Fisheries Occasional Publication No. 102, 2011

Improving Commercial Fishing Access Rights in Western Australia

Access Rights Working Group Report to the Hon Norman Moore, MLC Minister for Fisheries

April 2011

This report represents the views of the Access Rights Working Group. It does not reflect current WA State Government policy.

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Published by Department of Fisheries, Perth, Western Australia.
Fisheries Occasional Publication No. 102, November 2011.
ISSN: 1447 - 2058 ISBN: 978-1-921845-30-7

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1. INTRODUCTION

On 28 June, 2010 Hon. Norman Moore, MLC, Minister for Fisheries wrote to the Chair of the Western Australian Fishing Industry Council (WAFIC) regarding funding reform and the introduction of a new fee setting model. The Minister stated that Government had granted a degree of exclusivity of access to commercial fishers, and that it was appropriate that commercial fishers paid a fee for this privilege as well as cost-recovery fees for specific services undertaken at the request of industry.

He advised WAFIC that as part of the funding reform process he was committed to improving the access rights of fishers. The approach would include reference to the development of proposed new aquatic resources management legislation. He advised that, as a matter of priority, he would establish three working groups to provide advice on elements of policy that related to the improvement of commercial fishing access rights, the fees charged for leases under the *Fish Resources Management Act 1994 (*FRMA) and *Pearling Act*, and the distinction between "core" and "non-core" activities by the Department of Fisheries.

This report has been prepared by the Access Rights Working Group (the Working Group) to identify key factors currently affecting aspects of statutory access and other usage rights established under the FRMA, as they relate to not only commercial fishers, but also to the pearling and aquaculture industries. The Working Group has made recommendations which it considers may enhance various aspects of these rights. It reflects the investigations, views and conclusions of the Working Group, based on a select review of the literature, Australian legislation and case law, and discussions with fishing industry representatives, finance industry representatives with experience in fishery investments and transactions and fisheries managers. It should not be taken to be comprehensive, or to represent either government policy or a legal opinion on the nature of these rights.

The Working Group also considered the relationship and consistency of fishing rights created under the FRMA with pearling and aquaculture licences and leases. A joint discussion was held between representatives of the Working Group and the Water Lease Fees Working Group with a view to developing recommendations on these particular matters. Many of the recommendations in this report have direct relevance to pearling and aquaculture, particularly in the context of development of proposed new aquatic resources management legislation. It is noted that the Water Lease Fees Working Group will address specific matters related to future tenure arrangements and fees as they relate to pearling and aquaculture activities.

ACCESS RIGHTS WORKING GROUP

The Access Working Group was appointed by the Minister in July 2010. Membership of the Working Group comprises:

- *Heather Brayford* *Director, Aquatic Management, Department of Fisheries (Chair).*
- *Ian Taylor* *Executive Officer, Abalone Industry Association of WA.*
- *Gil Waller* *Industry representative.*
- *Guy Leyland* *Executive Officer, Western Australian Fishing Industry Council.*
- *Lindsay Joll* *General Manager, Aquatic Management, Department of Fisheries.*
- *Andrew Cribb* *Principal Policy Officer, Department of Fisheries.*
- *Fiona Crowe* *Principal Management Officer, Department of Fisheries (Executive Officer).*

The Working Group met a number of times, and was also informed by a representative of the banking industry and the boat-broking industry.

TERMS OF REFERENCE

The Access Rights Working Group was appointed under the following terms of reference:

"To provide advice on the improvement of commercial fishing access rights, including reference to the development of proposed new aquatic resources management legislation".

The Working Group recognized that the question of statutory fishing access rights and how they operate is also of significant interest to the recreational fishing sector, aboriginal communities, marine conservation interests and other groups. While the recommendations in this report focus on the terms of reference, and on commercial fishing access rights in particular, they have been formulated in the context of their relationship to ecological sustainability, biodiversity conservation and the rights and aspirations of other sectors.

The Working Group also considers that there is a need to develop a clearer policy and legal framework which encompasses the fishing access rights of other groups.

