

## ***FISH RESOURCES MANAGEMENT ACT 1994 (FRMA) AMENDMENTS***

### **WAFIC Preliminary Submission**

21 July 2006

#### **Background**

The Minister for Fisheries has appointed an advisory committee to inquire into the FRMA. The membership comprises:

Matt Benson (Chairman)

Max Ball

John Newby

Heather Brayford

Rae Burrows (Executive Officer)

The Terms of Reference for the Inquiry are:

1. to inquire into and report on the effectiveness of the FRMA in conserving, developing and sharing the fish resources of the state for the benefit of present and future generations;
2. to inquire into and report on the effectiveness of the Act in the protection of fish habitats and aquatic biodiversity; and
3. in the context of the Act, report on any other matters of significance arising from the review process

The committee is required to report to the Minister by the end of November 2006.

The committee has called for submissions to the inquiry by 21 July 2006. The committee has indicated that on the basis of these submissions and other relevant material it will issue a draft report by August/September for public submission. This report will form the basis for regional consultation on the inquiry. Following consideration of feedback from the consultative phase the committee will finalise its report to the Minister. What further processes the Minister puts in place following receipt of the committee's report have not yet been determined.

It is worth noting that in 1994 the FRMA Bill was released by the Minister as a green paper (exposure draft) and submissions called for prior to the Bill being finalised and debated in parliament. This process was put in place due to strong public interest in the legislation and thus a desire to ensure that any contentious draft provisions were debated and resolved, in so far as possible, prior to the Bill's passage through parliament.

#### **Department of Fisheries Discussion paper**

The Department of Fisheries has issued a Discussion Paper on proposed amendments to the FRMA (Paper # 208). This contains in tabular form the relevant Act provision, discussion on the issue relevant to the provision and proposed change to the provision. Most of these have been discussed with industry sector bodies previously.

## **WAFIC Position**

WAFIC has not yet carried out a detailed analysis of the proposed amendments to the Act. We will be undertaking this work over the coming months and during the consultative phase of the inquiry. This will allow full consideration of appropriate amendments based on issues identified by industry. In addition we will be proposing amendments to the Act that were not identified in the Department of Fisheries paper.

For the purpose of this submission we have confined our comments to selected specific matters and general matters that we believe the inquiry should examine and highlight in its discussion paper in order to draw out both industry and other stakeholder's views. A difficulty in considering the context and merits of the proposed amendments is the lack of a clear policy framework which the Act then implements. This was identified as a deficiency when the Act was drafted in 1994 and this deficiency remains. For example it is clear from some of the amendments proposed particularly for recreational fishing that there is an implicit policy position that underpins these amendments. It would be beneficial for consideration of these if this position was made explicit.

We suggest that the consideration of the matter of appropriate amendments to the FRMA should begin by examining broad conceptual matters (including policies) and once positions are determined to examine and determine the detail of amendments that are required to put in effect the desired outcomes.

### Statutory schemes that provide for a secure investment climate

This matter has been subject to much discussion over a lengthy period. Fisheries Management Paper #195 *Nature and Extent of Rights to Fish in Western Australia* examines this matter. The paper was initiated as a result of the Labor Party's 2001 election platform in which the Party undertook to "*continue discussions with the industry aimed at clarifying the legal status of property rights inherent in commercial fishing licenses*" (p7 Geoff Gallop and Labor: A Better Government).

This commitment was further bolstered in the response by the Labor Party to WAFIC's 2001 Election Questionnaire which requested clarification of the Party's position on Resource Security: *Labor recognises that this is a legitimate claim by the fishing industry. We are not prepared to give a specific commitment that we will introduce legislation with this effect. We are prepared to enter discussions with the industry in good faith, with a view to constructing draft legislation for public comment provided that this remains consistent with our broader policy on Integrated Fisheries Management.*"

At the 2005 State Election the Labor Party gave the following commitment:

*"Labor is committed to clarifying and securing access rights. While this is not a simple process, we have made progress on the issues that need to be resolved to fulfil this commitment. Significantly, the Government has now fulfilled its election commitment to clarify the legal status of property rights with the finalisation of the Department of Fisheries Report titled "Nature and Extent of Rights to Fish in Western Australia"*"

From Report # 195 (p.16) it is recognised that:

*“In the absence of legislation, the common law position will apply. This may be seen as the “minimum” extent to which legislation can create rights. Legislation modifies the “non-legislative” (i.e. common law) position and, in this way, is able to introduce differentiation between the rights of different user groups. The more complete a statute-based regime is (in terms of creating rights of permanency, transferability, exclusivity), the greater the extent legislative rights will have been created and the greater the “proprietary” nature of those rights.”*

It is noted that the Proposed Pearling Management Bill (Discussion Draft #11) includes in the objects:

*3 (3) In addition, the Minister in the administration of this Act and the Executive Director in the performance of his functions under this Act are to have regard to the following secondary objectives-*

*(b) ensuring that persons authorised to carry out pearling and pearl farming have secure rights in the fishery”*

The Discussion Draft Bill then goes on to specify provisions that support this object.

