to be available for commercial purposes, including —

(i) the proportion of the TAC to be available for commercial fishing for the resource; and

(ii) the proportion of the TAC that is to be available for taking incidentally in the course of commercial fishing for other aquatic resources;

(j) the number of shares in the resource that are to be available to the commercial sector, including, where the aquatic resource is managed by zone, the number of shares in the resources that are to be available for each zone;

(k) the scientific parameters to be used to assess how effectively the aquatic resource is being managed;

(l) the consultation to be carried out in relation to the making, amendment or revocation of an aquatic resource use plan (ARUP) to implement the ARMS.

(2) For the purposes of subsection (1)(d), the activities that should be regulated in respect of the aquatic resource may include the taking of other aquatic resources incidentally in the course of commercial fishing for the aquatic resource.

(3) For the purposes of subsections (1)(h) and (1)(i), the allocation of the TAC under an ARMS must:

(a) be expressed as a percentage of the TAC and reflected in an allocation of equivalent resource shares; and

(b) maintain the proportions of allocation between recreational fishing and fishing for commercial purposes provided under a management plan or earlier ARMS that the ARMS replaces.

(4) For the purposes of subsection (1)(j), the issue of new shares in the resource must only be to:

(a) all existing holders of resource shares or previous entitlements to take the resource; and

(b) on equivalent terms and in proportion to each existing holder's allocation of resource shares or previous entitlements.

25. Content of ARUPs

(1) An ARUP must —

(a) identify the resource to which the ARUP relates; and

(b) identify the ARMS that the ARUP is to implement; and

(c) set out the objectives to be achieved by the ARUP; and

(d) identify the activities regulated under the ARUP; and

(e) identify the class or classes of persons that may undertake the activities regulated under the ARUP; and

(f) specify the type of authorisation (if any) required to undertake activities regulated under the ARUP; and

(g) specify the form and the minimum and maximum amounts of surety (if any) that may be required to be provided for an authorisation to undertake activities regulated under the ARUP; and

(h) specify the number of resource shares (if any) in the aquatic resource available under the ARUP; and

(i) set out the method for allocating any resource shares available under the ARUP at the commencement of the ARUP; and

(j) set out any restrictions in relation to persons who are eligible to be holders of resource shares available under the ARUP; and

(k) set out procedures for monitoring the quantity of the resource that is taken in a fishing period; and

(l) set out any conditions that are to apply in respect of the transfer of catch entitlement for the resource; and

(m) set out any circumstances in which the CEO may, by notice published in the *Gazette*, modify provisions in the ARUP in order to ensure that the objectives to be achieved by the ARUP are achieved.

(2) An ARUP may include any provision that, in the Minister's opinion, is necessary for —

(a) the protection or management of the resource; or

(b) the protection of the aquatic environment, other aquatic resources, aquatic mammals, aquatic reptiles, aquatic birds and amphibians from activities related to the resource.

(3) The objectives to be achieved by an ARUP are to be consistent with, but not limited to, the main objective of the ARMS that the ARUP is to implement.

(4) For the purposes of sub-sections (1)(e) and (h), a person must not sell an aquatic organism unless:

(a) the person is a holder of a resource share in the aquatic resource from which the aquatic organism is taken;

(b) the organism is taken by way of commercial fishing of the resource; and

(b) the organism is part of the catch entitlement of the person.

(5) For the purposes of subsection (1)(i), the resource shares allocated in an ARUP for the purpose of recreational fishing shall be:

(a) allocated to a body that, in the Minister's opinion, is a peak representative body for recreational fishers of the aquatic resource to which the ARUP relates;

(b) held on trust by that peak representative body for all recreational fishers of the aquatic resource to which the ARUP relates; and

(c) subject to section 36, capable of transfer by the peak representative body to another person.

26. Method for allocating shares under ARUP

(1) In making an ARUP that sets out a method for allocating resource shares the Minister must have regard to the following —

(a) the interests of persons who have a history of involvement in taking the resource;

(b) the interests of persons who have entitlements to take the resource under this Act immediately before the commencement of the ARUP;

(c) any option granted under section 42(2) in respect of the resource or a component of the resource.