STATEMENT FROM THE WORKING GROUP

The Access Rights Working Group has interpreted the task set for it in the context of the following policy principles:

- *The aquatic biological resources of Western Australia are a common property resource, managed by the Western Australian Government on behalf of the community.*
- *The prime directive for the management of these resources is to ensure their ecological sustainability, and protect the ecosystems of which they form a part.*
- *The continuing sustainable harvest of WA's aquatic biological resources provides significant benefits to the community in economic and social terms.*
- *The prime purpose of developing and allocating statutory access rights to these resources is to avoid the "tragedy of the commons", and ensure the optimum economic and social performance of the harvest sectors.*
- *The perpetual access rights of the harvest sectors to ecologically sustainable aquatic biological resources should be broadly recognized across Government, and given proper consideration and weight in all government planning and policy development processes.*
- *The primary act of Parliament for the conservation and ecologically sustainable management of fish and related aquatic biological resources within the jurisdiction of Western Australia is the Fish Resources Management Act 1994. The primacy of this Act should be explicitly asserted in all legislation that impacts on use of the aquatic environment.*
- *Any reduction of statutory fishing access rights for reasons other than the ecological sustainability of the harvested resources themselves should be appropriately compensated.*

2. BACKGROUND - FISHING ACCESS RIGHTS IN WESTERN AUSTRALIA

The development of commercial fishing access rights in Australian statute law has been an incremental process, linked to the evolution of public policy and legislation for the management of commercial fisheries, and more recently environmental impacts, during the 20th and early 21st Centuries.

Throughout this period the access rights "footprint" and the property characteristics of these rights have gradually improved as the access regime has developed, although many aspects of fishing access rights still remain relatively tenuous and subject to erosion or encroachment through shifts in government policy or the expansion of activities and interests by other marine resource user groups.

LEGAL CONTEXT

OWNERSHIP OF FISH

In English common law[1] fish at large in public water bodies are generally deemed "*ferae naturae*" or wild animals, as opposed to *domitae naturae* (domestic animals). As such they are generally not susceptible to ownership until captured.

According to many commentators the *Magna Carta* established the common law principle of the public right to fish in tidal waters – although the text of the *Magna Carta* makes no mention of fishing. Most likely the "right to fish" was transposed into English Common law from Roman law in the 12th C, or pre-existed the Norman conquest in ancient, but continuous traditional usage customs that extend back to the earliest times of human society (Gullet, W. undated).

Hence wild fish, in the context of the law, are usually deemed a "common property" resource, owned by no-one and available to all.

In some Australian jurisdictions ownership of fish is asserted by the Crown or State through statute (Parliaments of Victoria 1995, South Australia 2007, Tasmania 1995), and rights to take fish are explicitly devolved to individuals through licences and permits or "when taken" lawfully. Other jurisdictions leave the question of ownership of fish resources in the wild open.

[1] Law as determined by the courts, as opposed to statute law, which is codified and set out in legislation.

The effect of State assertions of ownership of aquatic biological resources in statute law on the nature of the fishing access right and their likely interpretation by the courts is unclear, but it is likely that it provides a clearer statutory basis for the creation and State allocation of access rights to aquatic resources, and a stronger expression of the base on which the property characteristics of the rights exist, more akin in nature to the concept of "crown land" and "crown leases". Other possible benefits may include wider recognition in areas of law and policy outside fisheries management Acts.

An observable weakness inherent in most fisheries management legislation is that it does not approach the establishment of rights as property in a spatial sense, but rather as privileged activity. A consequence of this is that property-based Acts, which assign specific ownership and tenure of marine areas, sometimes override the more "nomadic" rights of harvest created in fisheries law.

This issue affects not only the rights of access created through fishing licences, but also any "leases" for various activities created under fisheries or pearling legislation. The definition of all marine waters within the limits of the State as Crown Land in the *Land Administration Act 1997* has effectively altered the legal context of State (Crown) ownership of waters in which the FRMA was created.[2]

Strengthening the spatial tenure of harvest and lease rights for fishing and related purposes warrants further investigation in the context of the proposed new aquatic resources management Act. This approach should also ensure that these rights are properly recognized in other relevant Acts of Parliament, and jurisdictional overlaps minimized to the extent possible.