We are advised by the Pearl Producers Association that the Minister for Fisheries has recently endorsed the position that pearling activities should be afforded security in order to attract investment.

It is WAFIC’s view that the proposed amendments to the FRMA presents an opportunity to address this matter and honour ALP election undertakings. It is suggested that the objects of the Act contain a provision similar to the Discussion Draft Pearling Bill that specifies that:

*The Minister in the administration of this Act and the Executive Director in the performance of his functions under this Act are to have regard to the following secondary objectives-*

*ensuring that persons authorised to carry out fishing pursuant to a managed fishery<sup>1</sup> management plan have secure rights in the fishery”*

It is suggested that the Inquiry request clarification from the Minister for Fisheries in regard whether he would like the amendments to the Act to contain similar provisions that he has approved for the Pearling Management Bill. If approval is provided WAFIC would be pleased to offer a suite of amendments to provisions in the Act in support of this object e.g. renewal of licenses, transfer of licences, suspension versus cancellation of licenses etc. This approach can be characterised as a “bundle of rights” where each provision is one element of the bundle which collectively define the proprietary nature of the fishing right.

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<sup>1</sup> This recognises the hierarchy of maturity of fisheries which was the intent behind the 3 categories of management plans in the 1994 Act: Developmental, Interim Managed and Managed. Managed fisheries represent fully mature fisheries and to ensure optimum economic performance appropriate provisions should be incorporated into the Act to allow financial institutions to have confidence in the asset nature of licenses issued pursuant to Managed Fisheries Management Plans. An object in the Act would make this policy position clear.

## Aims, Objectives and Performance Measures in Management Plans

This again is a matter that has been under discussion for a number of years. The proposition put simply is that management plans under Part 6 of the FRMA should include provisions that define the aims and objectives for the relevant fishery and include measures to achieve aims and objectives. The case for including these matters was recommended by the Auditor General in his 1999 review of administration of fisheries in WA. Specifically the Auditor General recommended that *“Fisheries WA should augment management plans with statements of aims and objectives, performance indicators and consultative arrangements.”*

At the 2001 State Election the ALP gave an undertaking that *“Labor will augment management plans for fisheries by including statements of aims and objectives, performance indicators and consultative arrangements, consistent with recommendations made in the Auditor General’s report “Fish for the Future””*.

Following the election there followed discussion with the Minister and the Department about implementing this recommendation. Subsequently the Minister determined that this requirement would be picked up through the use of Ministerial Policy Guidelines pursuant to Section 246 of the FRMA. Unfortunately there has been little progress on this matter. WAFIC is aware that the South Australian Fisheries Management Bill 2005 contains the requirement, in the relevant provisions on management plans that the plans must set out the management objectives and strategies for achieving those objectives. WAFIC again puts the view that it is in the public interest that the purpose of administration of the State’s fisheries should be documented in the plan and that accountability for performance in achieving that purpose is readily discernable. WAFIC would be happy to provide appropriate amendments in relation to this matter.

## Customary Fishing

This matter needs to be addressed in the amendments to the Act. We note that in the proposed Pearling Bill that matter is addressed through not requiring an aboriginal person to hold a pearling activity wild stock licence where the person takes pearl oysters by fishing in accordance with a determination of native title made under the *Native Title (NT) Act 1993*.

WAFIC also notes that the South Australian Bill contains provisions that permit and define indigenous cultural fishing management plans. The plans are limited to indigenous people defined as a native title group under section 24CD of the NT Act who is a party to an Indigenous Land Use Agreement registered under the NT Act.

Thus in both cases recognition of customary fishing is through the Commonwealth’s NT Act. The current position under State legislation is that aboriginal people are exempt from holding a recreational fishing licence but are subject to bag and size limits and gear restrictions that apply to recreational fishers.

It is our preference that the South Australian approach is adopted as specified in their Bill. It is particularly noted that this approach incorporates negotiated outcomes and a proper examination of what customary fishing entails in any area. We also note that at law there have been 4 determinations of native title in the north of the State that recognise and protect customary usage of marine resources.

This is a complex matter and further complicated by the lack of a clear position by the WA Government on customary fishing.

We suggest that this matter is documented in the committee's discussion paper to draw comment and further discussion.