(2) ~~A~~ The method for allocating resource shares set out in an ARUP ~~may include, but is not limited to~~must —

(a) first provide for allocation based on converting previous entitlement to take the resource to a specified share entitlement; ~~or~~and

(b) then provide for allocation based on converting options granted under section 42(2) to a specified share entitlement; ~~or~~and

(c) to the extent there remains unallocated resource shares, those shares may then be allocated

~~(c) grant by the CEO on application, including payment of an application fee if applicable, and on the basis of specified criteria; or~~

~~(d)~~ by sale by public tender or auction.

(3) An ARUP that sets out a method for allocating resource shares other than by sale by public tender or auction must provide —

(a) that a decision not to allocate a resource share is a reviewable decision for the purposes of sections 146 and 147; and

(b) that a person who is affected by a decision about allocation of a resource share is an affected person for the purposes of those sections.

34. Allocation of resource shares

(1) When an ARUP comes into operation any resource shares in an aquatic resource available under the ARUP vest in the Minister.

(2) The Minister must, as soon as is practicable after an ARUP comes into operation, allocate the resource shares in accordance with the method set out in the ARUP.

(3) A person to whom a resource share is allocated may request the CEO to register the person as the holder of the resource share.

(4) A request must —

(a) be in an approved form; and

(b) be accompanied by the fee (if any) that is set out in the relevant ARUP or the regulations.

(5) On receipt of a request under subsection (3) the CEO must register the person as the holder of the resource share.

(6) A resource share must not be allocated to the State or an agent of the State.

35. Nature of resource shares

(1) Subject to section 37, a person who is the holder of a resource share in an aquatic resource at the beginning of a fishing period for the aquatic resource is entitled to be registered as the holder of the allocated catch for the share for that fishing period.

(2) A resource share —

(a) is transferrable as provided by this Act; and

(b) is capable of devolution by will or by operation of law.

(3) In accordance with the *Personal Property Securities Act 2009* (Commonwealth) section 10 in paragraph (b) of the definition of ***personal property***, a resource share is declared not to be personal property for the purposes of that Act.

(4) A resource share allocated to a person based on converting the person's previous entitlement in relation to a managed fishery that is declared a managed aquatic resource is taken to be a replacement and continuation of the previous entitlement.

36. Transfer of resource shares

(1) The holder of a resource share in an aquatic resource may, in accordance with the relevant ARUP or the regulations, request the CEO to transfer the share to another person (the ***recipient***).

(2) On receipt of a request under subsection (1) the CEO must transfer the share by registering the recipient as the holder of the resource share unless subsection (3) applies.

(3) The CEO must not transfer a resource share if —

(a) a fee or fine payable by the holder of the share under this Act is outstanding; or

(b) the share is nominated as surety for an authorisation; or

(c) the recipient is a person who is not eligible under the relevant ARUP to hold the share; or

(d) the CEO has, under section 156, given details of the request to a security holder unless —

(i) 21 days has expired from the day on which the details were given; or

(ii) the CEO has the written consent of the holder of the share and the security holder to do so~~.~~; or

(e) the recipient is the State or an agent of the State.

38. Transfer of catch entitlement

(1) A person who is registered as the holder of catch entitlement may request the CEO to transfer to another person (the ***recipient***) part or all of the catch entitlement.

(2) The request must be made in an approved manner and form.

(3) Following the receipt of a request, the CEO must register the recipient as the holder of catch entitlement up to the amount specified in the request —

(a) in accordance with the regulations; and

(b) subject to any conditions set out in the ARUP under which the catch entitlement is allocated.

(4) A person who makes a request referred to in subsection (1) may withdraw the request to the extent that the recipient has not been registered as the holder of an amount of catch entitlement specified in the request —

(a) in accordance with the regulations; and

(b) subject to any conditions in respect of the withdrawal of a request to transfer the catch entitlement set out in the ARUP under which catch entitlement is allocated.

(5) The recipient must not be the State, or an agent of the State.

36A Cancellation or reduction of resource shares

(1) Subject to subsection (2), a resource share in an aquatic resource may only be cancelled and a catch entitlement may only be reduced, by way of a scheme within the meaning of Part 3 or Part 4 of the *Fisheries Adjustment Schemes Act 1987*.

(2) Subsection (1) does not apply where a resource share in an aquatic resource is to be cancelled under section 134(1) or 208(1).

