

**NATURE AND EXTENT OF RIGHTS TO FISH  
IN WESTERN AUSTRALIA**

*Final Report*

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FISHERIES MANAGEMENT PAPER No. 195

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## **PREFACE**

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This report (*'Nature and Extent of Rights to Fish in Western Australia'*) is not a policy document. It has been written to assist Government and stakeholders alike in reaching a common position on the issue of fisheries access rights in Western Australia.

The report is intended to inform policy makers and stakeholders in gaining an understanding of fisheries legislation in Western Australia and the mechanisms and implications of resource allocation shifts. Its main use will be as a reference document and not a full treatise on the law.

The report examines the common law position in the waters in respect of which Western Australia can regulate fishing and therefore generally limits itself to an examination of rights in tidal fisheries and the effect of wider fisheries legislation.



## **PART 1                      INTRODUCTION**

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### **1.1      Background**

Western Australia is committing significant resources to the analysis and development of a new approach to fisheries management in which the whole of the stock is managed. This approach will be based upon the distribution of fish stocks, the determination of sustainable harvest levels and, ultimately, the allocation to various user groups of rights to those harvest levels.<sup>1</sup>

In the course of discussions regarding possible changes to fisheries management regimes, and in particular the mechanisms which might be employed to allocate catch shares both between and within user groups, concerns have been expressed by various interest groups and individuals within the Western Australian fisheries sector about whether particular proposed changes will result in either the removal of or the creation of “property” or proprietary rights.

There has been much debate within the Western Australian fisheries sector about the degree to which fishing licences or authorities constitute “property”.<sup>2</sup> However, it appears there is often no common understanding of what is meant by the term “property”. Better articulation and understanding of the notion of “property” will assist discussions and provide a foundation upon which decisions about changes to the current fisheries management regime in Western Australia can be made.

To that end, the Labor Party's electoral platform included the continuation "of discussions with the commercial fishing industry aimed at clarifying the legal status of property rights inherent in commercial fishing licences".<sup>3</sup>

A project steering committee (**Steering Committee**) was convened for the purpose of considering that issue. It consisted of the following officers of the Department of Fisheries (**Department**) and the Department's three major stakeholder groups:

- Peter Millington - Director, Fisheries Management Services, Department of Fisheries;
- Heather Brayford - Manager, Strategic Planning and Policy, Department of Fisheries;
- Martyn Cavanagh - Senior Fisheries Legislation Officer, Department of Fisheries;

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<sup>1</sup> Refer Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee, Fisheries Management Paper No. 165, Department of Fisheries, November 2002.

<sup>2</sup> This debate is also taking place at a national and international level as various jurisdictions reconsider their fisheries management regimes.

<sup>3</sup> *Fisheries: Geoff Gallop and Labor: A Better Government*, p. 7.

- Guy Leyland - Executive Officer, Western Australian Fishing Industry Council;
- Frank Prokop - Executive Director, Recfishwest; and
- Nick Dunlop - Sustainable Fisheries Liaison Officer, Conservation Council.

The Steering Committee prepared a brief to define the scope of the project. That brief set out the following objectives (**Project Objectives**):

1. *To identify and document the nature and extent of fisheries access rights in Western Australia by reference to common law principles and the application of statute law.*
2. *To identify the maximum and minimum theoretical extent by which the use of statute law can determine access rights.*
3. *To identify various approaches which can be taken to change the nature of rights on a sector basis.*
4. *To identify the changes to statute law necessary to attain a change in the nature of access rights, if required.*
5. *To report outcomes from the project in a form that can be understood by policy makers and key stakeholders.*

This report, which addresses the Project Objectives, has been prepared by the Department with input and feedback from the Steering Committee. The report also includes input from the State Solicitor's Office but does not necessarily represent the views of the State Solicitor or reflect Government policy.

It was not the Steering Committee's task to examine the merits of any policy for the management of fisheries. Rather, the report analyses the legislation and case law that underpins the current system of fisheries management and considers the nature of "property" and matters that will need to be taken into account in any change from the current regime. The results of this examination will inform debate about an appropriate future system for management of fisheries in Western Australia and the legal issues which will need to be addressed in implementing any change.

The report is limited to an examination of rights in tidal fisheries.

## **PART 2 PROJECT OBJECTIVES 1 AND 2**

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*Identify and document the nature and extent of fisheries access rights in Western Australia by reference to common law principles and the application of statute law.*

*Identify the maximum and minimum theoretical extent by which the use of statute law can determine access rights.*

### **2.1 Introduction**

Several issues need to be considered in responding to Project Objectives 1 and 2. They include:

- (a) Which legal systems currently govern access to fish in Western Australia?
- (b) Who owns fish?
- (c) Who is entitled to take fish in Western Australia?
- (d) What rights does the State presently grant when it grants fishing access rights?
- (e) Can those rights be considered to be property rights?
- (f) Is there any obligation to compensate holders of fishing access rights in Western Australia in the event that those rights are changed or revoked as a part of implementing a new fisheries management regime?

### **2.2 Which Legal Systems Currently Govern Access To Fish In Western Australia?**

In Australia, access to fish is governed by:

1. a body of law developed by the courts (the common law);
2. legislation passed by the relevant State Parliament; and
3. legislation passed by the Commonwealth Parliament.

In Australia, the Parliaments have the capacity to vary the common law by the enactment of statutes.<sup>4</sup>

#### **2.2.1 Capacity of the Commonwealth and the States to legislate**

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<sup>4</sup> In *Harper v. Minister for Sea Fisheries and Others* (1989) 168 CLR 314 the High Court confirmed that the public right to fish was amenable to abrogation or regulation by a competent legislature. In that case Brennan J, with whom Mason CJ, Deane and Gaudron JJ agreed, stated that a regulation prohibiting the taking of abalone without the payment of a licence fee abrogated the common law

The Australian States commenced life as British colonies. As such they derived their laws from the English common law system. Upon colonisation, those parts of the English law that were then in force, and which were applicable to the situation of the Australian colonies, were incorporated into the laws of the new Australian colonies.<sup>5</sup>

The traditional laws of the indigenous inhabitants were not taken into account by virtue of the adoption of the legal fiction of *terra nullius* or "empty land".<sup>6</sup>

Over time each colony attained self-government and had conferred upon it a constitution that, among other things, governed its capacity to make legislation and the manner in which it could do so.

The colonies formed a federation in 1901 and agreed upon a constitution for the Commonwealth of Australia. That *Constitution* sets out the matters in respect of which the Commonwealth Parliament is entitled to make laws. It restricts the Commonwealth Parliament's ability to make laws about certain matters specified in the *Constitution*<sup>7</sup> in order to preserve the States' exclusive capacity to legislate in respect of all other matters.

One of the powers set out in the *Commonwealth Constitution* is the power to make laws for the peace, order and good government of the Commonwealth with respect to "fisheries in Australian waters beyond the territorial limits".<sup>8</sup> The reference to "territorial limits" is a reference to the territorial limits of each State.<sup>9</sup>

Unlike the Commonwealth, the State Parliaments have a general power to legislate on any matter (including those in respect of which the Commonwealth has power), subject only to the limitation that the laws are for peace, order and good government of the State.<sup>10</sup> The limitation that the legislation is for the "peace, order and good government" is not a significant limitation in practice. Courts have not intervened to invalidate legislation on that ground. However, the fact that legislation must be for the "government" of the State is a genuine limitation in that it does require a sufficient territorial nexus between the law in question and the State. The accepted test of whether a law is for the "peace, order and good government of a State" is that a law is valid if it is connected, not too remotely, with the State that enacted it. In other words, the law is valid if it operates on some circumstance that really appertains to the State.<sup>11</sup>

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right to take abalone in the relevant waters and conferred private statutory rights to do so on the licence holders.

<sup>5</sup> Blackstone Commentaries (18<sup>th</sup> edn) Bk1 pp. 111-112.

<sup>6</sup> The principle of *terra nullius* was overturned by the High Court in 1992 in *Mabo v. Queensland* (No. 2) (1992) 175 CLR 1.

<sup>7</sup> These are known as "heads of power" and are set out in s. 51 of the *Commonwealth Constitution*.

<sup>8</sup> *Commonwealth Constitution* s. 51(x).

<sup>9</sup> A useful discussion on marine boundaries, including the territorial sea, can be found in Sparkes S, *Native Title – all at Sea?*, paper presented at the Native Title Representative Bodies Legal Conference 28-30 August 2001 and updated 12 October 2001, National Native Title Tribunal.

<sup>10</sup> *Constitution Act 1889* (WA) s. 2.

<sup>11</sup> *Commissioner of Stamp Duties v. Millar* (1932) 48 CLR 618 at 632-3.

A Western Australian law which dealt with fishing within the territory of the State clearly would be a law for the peace, order and good government of Western Australia and, therefore, would satisfy that constitutional requirement.

Whether a law enacted by the Parliament of Western Australia concerning acts done outside the territory of Western Australia satisfied that constitutional requirement would depend upon there being a sufficient nexus between the territory of the State and the law. What precisely constitutes a "sufficient territorial nexus" has been the subject of much judicial debate.<sup>12</sup> The validity of any particular law would always depend on the circumstances of the case.<sup>13</sup>

### 2.2.2 Interaction of State and Commonwealth laws

On occasions, the Commonwealth and the States will have concurrent power to legislate in relation to a particular subject matter. When this occurs, to the extent that the State's laws conflict with those of the Commonwealth, the State's laws are invalid to the extent of the inconsistency.<sup>14</sup> In essence, this means that as long as the law of the Commonwealth is in force, the State's law will be inoperative.

A law of a State can be inconsistent with a law of the Commonwealth in three situations<sup>15</sup>:

- (a) where simultaneous obedience to both laws is impossible;
- (b) where one law takes away a right or privilege conferred by the other; and
- (c) where the law of the State deals with a field which the Commonwealth law was intended to cover exhaustively.

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<sup>12</sup> For example, contrast the reasons of Gibbs J in *Pearce v. Florenca* (1976) 135 CLR 507 at 519 who considered the fact the waters concerned were the off-shore waters of the State gave it sufficient territorial nexus, with the decision in *Robinson v. Western Australian Museum* (1977) 138 CLR 283 at 294 where Barwick CJ held that Western Australia had power to legislate for its territory but that waters within three nautical miles of its coast "neither form part of the territory of the State nor are themselves the subject of legislative power of the State". In that case, while Barwick CJ noted that a law of the State might operate in those waters if it satisfied the test "of being a law for the government of the State", both he and Murphy J concluded that a law to control historical wrecks and archaeological sites on the bed of the sea was not a matter within the State's legislative competence.

<sup>13</sup> By way of example, a law that is expressed to apply outside the limits of the State might be found to have a sufficient territorial nexus with the State if it were aimed at protecting the health or safety of Western Australians.

<sup>14</sup> Section 109 of the *Commonwealth Constitution* provides that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid".

<sup>15</sup> In *The Commonwealth of Australia v. The State of Western Australia and Others (Mining Act Case)* (1999) 196 CLR 392 Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ seemed to accept that "operational inconsistency" may itself be a separate, and fourth, basis of inconsistency. "Operational inconsistency" is the term given to the situation where in practice, and for a particular period of time, at a particular place, both laws cannot operate.

### 2.2.3 Commonwealth v. State jurisdiction in relation to fishing laws

Over many years there was considerable uncertainty about which waters were considered to be within the territorial limits of the States and, in particular, whether the Commonwealth or the relevant State had the power to legislate in relation to fisheries in the seas adjoining the Australian coastline. This issue was settled by the High Court in 1975, when it considered the *Seas and Submerged Lands Act 1973* (Cth) in the *Seas and Submerged Lands* case.<sup>16</sup> In its decision, the High Court declared that Act valid<sup>17</sup> and decided that:

- (a) the low watermark constituted the seaward boundary of the States (meaning a State's territory extended only to that boundary);
- (b) the jurisdiction of the Commonwealth extended over fisheries both in the territorial sea (being waters extending three nautical miles from the "baseline" (the low water mark)) and on the continental shelf; and
- (c) the Commonwealth derived the power to legislate over offshore areas from the external affairs power in s. 51(xxix) of the *Commonwealth Constitution*.

A detailed discussion about the various laws and intergovernmental agreements determining the waters and the fish in respect of which the State can make laws is beyond the scope of this report. For the purposes of this report it is sufficient to note that the current position in respect of the capacity of the State of Western Australia and the Commonwealth to legislate in relation to fishing in particular waters is as follows:

- The State has capacity to legislate in respect of fisheries in "inland waters" (all waters which are landward of the high water mark).
- The State and the Commonwealth have the concurrent power to legislate in respect of the adjacent territorial sea (being waters extending three nautical miles from the baseline (the low water mark)).<sup>18</sup> The State also has limited title to the seabed in those adjacent coastal waters.<sup>19</sup>

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<sup>16</sup> *New South Wales v. Commonwealth* (1975) 135 CLR 337.

<sup>17</sup> *The Seas and Submerged Lands Act 1973* (Cth) was held to be valid primarily as an exercise of the Commonwealth's external affairs powers (*Constitution* s. 51(xxxix)) because it gave effect to two international conventions to which Australia was a party. Those were the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the Continental Shelf. By s. 6 of the Act it was declared that the sovereignty in respect of the territorial sea and in respect of the airspace over it and in respect of its seabed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth. By s. 11 of the Act it was declared that the sovereign rights of Australia as a coastal state in respect of the continental shelf of Australia, for the purposes of exploring its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth.

<sup>18</sup> *Coastal Waters (State Powers) Act 1980* (Cth).

<sup>19</sup> *Coastal Waters (State Title) Act 1980* (Cth).

- The State has power to legislate in relation to fisheries outside its coastal waters (i.e. the three nautical mile limit) if it has the sufficient “peace, order and good government” connection with the State.<sup>20</sup>
- The State has power to legislate in relation to certain issues in areas outside coastal waters where there is an arrangement with the Commonwealth in place. This includes the power to make laws with respect to fisheries as if the waters were within the limits of the State.<sup>21</sup>
- The Commonwealth has power to legislate in relation to fisheries in the waters between the three nautical mile limit and the 12 nautical mile limit. The "territorial sea" is the term given to the waters between seaward of the low water mark and the 12 nautical mile limit.<sup>22</sup>
- The Commonwealth has the power to legislate in relation to fisheries in the contiguous zone, which is the area of water between 12 and 24 nautical miles seaward from the baseline.
- The Commonwealth has the power to legislate in relation to fisheries in Australia's "exclusive economic zone".<sup>23</sup> The exclusive economic zone is the area extending a distance of 200 nautical miles from the baseline, which establishes the territorial sea. The State has sovereign rights for the purposes of exploring and exploiting the natural resources in the waters super-adjacent to the seabed, on the seabed and below the seabed in the exclusive economic zone.
- The Commonwealth also has the power to explore and exploit the living and non-living resources of the continental shelf. The continental shelf is the area between 12 nautical miles and 200 nautical miles seaward of the baseline, which established the territorial sea, and any areas of physical continental shelf, which exist beyond the 200 nautical mile limit.<sup>24</sup>

Sitting alongside the various instruments that deal with the legislative capacity of the Parliaments is the *Offshore Constitutional Settlement (OCS)*. The OCS is an inter-governmental agreement, which, under arrangements made in 1995, provides that Western Australia will control all fish out to the 200 nautical mile limit except for:

- (1) the northern prawn fishery - which is exclusively controlled by the Commonwealth;
- (2) tuna and tuna-like fish - which are exclusively controlled by the Commonwealth;

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<sup>20</sup> This was demonstrated in respect of State law management of finite lobster stocks up to 200 nautical miles off the South Australian coast. Note that State law would be inoperative to the extent of any inconsistency with Commonwealth law.

