

Proposed Amendments to the *Fish Resources Management Act 1994 (FRMA)*

Draft Report of the Ministerial Review Committee

WAFIC submission, February 2007

BACKGROUND

In July 2006 WAFIC made submission to Department of Fisheries Discussion paper #208 on proposed amendments to the *FRMA*. In October the Ministerial Review Committee released its draft report and called for public submissions. It is noted that the Committee also held regional briefings in regard to its draft during December 2006 and early 2007.

WAFIC has reviewed the draft report. WAFIC believes that changes to the *FRMA* must not only address specific deficiencies that have arisen since its inception but must also look to the future of fisheries management

Accordingly WAFIC makes the following submission in regard to the proposed amendments:

SECURE RIGHTS

WAFIC made substantial submission in July 2006 in regard to secure rights. The basis for this submission focused on a number of commitments provide by Government since 2001. The submission is repeated below:

WAFIC submission (July 2006)

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 WAFIC’s view that the proposed amendments to the FRMA presents an opportunity to address this matter and honour ALP election undertakings.

Ministerial Review Committee-draft report (October 2006)

The Ministerial Committee in response to this submission advised that:

3.4 Secure rights

The commercial fishing industry has been requesting increased security of rights for some time in order to plan their business and provide comfort to financial investors, and to provide a mechanism for compensation when fishers’ rights are removed for purposes unrelated to sustainability.

This position is supported in the submissions from the WA Fishing Industry Council (WAFIC) and from the Western Rock Lobster Council (WRLC). Specifically, the submissions argue that the legislation should be amended by:

- a) the insertion of a secondary Object that specifically states that persons authorised to carry out fishing pursuant to a managed fishery management plan should have secure rights in the fishery; and
- b) the consideration of compensation for licensed fishermen who suffer a demonstrable financial loss from the reallocation of resources from one user group to another.

In relation to a), the Committee notes that the notion of “secure rights” is not elucidated within the WAFIC submission. One could argue that the current and proposed legislation provides a level of security and protection for fishers through rights of renewal for all licence holders (subject to them abiding by the rules), a new proposed provision clarifying the right to bequeath one’s authorisation, and through the FRMA Register which identifies all commercial licences, permits, security interests and convictions, and was set up to provide security and comfort to investors in the commercial fishing industry.

The Committee is not in a position, based on the information available, to comment on the scope and level of “secure rights” suggested by WAFIC and the WRLC. Accordingly, the Committee is unable at this time to support the new secondary Object proposed by these bodies.

In relation to b), the Committee notes that the State is not obliged to pay compensation to any person for any act by which the State acquires a person’s property, in the absence of legislation that provides to the contrary.

However, through custom and practice, where there has been a change to access to fish stocks for purposes other than sustainability, successive Governments have usually offered a form of compensation through the buy back of fishing authorisations. The Voluntary Fisheries Adjustment Scheme has been continued to support the reduction of commercial fishing effort. Recent amendments to the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* will provide for a further avenue for commercial fishers excluded from areas within Marine Management Areas and Fish Habitat Protection Areas to seek compensation¹.

Recommendation:

The Committee supports the proposed amended and expanded Objects of the FRMA (reference number 1) without the insertion of a secondary Object that specifically states that persons authorised to carry out fishing pursuant to a managed fishery management plan should have secure rights in the fishery (as proposed by WAFIC and WRLC).

WAFIC further submission

Introduction

WAFIC believes that past policy statements by the Government as identified in our July Submission combined with government policy relating to Integrated Fisheries Management and National Competition Policy commitments provide a sufficient basis for the Review Committee to examine this matter with a view to making firm recommendations to Government on amendments to the fisheries legislation that improve the property right nature of fishing authorisations issued pursuant to managed fisheries management plans.

Our submission in this regard is limited to authorisations issued subject to the highest level of managed fishery in Western Australia, those managed fisheries management plans, typically a long standing fishery where the resource is well researched and fully utilised. Rights of a more tentative nature are appropriate for experimental and developing fisheries, although WAFIC believes that participants in those fisheries

¹ **Correction:** WAFIC wishes to correct an error in the Committee’s statement. There have been no amendments recent or otherwise to the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* that would require that commercial fishers excluded from areas within Marine Management Areas and Fish Habitat Protection Areas are awarded compensation. The Government at the last election made a commitment to amend this Act to extend its coverage to these categories of conservation areas but to date WAFIC is not aware of progress towards meeting this objective.

should be provided with guidance as to how their rights may evolve over time to a more secure footing.