52. Application for grant, renewal, variation or transfer of managed fishery licence or entitlement

(1) Subject to the provisions of this Act, ~~A~~a person, other than the State or an agent of the State, may apply to the CEO for —

~~(a) a managed fishery licence to undertake a fishing activity in a managed fishery; or~~

(a~~b~~) the renewal of a managed fishery licence; or

(b~~e~~) the variation of a managed fishery licence; or

(~~d~~c) the transfer of a managed fishery licence to another person; or

(~~e~~d) the transfer of part of the entitlement under a managed fishery licence to another managed fishery licence; or

(~~f~~e) the transfer of the whole or part of an entitlement under a managed fishery licence to another managed fishery licence for a limited period; or

(f) the transfer of the whole or part of an entitlement under a managed fishery licence which has not been renewed, has been cancelled or has been forfeited under this Act to another managed fishery licence.

(2) An application must —

(a) be made in an approved form; and

(b) be accompanied by the fee (if any) prescribed or specified in the management plan; and

(c) be accompanied by any information that the CEO reasonably requires for a proper consideration of the application.

(3) The State, or an agent of the State, cannot apply to the CEO for —

(a) a managed fishery licence to undertake a fishing activity in a managed fishery; or

(b) the renewal of a managed fishery licence; or

(c) the variation of a managed fishery licence; or

(d) the transfer of a managed fishery licence to another person; or

(e) the transfer of part of the entitlement under a managed fishery licence to another managed fishery licence; or

(f) the transfer of the whole or part of an entitlement under a managed fishery licence to another managed fishery licence for a limited period; or

(g) the transfer of the whole or part of an entitlement under a managed fishery licence which has not been renewed, has been cancelled or has been forfeited under this Act to another managed fishery licence.

54. Grant of managed fishery licence

(1) The CEO may grant a managed fishery licence to an applicant if —

(a) the CEO is satisfied that the applicant meets any criteria for the grant of the managed fishery licence specified in the management plan; and

(b) the applicant is selected in accordance with any procedure for determining which persons are to be granted a managed fishery licence specified in the management plan.

(1A) The CEO must not grant a managed fishery licence to an applicant if the applicant is the State or an agent of the State.

(2) In accordance with the *Personal Property Securities Act 2009* (Commonwealth) section 10 in paragraph (d) of the definition of ***licence***, a managed fishery licence is declared not to be personal property for the purposes of that Act.

56. Effect of managed fishery licence

(1) Subject to this Act, the holder of a managed fishery licence, or a person acting on behalf of the holder, may undertake fishing or any fishing activity of a specified class in:

(a) a specified managed fishery; or

(b) a zone within a managed fishery.

(2) The entitlement the holder has under a managed fishery licence may be limited by reference to one or more of the following —

(a) a quantity of aquatic organisms that may be taken;

(b) a quantity of fishing gear that may be used or carried;

(c) the type, size or number of boats or other vehicles that may be used;

(d) a number of persons that may operate;

(e) an area of land or waters;

(f) a period of time;

(g) any other factor.

(3) For the purposes of subsection (2):

(a) the extent of an entitlement under a managed fishery licence may be expressed in terms of units of entitlement defined in the management plan, including in

terms of units of entitlement in respect of a particular zone in the management plan; and

(b) only a holder of a commercial fishing licence may undertake activities for commercial purposes in a managed fishery.

60. Transfer of managed fishery licence and entitlement

(1) On an application referred to in section 52(1)(d), the CEO must transfer the managed fishery licence unless the CEO is satisfied that —

(a) the proposed transferee —

(i) is not a fit and proper person to hold the managed fishery licence; or

(ii) does not satisfy guidelines under section 255 relating to foreign persons holding, controlling or having an interest in a managed fishery licence; or

(iii) is the State or an agent of the State;

or

(b) the applicant, or a person acting for or on behalf of the applicant, may be liable to prosecution for an offence that is prescribed for the purposes of section 209; or

(c) the managed fishery licence is suspended; or

(d) the transfer is prohibited on prescribed grounds or grounds specified in the management plan.

(2) On an application referred to in section 52(1)(e), the CEO must transfer the part of the entitlement unless the CEO is satisfied that —

(a) the applicant, or a person acting for or on behalf of the applicant may be liable to prosecution for, an offence that is prescribed for the purposes of section 209; or

(b) the entitlement to be transferred is under a managed fishery licence —

(i) that is suspended; or

(ii) in respect of which a conviction is recorded under section 209;

(c) the transfer is prohibited on prescribed grounds or grounds specified in the management plan;

(d) the proposed transferee is the State or an agent of the State.