<sup>21</sup> *Coastal Waters (State Powers) Act 1980* (Cth) s. 5(c).

<sup>22</sup> It is noted that the reference to the low water mark is a significant simplification for present purposes of what is in fact a complex issue.

<sup>23</sup> See Part V of the United Nations Convention on the Law of the Sea 1982.

<sup>24</sup> In accordance with international law specifically, see the United Nations Convention on the Law of the Sea 1982.

- (3) deep water trawling in waters more than 200 metres deep (outside the 200-metre isobath) - which is exclusively controlled by the Commonwealth;
- (4) shark fishing east of Koolan Island - which is jointly controlled by the State and the Commonwealth under State law; and
- (5) demersal longline and demersal gillnetting south of 35 degrees south - which is jointly controlled by the State and Commonwealth under State law.

The division of control provided by the OCS in order to ensure uniform controls over the entire fishery generally reflects the philosophy that the Commonwealth should control fishing relating to or involving:

- (a) migratory fish;
- (b) deep water fish;
- (c) overseas interests; and
- (d) fisheries operating in the waters which would otherwise be managed by more than one State.

For the remainder of this report, a reference to "Western Australia" is to be taken as a reference to all of the waters in respect of which the State of Western Australia may make laws in relation to fishing pursuant to the above arrangements.

## 2.3 Who Owns Fish?

### 2.3.1 Common law position

At common law<sup>25</sup>, fish which are found in tidal waters are not owned by any person.<sup>26</sup>

Prior to 1215<sup>27</sup>, subject to certain exceptions, the public had a right to fish in the tidal reaches of all rivers and estuaries and the sea and the arms of the sea that were within the territorial limits of the Kingdom. The exceptions were:

- (a) where the Crown or a subject acquired a property right which excluded the common law right to fish; and
- (b) where the Parliament had restricted the common law right.

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<sup>25</sup> Particular species of fish were historically reserved for the Crown.

<sup>26</sup> In contrast, where a person owns inland waters they also have ownership of the fish in those waters. For example, fish in dams or lakes, which are the property of the adjoining landowner, are owned by that landowner. That landowner can grant a *profit a prendre* in respect of the fish to a third party who then would have a property interest of sorts in the fish. A *profit a prendre* is an interest in land which gives its holder a right to enter the land of another and to take away some part of the land or the produce of the land (see *Duke of Sutherland v. Heathcote* [1892] 1 Ch. 475 at 484).

<sup>27</sup> When King John acceded to the *Magna Carta*.

Since the *Magna Carta*, the common law rights can only be varied by an enactment of Parliament.

At common law, with some exceptions, while fish are in the ocean they are common property and are not owned by any person.<sup>28</sup> At common law every person was equally entitled to endeavour to catch fish. Once caught, a fish became owned by the person who caught it.<sup>29</sup> In this respect, the common law treated fish like other wild animals that were also not capable of ownership until caught.

Today, society generally regards fish as public property or a common property resource.<sup>30</sup>

### **2.3.2 Has the common law position on ownership of fish been altered in Western Australia?**

As discussed above, a valid Act of Parliament can alter the common law position on any matter. Neither Western Australia nor the Commonwealth has legislated to change the common law position in respect of ownership of fish.

In the waters in respect of which Western Australia can regulate fishing, the position remains that no person owns any fish in tidal waters until they are lawfully caught. Once lawfully caught a fish is owned by the person who caught it.

In Tasmania and Victoria, the legislature has enacted legislation vesting the property in fish in the State.<sup>31</sup> While that sounds like an intention to "own" the fish, a court

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<sup>28</sup> *Halsbury's Laws of England* (4<sup>th</sup> edn) vol. 18, para 652. The exception to the common law position was that mussels, cockles, oysters and clams on particular land could be owned.

<sup>29</sup> See *St Leger v. Bailey* [1962] Tas. S.R. 131. In *St Leger*, the court considered when a rock lobster was to be regarded as "caught" and therefore "taken" for the purposes of a Fisheries regulation. The court held that the rock lobster was caught when it was entrapped within a rock lobster pot. Although not a principle derived from the *St Leger* case, if a rock lobster were to "escape" from a pot or a fish once caught were to free itself and return to the water, the ownership would end - i.e. the person from whom it escaped could not claim ownership if a second person then caught the same rock lobster or fish. For interest, the concept of other animals in the wild is discussed in *Pierson v. Post* 3 Cal R 175, 2 Am. Dec. 264 [Supreme Court of New York, 1805].

<sup>30</sup> Roscoe Pound explained why wild animals and other things not the subjects of private ownership were spoken of as being "publicly owned". He said:

"We are also tending to limit the idea of discovery and occupation by making *res nullius* (e.g. wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (e.g. of the use of running water for irrigation or for power) by declaring that they are the property of the state or are 'owned' by the state in trust for the 'people'. It should be said, however, that while in form our courts and legislature thus seem to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns furniture in the state house. It does not own wild game as it owns the cash in the vault of the treasure. What is meant is that conservation of an important social resource requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination. Our modern way of putting it is only an incident of the nineteenth century dogma that everything must be owned". See Pound, R, *An Introduction to the Philosophy of Law* (rev edn, 1954) at p. 111 cited in *Yanner v. Eaton* (1999) 201 CLR 351 at 370.

may find that this vesting does not in fact confer ownership of the fish on the relevant State but is simply a means of vesting such property as is necessary for the control of the fish.<sup>32</sup>

## **2.4 Who Is Entitled To Take Fish In Western Australia?**

### **2.4.1 Common law**

At common law every person had the unrestricted right to take fish in tidal waters.<sup>33</sup>

### **2.4.2 Statute law**

It is certainly no longer the case in Western Australia that there are no restrictions upon the common law right.

Given that State and Commonwealth fishing laws prohibit the taking of fish for commercial purposes except with the authority of a licence or some other form of authority, it can be said that the common law right to take fish for commercial purposes has been entirely abrogated.

In contrast, while the common law right to take fish for personal use has not been entirely abrogated, it may be considered to have been severely regulated or limited. For example, the State and the Commonwealth dictate bag and size limits for certain species of fish, dictate the season in which certain fish may be caught and require that certain fish may be caught only under the authority of a licence.

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<sup>31</sup> Section 9 of the *Living Marine Resources Management Act 1995* (Tas) provides "all living marine resources present in waters referred to in s. 5(1)(a), (b) and (c) are owned by the State". See also s. 10 of the *Fisheries Act 1995* (Vic).

<sup>32</sup> In *Yanner v. Eaton* (see footnote 30 above), the majority of the High Court held that the vesting of "property" in fauna in the Crown pursuant to s. 7(1) of the *Fauna Conservation Act 1974* Act (Qld) did not in fact mean that the Crown owned the fauna. Rather, they held that it vested only the rights necessary to control the taking of fauna in the State and to enable the State to impose royalties on the taking of fauna.

<sup>33</sup> Jenks, E (ed.), *Stephen's New Commentaries on the Laws of England*, 14<sup>th</sup> edn, vol. (i) at 411, citing *Carter v. Murcot* (1768) 4 Burr 2163.

### 2.4.3 Native title law - a combination of common law and statute law

Native title rights are rights recognised by the common law of Australia. They are derived as a consequence of an indigenous community's continued acknowledgment of traditional laws and exercise of traditional customs in relation to an area of land from sovereignty to the present day. In order to be recognised and protected under Australian law, native title rights and interests must be related to land or waters<sup>34</sup> and cannot be abhorrent to the common law.<sup>35</sup>

Despite many native title claimants seeking determinations that their rights include an exclusive right to fish in certain waters, two recent High Court cases have made it clear that native title holders cannot have exclusive rights to fish in any tidal waters.<sup>36</sup>

That notwithstanding, Aboriginal communities will have a non-exclusive native title right to fish in tidal waters where they can establish that the right is held as a result of a community's continued adherence to a set of traditional laws acknowledged, and customs observed, from sovereignty to the present day and from which their right to fish is derived.<sup>37</sup>

The *Native Title Act 1993* (Cth) deals with acts done by government that will affect native title rights and interests. These acts must be done if they are to be valid. This is known as "the future acts regime". A future act is any act that will affect native title rights and interests. An "act", which is defined to include the enactment of legislation, affects native title if it extinguishes native title rights and interests or if it is otherwise wholly or partly inconsistent with the continued enjoyment or exercise of native title rights and interests.<sup>38</sup>

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<sup>34</sup> In *Western Australia v. Ward; Attorney-General (NT) v. Ward; and Ningarmara v. Northern Territory* (2002) 191 ALR 1, the majority held that to the extent that a right, which was described as a right to protect and prevent misuse of cultural knowledge did not involve control of access to land, was not a native title right because it was not a right in relation to land or waters. There are many aspects of Aboriginal laws and customs unrelated to land that are not recognised or protected as native title rights and interests.

<sup>35</sup> For example, a right to inflict physical punishment for breach of a community's laws and customs would not be recognised as a native title right even if it had the required nexus with land, because our laws do not accept physical violence.

<sup>36</sup> In *Commonwealth of Australia v. Yarmirr & Ors* (2001) 208 CLR 1, the majority of the High Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) held that because, at the time of acquisition of sovereignty, the common law recognised a public right to fish and navigate in tidal waters, and the international right of innocent passage, there could be no recognition of any Aboriginal community's exclusive right to fish in those same waters. In *Ward*, the majority expressed the reasoning slightly differently saying that the public right to fish and navigate in tidal waters, which formed part of the laws of the British colonies upon sovereignty, extinguished any exclusive right to fish in those same waters.

<sup>37</sup> Native title rights and interests are liable to extinguishment or regulation. Thus, provided the requirements of the *Native Title Act* were met, it would be possible for governments to prohibit native title holders from taking particular fish or from fishing by particular means.

<sup>38</sup> See definition at s. 227 *Native Title Act 1993* (Cth).

Section 211 of the *Native Title Act* provides:

- (a) if an Aboriginal person holds native title rights in relation to land or water (which rights include the right to hunt, fish, gather or conduct cultural or spiritual activities); and
- (b) the law of the Commonwealth or the State prohibits or restricts persons from carrying on those activities other than in accordance with a licence, permit or other instrument granted to them under the law,

then the native title holders are permitted to carry on the hunting, fishing, or gathering, or to conduct the ceremonial or spiritual activity without a licence, provided that the activity is done:

- (c) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
- (d) in the exercise of their native title rights and interests.

## **2.5 What Rights Does The State Grant When It Grants Fishing Access Rights Under The Fish Resources Management Act?**

The *Fish Resources Management Act 1994* (WA) (the **FRMA**) is the primary Act that regulates fishing activities in Western Australia.<sup>39</sup> The FRMA distinguishes between commercial and recreational fishing activities. In the case of commercial activities (such as fishing and processing), it prohibits people from undertaking specified commercial fishing activities (generally catching and processing of fish) except as authorised by it. It is only selectively prohibitive in the case of recreational fishing.

The FRMA enables the use of a range of management tools, which can be applied to either or both commercial and recreational fishing as the FRMA provides and as the circumstance requires. This includes:

- restricting catch effort (e.g. by limiting boat size, quantity of pots or hooks permissible, or type of equipment used);
- restricting the season(s) in which certain fish can be taken;
- declaring particular species of fish, or fish having certain specified characteristics (e.g. under sexual maturity size or in reproductive state) to be protected fish, either totally or from commercial fishing;
- imposing bag/possession limits; and
- imposing size limits.

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<sup>39</sup> It should be noted that specific matters are dealt with by other Acts, for example the *Pearling Act 1990* (WA). An analysis of the nature of rights granted under those other Acts has not been undertaken in this report.

Appendix 1 sets out a summary of the types of fishing access rights that are available under the FRMA and some general notes on its provisions.

At this point, it is worth noting that, while the FRMA regulates a wide range of fishing activity, it is not an all-encompassing code for the creation of fishing rights. Some fishing activities are still carried out in reliance on the public's common law right to fish, rather than in reliance on any fishing access right granted under the FRMA. The focus of this report is fishing access rights granted under the FRMA, rather than common law rights to fish.

## 2.6 Can Fisheries Access Rights Be Considered Property Rights?

One of the purposes of this report is to consider the extent to which fishing access rights under the FRMA can be regarded as "property" as that term is used in a legal sense.<sup>40</sup> Before considering this, it is important to identify what is meant by the term "property" in a legal context. This involves, first, making some observations about the legal theory of property and, secondly, considering relevant Australian case law.

### 2.6.1 Legal theory of property

Even when used in a legal context the term "property" is elastic and capable of wide meaning or definition. In general speech the term is frequently used as a noun and refers to a thing; for example: "keep off my property". In law, however, property does not refer to a thing but the legal relationship between a person and a thing. It refers to the degree of power a person can lawfully exercise over an object. As an analytical tool, property is often conceived of as a bundle of rights.

Kevin and Susan Gray explain the notion of property. While their paper *The Idea of Property in Land* was, as the title suggests, concerned with property in land, their explanation of the concept of property is just as apt in relation to fishing rights. They said:

*Few concepts are quite so fragile, so elusive and so often misused as the idea of property. Most everyday references to property are unreflective, naive and relatively meaningless. Frequently the lay person (and even the lawyer) falls into the trap of supposing the term "property" to connote the thing which is the object of "ownership". But the beginning of the truth about property is the realisation that property is not a thing but rather a relationship which one has with a thing. It is infinitely more accurate, therefore, to say that one has property in a thing than to declare that a thing is one's property...It may be noted furthermore, that the power relationship implicit in property is not absolute but relative: there may well be gradations of "property" in a resource. The amount of "property" which a specified person may claim in any resource is capable of calibration - along some sort of sliding scale - from a*

<sup>40</sup> There are other contexts in which the concept of "property" exists, including the economic context and social/political context. These are outside the scope of this report and the focus will be on the legal theory of property.

*maximum value to a minimum value. Of course, where this value tends towards zero it will become a misuse of language to say that this person has any "property" at all in the resource in question.*<sup>41</sup>

In *Yanner v. Eaton*<sup>42</sup>, the High Court endorsed these views saying:

*Much of our false thinking about property stems from the residual perception that property is itself a thing rather than a legally endorsed concentration of power over things and resources*

and

*"Property" is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not a "monolithic notion of standard content and invariable intensity".*<sup>43</sup>

Property can, therefore, be considered as a continuum. In some instances, a person will have few rights in relation to a thing and in others a person will have many rights. Where the rights are few it is not correct to speak of there being "property" in the thing. When the rights are at their highest, the thing can be considered to be the property of the person possessing the rights; that is, "ownership". "Ownership" may be regarded as the greatest possible interest in a thing which a system of law recognises, and is short hand for a bundle of rights which importantly includes:

- (a) the perpetual right to possess and enjoy the thing in question, which includes the right to assert that possession against the world at large rather than any particular individual(s);
- (b) the perpetual right to the profits generated by it; and
- (c) the right to bequeath, alienate or destroy it.

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. the common law) position and, in this way, is able to introduce differentiation between the rights of different user groups.<sup>44</sup> 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.

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<sup>41</sup> *The Idea of Property in Land*, Gray K and Gray SF, in *Land Law: Themes and Perspectives*, Bright S and Dewar J (eds), Oxford University Press, Oxford, 1998, p. 15

<sup>42</sup> (1999) 201 CLR 351 at 366 per Gleeson CJ, Gaudron, Kirby and Hayne JJ, quoting Gray, *Property in Thin Air*, (1991) 50 Cambridge Law Journal 252 at 299.

<sup>43</sup> Quoting Gray K and Gray SF, *The Idea of Property in Land*, in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998), 15 at 16

<sup>44</sup> See, for example, Appendix 1 for a comparison of different rights currently provided for by the FRMA.