FISHING ACCESS RIGHTS

Due to the common property nature of fish resources, fishing rights, whether statutory or not, do not provide ownership of the fish themselves *prior to capture*. Rather they describe the right of individuals or groups to engage in the act of fishing, with the aim of capturing fish. The fish only become "owned" once they have been captured and are in the possession of an individual (or other legal entity).

Fishing rights appear to have the most similarity with the legal notion of a 'non-possessory interest' used in property law, rather than land title (Fitzpatrick, 2000). These rights

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[2] In 1997 the proclamation of the State *Land Adminstration Act (LAA)* effectively altered the status and tenure of "all waters within the limits of the State" (i.e. within 3nm of the coast) from untenured open access areas to the form of State property known as "crown land". Prior to this marine waters had no clear system of ownership or tenure. No explicit recognition of leases and or other rights issued under the *FRMA 1994* or the *Pearling Act* is made in the LAA.

provide an entitlement to use something which is owned by another person, or not susceptible to ownership.

Non-possessory interest rights include concepts such as:

- *usufructs (a right pertaining to use and enjoyment);*
- *easements;*
- *'profit a prendre'; and*
- *licences.*

As a consequence it is more accurate to describe "fishing rights" as "access rights" which allow individuals or groups of individuals to "use and enjoy" fish for various purposes, consistent with any extant prohibitions.

These rights are essentially a privilege created by statute law and are hence "statutory fishing rights". To obtain this privilege there is usually a requirement to meet certain criteria. The rights may or may not have any of the characteristics of property.

All statutory fishing rights exist in the context of a general restriction or prohibition. The permits or licences by which these rights are assigned provide individuals or other legal entities with a personal remit to take fish under specified circumstances for specified purposes. The degree of "privilege" accorded by the right is, to a large extent, inversely proportional to the extent of the general prohibition.

The extent to which these rights have the characteristics of 'property' depends primarily on their definition in fisheries legislation and the degree to which they are recognised and upheld by the courts and Government outside the fisheries management process (Fitzpatrick, *op cit*).

LEASES AND LICENCES FOR AQUACULTURE AND PEARLING

The WA *Pearling Act 1990* takes a similar approach to the FRMA in respect of the allocation and establishment of access entitlements to wild pearl oyster resources, although the property aspects of these rights are less developed than in the later FRMA. Statutory "pearling rights" are essentially created by the various licences and permits required under the Act.

The allocation and use of these privileges is conducted through the provisions of the Act in relation to the grant of these licences, administrative licence conditions imposed by the CEO and a range of less formal policy instruments.

In the case of aquaculture, the FRMA provides for both "leases" and licences".

It is important to note that while aquaculture licences are deemed to be "authorisations" under the FRMA, they are considered to have relatively weak "property rights" and are

more similar in nature to a licence issued under S257 of the FRMA which grants permission in the face of a general prohibition.

Leases for pearling and aquaculture under each Act, by way of contrast, provide a right to use a specific area for specific purposes. In the case of aquaculture, a lease can only be granted under the FRMA if the area is vested in the Minister for Fisheries (FRMA, S97), or is an area of “coastal waters”.

The change in the status of “ownership” for State waters from “coastal waters” (within 3nm) to “crown land” appears to change the underlying rights associated with FRMA and Pearling Act leases, unless these are also formally transferred under the *Land Administration Act 1997* (LAA) to the ownership of the Minister for Fisheries, or have separate tenure status under the LAA.

In the absence of clear ownership and tenure FRMA “leases” appear to have the effect of an activity licence for a specific area, with relatively weak property or tenure rights associated with the lease.

In practice this may not matter a great deal unless the rights under the lease are challenged or there is a desire to transfer them to another holder.

A key question for Government is the extent to which it wishes to strengthen the “property right” associated with leases, and the extent to which it wishes market or administrative mechanisms to regulate their grant and the exchange of rights.

A further issue remains the absence of any statutory or integrated planning framework for aquatic areas which deals with competing uses and allocation issues, and takes into account the requirements of the pearling and aquaculture industries.

JURISDICTIONS

In Australia, the Federal structure of the Constitution, and the boundaries of State and Commonwealth jurisdiction have critical implications for the degree and strength of access right that can be achieved through State fisheries legislation alone.

Even within the jurisdiction of a single State there are many factors outside the boundaries of fisheries management that affect the security and other characteristics of fishing access rights.