### Amendments to *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (FRIC)

At the 2005 State Election the ALP gave the following undertaking: *The legislative improvements that the Government will introduce to ensure that the commercial fishing interests in the Marine Planning process are further protected will be to introduce amendments to the Fishing and Related Industries Compensation (Marine Reserves) Act 1997 to provide compensation for commercial fishers excluded from areas within Marine Management Areas and Fish Habitat Protection Areas.*"

WAFIC urges that this commitment is honoured by the inquiry recommending appropriate amendments to the FRIC Act.

### Advisory Committees

The proposal (Ref. # 9) by the Department of Fisheries to collapse Part 4 into one division so no individual Advisory Committee is identified by name in the Act is a matter of some interest to the fishing industry, particular lobster. It is suggested that this proposal is included in the committee's discussion paper including documenting the costs and benefits.

### Protected Fish

The proposal (Ref# 11) makes reference to the need to provide the ability to declare protected fish for recreational fishers eg recreational fishers may want different size limits to commercial fishers. This proposal needs to be broadened to allow commercial fishers to take different size limits. This will enable flexibility in setting size limits for the different sectors depending upon particular circumstances eg snapper in Wilson's Inlet.

### Integrated Fisheries Management (IFM)

Proposal # 17 suggests the inclusion under Part 6 of the Act of the principles that underpin IFM. These principles are confined to the 10 guiding principles for management. WAFIC suggests that an important component of the IFM principles adopted by Government is the principle in regard to compensation and that this should also be included in the amended Act. This principle is a key matter in the fishing industry's support for IFM.

The principle states:

*Where a reallocation of resources from one user group to another results in demonstrable financial loss to a licensed fisherman, in principle there should be a consideration of compensation. Compensation may take various forms and desirably does not necessarily involve the payment of money.*

The principle goes on to state that:

*The Department of fisheries will review the scope of the Fisheries Adjustment Scheme Act to ensure it contains sufficient flexibility to encompass these principles under an integrated management system.*

WAFIC notes that this review of the FAS Act has not been included in the proposed amendments put by the Department. WAFIC would welcome the review examining whether the scope of the FAS Act encompasses this matter.

#### Harvesting from the Wild of Brood Stock or Spat

The proposal (Ref # 40) to include additional amendments to require a person to hold an authorisation to collect from the wild, brood stock or spat raises the issue of collection from the wild of species that are already subject to a management plan under Part 6 of the Act. This issue has been raised recently in regard to a proposal to collect lobster puerulus for grow out with accompanying concerns from the wild fishery on the impact of large scale collection of puerulus on recruitment to the fishery and sustainable harvest levels. Given this concern there would be value in the inquiry examining the desirability of including this type of activity within the constraints of management plans (under Part 6) for aquaculture species that require collection of wild stock. That is for those species that are already subject to a management plan the circumstances under which wild stock can be harvested for aquaculture should be specified in the plan. This will enable proper consideration and evaluation of these proposals in the context of the commercial use of these species.

#### Part 17 – Legal Proceedings

The reversal of the onus of proof under Sections 202 and 203 make either the master or the authorisation holder responsible for offences that may have been committed by others. It is noted that it is a defence in the proceedings against either the master or the authorisation holder of a boat for an offence against this Act for the master or authorisation holder to prove that:

- proper instructions were issued and reasonable precautions were put in place to ensure compliance with the Act;
- the offence was committed by the principle offender without the master's or authorisation holder's knowledge; and
- the master could not by the exercise of reasonable diligence have prevented the commission of the offence.

The problem arises under the circumstance of a master or authorisation holder successfully putting forward a defence (as specified above) but still being subject to sanction due to the effect of Section 224 of the Act. That is Section 224 requires the Executive Director, in the event of a conviction of a prescribed offence, to notify the Registrar of the conviction and the Registrar must record the conviction on the register in respect of the authorisation. In the event of the Registrar recording 3 or more convictions in any 10 year period the Executive Director must cancel the authorisation. Thus a master or authorisation holder, despite successfully mounting a defence against an offence against the Act, can be penalised through a black mark

being recorded on the authorisation due to the mandatory effect of Section 224 for prescribed offences.

Advice to WAFIC indicates that at least on several occasions this circumstance has arisen. WAFIC notes that this approach is not proposed under the Discussion Draft Pearling Management Bill. WAFIC will consider this matter further and provide advice on an alternative approach.

#### Designated Fishing Zones (DFZ)

WAFIC is aware of difficulties being experienced by Fisheries Officers in the interpretation and practical effect of DFZ's. At this stage WAFIC is not aware of the precise details of these difficulties. WAFIC will make further submission on this matter.

#### Other Matters

WAFIC will review the proposed amendments not mentioned above and make further comment.