(3) On an application referred to in section 52(1)(f), the CEO may transfer the whole or part of an entitlement under the managed fishery licence for a limited period if the management plan or the regulations authorise the transfer.

(4) If, under section 156, the CEO gives written details of an application referred to in this section to a security holder the CEO must not transfer the managed fishery licence or the part of the entitlement unless —

(a) 21 days has expired from the day on which the details were given; or

(b) the CEO has the written consent of the holder of the managed fishery licence and the security holder to do so.

134. Suspension, non-renewal and cancellation of authorisations

(1) The CEO may, by notice in writing given to the holder of an authorisation, suspend for any period, refuse to renew or cancel the authorisation —

(a) if the holder, or a person acting for or on behalf of the holder, has been convicted of an offence against —

(i) this Act; or

(ii) a written law other than this Act if the offence relates to the fishing, aquaculture, fishing tour or aquatic eco-tourism industries; or

(iii) a law of the Commonwealth, or of another State or a Territory, relating to the management or regulation of aquatic resources;

or

(b) if a condition of the authorisation has been or is being contravened; or

(c) if the CEO is satisfied that the holder is no longer a fit and proper person to hold the authorisation; or

(d) if the authorisation was obtained by fraud or misrepresentation; or

(e) if the holder has —

(i) failed to keep any record, or to submit or lodge any return, that is required to be kept or submitted or lodged under this Act; or

(ii) made an entry or statement in such a record or return that is false or misleading in a material particular;

or

(f) if the holder does not satisfy guidelines under section 255 relating to foreign persons holding, controlling or having an interest in an authorisation; or

~~(g) if any fee, charge or levy payable in respect of the authorisation, or any other amount payable under this Act by the holder, has not been paid when it becomes due; or~~

(g~~h~~) on any other ground specified in a relevant management plan or ARUP.

(2) The fact that an authorisation has not been cancelled or suspended under section 208 or 209 is not to be taken to prevent the CEO from cancelling, suspending or refusing to renew the authorisation under this section.

(3) The CEO may, by notice in writing given to the holder of an authorisation, suspend the authorisation for any period the CEO considers necessary for the purpose of resolving any dispute with the holder if any fee, charge or levy payable in respect of the authorisation, or any other amount payable under this Act by the holder, has not been paid when it becomes due.

Fisheries Adjustment Schemes Act 1987

14E. Selecting authorisations to be cancelled or entitlements to be reduced

(1A) This section does not apply to a scheme under which all the authorisations relating to the fishery or fisheries, or resource shares relating to an aquatic resource, are to be cancelled.

(1) The authorisations or resource shares that are to be cancelled or the entitlements or resource shares that are to be reduced under a scheme may be selected in such manner as the Minister thinks fit, provided any cancellation or reduction is effected proportionately among holders of authorisations or entitlements or resource shares.

~~(2) Without limiting subsection (1), the authorisations or entitlements may be selected by ballot or lottery.~~

~~(3) If the authorisations or entitlements are to be selected by ballot or lottery —~~

~~(a) the ballot or lottery must not be held before the Minister has complied with section 14C; and~~

~~(b) the notice referred to in section 14D(1) must specify the time and the place at which it is proposed to hold the ballot or lottery.~~

14G. Compensation for loss suffered for affected person

(1) An affected person is entitled to fair compensation for any loss suffered by the person as a result of the cancellation of an authorisation or resource share, or the reduction of an entitlement or resource share, under a scheme.

(2) The value of an authorisation or resource share that is to be cancelled, or part of an entitlement or resource share that is to be reduced, under a scheme, is to be assessed as the market value of the authorisation or entitlement or resource share.

(3) The market value referred to in subsection (2) is to be assessed as the market value immediately before the day on which a notice was published under section 14D(1)(a).

Appendix 3B: Concepts to effect statutory compensation regime (Recommendation 8)

Fisheries Adjustment Schemes Act 1987

Purpose

2. The purposes of the proposed amendments are to modify the framework of the *Fisheries Adjustment Schemes Act 1987* to:

   2.1 facilitate a structured approach to the assessment and payment of compensation to holders of authorisations or entitlements in respect of a managed fishery or managed aquatic resource; and

   2.2 provide additional sources of funding for compensation, namely private actors benefiting from activity which disturbs the enjoyment of rights associated with authorisations or entitlements in respect of a managed fishery or managed aquatic resource.