The key elements in statute law that relate to access and property rights in fish in Western Australia are:

- *Commonwealth Environment Protection and Biodiversity Conservation Act 1999.*
- *Commonwealth Fisheries Management Act 1991.*
- *Commonwealth Native Title Act.*

- *WA Fish Resources Management Act 1994.*
- *WA Fisheries Adjustment Schemes Act 1987.*
- *WA Fishing and Related Industries (Marine Reserves) Compensation Act 1997.*
- *WA Conservation and Land Management Act 1984.*
- *WA Wildlife Conservation Act 1950.*
- *WA Museum Act 1969.*
- *Various Port Authority Acts.*
- *Land Administration Act 1997.*

Jurisdictional agreements under the Commonwealth/State Offshore Constitutional Settlement also significantly affect the robustness and extent of fishing rights in both State and Commonwealth waters.

The operation of other Acts may also impinge upon nature and extent of fishing rights less directly.

PUBLIC POLICY CONTEXT

Over the past 150 years or so most jurisdictions across the English-law based world have followed a similar path in the development of legislation to conserve fish resources and manage the impact of commercial fishing.

An underlying assumption in all English-law based fisheries legislation is that commercial fishing is, by its nature, driven by motives that relate to the derivation of profit which, if unconstrained, act adversely on the sustainability of fish resources and may cause the depletion and collapse of natural populations of fishes, and damage to aquatic environments.

Economists call this phenomenon “market failure” – in other words the free market, due to its nature, will seek to optimise economic activity – but will generally fail to act in the interests of ecological sustainability. The degree of “market failure” to some extent justifies (inversely) the degree of government intervention in protecting the long-term public interest in sustainable aquatic ecosystems and fisheries.

A prime function of all English–law based fisheries legislation is to ensure that the self-interest of individuals does not degrade the long-term viability of the resources they are exploiting, and that the ultimate owners of the resource (the community, State or Crown) derive the optimum long-term (sustainable) benefit from the use of these resources, consistent with their conservation. In modern legislation these principles are summed up in the concept of Ecologically Sustainable Development (ESD).

In managed commercial fisheries, the (commercial) “commons” which allows unconstrained competition (for catch) is usually replaced by a Government-regulated

market (for fishing rights) with carefully delimited individual or collective rights and rules of ownership ("property rights"[3]), in which the property owners are required to play a role in ensuring the sustainability of the resource.

The benefits ascribed to this approach and a stronger rights-based management regime include better stewardship of the resource driven by the interest of individuals in its well-being and improved economic performance through factors such as the ability to attract capital into the industry.

The limitations of this thinking as a basis for public policy are that it is not "holistic" in its view, and has tended to translate in practice into rights management regimes exclusively focused on commercial use of fish resources, where all rights are defined in the context of a commercial "fishery".

Importantly, it does not properly incorporate a broader and more complex view of human impact on the natural world generated by ecosystem approaches to assessment and management, nor does it take into proper account non-commercial fishing interests and their interest in fish resources – including those utilised for commercial fishery purposes.

Further considerations also include the broader public interest in sustainable use and commercial harvest levels, and the role that commercial fishing plays in helping to ensure an ecologically sustainable food supply.

Ultimately the narrow scope in which commercial fishing access rights have been described represents a significant weakness in the "strength" of their proprietary nature (Figure 1).

THE DEVELOPMENT OF WA FISHERIES LEGISLATION

The advent of comprehensive legislation to regulate fishing is relatively recent, and stems from the late 19th Century, when the impact of uncontrolled harvesting on freshwater and estuarine fisheries, and competition between commercial, subsistence (artisanal) and recreational fishers began to cause a significant level of public complaint (Christensen, J. 2009).

In broad terms the WA legislation has developed in three key stages:

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[3] *In this context, the term "property rights" means fishing access rights which have some or all of the characteristics of property to varying degrees.*

1899 – 1973: ***Fishery Amendment Act (1899), Fisheries Act (1905).*** Regulation of owner/operator commercial fishing. Licensing of commercial operators and boats. Regulatory control of gear, catch, area of operation etc.