The Role of Property Rights

It should be stated up-front that ‘property’ is used in the modern legal context of a bundle of rights. It does not equate to what is sometime termed ‘freehold’ title. In a fishing context it relates generally to rights relating to access a fish resource and not ownership of the fish itself until capture. Rights have been extended over time that protect against other competing users and uses.

Current fisheries legislation acknowledges the need for its powers to be utilised to obtain optimum economic benefit from use of the State’s aquatic resources for the benefit of society.). Indeed the *FRM Act* current objects includes the object *f) To achieve the optimum economic, social and other benefits from use of aquatic resources*. Property rights are fundamental to the processes that people usually regard as economic development (Arnason, 2000). In addition secure property rights better align the incentives of commercial fishers with the interests of the State in long term sustainability of fish stocks. Western Australia has historically been a leader in a number of steps towards improving better defined fishing rights and rights based management. Even developed countries originally antipathetic to rights based management such as the US have recently changed their legislation to provide for better recognition and continuity of fishing rights (amendments to the *Magnusson Stephenson Act* December 2006).

For Western Australia the question that needs to be examined is how can we improve existing legislative provisions so that economic progress and efficiency can be further facilitated? It would be disappointing if a State which historically was a leader in this area were to effectively vacate the field. The Committee rightly points out that there are a bundle of provisions in the FRMA which combined with current Government policy provide for a degree of security for fishing rights. The FRMA, however, also gives very broad discretion to the Executive Director and Minister. Many of these rights accordingly rely more on historical practice than a firm legislative base. In metaphorical terms the twine tying the bundle together is very fragile.

Challenges for Western Australian in relation to commercial fisheries

Western Australia’s commercial fisheries face many challenges from increasing community scrutiny, application of ecosystem management and bio-diversity conservation initiatives, aquaculture competition (especially from imports) and a growing population base. Although the existing loose system of rights described by the Committee has generally served Western Australia these increased and new pressures require increasing level of sophistication in the industry with a need for industry to become even more highly economically efficient and innovative. Property rights are a powerful and necessary driver of innovation. Enabling those investing in time and money to improve fisheries to be assured that if successful they will reap the benefits. In addition effective durable and well designed fisheries rights more closely align those incentives with those of the community.

Characteristics of Property Rights (after Scott 2000 & Arnason 2000)

WAFIC has noted the Committee's comments that "the notion of 'secure rights' is not elucidated within the WAFIC submission" Accordingly we give specific examples in accordance with what is now the generally accepted framework for analysing and considering rights in a fisheries context.

As noted previously a property right consists of a collection of different characteristics. There are many distinguishable characteristics that make up a property right. According to Scott the most crucial property rights characteristics are:

1. security, or quality of title
2. exclusivity
3. permanence
4. transferability

The higher the quality of each of these characteristics the more "perfect" the property right².

Examination of Property Rights Characteristics (after Arnason, 2000) **and the Fish Resources Management Act 1994**

Security or quality of title

A property right may be challenged by other individuals, institutes or the government. Security here refers to the ability of the owner to withstand these challenges and maintain his property right.

The FRMA provisions in regard to the security of title of a managed fisheries authorisation are laid out in Part 6 Divisions 1-5. In regard to providing greater security the following provisions could be amended:

- Section 56- general contents: it is suggested that another provision is added to 56(1) to the effect that a management plan must set out the management objectives and broad strategic settings for achieving those objectives. This is consistent with fisheries legislation that recently passed through the South Australian parliament and the Commonwealth Government's *Fisheries Management Act 1991*. It is noted that the SA legislation requires that the objectives of management plans must be consistent with the objects of the SA Act. WAFIC supports this qualification.

Government Policy on Integrated Fisheries Management also points towards natural development along these lines with requirements for the Executive Director to set specific 'Sustainable Harvest Limits' for fisheries and manage sectors to their share.

The relevant point to note is that the management plans represent the

² In reality, property rights are quite imperfect. This applies not the least in fisheries. Property rights are generally limited for two basic reasons: technical reasons and social reasons (after Arnason, 2000)

boundaries in which the fishing authorisation (title) operates. Thus the quality of title is dependent upon the plan in which it operates. By providing clarity in regard to the objectives of the plan the quality of the title can be ascertained which should encourage greater economic benefits to be generated. In addition explicit objectives are a powerful tool for public accountability and to advance sustainability more generally.