## 2.6.2 Australian case law concerning property

In the past 20 years there have been many examples of Australian courts having considered the issue of whether licences, and frequently fishing licences, constitute property. One of the major themes to emerge from the case law is that a licence that can be renewed or transferred, even if only with the consent of the relevant licensing authority, seems to have been considered to have some proprietary features or value. What needs to be borne in mind when considering these cases is that the answer to the question of whether a licence confers or constitutes "property" seems to be dependant upon two things:

- (a) the results of an examination of the particular rights granted to the holder of the licence pursuant to the relevant legislation; and
- (b) the definition of "property" being used. This in turn depends upon the context in which the question is being asked.

Below is a brief analysis of some of the important cases, which deal with the issue of whether particular interests constitute property.

### *Harper v. Minister for Fisheries*

In *Harper v. Minister for Fisheries*<sup>45</sup>, the question to be decided was whether a licence fee for the taking of abalone, imposed by regulation made under the *Fisheries Act 1959* (Tas), was an excise. If it were an excise, the regulation would have been invalid because the Commonwealth has the exclusive power to impose duties of excise. In that case, the High Court held that the licence was not a means of imposing a tax but a means of environmentally managing the resource. The licence fee was to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public resource. In doing so, the High Court considered that the licence could be likened to a *profit a prendre*.<sup>46</sup> Some members suggested that, in reality, it was not a *profit a prendre* but a new kind of statutory entitlement. The Court saw this entitlement as created as part of a system for preserving a limited public resource in a society which is coming to recognise that, in so far as resources are concerned, to fail to protect may destroy, and to preserve the right of everyone to take what he or she will, may eventually deprive that right of all content.

### *Austell Pty Ltd v. Commissioner for State Taxation*

In *Austell Pty Ltd v Commissioner for State Taxation*<sup>47</sup>, the Supreme Court of Western Australia was concerned with the question of whether the Commissioner for State Taxation was correct to assess the stamp duty payable on an agreement to purchase a fishing boat together with a western rock lobster fishing licence. The Commissioner had determined that the licence was "property" within the meaning of s. 74 or 75 of the *Stamp Act 1921* (WA). The taxpayer objected on the ground that the licence was not property.

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<sup>45</sup> (1989) 168 CLR 314.

<sup>46</sup> See explanation of *profit a prendre* at footnote 26.

<sup>47</sup> (1989) 4 WAR 235.

Brinsden J held that the licence, while not conferring a proprietary interest over the fishing ground or any particular rock lobster, was an interest which could be called "property" in the ordinary meaning of the word as used by laypersons. As a consequence, he held that it constituted property for the purposes of the *Stamp Act* because, in that Act, the term "property" was not defined and was a "word of very general meaning and comprehensiveness". Important factors in his Honour's decision that the licence was a form of property were:

- (a) the licence was valuable;
- (b) a decision to revoke it would need to be made for reasons within the *bona fide* administration of the fishery; and
- (c) a decision to refuse to transfer it could not be made on a whim.

It is important to recall that the licence was considered to have the qualities of property in the context of the *Stamp Act*, and not necessarily for every purpose.

#### *Kelly v. Kelly*

In *Kelly v. Kelly*<sup>48</sup>, the High Court was asked to consider whether an authority to take abalone was part of the property of a partnership for the purposes of winding up the partnership. In this case, a husband and his de facto wife operated a business in partnership as fishermen. When the relationship ended the partnership was to be wound up. The husband initially held a permit to take abalone, which was issued under the *Fisheries Act 1971 (SA)*. The permit did not form part of the assets of the partnership as the couple had considered it to be personal to the husband and hence a valueless asset because it was not transferable. After a time the permit was replaced with an authority to take abalone, which was referable to a particular boat and transferable with the consent of the Executive Director of Fisheries.

The partnership paid the annual fee for the authority, which was referable to a boat owned by the partnership, but registered solely in the husband's name.

The Court held that, whatever the situation in relation to the original permit, the authority gave rise to valuable rights, which were capable of being held for the partnership in such a way as to constitute partnership property.

While the case did deal with the nature of the rights conferred by the authority to take abalone, it was, in essence, a case concerned with the construction of the intention of the partners with respect to the authority.

#### *Pennington v. McGovern*

*Pennington v. McGovern*<sup>49</sup> concerned a licence for taking abalone issued under the *Fisheries Act 1982 (SA)*. A business arrangement existed between two men, one a

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<sup>48</sup> (1990) 64 ALJR 234.

<sup>49</sup> (1987) 45 SASR 27.

diver who held an abalone licence, and the other, known as the principal, for whom, pursuant to various contracts, the diver purported to hold the licence on trust. The question here was whether the licence was capable of being the subject of a trust.

King CJ, with whom White J agreed, held that the provisions of the *Fisheries Act* made it clear that the licence was not a mere personal inalienable right but was proprietary in nature because:

- (a) it had value due to the limited number that could be issued and the competitive tender process by which the licence was issued;
- (b) it was transferable, albeit subject to the consent of the Minister; and
- (c) its exercise could be subject to the direction and instruction of another (for which the consent of the responsible Minister was not required).

*Pyke v. Duncan*

In *Pyke v. Duncan*<sup>50</sup>, Nathan J held that licences issued under the *Fisheries Act 1968* (Vic) and the *Fisheries Act 1952* (Cth) were personal in nature and did not possess the characteristics necessary to make them property capable of being sold by the sheriff. His Honour held they were outside the common law concept of "seizable property" because they were neither tangible nor transferable at the direction of the sheriff. This is because only things which can be sold can be seized by the sheriff to satisfy a judgment debt. In this case, the Acts required the consent of the Director of Fisheries before a transfer could occur and the sheriff did not have the power to direct the Director of Fisheries to consent to the transfer of the licence.

It is important to note that while they were not considered to be property for the purposes of seizure and sale by the sheriff, Nathan J did state that the licences may give proprietor rights which amount to property for other purposes.

*Banks v. Transport Regulation Board*

In *Banks v. Transport Regulation Board*,<sup>51</sup> Banks was the holder of a metropolitan taxicab licence issued under Pt II of the *Transport Regulation Act 1958* (Vic). Banks appealed a decision of the Supreme Court, which had upheld a decision of the Transport Regulation Board to revoke his licence. The High Court was required to consider whether the licence was "property" for the purposes of the *Judiciary Act 1903* (Cth) because, if it were not, the High Court would not have had jurisdiction to hear the appeal. The High Court's jurisdiction was, relevantly, limited to "directly or indirectly a question to or respecting property or a civil right of a value in excess of \$3,000" (s. 35(1)(a)(2) *Judiciary Act*).

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<sup>50</sup> [1989] VR 149.

<sup>51</sup> (1968) 119 CLR 222

Barwick CJ referred to a line of authorities, which held that a licence was not property, doing no more than rendering lawful that which, in its absence, would have been unlawful.<sup>52</sup> His Honour then went on to state:

*So it seems to me that even if it be right (though I think it is not) to extend Vaughan CJ's statements in Thomas v Sorrell (1673) Vaugh 330 (124 ER 1098) to the case of a licence granted under statute to ply a trade or to operate a vehicle upon a public highway, they cannot be definitive when the question is whether or no such a licence is property within the meaning of a section such as s. 35(1)(a)(2) of the Judiciary Act. Whilst that provision is on the one hand designed to limit by reason of the relatively small value of the property or right involved the cases in which appeals may be brought to this Court, it does on the other hand exhibit an intention to widen quite generously the range of decision or judgment which, if the stated value be present, will found a right of appeal: for it extends to judgments which indirectly involve any claim, demand or question to or respecting any property or civil right.*

In that circumstance, the Court held that the licence, revocable only in the stated circumstances and transferable to a fit and proper person, was property within the meaning of s. 35(1)(a)(2) of the *Judiciary Act*.

*Griffiths v. Civil Aviation Authority*

The case of *Griffiths v. Civil Aviation Authority*<sup>53</sup> concerned the question of whether a commercial pilot (aeroplane) licence and a commercial pilot (helicopter) licence issued under the *Civil Aviation Act 1988* (Cth) were property for the purposes of the *Bankruptcy Act 1966* (Cth).

In s. 5(1) of the *Bankruptcy Act*, the term "property" was defined widely to mean:

*real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incidental to any such real or personal property.*

In that case, the Full Court of the Federal Court of Australia (Spender, Einfeld, and Cooper JJ) held that the licences were not property for the purposes of the *Bankruptcy Act* but rather were personal in nature. According to the terms of the *Civil Aviation Act*, the two licences were not transferable or assignable and required that individuals possessed particular qualifications in order to be eligible to hold them and were granted on the personal fitness of the applicant. They also found that such licences were subject to variation, suspension or cancellation by the Civil Aviation Authority where it was satisfied that one or more of the grounds set out in the regulations existed, such as that the holder of the licence was not a fit and proper person to have

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<sup>52</sup> The main case on that point was *Thomas v. Sorrell* (1673) Vaugh 330; 124 ER 1098 per Vaughan CJ, in particular p. 351.

<sup>53</sup> (1996) 137 ALR 521.

the responsibilities, and to exercise and perform the functions and duties, of a holder of such a licence.

*Commissioner of Stamp Duties (NSW) v. Yeend*

In *Commissioner of Stamp Duties v. Yeend*<sup>54</sup>, Isaacs J drew the distinction<sup>55</sup> between a right which is a personal right and a right which is a property right. In that case the High Court was concerned with whether an agreement between a caterer and a racing club relating to the supply of refreshments to the public was liable to ad valorem duty as a "conveyance of any property" under the *Stamp Duties Act 1920* (NSW). In that Act, "property" was relevantly defined as to include "real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest". The High Court concluded that the agreement gave rise to a more personal right of selling refreshments with ancillary stipulations, and was not "property" within the meaning of the New South Wales *Stamp Duties Act 1920*.

*Commonwealth v. WMC Resources*

Many of the cases that touch on the issue of the proprietary nature of statutory interests are concerned with the question of whether, if the interest is varied or extinguished by subsequent amendment to the statute, compensation should be paid. This is because, by s. 51(xxxi) of the Commonwealth *Constitution (Constitution)*, the Commonwealth is empowered to make laws to acquire property, but the acquisition must be on "just terms". Most of the cases concern the issue of whether there is an "acquisition", rather than whether the interest is considered to be "property". It is generally recognised in the context of s. 51(xxxi) of the *Constitution* that the conferral of rights pursuant to a statute confers a particular bundle of rights in the holder which is a form, albeit perhaps limited, of "property".

For example, in *Commonwealth v. WMC Resources*<sup>56</sup>, the issue, which was determined by the Court, was whether amendments, which enabled the excision from a permit area of particular blocks, were laws for the "acquisition of property" within the meaning of s. 51 (xxx) of the *Constitution*.

The Court did not actually consider whether the permit and WMC's interest was a property right, as the parties were happy to proceed on the basis that they were.

It is interesting to note that, in that case, the Court held that where a purely statutory right is by its very nature susceptible to modification or extinguishment, its modification or extinguishment causes no acquisition of property. Further, the Court held that where a right created by statute is proprietary in nature, the modification or extinguishment of the right will be an acquisition of property only if it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject.<sup>57</sup>

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<sup>54</sup> (1929) 43 CLR 235.

<sup>55</sup> at 245-6.

<sup>56</sup> (1998) 194 CLR 1.

<sup>57</sup> The point being made is that the mere modification of a right does not itself equate to an acquisition by the party modifying the right. For the modification of a statutory right to amount to an acquisition of property, not only does the right modified have to be proprietary in nature but the

### 2.6.3 Application of theory and case law to FRMA rights

#### *Method of analysis*

It is clear from the analysis of the legal authority on the question of whether a right can constitute property that courts have applied various criteria, depending on the circumstances of the case. Accordingly, it is not possible to point to a finite and precise list of parameters by which any interest can be measured in order to determine whether or not it is "property".

In particular, the context in which the question was asked and an analysis of the legislation pursuant to which the particular right was granted was crucial to determining the question in each case.

While there is no settled checklist against which Western Australia's fishing access rights can be assessed to determine whether they constitute property it is, however, possible to discern certain themes, which run through the relevant case law. It seems that, when considering the nature of a fishing right or licence, courts have, in the past, focused on one or more of the following, among other factors:

- the value which the right provided, including, in some cases, whether any person could obtain (and enjoy) a right or whether access to the right was restricted - for example, see *Pennington v. McGovern*;
- the extent to which the right continued (encompassing both the term for which the right was granted and the ease with which it could be renewed, cancelled or revoked) - for example, see *Austell Pty Ltd v. Commissioner for State Taxation*; and
- the extent to which the right could be dealt with; that is, the ease with which it could be transferred by the holder to another person - for example, see *Austell Pty Ltd v. Commissioner for State Taxation* and *Pennington v. McGovern*.

For the purposes of examining fishing access rights under the FRMA, this report has taken these three themes and translated them into three parameters against which the rights will be measured. Those parameters are<sup>58</sup>:

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State modifying the right must derive some increase in the value of its own assets as a result. The Court gave the example of *Newcrest Mining v. Commonwealth* (1997) 190 CLR 513 where the modification of a statutory right was held to be an acquisition of property because the modification also extinguished the liability of the Crown to have those minerals extracted from its land and thereby enhanced the property of the Commonwealth.

<sup>58</sup> It needs to be acknowledged at the outset that identifying these parameters as indicators of proprietary rights is not put forward as a definitive statement of the tests which are to be applied in considering the nature of particular rights. There are differing views as to indicia to be used in particular circumstances. Further, consideration of the elements of a property right for legal purposes is not necessarily governed by the same rules as is consideration of the issue in other contexts. As one example, in his article presented at the Fish Rights 99 Conference, Anthony Scott lists the characteristics of property rights as (i) exclusivity, (ii) duration, (iii) security, or quality of title and (iv) transferability (he also lists two further characteristics as divisibility and flexibility). Our analysis combines Scott's second and third characteristics as "perpetuity" and

- *exclusivity* - are fishing access rights valuable? Can the holders of fishing access rights exclude others from doing something in respect of the subject matter of those rights? Are those rights generally enforceable against the world at large, rather than only one or more identified persons?
- *perpetuity* - are fishing access rights perpetual, in that holders of fishing access rights are entitled to hold them forever without risk of expiry, cancellation or revocation?
- *transferability* - can holders of fishing access rights freely transfer, bequeath, surrender or otherwise deal with them?<sup>59</sup>

An analysis of fishing access rights must consider them in the context of a property continuum. In doing this, it helps if we can identify a bundle of property rights with strong proprietary characteristics, against which we can compare fishing access rights. Accordingly, this report will, where relevant, contrast fishing access rights with the bundle of rights comprising absolute ownership of property.<sup>60</sup>

### 2.6.3.1 Fishing access rights

For ease of reference, fishing access rights granted under the FRMA can be categorised as follows:

- aquaculture leases granted under s. 97;
- exclusive licences granted by the Minister under s. 251; and
- other licences and permits (which are referred to as "authorisations" in the FRMA and for which the same term will be used in this report).<sup>61</sup>

In the case of a fishing access right, the relevant "bundle of rights" is the collection of rights, which the holder of that fishing access right enjoys. Appendix 1 sets out a summary of the various types of rights under the FRMA and their broad characteristics.

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does not address his two further characteristics. See Scott, AD, *Moving through the Narrows: From Open Access to ITQs and Self-Government*, in Shotton, R (ed.), *Use of Property Rights in Fisheries Management*, FAO Fisheries Technical Paper 404/1. Rome, 2000, p.110.