1974 – 1993: ***Fisheries Act 1905 – Amendments 1974***. Regulation of "limited entry fisheries" with "fishing rights" assigned to owner-operators through licence provisions and conditions. No formal system of transferable "entitlement". Informal fishing/pot leasing and trading arrangements (within industry) recognised for compliance purposes in 1982 by including provisions for "acting under the direction and control of".

1994-2010: ***Fish Resources Management Act 1994***. Establishment of "managed fisheries" with formal schemes of transferable entitlement derived from each management plan (FRMA Pt 6).

The maintenance of a strong legal nexus between the owner of the "fishing right" and the fishing operator (owner-operator nexus) is a fundamental plank throughout each of the Western Australian Acts, and up until 1994 these rights were essentially indivisible.

A Government-Industry workshop (the "Mandurah Working Group") held during the mid-1980s helped to develop industry consensus on an overall reduction of commercial fishing capacity and the use of fisheries adjustment schemes (buy-back), the general development of limited entry managed fisheries, and the concepts and principles which led to the creation and development of transferable rights in the FRMA *(*Bowen, B.K. 1985, Fisheries Dept, WA 1985*)*.

As the fishing industry has developed in a corporate and business sense, successive modifications to legislation have increased the statutory recognition of private commercial sub-letting arrangements of fishing access rights within the industry, culminating in the FRMA*,* which created a formal means of allocating tradeable fishery shares ("entitlements") within managed fisheries. This was supported by a register of authorisations (Part 12) that also recognized financial interests in the licence of third-parties through a notation of security interests on the register.

It is important to note that the function of the register, as delineated in Part 12 of the FRMA, hinges on the licence (authorisation). It does not concern itself with the tracking or administration of entitlements held under authorisations.

The legal nexus between the rights owner and fishing operator appears to exist primarily for compliance and stewardship purposes, and can be traced in the FRMA through the relationship between a Part 6 management plan, a managed fishery authorisation under S66, the scheme of entitlement under S60, and the liability and defence provisions in S203.

The structure of the *FRMA 1994* clearly implies that, at the time, it was considered undesirable, from a public policy perspective, to establish unfettered private ownership of the "fishery shares" in isolation from the "right to fish".

The Act also envisaged a hierarchy or progression of management for fisheries from a "developmental" status involving controlled resource exploration, through an interim management phase which allowed the performance of the fishery to be assessed and the scientific assessment methods to be appraised, to a "managed" status for a mature fishery where the controls and assessment were largely settled and longer term access rights could be established with confidence.

In practice, this progression has not occurred as originally envisaged, and a number of fisheries continue to operate under permits of various forms or interim management arrangements. This issue also relates to the manner in which fees are applied to various forms of fishing access right. The working group considers that the level of fees should relate to the quality of the right, and recommends that the movement of fisheries with poor access rights to a stronger rights base should be expedited where appropriate. Alternatively fees should be scaled in proportion to the nature and strength of the right.

Absent from the 1994 legislation were powers to establish overarching resource management plans, and provide for sectoral allocations. A further consideration is the fact that the Act is promulgated on the concept of a "fishery" rather than on the concept of a biological resource. These are matters that have significant impact on the strength of access rights and need to be addressed in the proposed new Act.

GOVERNANCE ISSUES

The nature and closeness of the legal nexus between "owner" and "operator" affects certain economic, social and governance outcomes for both the commercial fishing industry and the State, as well as the specific rights of individual fishers.

Many of these issues are not unique to the fishing industry, but concern the relationship between the operation of the free market, and the management of societal aspirations through government interventions.

From a governance and compliance perspective, a close owner-operator nexus in law has so far been considered an important feature that helps to ensure that responsibility for the use of the fishing right is clearly assigned, and ultimate control of the exploitation of the fish resources remains clearly with the State, rather than migrating to private sector commercial interests or disinterested investors.

A close owner-operator nexus also helps prevent scenarios such as "revolving door" operators, in which the access owners may place pressure on operators, using financial or other means of coercion or incentive, causing them directly or indirectly to act illegally. As

successive operators leave the industry, new ones enter and are subject to the same pressure. In the absence of a stewardship ethic or any downward pressure through a chain of liability tied to the fishing right there is potential for rights owners to put their business interests ahead of the sustainability requirements for the resource and act without risk of penalty (Kazmierow, Booth, and Mossman 2010).