- To ensure that rights issued pursuant to fisheries management plans are not undermined by use of other provisions in the Act, specifically Section 43 it is suggested that the operation of this Section expressly excludes any effect on fisheries management plans issued pursuant to Section 56. Thus changes to the effectiveness of managed fisheries management plans will need to be done through amendments to the plan (and will need to be consistent with the objectives of the plan) and not through use of other legislative provisions of the FRMA that may have the effect of limiting the effectiveness of the plan but do not directly amend the plan itself. This will improve rights and the quality of management itself through better transparency and certainty.
- Section 72-grant of authorisation confers no right to subsequent authorisation: This provision should be limited to authorisations issued pursuant to developing and interim managed fisheries. In regard to authorisations issued pursuant to managed fisheries it should be made explicit that in the event that a managed fishery management plan is revoked that previous authorisations will be reissued in the same proportion in the event that a subsequent managed fishery management plan is determined for the fishery. Revocation is an extreme step, but may be necessary for sustainability purposes for example due to climate change and its uncertain impact on a fishery. It is precisely at this time that the industry needs the most assurance that co-operation with management and investment in the long term will be recognised in any new management plan.

It is noted that the Federal government has made similar provisions for Commonwealth Fisheries. See provisions listed following:

[FISHERIES MANAGEMENT ACT 1991](#)

[Division 4A—Statutory fishing rights options](#)

- 31A. [Options arising when plan of management for fishery is revoked](#)
- 31B. [Rights of option holder where the new plan of management is the same or substantially the same as the former plan of management](#)
- 31C. [Rights of option holder where new plan of management has some features in common with the former plan of management](#)

A new provision should be added to the effect that government will compensate where managed fishery authorisation holders have seen a reduction or diminution in the value of the authorisation for reason of allocation to other users or on other social grounds.

This suggested provision picks up on both past practice and current policy positions by government in regard to integrated fisheries management, legislative requirements in regard to the impact of marine reserves (marine nature reserves and non permissible zones in marine parks) and policy commitments in regard to marine management areas and fish habitat

protection areas.

The Committee noted that

“through custom and practice, where there has been a change to access to fish stocks for purposes other than sustainability, successive Governments have usually offered a form of compensation through the buy back of fishing authorisations”

It is WAFIC’s strong contention that good public management principles suggest that it is time that this now long accepted practice is statutorily recognised. In addition to the economic benefits to the State of improving the quality of fishing rights converting an ad-hoc discretionary approach to a right to compensate will amongst other advantages: make explicit to the community the real costs of changes and provide for a more certain and cost effective set of processes for compensation. Based in more secure rights industry itself can more effectively engage in the exploration of creative changes in resource management such as the design and selection of marine reserves and recreational fishing only areas without fear that its involvement will lead to significant economic loss.

Exclusivity

This characteristic refers to the ability of the rights holder to use, and where appropriate, manage their access to the resource in question without outside interference. In relation to competition between different uses WAFIC acknowledges and supports government policy in relation to Integrated Fisheries Management and in particular that all consumptive users of a marine resource should not see their access to that resource undermined thorough unregulated growth in catches of another sector.

In relation to exclusivity within the broad category of a commercial use of a right there are differing degrees of exclusivity. A Limited Entry right to fish has weak exclusivity in that that right also extends to other fishers in the limited entry fishery. An ITQ holder has a right to a specified volume of harvest from a given stock of fish over a certain time period and therefore the degree of exclusivity is much higher. A south coast salmon fisher has exclusive commercial rights to take salmon from a specified beach for a specified period. These fisheries are known as Territorial Use Right Fisheries (TURFs). Arguable the exclusivity of this right is higher than that of an ITQ holder in that the beach fisher is free of any interference with other commercial salmon beach fishers.

It is noted that the degree of exclusivity of authorisations issued under managed fishery management plans is dependent on the type of management systems in place eg Limited Entry, ITQ or Territorial Use Right and these management systems are usually based on fishing industry recommendation, as the participants in a fishery see as the most appropriate. There may be a high degree of intervention by government for purposes related to enforcement and compliance as well as ensuring fish stocks are not overfished. Historically this intervention has been welcomed by the industry and underpinned by desire to ensure sustainability and to maintain the integrity of the relevant management plan. Thus WAFIC offers no suggested amendments that might undermine the powers of the government to intervene in this regard.

Looking to the future, however, under settled IFM arrangements where share of fish stocks is determined, cost recovery applies and where authorisation holders hold the same units of entitlement there are strong incentives for authorisation holders to cooperate and assume greater responsibility for management functions. A good example is Exmouth Gulf Prawn fishery where a corporate entity holds most of the rights to commercially harvest prawns³, and already has in place a sophisticated in-house VMS based catch monitoring system and there is no competing demand from other sectors. WAFIC therefore suggests an amendment is added to Section 54 that would allow the Minister to delegate his powers to determine and enforce a management plan to an entity subject to the Minister being satisfied that the management plan includes matters that the Minister considers to be essential and subject to regular audits to ensure compliance by the entity with those matters. Similar provisions have been incorporated in New Zealand fisheries legislation for some time.