<sup>59</sup> Sackville & Neave note "Although the ability to alienate the thing owned is sometimes put forward as a reliable indicator of private property, there are many examples of non-assignable rights treated as property rights by courts and legislatures". See Neave, MA, Rossiter, CJ and Stone, MA *Sackville & Neave Property Law, Cases and Materials* (6<sup>th</sup> edn), Butterworths, Australia, 1999, p. 3.

<sup>60</sup> Our concept of "absolute ownership" for the purposes of this report would entitle the relevant owner to, among other things, perpetual enjoyment of the property rights held, absolute freedom to deal with the property (physically and legally) and the right to possess, use and deal with the property to the exclusion of all other persons.

<sup>61</sup> Under s. 80 of the FRMA, the Executive Director may issue a permit to enable a person to construct or modify a place for the purposes of using it for processing fish. Further, regulations 176, 178 and 179 of the Fish Resources Management Regulations 1995 provide for the issue of written approvals or authorities to import into the State live species of fish not endemic to the State, or to take and/or deal with fish for scientific purposes or genetic or chemical extraction or analysis. These permits and authorities will not be specifically considered for the purposes of this report.

Each category of fishing access rights listed above has different "property" characteristics and this report will, therefore, consider each category in turn in the context of the different parameters.

### **2.6.3.2 Exclusivity of fishing access rights**

The basis of an exclusive right is that it gives the holder of the right the ability to enjoy it to the exclusion of, and accordingly to enforce it against, all others. For example, absolute ownership of a thing gives to its owner the right to prevent others from accessing or using that thing. This applies equally to tangible things such as land and to intangible things such as processes protected by patents.

A pure form of exclusive right would give its holder the right to enjoyment, even to the exclusion of interference from the State. In discussing "exclusivity", this report uses the term in the sense of the right to enjoy without interference from other persons but subject to legislative and regulatory constraints.

#### *Aquaculture leases and exclusive licences*

An aquaculture lease granted under s. 97 of the FRMA authorises a person, or his or her representative, to occupy or use an area of land or waters for the purposes of aquaculture in respect of a specified species of fish. Subject to contrary provision in the FRMA or the lease, the lease vests in the lessee the exclusive right to keep, breed, hatch and culture the particular species within the leased area, and ownership of the fish that are kept, bred, hatched or cultured. Note that the exclusive right relates only to carrying out aquaculture activities in the leased area; it is not a right to occupy the relevant land or waters to the exclusion of all others.

An exclusive licence granted under s. 251 grants to the holder an exclusive licence to take fish from a specified area of coastal waters, or the foreshore above high water mark, as is specified in the licence.

Both of these kinds of fishing access rights are expressed in the FRMA to be exclusive rights and we can, therefore, draw the inference that they are so. The FRMA does not provide a specific remedy for holders of the exclusive rights in the event that another person seeks to exercise the rights and, to that degree, holders are left to rely on rights at common law. In the case of an exclusive licence, the FRMA does provide for regulations to prohibit persons other than the holder of the licence from exercising the rights granted under it. In the case of an aquaculture lease, the FRMA prohibits persons undertaking aquaculture activities in the absence of a licence to do so. As a practical matter, then, in such a situation, the holder of the fishing access right would presumably "enforce" that right against others by reporting to the authorities any attempt by another person to exercise them.

#### *Authorisations*

Due to their very nature, the rights of a holder of an authorisation cannot be described as exclusive.

Rather, the rights are *permissive*, in that they entitle the holder to do certain things where doing those things in the absence of an authorisation would be prohibited.<sup>62</sup> The rights given to a holder of an authorisation could be said to be "enforceable" against the authorities that administer the FRMA (in the sense that authorities would be bound to recognise an authorisation), but it does not make sense to speak of the rights being exclusive of, or enforceable against, all other persons. While an authorisation holder can enjoy rights to the exclusion of persons who do not hold an authorisation, the fact that the holder has the relevant rights does not prevent other persons duly authorised under the FRMA from exercising precisely the same rights.

Authorisations do not, therefore, have of themselves the exclusivity element of property. An authorisation authorises a person to do something that would otherwise be prohibited. Within the legislative framework, an authorisation holder may have a "bundle of rights" (e.g. a right to use gear, a right to transfer units, a right to renew the licence). A person may also hold a number of authorisations and exercise those authorisations concurrently (e.g. Commercial Fishing Licence, Fishing Boat Licence, Managed Fishery Licence). Authorisations do not inherently confer any right of exclusivity. The legislative framework underpinning the grant of an authorisation may create a situation where a person holding a particular authorisation is the only person able to exercise those rights, or licence conditions may be imposed with like effect. However, it is the management tools that can create some air of exclusivity, not the inherent characteristic of an "authorisation".<sup>63</sup>

### 2.6.3.3 Perpetuity of fishing access rights

At the upper end of the property continuum, a right of absolute property in a thing gives to its owner the right to own it forever - "in perpetuity". At the lower end, a right given to a person which may be terminated at any time and without reason is not a right "in perpetuity" and hence might be regarded as a right without one of the incidents of property.

In considering the question of continuity of fishing access rights under the FRMA, we need to take into account the term for which the fishing access rights are or may be granted, any rights of the person to obtain a renewal of the fishing access rights and the circumstances in which the fishing access rights may be terminated or limited in a particular manner.

#### *Aquaculture leases*

An aquaculture lease may be issued under the FRMA for a maximum initial term, and any subsequent terms, of up to 21 years each. The FRMA provides that the Minister may terminate a lease:

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<sup>62</sup> This was recognised by the High Court in relation to aquaculture licences under the Act in *Western Australia v. Ward; Attorney-General (NT) v. Ward; Ningarmara v. Northern Territory* (2002) 191 ALR 1, where Callinan J noted at p. 216: "All that such licences do is to remove a prohibition imposed on engaging in aquaculture by s. 90(a) of the FRMA. They appear to confer no proprietary right of any kind in the fish".

<sup>63</sup> For example, salmon fishermen on the south coast of Western Australia do not fish in competition in the same waters (although they access the same stock) and may be seen to have greater exclusivity than a group of commercial fishermen who actively compete with each other in the same waters at the same time (for example, rock lobster fishermen).

- if the area the subject of the lease is no longer being used or is being used for purposes other than for which the lease was granted; or
- on any other grounds specified in the lease.

The continuity of the lease will, therefore, depend upon its terms. As leases are issued for a specified term, a lessee's right may only continue beyond that term if a further term is granted (that is, the lease is renewed). The FRMA provides no express guarantee to a holder in relation to renewal of a lease.

Aquaculture leases do not, therefore, confer perpetual rights. However, they are granted for a specified term and may be terminated only in particular circumstances during that term. Accordingly, while in the context of perpetuity they are something less than an absolute property right, they are something more than a mere revocable permit.

#### *Exclusive licences*

Exclusive licences may have a maximum initial term of 14 years and subsequent terms of up to seven years each. The Minister may revoke or vary the licence in the manner provided for in the licence. Accordingly, the continuity of the right held will be determined by the terms of the licence.

Again, as licences are issued for a specified term, a licensee's right may only continue beyond that term if the licence is renewed. The FRMA provides no express guarantee to a holder in relation to renewal of a licence.

On the question of perpetuity, then, the same considerations apply to exclusive licences as to aquaculture leases.

#### *Authorisations*

The FRMA provides that an authorisation has a term of either 12 months from the date of grant or renewal of the authorisation, or as otherwise provided in the FRMA, or as otherwise provided in the licence (and, in the case of managed fishery authorisations, as otherwise provided in the relevant management plan).

The Executive Director may cancel authorisations at any time, but only for particular reasons, such as failure to comply with the terms of the authorisation, breach of the FRMA or other specified misconduct. Accordingly, the holder of an authorisation has the right to enjoy it without risk of its cancellation for reasons other than those specified in the FRMA.

As authorisations are issued for specified terms, they can be continued only by renewal, which involves application to the Executive Director or the Minister, as the case may be. The FRMA provides that authorisations may be granted or renewed subject to such conditions as the Executive Director thinks fit and specifies in the authorisation. However, the FRMA provides a limited guarantee of renewal for the holder of an authorisation (subject to exceptions) in that if the holder applies for a renewal, the Executive Director must grant it, subject to:

- section 136A, which effectively limits the Executive Director's ability to renew authorisations where they apply in marine parks and marine nature reserves; and
- section 143, which provides that the Executive Director may refuse to renew an authorisation in certain circumstances, including where the applicant has been convicted of a relevant offence, or has contravened a condition of the authorisation, or has not used the authorisation for at least two years.

The limited guarantee given to holders of authorisations by the cancellation and renewal provisions of the FRMA is subject to some notable exceptions. In particular, s. 73 of the FRMA provides that none of a commercial fishing licence, fishing boat licence or any other licence granted under the regulations authorises a person to use a boat for fishing, or engage in a fishing activity, in a managed fishery or an interim managed fishery. Imposition of a management plan for a fishery, therefore, has the effect of rendering these authorisations ineffective.

Revocation of an existing management plan for a fishery or expiry or revocation of a management plan for an interim managed fishery will have a similar effect on any managed fishery licence or interim managed fishery permit issued in respect of the fishery.

While it is open to the holder of an authorisation to then apply for an authorisation in respect of the managed fishery and seek to meet the criteria for its grant, and the Executive Director is obliged to take into account the fact that the person previously held an authorisation, the Executive Director is not *bound* to grant a further authorisation.

Further, declaration of a class of fish as totally protected or commercially protected under the FRMA has the effect of imposing restrictions on dealing with the fish or class of fish (although activity in accordance with an aquaculture licence is still permitted). Authorisations are, however, unaffected by the imposition of bag limits.

Accordingly, authorisations obtain some element of perpetuity by virtue of the fact that the FRMA gives authorisation holders a limited guarantee of renewal. This limited guarantee is, however, subject to some important limitations, meaning that despite it, authorisations cannot be described as perpetual.

#### **2.6.3.4 Transferability of fishing access rights**

An absolute right of property in a thing enables its owner to transfer, mortgage or otherwise deal with it as he or she sees fit. While a holder of fishing access rights under the FRMA may deal with them, the FRMA imposes certain limitations on the holder's right to do so.

##### *Transfer of aquaculture leases and exclusive licences*

There are no provisions in the FRMA dealing with transfer of aquaculture leases or exclusive licences.

### *Transfer of authorisations*

The FRMA provides that authorisations may be transferred subject to such conditions as the Executive Director thinks fit and specifies in the instrument, which evidences the authorisation. Currently, an application for the transfer of an authorisation must be made on a form approved by the Executive Director. The form must be competently completed by the holder of the authorisation and be accompanied by the correct fee.

The Executive Director is obliged, on application by a holder of an authorisation, to transfer it, or part of an entitlement under the authorisation held by the person, except in certain specified circumstances. Those circumstances are where the Executive Director considers the proposed transferee is not a fit and proper person to hold the authorisation, or does not satisfy relevant guidelines relating to foreign persons holding, controlling or having an interest in authorisations, or a range of other grounds set out in regulation 131. To that extent, authorisations come with a limited guarantee of transferability, in that the Executive Director may refuse to transfer only on specified grounds.

A holder may voluntarily surrender an authorisation (s. 144).

### *Ability to bequeath fishing access rights*

The FRMA makes no provision for what, if anything, is to occur in the event that the holder of a fishing access right who is a natural person dies.

### *Security over fishing access rights*

The FRMA specifically contemplates that a holder may mortgage, or otherwise create security over, a fishing access right. Under the FRMA, the rights of a security holder can be noted on the register of rights maintained under Part 12 of the Act and a security holder obtains certain rights to be notified under the FRMA in the event that a dealing with the secured rights is proposed (see s. 130). The recognition by the FRMA of a holder's ability to grant security over a fishing access right lends weight to the view that these rights are a form of property capable of being dealt with by the holder.

### **2.6.3.5 Other considerations**

The fact that the fishing access rights are created and administered under the FRMA gives holders of them the capacity to call on general principles of administrative law to challenge or question the way in which the State deals with them. Administrative law, in the context of rights created under statute, seeks to apply various principles of fairness to the administration of those rights by the State and to impose on the State a broad duty to act reasonably in undertaking that administration. Where State decision makers do not observe these principles and duties, certain persons affected have available to them legal rights and remedies to address that failure.

The availability of these rights and remedies may in some circumstances have the effect of supporting any right of a holder of a fishing access right to continue to enjoy it. For example, they would be available to a holder of an authorisation whose authorisation was cancelled or was not renewed by the Executive Director where the

holder considered that the Executive Director's action was not in accordance with administrative law principles.

### 2.6.3.6 Conclusion

Using the above analysis, the extent to which the three main groups of fishing access rights available under the FRMA have the elements of "property" outlined at the start of this section of the report can be summarised as follows:

	<b>Exclusive</b>	<b>Perpetual</b>	<b>Transferable</b>
<b>Aquaculture lease</b>	Expressed to be so.	Not perpetual, but more enduring than a mere revocable licence.	No express transfer provisions in the FRMA.
<b>Exclusive licence</b>	Expressed to be so.	Not perpetual, but more enduring than a mere revocable licence.	No express transfer provisions in the FRMA.
<b>Authorisation</b>	No. <sup>64</sup>	Not perpetual, but limited guarantee of renewal, subject to exceptions.	Limited guarantee of transfer, subject to exceptions.

In the end result, it cannot be said that rights granted under the FRMA are "property" in the sense in which this report uses the term. However, it is clear that the rights have proprietary elements about them. These elements make the rights something more than a mere personal permission, which cannot be dealt with and can be terminated at any time, but something less than an absolute right of ownership.

## 2.7 Would Compensation Be Payable For Any Change In The Current Fisheries Management Regime?

Section 51 (xxxii) of the *Constitution* in essence requires the Commonwealth to provide compensation on just terms for any acquisition of property by it from any person. As we have seen above, many of the cases that deal with whether a fishing right constitutes property arose in that context.

Unlike the Commonwealth, there is no requirement in the *Constitution* of the State of Western Australia for compensation to be paid for the acquisition of property.

There is, however, a principle of statutory construction, which provides that legislation, should not be regarded as permitting the removal or impairment of a vested property right without compensation unless the contrary intent is clear from the statute.<sup>65</sup> In *Greville v. Williams*<sup>66</sup>, Griffiths CJ explained the situation

<sup>64</sup> However, see discussion concerning "Authorisations" under section 2.6.3.2 and footnote 62.

<sup>65</sup> See *Pearce on Statutory Interpretation in Australia* (2<sup>nd</sup> edn) at para. 11: "Legislation is presumed not to alienate vested proprietary interests without adequate compensation ... It thus seems that the courts will be most reluctant to hold that a person is to have a vested proprietary right taken away without compensation. It will probably require a clear statement in the Act to that effect: certainly it will not be implied by the court". Cited with approval in *South Australian River Fishery*

concerning a State's requirement to compensate for an acquisition of property, saying<sup>67</sup>:

*...it is important to remember that there is a presumption in all legislation that it is not intended to interfere with vested interests. The legislature of course have plenary power to do so, and can destroy such rights if they please, but it is always taken that they have not done so unless their intention to do so is shown by express words.*<sup>68</sup>

That presumption can be rebutted in the statute. Examples of such a rebuttal are:

- (a) where the legislation expressly provides that no compensation is payable for the acquisition; and
- (b) where the legislation provides for some compensation (in which case the question of the compensation payable is governed by the terms of the legislation and not the presumption).