Concept 1: When an adjustment scheme should be considered

3. Adjustment schemes should be required where a reduction in total allowable catch or in the total number of entitlements, authorisations, or resource shares (whether temporary or permanent) is required for a reason other than the ecological sustainability of the resource. Examples of when a scheme should be considered include when a reduction is required or results from other activity in the area or in nearby areas conducted under or permitted by a law of the State, or when the reduction is required for the purpose of re-allocation between sectors.

Concept 2a: Voluntary adjustment schemes by collective negotiation

4. When a scheme is first proposed, the Minister or Committee is to give notice to the peak representative body for holders of interests in the managed fishery or aquatic resource the subject of the proposed scheme at the same time as the Minister publishing a s. 10B notice in the *Gazette*.

5. The peak representative body is then to consult with its members with a view to agreeing a collective proposal for a proportionate reduction to be effected across all interest holders in the aquatic resource and the amount of compensation sought to be paid to the holders.

6. The proposal is then to be negotiated by the Committee (within the bounds of concept 4) and the representative body, and if a scheme is agreed, given effect in the same manner as provided by s. 10C of the Act.

Concept 2b: Voluntary adjustment schemes by private tender (reverse auction)

7. If there is no representative body for the holders of interests in the managed fishery or aquatic resource, or if a scheme cannot be agreed, the scheme should be effected by way of private tender or "reverse auction", as contemplated by the current form of s. 10C of the Act.

Concept 3: Responsibility to pay compensation is with the State, unless a private actor is identifiable

8. Where the activity that has created the need for a reduction has been undertaken by a private actor, or the proposed transferee of re-allocated rights is a private actor (which, if

the recommendations are accepted, will be the case in all circumstances involving re-allocation by transfer rather than cancellation), the private actor should be primarily responsible for the payment of the compensation, either by way of direct payment, or by way of contribution in to the Fisheries Adjustment Schemes Trust Account. Alternatively, the State should be primarily responsible for payment (particularly where harmful or disruptive activity is authorised), and then able to recover from the private actor.

9. If compensation is to be paid by the private actor, the private actor should have an opportunity to be consulted by the committee on the question of the appropriate amount of compensation payable.

10. For the purpose of determining whether a private actor is responsible for a disturbance, there ought to be rebuttable presumptions:

10.1 that a disturbance has occurred where the TAC for an aquatic resource is reduced by an identifiable proportion within a certain period of time;

10.2 that an activity within a certain proximity of the fishery is the cause of that disturbance.

Where the proximity criterion to engage the presumption is not met, the Minister or a holder of an entitlement in the affected managed fishery or aquatic resource may apply to the State Administrative Tribunal or Supreme Court of Western Australia for determination of any question as to whether the disturbance was caused by the private actor.

11. If the activity is otherwise authorised by the State, the State should be responsible for ensuring the private actor is committed to paying into the Trust Account or providing security for such payment, and the State is otherwise to be responsible for any shortfall owing under a scheme.

Concept 4: Considerations for the Minister or Committee when determining whether an offer is an appropriate amount of compensation

12. In determining the amount of compensation to be paid to participants in a scheme, the Committee must have regard to:

12.1 as a principal consideration, the TAC prior to the undertaking of the activity or transfer, and its market value;

12.2 if the reduction is permanent:

(a) the TAC, or the projected TAC, after the undertaking of the activity or transfer;

(b) the market value of the entitlement to take the proportion of the TAC associated with the interest to suspended, surrendered or transferred to give effect to the scheme;

12.3 if the reduction is temporary:

(a) the TAC, or the projected TAC, during the period of the disturbance;

(b) the market value of a lease of an entitlement equivalent to the reduction in the TAC during the period of the activity.

13. If the amount of compensation requested by the holders of interests in the managed fishery or aquatic resource is less than the amount referred to in 12.2(b) or 12.3(b) above, the Committee must accept the offer.

Statutory Act of Grace Regime

Purpose

14. The purpose of a statutory act of grace regime is to permit holders of entitlements in a managed fishery or aquatic resource to seek ex gratia compensatory payments from the Minister in circumstances where there has been a reduction in the TAC or the value of the entitlement, but the holders have been unable to access compensation by way of an adjustment scheme.

15. A general purpose statutory act of grace payment regime exists in Western Australia in s 80 of the *Financial Management Act 2006*, with cognate provisions appearing in the *Government Sector Finance Act 2018* (NSW) and the *Financial Management Act 1996* (ACT).