WAFIC believes that currently few fisheries in WA would wish to avail themselves of this opportunity (and associated costs). Over time with settled IFM arrangements combined with incentives to minimise costs whilst maintaining the integrity of the relevant management plan it is likely that a greater number of fisheries (including recreational fisheries) would wish to assume this responsibility. It is WAFIC's view that such an approach would have great potential to deliver cost savings, improve efficiency and effectiveness and thus optimise economic performance. Our suggested amendment opens the door to this opportunity. This is a measure which looks to the future of fisheries management and not merely to the past.

Permanence

Permanence refers to the time span of the property right. This can range from zero, in which case the property right is worth nothing, to a perpetual duration.

The *FRM Act* is silent in regard to the duration of a managed fishery management plan. In effect it is for an indefinite duration unless Section 70(a) is invoked which has the effect of revoking the management plan for the managed fishery. Depending on the balance of other provisions in the amended Act this may provide for adequate assurance of rights

WAFIC is aware that the new SA Fisheries Act explicitly states that the management plan expires either on the tenth anniversary of its commencement or on the expiry date specified in the plan whichever is the earlier. It is further noted that at the end of the expiry of the plan there is no obligation on the Minister to direct that a new management plan will be prepared or that the proportional rights enjoyed by authorisation holder will have the same effect as under the new plan. The risk of this strategy is that as time expires and the plan draws to an end all parties can be expected to shorten their time horizons and for significant periods fisheries management will be based on short term objectives inconsistent with both optimal economic objectives and long term sustainability.

³ 15 out of 16 licenses.

In terms of economic performance a plan with a perpetual duration for the fishing rights under it , but with specific objectives and strategies as recommended above will act to optimise benefits for the state. On this basis there is a good public interest case to remove Section 70(a) from the *FRM Act*. There are sufficient general provisions in the *FRMA* to ensure alignment of Management Plans with the public interest. WAFIC notes, however, that despite this flexibility government, may not wish to give the appearance of binding itself and successive governments. Accordingly as a compromise between ensuring government flexibility in regard to use of common property resources and optimising economic performance, it is suggested that Section 70(a) be retained but qualified by an obligation that in the event that a management plan is revoked for purposes of reallocating access to the relevant fish stock to other parties that full and fair compensation will be payable to authorisation holders for loss of access to the relevant fish stock.

Section 143 in regard to renewal of authorisation specifies that under subsection (1)(d) that the Executive director may by notice in writing given to the holder of an authorisation refuse to renew the authorisation if the holder has not used the authorisation in the previous 2 years. This may make sense in relation to Developing Fisheries where there may be significant latent effort and unused authorisations, indeed the transition to a managed fishery may be dependant on removing this latent effort. WAFIC submits however that in respect to authorisations issued pursuant to managed fisheries management plans this provision should be removed. It is contrary to sustainability objectives, and serves little purpose except to compel authorisation holders to fish the resource and impede creativity in managing a fishery. Authorisation holders should be able to exercise free choice in regard to use of their authorisation within the confines of the management plan. There may be good economic reasons why authorisation holders do not wish to fully exercise their entitlement. WAFIC regards this provision as potentially counterproductive and inappropriate.

Transferability

This refers to the ability to transfer the property right to someone else. For any scarce resource, this characteristic is economically important because it facilitates the optimal allocation of the resource to competing users as well as uses.

WAFIC notes that Section 140 in the *FRM Act* provides that the Executive Director is to transfer an authorisation subject to specified grounds. WAFIC supports this provision.

WAFIC fully supports the proposed new section to the Act that explicitly specifies that commercial authorisations are to be taken to be part of the legal personal estate of a deceased authorisation holder.

WAFIC believes that provision should also be made for the legal framework to provide for transferability across uses (i.e. commercial to recreation or vice versa) as part of long term changes necessary to implement Integrated Fisheries Management. In the long run transfers between uses should not be based on administrative fiat but through transparent mechanisms that allow for the highest and best use to prevail while respecting the rights of existing holders.

References

- Arnason, R. 2000. *Property Rights as a Means of Economic Organisation* FAO Fisheries Technical Paper 404/1
- Scott, A.D.2000. *Introducing Property in Fisheries Management* FAO Fisheries Technical Paper 404/1