A close nexus between the ownership and operation of fishing rights also provides a direct flow of accountability for the proper use of those rights. In a practical sense it ensures that rights owners remain directly and specifically liable for actions taken by their agents, although the FRMA does provide grounds for defence against prosecution (Figure 2).

The alternative or "investor-operator" model (Figure 3) creates a separation between the ownership of fishing access rights (the entitlements or assets) and the use of those rights to catch fish (the fishing licence or permit) introduces a less regulated rights market, and provides a more flexible environment for investment and trading in fishery shares.

In this scenario, where the ownership and trading of 'fishery shares" is largely divorced from the activity of fishing, the outcomes and risks associated with management of the resource may be expected to shift to those more akin to a commercial market environment (Lock, K. and Leslie, S. 2007).

In New Zealand, where this nexus has been severed, additional regulatory controls on the operation of the market may specify maximum ownership requirements to inhibit monopolistic behavior and to ensure "a diversity of ownership and opportunity to enter the fishery" (Lock, K. and Leslie, S. 2007, Parliament of New Zealand 1996, Parliament of NSW, FA 1996). Minimum annual catch holdings may also apply to limit the number of operators on a given stock.

Most fisheries jurisdictions in Australia have adopted an approach which provides some of the benefits, in terms of property right characteristics, of a free market system for fishing entitlements with a degree of regulatory intervention. This could be characterised as a "hybrid" model which includes a mix of owner-operator and investor-operator characteristics.

The hybrid model also, arguably, provides a degree of assurance for the community (and other resource users) against less desirable outcomes (in terms of sustainability) that may be associated with privatizing the ownership of public resources.

The fisheries literature cites a number of potential governance and sustainability benefits from "market-based" systems of tradeable fishing rights, which are generally presumed to be "quota management" systems. Benefits may include greater cost-effectiveness, improved capital growth, greater responsibility and stewardship, and enhanced harvest values or overall economic performance of the fishery (Shotton, R. 2000).

However some authors also warn that the concentration and stabilization of ownership inherent in “commercial fishery only” systems, in the absence of a more holistic regime of community or collective interest rights, is likely to mitigate against a number of important social and fishing industry level outcomes including the entry and development of new operators, small-scale “artisanal” fishers and non-commercial interests in the resource (Stewart, C. 2004).

Importantly, the creation of a system which clearly defines the fishing rights and allocations between and within sectors and allows the transfer of rights through market, rather than administrative, mechanisms may also facilitate the allocation and reallocation of resource shares – in whole or part – both within and between sectors (Fisheries Dept, W.A. 2000).

FISHING RIGHTS IN WESTERN AUSTRALIA

At present fishing rights in Australia, as recognized in common law, exist in four primary forms (Gullet, W. 2008):

- *the public right to fish;*
- *the exclusive right of landowners to fish in waters on private land;*
- *the right to take fish as defined, or modified by statute, generally under Fisheries legislation; and*
- *native title fishing rights.*

A detailed exploration of the nature of fishing rights as they exist in WA and under the FRMA is provided in Fisheries Management Paper No. 195 (Fisheries Dept W.A. 2005).

The Working Group has considered four key questions that relate to the strength of fishing access rights:

1. *What is the “thing” that the rights are held in?*
2. *Where, in a legal sense, do the rights exist?*
3. *What recognition or consideration do the rights receive in policy and law?*
4. *What are the “property” characteristics of the rights in question?*

WHAT IS THE “THING” THAT THE RIGHTS ARE HELD IN?

Under the licensing provisions of the FRMA, most access rights are issued as a licence which entitles holders to conduct an activity in the face of a general prohibition.

The thing in which the right is held is determined by the nature of the prohibition. For example a commercial fishing boat licence (FBL) or a recreational netting licence contain little by way of entitlement in a thing. However a species specific managed fishery licence

(e.g. rock lobster) provides a clear and specific remit for an individual to take a share of the allowable catch in that fishery. In fisheries where no legislated management plan or system of entitlement exists the "share" of the fishery ascribed to licensed individuals is undefined.