Considerations

16. The relevant consideration for the payment should be special circumstances or specific circumstances prescribed by regulation. The identification of special circumstances in policies adopted in other jurisdictions includes consideration of the appropriateness of making a payment of a relevant amount, in light of:[74]

    16.1 the role of State in causing an unintended and inequitable result to a person such that it considers it has a moral responsibility to address the circumstances of the individual

    16.2 whether a legislative or policy decision has had an unintended, anomalous, inequitable or otherwise unacceptable impact on an individual or organisation's circumstances, and those circumstances were:

        (a) specific to the individual or organisation;

        (b) outside the parameters of events for which the individual or organisation was responsible or had the capacity to adequately control; or

        (c) consistent with what could be considered to be the broad intention of relevant legislation, and not merely the intended effect of legislation; and

    16.3 any other matter that is rationally connected to the circumstances being considered.

17. Those considerations should be made specific to the cause, in particular State involvement, of a reduction in the TAC or value of entitlements in relation to a managed fishery or aquatic resource.

Specific appropriation

18. There should be, as is the case in the ACT regime (but not the NSW regime), a specific appropriation for the purpose of making the payments, to be used in conjunction with any existing funds available to the Minister.

Environmental Protection Regulation

Purpose

19. The purpose of this proposal is to require that activities authorised by government are made conditional upon the giving of financial assurance or an undertaking to pay compensation

---

[74] See, e.g. *Act of Grace Payments,* ACT Government Factsheet <https://apps.treasury.act.gov.au/__data/assets/pdf_file/0008/1324997/Act-of-Grace-Payments-Factsheet.pdf>

for adversely affected aquatic resources, and that the requirement is sought and administered through the approval mechanism in the *Environmental Protection Act 1986,* and recognising that many activities with the potential to adversely affect a fishery may be undertaken in Commonwealth waters, pursuant to the *Environment Protection and Biodiversity Conservation Act 1999*.

State regime

20. The State regime already provides for the giving of financial assurances. The extension required is to amend s. 86E to permit the CEO to call upon the financial assurances for the purpose of paying compensation to the holders of interests in a managed fishery or managed aquatic resource who suffer loss or damage as a result of the activity the subject of the financial assurance. Given the structure of s. 86E, this may require the insertion of a new provision dealing with the CEO's responsibility to compensate the holders of interests in a managed fishery or managed aquatic resource for loss and damage caused by an authorised activity, to make clear that such payments are an intended and permissible application of the financial assurance.

Commonwealth regime

21. Insert into Chapter 4 of the *Environment Protection and Biodiversity Conservation Act 1999* a requirement for the Minister to consult in relation to, and in deciding whether or not to approve the taking of an action and what conditions to attach to the approval, to consider, the impact of the activity on a managed fishery or managed aquatic resource and the commercial interests of holders of entitlements and authorisations in respect of the fishery or managed aquatic resource.

22. An express requirement for the Minister to consider a condition requiring security for the payment of any compensation to the holders of entitlements in a managed fishery or managed aquatic resource is also necessary, as the current power to require security is limited to the purposes of Pt 3 and s 499, which do not capture the commercial nature of the purpose of security for compensation to users of the aquatic resource.

Appendix 3C: Draft language of Ministerial commitment (Recommendation 5(d))

To be addressed to the CEO of the Department of Fisheries

Statement of Expectation

In the context of ongoing consultation with the fishing industry concerning the transition from the *Fish Resources Management Act* to the *Aquatic Resources Management Act 2016*, in relation to the establishment of aquatic resource management strategies (**ARMS**) and aquatic resource use plans (**ARUP**s), I acknowledge the importance of ensuring that the transition to ARMS and ARUPs is the subject of effective engagement and consultation with commercial and recreational fishers alike.

As the Minister responsible for the Department of Fisheries and the administration of the *Aquatic Resources Management Act 2016*, I expect that, notwithstanding the consultation period expressed in the Act, the CEO of the Department of Fisheries will not proceed with:

1. the further development of an ARMS; or
2. the implementation of an ARUP,

affecting a commercial fishing sector until such time as that sector has been adequately consulted in accordance with ss 18 and 19 of the *Aquatic Resources Management Act 2016* and has expressed support for the transition of the aquatic resource to a managed aquatic resource, the ARMS and the ARUP, as the case may be.