This principle was recently reaffirmed by the High Court in *Durham Holdings Pty Ltd v. NSW*.<sup>69</sup> In that case, the NSW State Government had enacted legislation vesting all coal in certain lands in the Crown. The Government also enacted legislation setting out the compensation payable to those who had, prior to vesting in the Crown, held interests in coal. The total amount of compensation payable by the State was capped at \$60 million and payments to individuals were also capped. The applicant claimed that it should be entitled to more than the capped amount of compensation and brought an application seeking a declaration that the State's compensation scheme was invalid. The Full Court of the Supreme Court dismissed the application. On an appeal by the applicant, the High Court unanimously rejected the application for special leave. In a joint judgment, Gaudron, McHugh, Gummow and Hayne JJ stated that the terms of the statutory compensation regime displaced the common law rules as to the provision of compensation and rebutted the presumption.

A similar conclusion was reached by the Full Court of the South Australian Supreme Court in *South Australia River Fishery Association and Warrick v. State of South Australia*.<sup>70</sup> In that case, the Supreme Court rejected the appellants' submission that delegated legislation may be invalid if it terminates rights or privileges previously available under a statutory scheme without providing adequate compensation for that loss. Doyle CJ stated:<sup>71</sup>

*To impose such a requirement would, in effect, be to impose a requirement akin to that imposed on the Commonwealth Government*

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*Association & Warrick v. State of South Australia* No. SCCIV - 02-1381 [2003] SASC 38 (14 February 2003).

<sup>66</sup> (1906) 4 CLR 694.

<sup>67</sup> at 703.

<sup>68</sup> See also *Attorney-General v. De Keyser's Royal Hotel* (1920) AC 508, *Minister of State for the Army v. Dalziel* (1943) 68 CLR 261.

<sup>69</sup> (2001) 177 ALR 436.

<sup>70</sup> [2003] SASC 174.

<sup>71</sup> At [122].

*by s. 51(xxxi) of the Commonwealth Constitution Act, namely that just terms be provided for the acquisition of property.*

A full consideration of this matter in the context of Western Australia needs to acknowledge the existence of the *Fisheries Adjustment Schemes Act 1987* and the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997*. Broadly, the *Fisheries Adjustment Schemes Act* provides for voluntary and compulsory acquisition by the State of authorisations and "entitlements" held under the FRMA in certain circumstances. Where this occurs, the State is obliged under the Act to pay compensation as determined in accordance with the Act.<sup>72</sup> The Act does not use a concept of "just terms" and there is, therefore, no guarantee that an amount of compensation payable as determined under that Act would equate to the measure of compensation provided for in s. 51(xxxi) of the *Constitution*.

The *Fishing and Related Industries Compensation (Marine Reserves) Act* is, as its long title states:

*An Act to provide for the payment of compensation to holders of leases, licences and permits under the Fish Resources Management Act 1994 and Pearling Act 1990 on account of the effect of marine nature reserves and marine parks constituted under the Conservation and Land Management Act 1984...*

The Act sets out a range of "relevant events" (which generally involve classification and management of marine reserves) in s. 4 and provides that a person who holds an "authorisation" is entitled to fair compensation for any loss suffered by the person as a result of a "relevant event".<sup>73</sup> The Act sets out what is considered to be "loss" suffered by a person.

In the specific context of Integrated Fisheries Management, the Minister for Agriculture, Forestry and Fisheries released a Government policy statement in October 2004. The Minister made the following statements in relation to compensation:

- 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 consideration of compensation. Compensation may take various forms and desirably does not necessarily involve the payment of money. The Department of Fisheries will review the scope of the *Fisheries Adjustment Scheme Act* to ensure it contains specific flexibility to encompass these principles under an integrated management system.
- 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

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<sup>72</sup> See ss. 10C and 14G of the Act.

<sup>73</sup> The term "authorisation" is defined in the Act and does not have the same meaning as the term used in the FRMA. For example, "authorisation" for the purposes of the Act does not include a recreational fishing licence.

social equity considerations, as soon as practicable. Clearly, consideration of any market-based system will be based on merit.

- No compensation should be payable where adjustments are made for sustainability reasons.

## 2.8 Summary

Before turning to summarise the observations made in this report, it is perhaps worth acknowledging that, if considering the question of sufficiency of fishing access rights, it might be useful to focus on whether the particular rights have the features considered to be sufficient for the purposes for which persons hold them, rather than to focus on whether they amount to "property". To an extent this will be a political judgment in the sense that what is satisfactory in one situation may not be in another and there will be competing interests involved which will need to be taken into account in assessing whether the rights are "sufficient".

On the matter of fishing access rights in Western Australia from a property analysis perspective, however, the following points can be made:

- If no statutes had been enacted in respect of the State, which dealt with fishing, the common law position would have applied in Western Australia.
- Had this been the case, all persons would have had a right to fish in tidal waters of Western Australia without restriction.
- Some Aboriginal persons may have rights to fish in tidal waters of Western Australia as a consequence of native title; that is, as a result of a continued adherence to a set of laws and customs from which that right is derived. In practice, the native title right is coincidental with the public right.
- Both the Commonwealth and State Parliaments have enacted legislation, which has altered the common law position. As to legislation made by the State of Western Australia:
  - Provided a law can be said to be for the peace, order and good government of Western Australia and has a sufficient territorial nexus with the State, the Parliament can make any law it wishes to in relation to fishing. Such a law will not, however, be valid (i.e. operative) if it is inconsistent with a valid law of the Commonwealth.
  - A law may not be valid if it affects native title rights and interests but after 1993 is not enacted in conformity with the future act processes of the *Native Title Act*.
  - The FRMA, the primary Western Australian State legislation dealing with fishing access rights, grants to holders rights that have some elements of "property" about them.

- In the absence of legislation that provides to the contrary, the State is not obliged to pay compensation to any person for any act by which it acquires a person's property. Any legislative right to compensation would constitute a right forming part of or associated with the “bundle of rights”.

## **PART 3 PROJECT OBJECTIVES 3 AND 4**

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*Identify various approaches which can be taken to change the nature of rights on a sector basis.*

*Identify changes to statute law necessary to attain a change in the nature of access rights, if required.*

### **3.1 Introduction**

Part 2 of this report examined the nature of current fisheries rights in Western Australia. What of the possible nature of future rights?

It is not the task of this report to canvas a list of fisheries management frameworks that might be considered as part of any change in the way in which the State regulates fisheries, or to discuss their respective merits. Rather, this part of the report will discuss some hypothetical broad scenarios of change in respect of the management of a fish resource, using the present dhufish management regime as its starting point. It should be noted that this area of fisheries management is constantly evolving and this aspect of the report should be read in that light.

Change in management of any public resource is often a large question and this is particularly so in the case of fisheries management. This part of the report will not attempt to set out comprehensive examples of change, or an exhaustive list of issues to be considered by those advocating (or, alternatively, arguing against) change. It merely seeks to briefly visit the concept of management change in order to give the reader an appreciation of the kinds of issues that would be involved.

### **3.2 Process Of Analysis**

Considering the impact of any change involves, logically, examining the position pre-change and the position post-change and analysing differences between the two. Applying that concept to potential changes in fisheries management in Western Australia, the appropriate method of inquiry would be to consider the difference in rights held by fishers in Western Australia now and those rights that they might hold under a fictitious new system.

Fishing rights, and the impact of changes to them, can be considered from a number of different perspectives. For example, we can examine changes in the fishing rights of each individual person, or we can examine changes in the fishing rights of different groupings of individuals. Two particular groupings are:

- the commercial sector; and
- the recreational sector.

Under the hypothetical scenario to be examined, changes are made in respect of the way the State manages fishing for dhufish, with particular emphasis on allocations of

the total available dhufish catch between the commercial and recreational sectors. This section of the report will consider:

- the current management framework for dhufish;
- two broad forms of systems of fisheries management - an administrative system and a market-based system;
- some of the more common management tools either currently used for dhufish, or which are available for use for dhufish, under the FRMA;
- the impact of change on a sectoral basis; and
- broad legal issues which might arise for consideration in implementing management change.

### 3.3 Dhufish - The Current Position

The total sustainable annual catch of dhufish in Western Australia has been *estimated* at 500 tonnes.<sup>74</sup> Currently, there is no formal notional allocation of the dhufish catch between the commercial and recreational sectors, and the total annual catch is taken, generally -

- *50% commercially*

Any holder of a commercial fishing licence may take dhufish (there are approximately 1500 boats). Dhufish are, in practice, targeted by a small group of dedicated wetliners (20 to 30 boats) with a seasonal take by a proportion of the Western Australian rock lobster fleet (20 to 30 boats). A size limit of 500mm applies, but there are no output controls (e.g. bag limits). There is a small net catch but this will not be considered in this hypothetical scenario.

- *50% recreationally*

There is no licensing regime for recreational fishing in respect of dhufish and no limit on the number of recreational fishers who may take dhufish. There is, however, a bag limit and a size limit. The bag limit is two fish per person per day for the west coast and one fish per person per day for the Gascoyne region. For the south coast, the current daily bag limit is four, however, this is the subject of review. A bag limit of two is being considered. A size limit of 500mm applies. There is also a possession limit that acts as a “catch all” control (but is not specific to dhufish).

While these specific limits are placed on the taking of dhufish at present, there is no total catch limit imposed on either the commercial or the recreational sector in respect of dhufish. The Department of Fisheries takes into account certain catch data in determining management settings but no formal determination as to allocations between sectors is made.

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<sup>74</sup> This is subject to ongoing review.

Accordingly, it is open to either sector (as an entire sector) to take as much as it is able, provided fishers in each sector remain within the limits of the current management settings.

### **3.4 Hypothetical Management Systems**

Two broad forms of system, which could be used to manage the catch of the dhufish resource, are an administrative-based system and a market-based system.

The hypothetical administrative-based system would involve the State allocating the total available dhufish catch among users based on non-market considerations. Such considerations might include historical or prior use, including spatial or temporal aspects (i.e. geographical location of use and timing of use), of the dhufish resource. The State would then seek to give effect to the allocation through using management settings of the kind currently available to it under the FRMA.

Some current management tools available under the FRMA are set out as an example in Appendix 2.

The hypothetical market-based system would involve the State dividing the total available dhufish catch into shares. These shares could be bought and sold, with shares being allocated according to the willingness to pay of the various users.

There are various elements that the "market" system might comprise. For example:

- initial allocation (or proportional allocation) of shares could be achieved by the State auctioning the shares to the highest bidders;
- shares could be traded by holders through private sale or an organised "exchange" managed by a dedicated body, or otherwise;
- shares might be measured as an output unit (i.e. tonnes caught) or an input unit (the amount of fishing gear which can be used) or even on a territorial basis (the right to undertake fishing in a defined area);<sup>75</sup>
- shares could be "bought back" by the State in order to reduce usage of the fish resource at particular times; and
- stakeholders could buy shares and yet not exercise the associated rights in an effort to reduce overall take or competition.

It should not be assumed that any system adopted would be purely administrative or purely market based. Elements of each system might be combined to form a hybrid system. Consider the following examples:

- The State allocates a percentage of the available dhufish catch between the commercial and the recreational sectors based on historical usage. The State then sub-allocates the catch within each sector on a seasonal basis (for example, the

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<sup>75</sup> See Shotton, R, *Current Property Rights Systems in Fisheries Management*, in Shotton, R (ed.) op. cit. n. 55, p. 45

access of each sector may be distinguished on the basis of time of year). After these allocations are determined, rights to use the dhufish resource within the determined parameters are auctioned to the highest bidders within the groups to whom allocations have been made.

- The State uses an administrative-based system of regulating use of the available dhufish catch in one region of the State and a market-based system for regulating use of the available dhufish catch in another region of the State in order to reflect different patterns of usage in those regions.

### 3.5 Effect Of A Change As Between The Sectors

#### *"Allocation" between the sectors*

If a new system is put in place, it is a real prospect that this will result in a reallocation of the available dhufish catch between the commercial and the recreational sectors.

Allocation might be explicit, in that the State identifies a specific percentage of the available catch to be allocated to each of the sectors, or it might be unspecific, in that the State focuses on other factors in determining any limitations on fishing activities and does not set explicit sectoral targets. It should be borne in mind that precise catch targets are unlikely to be achieved. Fishing is an inexact science and it is not possible to control with any certainty which particular species or size of fish will be caught in the course of fishing activity.

An explicit process for setting resource allocations on a sectoral basis is likely to be as follows:

- Based on information provided from appropriately qualified scientists, the Department would establish a sustainable harvest level (in tonnes) of the stock of dhufish in Western Australia.
- The sustainable harvest level would then be broken down into a proportional *commercial catch* share and a proportional *recreational catch* share. Each measure would represent the approximate maximum amount of dhufish which may be taken by the relevant sector in, say, a year in Western Australia.

It is theoretically possible to identify the actual catch of dhufish achieved by each sector over a specific period of time. On that basis, determining a new proportional *commercial catch* share and *recreational catch* share could result in either a shift of the catch from the commercial to the recreational sector or, alternatively, from the recreational to the commercial sector.<sup>76</sup> A shift could be enacted by changing the proportional shares.

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<sup>76</sup> Also note that the sectoral allocation could remain the same.

### 3.6 Legal Issues In Connection With Change

Below are some broad legal issues that might arise in connection with a change in fisheries management policy .

#### 3.6.1 Legislative issues

In considering any new system, one of the first issues to be investigated would be whether legislative change was required. The extent of legislative change required (if any) would depend on what the State wished to provide for. For example, a proposed change which primarily involved use of management tools already existing under the FRMA would be much less likely to involve significant legislative change than would a proposed change that sought to give effect to a market-based system.

Any legislative change would be undertaken within the State's legislative and constitutional framework and, therefore, the normal considerations applicable to any State legislative process would apply. These would include:

- constitutional limitations (see Capacity of the Commonwealth and the States to Legislate in Part 2 of this report);
- consideration of legal arrangements which the State has made with the Commonwealth with respect to fisheries management; and
- political and parliamentary process limitations. Specifically -
  - Any Bill dealing with change of fisheries management will be subject to the normal processes of parliamentary debate and amendment.
  - Regulations may be disallowed. Regulations are required to be laid before each House of Parliament within six sitting days of that House next following publication of the regulations in the *Government Gazette*. If either House passes a resolution disallowing any regulation within a specific time of the regulation being laid before it, or if regulations are not laid before Parliament in accordance with the required procedure, such regulations cease to have effect: *Interpretation Act 1984* s. 42(2).

#### 3.6.2 Administrative law issues

Any process of change would need to take into account issues of administrative law. The State would need to ensure that any administrative law duties, which applied to decisions made by government officers in the course of change, were met. Failure to do so would leave those decisions open to the potential of challenge by affected persons and, if a particular challenge was successful, invalidity.

It is important to note that administrative law principles relate to action by the executive arm of government; they do not relate to action by parliament. Consideration of administrative law issues is, therefore, not relevant to parliament's act of making of new legislation.

Whether any administrative law duties applied in any particular situation, and whether the relevant Government decision maker met them, would always depend on the circumstances of the case. Two examples of recognised administrative law principles are set out below.

### 3.6.3 Legitimate expectation

*What is "legitimate expectation"?*

A body of law has developed around the notion that public officials should act fairly in making certain kinds of decisions that affect the interests of private persons.

This body of law recognises a person's "legitimate expectation". A legitimate expectation is a reasonable expectation by a person that a legal right, which is subject to the control of a public decision maker, will be obtained, renewed or not be unfairly withdrawn or cancelled without the person being given a hearing: *Kioa v. West* (1985) 159 CLR 550 at 567.

Not every expectation of a person about any such legal rights will be a legitimate expectation recognised at law. As McHugh J noted in *Haoucher v. Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, a legitimate expectation that a person will obtain or continue to enjoy a benefit or privilege must be distinguished from a mere hope that he or she will obtain or continue to enjoy that benefit or privilege. Whether a legitimate expectation exists will always be a question of fact, depending on the particular circumstances of each case.

A legitimate expectation will exist where the circumstances of the case are such as to provide a reasonable basis or reasonable grounds for an expectation that the relevant decision-making body will exercise its power regarding an existing or a future right, interest, privilege or benefit in relation to an individual in a particular way. It will extend to future rights and interests provided that the expectation in question is reasonably based: *Kioa v. West* (1985) 159 CLR 550 per Mason J.

In *Attorney-General (NSW) v. Quin* (1990) 170 CLR 1, Mason CJ in the High Court<sup>77</sup> held that four factors were relevant to the existence of a legitimate expectation –

- (1) the giving of an assurance or undertaking by the decision-making body or by a person in authority;
- (2) the existence of a regular practice or course of conduct followed by the decision-making body;
- (3) the consequences to the individual of denial of the right, interest, privilege or benefit to which their expectation relates; and
- (4) the satisfaction or fulfilment of prescribed conditions or criteria.

*What is the relevance of a legitimate expectation?*

Where a statute gives a public decision maker the power to destroy, defeat or prejudice a person's legitimate expectation, the rules of "procedural fairness" operate.

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<sup>77</sup> At p. 20.

One aspect of "procedural fairness" is that, where a person has a legitimate expectation, the person has the right to be given a reasonable opportunity to be heard before a decision is made or action is taken by a public decision maker which would be incompatible with, or which would defeat, the expectation. It is important to note that a legitimate expectation will confer only the *entitlement to procedural fairness*; it will not confer the entitlement that a substantive decision will be made in conformity with the person's expectation.

There is no set form as to the kind of hearing a public decision maker must accord to a person with a legitimate expectation. What is appropriate in a particular case will depend on the circumstances of that case and will depend, among other things, on the subject matter and the rules under which the decision maker is acting.

#### *Legitimate expectation in a reform context*

The concept of legitimate expectation has been applied by Australian courts to decisions made by relevant government bodies in relation to fishing licences. The following cases are examples:

#### ***Dighton v. South Australia***

In *Dighton v. South Australia* [2000] SASC 194, Mr Dighton was a commercial fisher who held a marine scalefish licence under the *Fisheries Act 1982* (SA). As part of a new regime, the Governor in Council approved a variation of regulations closing a particular area to commercial nets. However, a regulation provided for the grant of an exemption to commercial fishers who could demonstrate financial hardship in that their income depended on net fishing in those specific areas. Fishers granted an exemption would be permitted to use nets in the area. Mr Dighton, the only licence holder in the area, sought an exemption. When the Minister denied his application for an exemption, Mr Dighton brought proceedings to have the decision set aside and claimed that his interests were not properly considered.

Williams J of the Supreme Court of South Australia held that as the regulatory regime changed when the area was closed to net fishing, no one could legitimately expect to receive any special treatment. Moreover, if there was a requirement of procedural fairness imposed on the Minister in the exercise of the power to grant an exemption by reason of the special position of Mr Dighton as a former licence holder affected in his livelihood, then the Minister had discharged that obligation in that case, as Mr Dighton had been provided with an opportunity to put his case.

However, as the Minister had announced a policy as to how ministerial exemptions would be considered, the Minister was obliged to administer that policy fairly in a procedural sense. The Minister's written communications to licence holders, including Mr Dighton, although creating no legal right, created a legitimate or reasonable expectation in the plaintiff that his application for an exemption would attract the rules of natural justice.

### ***Puglisi v. Australian Fisheries Management Authority***

In *Puglisi v. Australian Fisheries Management Authority* (1996) 42 ALD 211, Mr Puglisi sought judicial review of a decision by the AFMA to refuse him a fishing permit for the 1996 fishing period. Mr Puglisi had owned and operated a fishing vessel in the South East Fishery Zone since 1979. However, from 1991 onwards under the AFMA's new input control system, operators were required to own a fishing licence and comply with annual quota limits. If operators exceeded their quota, it was necessary for them to make subsequent adjustments and trade quota units with other licensees in order to come within their entitlements.

During 1993, Mr Puglisi overcaught his quota limits of several species. He was permitted to reconcile this in late 1994 and early 1995 by leasing quotas from other operators and using part of his prospective 1995 quota. A dispute arose as to whether he should be granted a 1996 permit.

The AFMA refused to allow Mr Puglisi the benefit of his prospective 1996 quota to reconcile his earlier overcatch. The AFMA then subsequently refused his application for a 1996 permit on the grounds that he did not meet the eligibility criteria as he had failed to reconcile his overcatch before 31 December 1995. Mr Puglisi brought proceedings to challenge the refusal to allow him to use the benefit of his prospective 1996 quota.

Tamberlin J of the Federal Court found for Mr Puglisi and held that the decision to refuse the 1996 permit amounted to procedural unfairness. The circumstances gave rise to a legitimate expectation by Mr Puglisi of timely warning by the AFMA that the benefit of the prospective 1996 quota would not be available for reconciliation of the 1994 overcatch. Here, there were no general guidelines as to how the overcatch policy would be applied in practice and there was no indication by the AFMA that permission to use the prospective 1995 quota was a one-off concession. Further, as the administrative arrangements surrounding the renewal of fishing permits were extremely complex and uncertain in the changing regulatory environment, it was reasonable for the holder of a licence to rely on the past actions of the statutory authority in administering the scheme as an indication of its future approach, as Mr Puglisi had done.

In relation to a right held by a person under the FRMA, the holder might have a particular legitimate expectation in relation to that right. If a decision were made or action were taken as part of management change and that decision or action would be incompatible with, or defeat that expectation, it would be necessary for procedural fairness to be awarded to the rights holder.

#### **3.6.4 Relevant considerations**

A public decision maker must take into account only relevant considerations when making a decision pursuant to legislation. If the decision maker takes into account irrelevant considerations, or fails to take into account relevant considerations, this may give rise to an application by an affected person for judicial review of the decision. A relevant consideration is one that the decision maker is obliged, under the

statute conferring the decision-making power, to take into account: *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24.

*Peko-Wallsend* is the leading case dealing with this issue and Justice Mason made the following observations about the applicable principles under the heading "Failure to Take into Account a Relevant Consideration" (at pp. 39-42):

*Together with the related ground of taking into account irrelevant considerations, it has been discussed in a number of decided cases, which have established the following propositions:*

- (a) *The ground of failure to take into account a relevant consideration can only be made out if a decision maker fails to take into account a consideration which he is "bound" to take into account in making that decision ...*
- (b) *What factors a decision maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors ... are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation ... By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision maker is bound to take a particular matter into account unless an implication that he is bound to do so is found in the subject-matter, scope and purpose of the Act.*
- (c) *Not every consideration that a decision maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law.*
- (d) *The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator.*

*... It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the*

*decision maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power ... I say "generally" because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene M. R. in *Wednesbury Corporation*, ... in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it ...*

- (e) *The principles stated above apply to an administrative decision made by a Minister of the Crown.*

Decisions by the Minister for Fisheries or an officer of the Department made under the FRMA in connection with management changes would be open to challenge on administrative law grounds if, in making the decision, the relevant decision maker failed to take into account a relevant consideration or took into account an irrelevant consideration.

### **3.6.5 Fisheries adjustment schemes**

It would be open to the State to seek to use a fisheries adjustment scheme as part of any management change, in which case compensation for "acquisition" of fishing rights would be payable in accordance with the legislation. See s. 2.7 in Part 2 of this report.

### **3.6.6 Compensation**

One or more groups of users of the dhufish resource might seek compensation from the State in respect of any change that occurs in their usage or rights. Again, see s. 2.7 in Part 2 of this report.

Compensation may be sought by way of political means (for example, lobbying government) or by legal means (that is, taking legal action on the basis of established legal principles). The kind of action a claimant might take would depend on the claimant's particular situation.

## **PART 4      CONCLUSION**

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This report has been developed by the Department of Fisheries, in liaison with a Steering Committee and with the State Solicitor's Office. The report has explored the nature and extent of rights to fish in Western Australia by reference to common law principles and the application of statute law. The report also includes a hypothetical case study that explores the various approaches, which can be taken to change the nature of rights on a sector basis and the changes to statute law that may be necessary to attain such a change.

The report has been written to assist Government and stakeholders alike in reaching a common position on the issue of the nature of fisheries access rights – a complex issue which has been subject to much discussion and debate in recent years. The report is intended to feed into development of the integrated fisheries management process and, hopefully, will assist policy makers and stakeholders in gaining an understanding of fisheries rights in Western Australia and the mechanisms and implications of resource allocation shifts.

**APPENDIX 1 FISH RESOURCES MANAGEMENT ACT 1994 SUMMARY OF ENTITLEMENTS**

<i>Subject matter</i>	<i>Prohibitions/obligations imposed by the Act re subject matter</i>	<i>Exceptions to the prohibition/obligation</i>	Nature of rights granted under the Act re subject matter	<i>Manner of grant of right</i>	<i>Details of right</i>	<i>Limitations on right</i>	<i>Duration of right and transferability</i>
RIGHTS PROVIDED FOR UNDER THE <i>FISH RESOURCES MANAGEMENT ACT 1994</i> ("ACT RIGHTS")							
Any matter dealt with by the Act			Exemption granted by Minister or Executive Director under s. 7. Minister may grant exemption for any purpose. Executive Director may only grant exemption as to limited matters.	Apply in prescribed form (s. 7(4)).	Can be subject to any conditions, revoked or varied (ss. 7(5), 7(6)).		
Dealings with a managed fishery	<ul style="list-style-type: none"> <li>Management plan for a managed fishery may prohibit a person from engaging in fishing or any fishing activity of a specified class in the fishery otherwise than in accordance with a managed fishery licence or interim managed fishing permit ("mfa") (s. 58(1)).</li> <li>Management plan may prohibit fishing activities in a fishery in various different</li> </ul>		Authorisation in respect of managed fishery under s. 58 (broad enabling provision for design of authorisation scheme for the managed or interim managed fishery) and Part 6 Division 4 (specifics of issue): managed fishery licence or interim managed	Apply to Executive Director who may grant if satisfied that criteria and procedures set out in management plan are satisfied (s. 66(1)). History of fishing by applicant, or authorisations held by applicant prior to imposition of management plan, must be taken into account by the	May authorise a person or persons acting on the person's behalf to engage in fishing or any fishing activity of a specified class in the managed or interim managed fishery (s. 66(2)).	Subject to provisions in the management plan relating to: <ul style="list-style-type: none"> <li>protection or management of fishery (s. 56(3));</li> <li>authorisations (s. 58);</li> <li>capacity of fishery (s. 59);</li> <li>entitlements conferred by mfas (s. 60);</li> <li>prohibitions on fishing activity in the fishery (s. 61);</li> <li>any other matter set out (s. 62); and</li> </ul>	Duration either: <ul style="list-style-type: none"> <li>12 months; or</li> <li>as otherwise provided in the Act; or</li> <li>as otherwise provided in the mfa; or</li> <li>as otherwise provided in the management plan (s. 67).</li> </ul> An mfa ceases to have effect if relevant management plan is revoked or expires (s. 70). An mfa can be

<b>Subject matter</b>	<b>Prohibitions/obligations imposed by the Act re subject matter</b>	<b>Exceptions to the prohibition/obligation</b>	<b>Nature of rights granted under the Act re subject matter</b>	<b>Manner of grant of right</b>	<b>Details of right</b>	<b>Limitations on right</b>	<b>Duration of right and transferability</b>
	<p>ways (s. 61).</p> <ul style="list-style-type: none"> <li>• Management plan may prohibit or regulate various other matters in relation to managed or interim managed fishery (s. 62).</li> <li>• Offence to fail to comply with a management plan (s. 74).</li> </ul>		<p>fishery permit. Under s. 58, management plan may set out limitations or criteria for authorisations for the relevant fishery.</p>	<p>Executive Director in certain circumstances when considering grant (ss. 71, 72). The fact that an applicant fished in the fishery before management plan determined does not entitle applicant to grant, but must be taken into account by Executive Director (s. 71).</p>		<p>set out (s. 62); and</p> <ul style="list-style-type: none"> <li>• ss. 13A and 13B of the CALM Act (s. 73A).</li> </ul> <p>May be limited in several ways (s. 66(3)) e.g. fish taken, fishing gear, fishing area, duration. Subject to conditions specified in the relevant management plan and conditions imposed by Executive Director (s. 69). Executive Director may add, delete or vary conditions specified in mfa by notice (ss. 69(3), 69(4)).</p>	<p>granted, renewed or transferred subject to such conditions as the Executive Director thinks fit and specifies in the mfa (s. 69(2)). The fact that a person holds an authorisation does not confer any right to the grant of another mfa if a subsequent management plan is determined for the fishery, but the matter must be taken into account by the Executive Director (s. 72). Executive Director obliged to grant a renewal if applied for, subject to ss. 136A and 143 (s. 68). See general provisions relating to authorisations (below).</p>
Fish processing - premises	<p>May not construct any place, or fit out an existing place, for the purpose of processing fish for a commercial purpose unless authorised by a permit (s. 79(1)).</p>	<p>Does not apply to place to be used for processing of fish:</p> <ul style="list-style-type: none"> <li>• to be sold by retail or served as meals to the public; or to process fish that have been kept, bred,</li> </ul>	<p>Permit granted by Executive Director (s. 80).</p>	<p>Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (including that</p>	<p>Permit may authorise person or person(s) acting on their behalf to construct or modify the place for the purpose of using it to process fish for a</p>	<p>May be subject to:</p> <ul style="list-style-type: none"> <li>• conditions prescribed in regulations; and</li> <li>• conditions imposed by Executive Director (s. 81(1)).</li> </ul> <p>Executive Director may</p>	<p>Permit may be transferred subject to such conditions as the Executive Director thinks fit and specifies in the permit (s. 81(2)). See general provisions</p>

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		hatched or cultured in accordance with an aquaculture licence, (subject to limitations on exception in regulations) (s. 79(3)).		applicant would fulfil criteria for grant of fish processor's licence (s. 80)).	commercial purpose (s. 80(2)).	add, delete or vary conditions, except prescribed conditions by notice (ss. 81(3), 81(4)).	relating to authorisations (below).
Fish processing - activity	<p>Must not process fish for a commercial purpose unless authorised to do so by a fish processor's licence (s. 82).</p> <p>Must not process fish for a commercial purpose, or store fish of a class prescribed by regulations, in a place other than the place(s) specified in licence (s. 86).</p>	<p>Does not apply to processing, other than of fish of a class prescribed by regulations:</p> <ul style="list-style-type: none"> <li>• on any boat if fish have been taken by use of that boat; or</li> <li>• at any place where fish are to be sold by retail or served as meals to the public; or</li> <li>• in or on land or premises if the fish have been kept, bred, hatched or cultured there in accordance with an aquaculture licence (s. 82(2)).</li> </ul>	Fish processor's licence (s. 83).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (s. 83).	Authorises a person, or person(s) acting on their behalf, to process fish for a commercial purpose (s. 83(1)).	<p>Executive Director must specify in the licence the place at which fish may be processed under the licence (s. 83(2)). May also specify storage locations in certain circumstances (s. 83(3)).</p> <p>Condition of licence that place specified in licence under s. 83(2) must not be modified or altered without prior written approval of Executive Director (s. 87(1)).</p> <p>Licence is also subject to:</p> <ul style="list-style-type: none"> <li>• conditions prescribed by regulations; and</li> <li>• conditions imposed by Executive Director (s. 87(2)).</li> </ul> <p>Executive Director may add, delete or vary conditions (except condition imposed by s.</p>	<p>Duration either:</p> <ul style="list-style-type: none"> <li>• 12 months; or</li> <li>• as otherwise provided in the Act; or</li> <li>• as otherwise provided in the licence (s. 84).</li> </ul> <p>Executive Director obliged to grant a renewal if applied for, subject to ss. 136A and 143 (s. 85). May be granted, renewed or transferred subject to such conditions as the Executive Director thinks fit and specifies in the licence (s. 87(3)). See general provisions relating to authorisations (below).</p>

<i>Subject matter</i>	<i>Prohibitions/obligations imposed by the Act re subject matter</i>	<i>Exceptions to the prohibition/obligation</i>	Nature of rights granted under the Act re subject matter	<i>Manner of grant of right</i>	<i>Details of right</i>	<i>Limitations on right</i>	<i>Duration of right and transferability</i>
						87(1) and prescribed conditions) by notice (ss. 87(4), 87(5)).	
Aquaculture (defined as keeping, breeding, hatching or culturing of fish)	May not: <ul style="list-style-type: none"> <li>engage in aquaculture;</li> <li>sell fish in, or taken from, waters on private land;</li> <li>receive or purchase for resale fish in, or taken from, waters on private land, unless authorised to do so by an aquaculture licence (s. 90).</li> </ul>	Does not apply to: <ul style="list-style-type: none"> <li>certain activities prescribed by regulations; or</li> <li>storing fish for processing in accordance with a processing licence; or</li> <li>storing fish for the purposes of selling for consumption; or</li> <li>a person who is owner/occupier of private land in a prescribed area selling fish of a prescribed class in or taken from a dam or lake on that land, where fish is sold to a person authorised by an aquaculture licence to purchase it (s. 91).</li> </ul>	Aquaculture licence (s. 92(1)).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (s. 92(1)).	May authorise a person or person(s) acting on their behalf to engage in an activity referred to in s. 90.	Subject to: <ul style="list-style-type: none"> <li>conditions prescribed by regulations; and</li> <li>conditions imposed by Executive Director (s. 95(1)).</li> </ul> Executive Director may add, delete or vary conditions (except prescribed conditions) by notice (ss. 95(3), 95(4)).	Duration either: <ul style="list-style-type: none"> <li>12 months; or</li> <li>as otherwise provided in the Act; or</li> <li>as otherwise provided in the licence (s. 93).</li> </ul> Executive Director obliged to grant a renewal, subject to s. 143 and details of the area the subject of the licence (whether in relation to area subject to aquaculture lease, whether in marine park etc.) (s. 94). May be granted, renewed or transferred subject to such conditions as the Executive Director thinks fit and specifies in the licence (s. 95(2)). See general provisions relating to authorisations (below).
Aquaculture (defined as keeping, breeding,			Aquaculture lease (s. 97)	<ul style="list-style-type: none"> <li>Apply to Minister (s. 97(1)).</li> </ul>	Authorises a person, or persons acting on their behalf, to occupy or use an	May be granted or renewed subject to such conditions as Minister thinks fit (s. 97(5)).	Lease may be granted for an initial term not exceeding 21 years and renewed by

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hatching or culturing of fish)					<p>area of land or waters for the purposes of aquaculture (s. 97(1)). Must specify species of fish covered (s. 97(2)). Subject to the provisions of the Act and the lease, the lease vests in the lessee the exclusive right, during the currency of the lease, to keep, breed, hatch and culture the covered species within the leased area, and also the ownership of all fish within the leased area that are kept, bred, hatched or cultured under the lease (s. 97(3)). Acting in accordance with a licence constitutes a defence to a contravention of:</p> <ul style="list-style-type: none"> <li>• offence of dealing with protected fish (s. 48);</li> <li>• offence of</li> </ul>	<p>Does not authorise the use of the leased area without an aquaculture licence (s. 99(1)). Cross-termination provisions between aquaculture leases and related aquaculture licences (ss. 99(2), 99(3)).</p>	<p>Minister, subject to s. 98A (dealing with areas in marine reserves and marine parks), for further period(s) not exceeding 21 years (s. 97(4)). Minister may terminate lease:</p> <ul style="list-style-type: none"> <li>• if leased area no longer being used for purposes for which lease granted, or is being used for other purposes; or</li> <li>• on any grounds set out in the lease (s. 100).</li> </ul> <p>On termination or expiration of lease, unremoved structures, equipment and fish are forfeited to the Crown if not removed within three months of termination or expiration (s. 100(3)).</p>

<i>Subject matter</i>	<i>Prohibitions/obligations imposed by the Act re subject matter</i>	<i>Exceptions to the prohibition/obligation</i>	Nature of rights granted under the Act re subject matter	<i>Manner of grant of right</i>	<i>Details of right</i>	<i>Limitations on right</i>	<i>Duration of right and transferability</i>
					taking fish in excess of specified bag limit (s. 50); and <ul style="list-style-type: none"> <li>• offence of holding fish in excess of specified possession limit (s. 51).</li> </ul>		
Taking fish	Regulations may prohibit persons other than persons authorised by exclusive licence, from engaging in fishing or any fishing activity of a specified class in an area that is subject to an exclusive licence (s. 251(7)). R.172 provides for this.	The prohibition in r. 172 does not apply to person taking fish for personal consumption (r. 172(2)).	Exclusive licence (s. 251(1)).	Apply to Minister (s. 251(1)).	<ul style="list-style-type: none"> <li>• May authorise holder to take fish from:</li> <li>• a specified area of coastal waters; and</li> <li>• foreshore above high water mark, (s. 251(1)).</li> </ul>	May be subject to conditions relating to payment of fees, type of fish, times at which fish to be taken, fishing gear to be used, etc. (s. 251(4)).	May be granted for an initial term not exceeding fourteen years and renewed for further terms not exceeding seven years (s. 251(2)). May be granted or renewed subject to such terms and conditions as Minister thinks fit (s. 251(3)). Minister may vary or revoke licence in manner provided for in licence (s. 251(5)). R. 171 sets out circumstances in which Minister may revoke licence (including where Minister considers it is in the public interest to do so).

<i>Subject matter</i>	<i>Prohibitions/obligations imposed by the Act re subject matter</i>	<i>Exceptions to the prohibition/obligation</i>	Nature of rights granted under the Act re subject matter	<i>Manner of grant of right</i>	<i>Details of right</i>	<i>Limitations on right</i>	<i>Duration of right and transferability</i>
<b>RIGHTS PROVIDED FOR UNDER THE FISH RESOURCES MANAGEMENT REGULATIONS 1995 ("REGULATION RIGHTS") (see notes)</b>							
Commercial fishing	Person who engages in commercial fishing must hold a commercial fishing licence (r. 121(1)). Person who takes fish or assists in taking fish must not directly or indirectly sell the fish unless taken under commercial fishing licence by holder of licence (r. 121(2)).	Licence not required where person sells fish of a prescribed class taken from a dam or lake on private land in an area prescribed by regulations and sold to a person authorised by an aquaculture licence (r. 121(1) and s. 91(d)).	Commercial fishing licence (r. 122).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (r. 122).	Authorises holder to engage in commercial fishing (r. 122).	If hold commercial fishing licence, may only hold recreational fishing licence for particular activities (r. 123(2)).	See general provisions relating to Regulation Rights and to authorisations (below).
Fishing boats	Person having day-to-day control of boat used for or in connection with commercial fishing must ensure current fishing boat licence in force (r. 117(1)). Master of fishing boat must not permit fishing from licensed boat unless person fishing holds commercial fishing licence or does so on an aquatic eco-tour or fishing tour (r. 117(7)).		Fishing boat licence (r. 118).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (r. 118(1)).	Authorises person to use boat for commercial fishing (r. 118(1)). Licence must specify licensed fishing boat number allocated in respect of boat (r. 118(3)).	Fishing boat licence of no effect in certain circumstances in respect of West Coast Rock Lobster Managed Fishery (r. 118A).	See general provisions relating to Regulation Rights and to authorisations (below).
Carrier boats	Person having day-to-day control of carrier boat must ensure current carrier boat licence in place (r. 119(2)).		Carrier boat licence (r. 120(1)).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (r. 120(1)).	Authorises holder to use boat as a carrier boat (r. 120(1)). Licence must specify licensed carrier boat number allocated in respect of boat (r. 120(3)).		See general provisions relating to Regulation Rights and to authorisations (below).

<b>Subject matter</b>	<b>Prohibitions/obligations imposed by the Act re subject matter</b>	<b>Exceptions to the prohibition/obligation</b>	<b>Nature of rights granted under the Act re subject matter</b>	<b>Manner of grant of right</b>	<b>Details of right</b>	<b>Limitations on right</b>	<b>Duration of right and transferability</b>
Recreational fishing	If carrying out activity referred to in r. 124 must hold a recreational fishing licence specifying the activity (r. 123(1)).	Exception if activity carried out for a commercial purpose or person is an Aboriginal person who falls within s. 6 (r. 123(1)).	Recreational fishing licence (r. 124(1)).	Apply to Executive Director who may grant (r. 124(1)).	Authorises holder to engage in activity(ies) specified in licence by way of recreational fishing (r. 124(1)).	May only hold recreational fishing licence for particular activities if hold a commercial fishing licence (r. 123(2)).	See general provisions relating to Regulation Rights and to authorisations (below).
Rock lobster pots	If use one or more rock lobster pots to engage in commercial fishing of rock lobster, must hold licence (r. 125(1)). Must not use more pots than specified in licence (r. 125(2)).	Exception if use rock lobster pot in managed fishery in accordance with authorisation granted in respect of that fishery (r. 125(3)).	Rock lobster pot licence (r. 126).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (r. 126).	Authorises holder to engage in the commercial fishing of rock lobster (r. 126).		See general provisions relating to Regulation Rights and to authorisations (below).
Oyster fishing	If fish for oysters in "public waters" must hold an oyster fishing licence (r. 127(1)).	Exception for person who takes oysters for purpose of personal consumption (r. 127(2)).	Oyster fishing licence (r. 128).	Apply to Executive Director who may grant if satisfied that specified criterion fulfilled (r. 128).	Authorises holder to engage in fishing for oysters in public waters (r. 128).		See general provisions relating to Regulation Rights and to authorisations (below).
Aquatic eco-tourism	If engage in aquatic eco-tourism for a commercial purpose in a schedule 15 zone, must hold aquatic eco-tourism operator's licence for that zone (r. 128A(1)).	Exception if: <ul style="list-style-type: none"> <li>licensed under the <i>Conservation and Land Management Act 1984</i> (r. 128A(2)); and</li> <li>eco-tourism operation conducted wholly within a marine reserve as defined in s. 3 of the <i>Conservation and</i></li> </ul>	Aquatic eco-tourism operator's licence (r. 128B).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (r. 128B(1)).	Authorises holder to engage in aquatic eco-tourism for a commercial purpose in zone specified in licence (r. 128B(1)). Licence must specify certain details and conditions of licence, including whether tour may be conducted using one		See general provisions relating to Regulation Rights and to authorisations (below).

<i>Subject matter</i>	<i>Prohibitions/obligations imposed by the Act re subject matter</i>	<i>Exceptions to the prohibition/obligation</i>	Nature of rights granted under the Act re subject matter	<i>Manner of grant of right</i>	<i>Details of right</i>	<i>Limitations on right</i>	<i>Duration of right and transferability</i>
		<p><i>Land Management Act 1984</i> (r. 128A(2)); or</p> <ul style="list-style-type: none"> <li>operator has fishing tour operator's licence or restricted fishing tour operator's licence (r. 128A(3)).</li> </ul>			or more of boat, vehicle, aircraft (r. 128B(2)).		
Fishing tours	If conduct a fishing tour for a commercial purpose in a schedule 15 zone, must hold a fishing tour operator's licence for that zone (r.128I).		Fishing tour operator's licence (r.128J).	Apply to Executive Director who may grant if satisfied that certain criteria are fulfilled (r. 128J(1)).	Authorises holder to conduct a fishing tour for a commercial purpose in zone specified in licence (r. 128J(1), 128J(1a)). Must specify certain details and conditions of licence, including whether tour may be conducted using one or more of boat, vehicle, aircraft (r. 128J(2)).		

***GENERAL PROVISIONS RELATING TO REGULATION RIGHTS***

- Licence subject to any **conditions** imposed in writing by Executive Director (r. 130(1)). May be **granted/renewed/transferred** subject to such conditions as Executive Director thinks fit and specifies in the licence (r. 130(2)). Executive Director may delete/vary/add conditions of licence by written notice (r. 130(3)).
- Obligation of Executive Director to **transfer** a licence under s. 140 is subject to right of Executive Director to refuse to transfer on variety of grounds set out in r. 131.
- **Duration** of licence is 12 months from date of grant/renewal except as otherwise provided in the Act or in the licence (r. 133).
- Executive Director obliged to **renew** licence on application of person, subject to s. 143 (r. 134).

**GENERAL PROVISIONS RELATING TO AUTHORISATIONS (ACT RIGHTS AND REGULATION RIGHTS)**

- “**Authorisation**” is defined in the Act as:
- a “**licence**” -
  - aquaculture licence
  - commercial fishing licence
  - fishing boat licence
  - fish processor's licence
  - managed fishery licence
  - recreational fishing licence
  - any other licence provided for in the regulations
- a “**permit**” -
  - interim managed fishery permit
  - permit granted under s. 80 (fish processing premises)
- “**Entitlement**” is defined as an entitlement that a person has from time to time under a managed fishery licence or an interim managed fishery permit

- A person is not entitled to the grant of an authorisation as of right (s.136). Right of renewal over some marine reserves/parks is restricted (s. 136A).
- An authorisation is granted, and has effect, subject to the Act and does not authorise the doing of anything in contravention of the Act. (s. 137).
- The Executive Director must **transfer** an authorisation or part of an entitlement under it, on the application of the holder of it, unless the Executive Director can refuse transfer under the Act. Grounds for refusal are if the proposed transferee is not a fit and proper person, if the proposed transferee does not satisfy guidelines under s. 247 relating to foreign persons holding interests or on any other ground specified in a relevant management plan or which is prescribed (s.140). Regulation 131 sets out prescribed grounds. Transfer of part of entitlement may be for only a specified period (s.141) but transfer may not be for longer than unexpired term of authorisation (r. 138).
- Holder of an authorisation may apply to **vary** an authorisation or Executive Director may vary it to correct errors or give effect to Act. Holder not entitled to variation as of right (except where application is made in accordance with a relevant management plan and the application for variation satisfies the criteria specified in the management plan) (s.142).
- Executive Director may by notice in writing **cancel, suspend or refuse to renew** authorisation for breach of Act or conditions of authorisation or other specified misconduct, or on any other ground specified in a relevant management plan (s.143).
- A holder may voluntarily **surrender** an authorisation by notice in writing to the Executive Director (s.144).
- Part 14 of the Act sets out a procedure whereby certain persons may object to proposed grants of, or dealings with, authorisations under the Act.

Notes

- Section 257 of the FRMA states that regulations may provide for the licensing of various matters and activities, including the licensing of persons engaged in commercial fishing or recreational fishing and specified kinds of boats.
- Under s. 43 of the FRMA, the Minister may make an order prohibiting any persons or specified class of persons from engaging in any fishing activity of a specified class (non-compliance with an order incurs a penalty).
- Under Part 5, Division 2 of the FRMA (ss. 45 and following) a class of fish may be prescribed by regulations as totally protected or commercially protected, in which case certain restrictions apply in respect of that fish (including restrictions on taking, possessing and selling the fish). Non-compliance incurs a penalty. Under s. 48, it is a defence to a contravention of the provisions if the relevant person can demonstrate fish were of a prescribed class and that they were being, or had been, kept, bred, cultured or hatched in accordance with an **aquaculture licence**.
- Regulations made under Part 5 Division 3 (ss. 50 and following) of the FRMA may declare bag limits, or possession limits, for a specified class of fish. Non-compliance with specified limits incurs a penalty. Under ss. 50(4) and 51(4), it is a defence to a contravention of a bag limit or possession limit provision if the relevant person can prove that the fish were taken for a commercial purpose by a person in accordance with an **authorisation** or that the fish were kept, bred, hatched or cultured by the person in accordance with an **aquaculture licence**.
- None of a **commercial fishing licence, fishing boat licence or any other licence granted under the regulations** authorises fishing activity in a managed fishery or interim managed fishery (s. 73). The fact that a person engaged in fishing, or used any boat for fishing, in a fishery before a management plan was determined for the fishery is not to be taken as conferring upon that person any right to the grant of a managed fishery licence or interim managed fishery permit if a management plan is determined for that fishery, but the Executive Director is to take into account the person's past history when determining whether or not to grant it (s. 71). Under s. 72, the same provisions apply in respect of a person who holds a managed fishery licence or interim managed fishery permit under a management plan when a subsequent management plan is determined for the fishery (as revocation of a management plan has the effect of rendering ineffective licences and permits issued under it (s. 70)).
- Regulation 176 prohibits the import into the State of live fish of a species not endemic to the State except in accordance with the written approval of the Executive Director, or with an authority issued by the Executive Director for that purpose, or with an aquaculture licence. Such approval or authority is subject to conditions specified in it, as varied from time to time by the Executive Director. The Executive Director may vary or cancel an approval or authority by written notice to the holder at any time. Regulation 178 provides for a similar kind of authority in respect of taking fish for scientific purposes and regulation 179 provides for authorities for taking of fish for genetic or chemical extraction or analysis, or dealing with fish in a certain way in the belief that the fish are to be used for genetic or chemical extraction or analysis. Refer to ss. 258(h), (x) and (y) for the source of power for these regulations. These authorities are not included in the definition of "authorisation" in the FRMA and, therefore, are not given the limited continuity or transferability characteristics of, for example, licences.

- Part 12 of the FRMA establishes and provides for a Register of authorisations, aquaculture leases and exemptions (s. 125(1)). The Register must be made available for public inspection, but details of recreational fishing licences must not be made available to the public (s. 125(3),(6)). The Registrar must, on application of the holder of an authorisation or aquaculture lease, make a note on the Register that the person specified in the application has a security interest in the authorisation, and include in the notation such details as are set out in s.128. Note that s. 129(2) provides that a notation on the Register that a person has a security interest in an authorisation or aquaculture lease does not give the interest any force that it would not have had if Part 12 had not been enacted. Registration of a security interest gives the holder of the security interest the right to be notified of certain proposed dealings with the interest the subject of the security (s.130).
- The FRMA provides for an area to be declared a **designated fishing zone** (s.109) (and see r. 71) or a **fish habitat protection area** (s.115) (and see part 9A of the Regulations).

## APPENDIX 2 MANAGEMENT TOOLS

This appendix discusses some of the management measures that are currently available to the State under the FRMA.

### Limited entry system

The FRMA prohibits persons from carrying out certain fishing activities without the appropriate authorisation, and enables the making of regulations to prescribe further prohibited or limited activities. Access to the State's fish resource can, therefore, be controlled to an extent through this licensing and authorisation scheme and the scheme can be viewed as a regulatory measure distinct from, but complementary to, the specific management measures discussed below.

### Managed fisheries

In properly considering the range of management measures available under the FRMA, it should be noted at the outset that the FRMA makes a distinction between management measures, which are available in respect of a managed fishery or interim managed fishery, and those available otherwise.

Part 6 of the FRMA deals with managed fisheries. Section 54 provides that the Minister may determine a management plan for a fishery by instrument in writing published in the *Government Gazette*. A fishery may be either a managed fishery or an interim managed fishery (s. 56(1)) and an interim managed fishery may be further classified as a developmental fishery (s. 56(2)). A management plan for an interim managed fishery may provide that the plan has effect for a specified period only (s. 57(1)), although this does not mean that a management plan cannot be revoked (s. 57(2)).

A management plan must specify an advisory committee or committees or a person or persons who are to be consulted before the plan is amended or revoked. The Minister must consult the specified committee(s) or person(s) before amending or revoking the management plan, unless, in the case of an amendment, it is required urgently or is of a minor nature (s. 65).

A management plan may include any provision that, in the Minister's opinion, is necessary for the protection or management of the fishery or any part of it (s. 56(3)). Further, a management plan may, among other things:

- prohibit a person from engaging in fishing or any fishing activity of a specified class in the fishery or any part of it otherwise than in accordance with an authorisation granted under Part 6 (s. 58(1));
- provide for different classes of authorisations (s. 58(2)(a));
- restrict the number of authorisations that can be granted (s. 58(2)(b));

- specify a procedure for determining which persons are to be granted authorisations if the number of eligible persons seeking an authorisation exceeds the number of authorisations that can be granted (s. 58(2)(d));
- specify the capacity of the fishery or any part of it, by reference to a quantity of fish that may be taken, a quantity of fishing gear that may be used, a number of boats that may be used, a number of persons who may engage in fishing, or any other thing (s. 59(2));
- provide for a scheme relating to the extent of the entitlements conferred by authorisations in respect of the fishery or any part of it (s. 60(1)). It may specify the way in which entitlements are to be fixed and allocated (s. 60(2)(a)), provide for entitlements to be expressed in terms of units, and from time to time, and specify the extent of the entitlement arising from such units (s. 60(2)(c)), provide for entitlements to be increased or reduced (s. 60(2)(e)), suspend entitlements during a specified period (s. 60(2)(d)), provide for the conversion of one kind of entitlement into another kind of entitlement (s. 60(2)(f)) and authorise the temporary transfer of entitlements (s. 60(2)(h));
- prohibit some or all fishing activities in the fishery or any part of the fishery at all times or during a specified period, and may authorise the Executive Director to prohibit fishing activities or to allow fishing activities, which would otherwise be prohibited, in the fishery (s. 61); and
- provide for and regulate the identification of fish (whether taken in the fishery or otherwise) by tagging, marking or other specified means (s. 62(h)).

The fact that a person engaged in fishing in a fishery before a management plan was determined does not confer on the person any right to the grant of an authorisation for the managed fishery, but the Executive Director is still required to take into account a person's past history of fishing in a fishery when determining whether or not to grant the authorisation (s. 71). Similarly, the fact that a person held an authorisation for the managed fishery is to be taken into account by the Executive Director in determining whether or not to grant the person an authorisation if a subsequent management plan is determined for the fishery (s. 72).

Authorisations that apply to a managed fishery are subject to the transfer provisions which apply to other authorisations (see ss. 140 and 141).

### **Management tools**

- *Imposing a system of individual catch quotas in managed fisheries*

The FRMA does not currently provide a mechanism for explicit recognition of individual catch quotas outside the context of a managed fishery. However, while recognition of units of entitlement is possible under a management plan, such units of entitlement could not be described as "assignable".

Part 6 of the FRMA sets out measures available in a managed fishery (see outline of Part 6 above). While a management plan may include any provision

that, in the Minister's opinion, is necessary for the protection or management of a managed fishery or any part of it (s. 56(3)), measures specifically referred to in Part 6 include:

- restricting the number of authorisations for fishing activity which may be granted (s. 58(2)(b));
- specifying a procedure for determining which persons are to be granted authorisations if the number of eligible persons seeking an authorisation exceeds the number which can be granted (s. 58(2)(d));
- specifying the capacity of a fishery or any part of it, including by reference to a quantity of fish that may be taken, a quantity of fishing gear which may be used, a number of boats which may be used, a number of persons who may engage in fishing or any other thing (s. 59(2));
- providing for a scheme relating to the extent of the entitlements conferred by authorisations (s. 60(2)) - the management plan may provide for an entitlement to be specified in an authorisation, may provide for entitlements to be expressed in terms of units, with the extent of the entitlement arising from such units to be specified from time to time; and
- allowing the grant of authorisations to engage in fishing or a fishing activity in the fishery and allowing the holder's entitlement under that authorisation to be limited to, among other things, a quantity of fish that may be taken or a quantity of fishing gear that may be used, and the extent of this entitlement may be expressed in terms of units of entitlement defined in the management plan (ss. 66(3) and (4)).

Authorisations in a managed fishery are subject to ss. 140 and 141 of the FRMA, dealing with transfer. Holders of authorisations are not, themselves, entitled to transfer those authorisations or entitlements under them. The Executive Director undertakes the transfer on application by the holder of the authorisation, but the Executive Director is entitled to refuse to transfer an authorisation on certain specified grounds (see s. 140(2)).

- *Imposing a closed season (in order to protect breeding stock)*

This can be achieved as part of a management plan (see above).

Section 43 provides that the Minister may, by order published in the *Government Gazette*, prohibit persons or any specified class of persons from engaging in any fishing activity of a specified class. The order may prohibit the fishing activity at all times or during a specified period.

Some closed seasons are currently imposed through regulations. Regulation 38M of the *Fish Resources Management Regulations 1995* provides that a person must not fish for marron during a defined "closed season".

- *Imposing size limits*

Section 45(1) provides for a class of fish to be prescribed as totally protected or commercially protected. A class of fish may be defined for the purposes of s. 45(1) by reference to, among other things, species or type, size, an area of land or waters from which fish are taken, a period of time during which fish are taken and any other factor (s. 45(2)). Section 46 sets out a list of prohibitions in relation to totally protected fish (for example, a person must not take, sell, purchase or have them in his or her possession) and s. 47 sets out a list of prohibitions in relation to commercially protected fish (for example, a person must not take them for the purpose of sale or process them for the purpose of sale).

- *Imposing closed areas*

This can be achieved as part of a management plan (see above).

A closed area might be achieved by the making of an order by the Minister under s. 43 (see "imposing a closed season" above).

Part 10 of the FRMA (ss. 109 to 113) deals with "designated fishing zones". An area may be prescribed to be a designated fishing zone (s.109). A fisheries officer may direct a person to leave a zone, cease any activity in a zone, or remove anything from a zone, where (broadly) it appears that the person's activity will interfere with fishing or the fish in the zone (s.112).

A closed area might be imposed pursuant to regulations. (s. 113 FRMA and r. 71).

- *Implementing a system of tracking vessel movements through a vessel monitoring system maintained by the Department*

A management plan may require persons to report to the Executive Director or to a fisheries officer, whether by radio or otherwise, the position of any boat, the landing of any fish or any other matter (s. 62(s)).

Such a system might be implemented through regulations. For example, regulation 55B provides the Executive Director with the power to require the holder of a fishing boat licence to have installed in the fishing boat an automatic location communicator that is capable of transmitting to the Executive Director at any time accurate information as to the geographical position, course and speed of the fishing boat.

- *Imposing a system of specific licensing for dhufish*

Section 256 provides that the Governor may make regulations prescribing all matters that are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of the Act. Section 257 states that regulations may provide for the licensing of:

- persons engaged in commercial fishing (s. 257(1)(a)) and, for the purposes of giving effect to this, regulations may prohibit a person from engaging in an activity unless authorised to do so by a licence (s. 257(2)(a)); and
- persons engaged in specified activities by way of recreational fishing (s. 257(1)(b)) and, for the purposes of giving effect to this, regulations may authorise the Executive Director to grant licences authorising persons to engage in activities referred to in subsection 1 (s. 257(2)(b)).

Section 258 provides that regulations may, among other things:

- regulate recreational fishing (s. 258(b)) (as an example, regulation 39 deals with permitted means of fishing for prawns by persons not holders of a commercial fishing licence);
- provide for and regulate the identification of fish by tagging, marking or other specified means (s. 258(f)).

Imposing a tag system (where, for example, a fish cannot be landed without a tag affixed to it, where a limited number of tags is issued) might be seen as a licence, given that it, in essence, constitutes an authorisation to do something that would otherwise be prohibited. Such a system could impose a direct quota requirement on individual fishermen.

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- No. 2** The Report of the Fish Farming Legislative Review Committee. Chairman P. Rogers (1986)
- No. 3** Management Measures for the Shark Bay Snapper 1987 Season. P. Millington (1986)
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- No. 12** Report of the Rock Lobster Industry Advisory Committee to the Hon Minister for Fisheries 24 September 1987. (1987)
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- No. 106** The impact of Occupational Safety and Health on the management of Western Australian Fisheries. Cameron Wilson (*in press*)
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- No. 108** Issues affecting Western Australia's inshore crab fishery - Blue swimmer crab (*Portunus pelagicus*), Sand crab (*Ovalipes australiensis*). Cathy Campbell (September 1997)
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- No. 123** Future directions for the Rock Lobster Industry Advisory Committee and the Western Rock Lobster Managed Fishery. A discussion paper prepared by Kevin Donohue on behalf of the Rock Lobster Industry Advisory Committee. (December 1998)
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- No. 141** Fish Protection Measures in Western Australia (June 2001)
- No. 142** Fisheries Environmental Management Plan for the Gascoyne Region (June 2002)
- No. 143** Western Rock Lobster. Discussion paper for seasons 2001/2002 and 2002/2003 (July 2000)
- No. 144** The Translocation of Brown Trout (*Salmo trutta*) and Rainbow Trout (*Oncorhynchus mykiss*) into and within Western Australia. Prepared by Jaqueline Chappell, contributions from Simon Hambleton, Dr Howard Gill, Dr David Morgan and Dr Noel Morrissy. (*not published, superseded by MP 156*)

- No. 145** The Aquaculture of non-endemic species in Western Australia - Silver Perch (*Bidyanus bidyanus*). As amended October 2000. Tina Thorne. This replaces Fisheries Management Paper No. 107.
- No. 146** Sustainable Tourism Plan for the Houtman Abrolhos Islands (February 2001)
- No. 147** Draft Bycatch Action Plan for the Shark Bay Prawn Managed Fishery (Full Report) (April 2002)
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- No. 149** Final Plan of Management for the Lancelin Island Lagoon Fish Habitat Protection Area (March 2001)
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- No. 164** Report of the Mackerel Independent Advisory Panel to the Executive Director, Department of Fisheries, on criteria for access to, and

- management arrangements for, the proposed Mackerel Fishery (Interim Management Plan (November 2002)
- No. 165** Report to the Minister for Agriculture, Forestry and Fisheries by the Integrated Fisheries Management Review Committee (November 2002)
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- No. 167** Draft Fisheries Environmental Management Plan for the Northern Region (*in press*)
- No. 168** Aboriginal Fishing Strategy: Report to the Minister for Agriculture, Forestry and Fisheries by the Hon E. M. Franklyn QC, Chairman of the Aboriginal Fishing Strategy Working Group (May 2003)
- No. 169** Hardy Inlet discussion paper (February 2004)
- No. 170** Management of the proposed Geographe Bay Blue Swimmer and Sand Crab Managed Fishery. By Jane Borg and Cathy Campbell (August 2003)
- No. 171** Draft Aquaculture Plan for Shark Bay (April 2004)
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- No. 174** Translocation of Golden Perch, Murray Cod and Australian Bass into and within Western Australia for the Purposes of Recreational Stocking, Domestic Stocking and Commercial and Non-commercial Aquaculture (December 2003)
- No. 175** Fish Stock and Fishery Enhancement in Western Australia - a discussion paper. By Jane Borg (February 2004)
- No. 176** Fish Stock and Fishery Enhancement in Western Australia - a summary report. By Jane Borg (February 2004)
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- No. 178** Draft Plan of Management for the Kalbarri Blue Holes Fish Habitat Protection Area (March 2004)
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- No. 184** South West Beach Seine Management Discussion Paper (*in press*)
- No. 185** Plan of Management for the Point Quobba Fish Habitat Protection Area (July 2004)
- No. 186** Management of the West Coast Rock Lobster Fishery - Advice to Stakeholders on Resource Sustainability Matters. (*in press*)
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