Importantly, the "thing" in which the rights exist (in WA) is generally "the fishery" as defined in the relevant management plan. In most WA fisheries, with the exception of purportedly single-species fisheries such as rock lobster and abalone, this seldom relates to a specific biological resource, but is more likely to encompass a mix of gear permissions, area permissions and multiple species permissions. As a consequence "fishing access rights" for a given species, stock or other biological grouping may exist in multiple fishery management plans, reducing significantly the degree of "exclusivity" accorded to rights holders in various fisheries, and increasing the complexity and difficulty of scientific assessment and management.

Any move to stronger rights-based management systems should also consider the need for standardizing the manner in which harvest rights for specific resources are created and described.

WHERE, IN A LEGAL SENSE, DO THE RIGHTS EXIST?

A range of fishing rights are established in statute under the FRMA and its subsidiary legislation.

These occur in the context of increasing restrictions on the public right to fish. Importantly most other Acts of Parliament do not create fishing access rights, but they may serve to diminish them. Of equal significance is the absence of any explicit statutory recognition of the fishing access rights created under the FRMA in other Acts of Parliament.

Statutory fishing access rights may be established in a number of ways. The primary mechanism is by the issue of licences or permits which effectively grant individuals permission to 'fish' in the context of a general prohibition. Where there is no general prohibition on an activity the only rights that exist are those that are recognised in common law, as modified by regulation, or may be created under other forms of statute, such as native title rights [4].

[4] A decision by the High Court of Australia in relation to access to waters overlying Aboriginal land also considered the nature of the public right to fish (HCA 29/2008 - the Blue Mud Bay decision). In effect the judgement by the High Court considered that the 'public right to fish' had been replaced by a statutory rights (HCA 29. S27) *"By necessary implication, the Fisheries Act (and in particular ss 10 and 11) abrogated any public right to fish in tidal waters in the Northern Territory that existed before the Fisheries Act was enacted."*

Management instruments for commercial fisheries fall into two groups:

- *managed fisheries; and*
- *'regulated' fishing activity.*

The strongest expression of access rights exists in the context of managed fisheries. The two primary tools for this category are management plans (FRMA, Part 6) and the authorisations (managed fishery licences) that permit access to the managed fishery.

Fishing activity on fish stocks for which a management plan has not been determined may be conducted under a range of other permissions, including:

- Section 7 'Exemptions';
- Section 43 Orders, (which create a general prohibition, then specific exceptions); and
- "Regulation licences" (S257).

Appendix 1 identifies the key powers in the FRMA that establish fishing access rights of various forms, as they relate to increasing degrees of restriction of the public right to fish under open access arrangements.

The most specific of these rights as they relate to individuals are created under licensing powers – with around 87 clauses in the FRMA referring to licences or permits.

Appendix 2 provides a summary of licences and permits in the Act, and the nature of the right described in the Act.

WHAT RECOGNITION OR CONSIDERATION DO THE RIGHTS RECEIVE IN POLICY AND LAW?

The recognition and consideration of fishing rights outside the confines of the FRMA hinges to a large extent policy settings in relation to fishing at Commonwealth and State level, and to the way in which other Acts of Parliament interact with, or take into account, the FRMA and its subsidiary legislation (Figure 1).

Within the framework of fisheries legislation, fishing rights established under the FRMA have a series of protections and features aimed at enhancing the right. These are balanced by a series of constraints and penalties attached to infractions associated with the use of the right.

Each of these legislative features represents a policy position on how fishing rights may be used, and what constitutes an infraction of that right.

PROTECTIONS

Protections of the right include the provision of features such as renewability and transferability, defences prescribed in the Act or regulations, and the right to object or

apply for an administrative review of decisions in relation to the grant, variation, transfer, renewal, cancellation or suspension of a licence by the CEO under Part 14.

In addition the *Fisheries Adjustment Schemes Act 1988* and the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* both provide for compensation payments in the event that the fishing rights associated with a licence are permanently diminished or removed due to shifts in Government marine resource use policy, and in particular the establishment of marine parks under the CALM Act. Compensation for the effect of other kinds of actions under other Acts of Parliament is not dealt with in current legislation.

PENALTIES

Most penalties at present are prescribed for specific offences and imposed by the Courts following conviction. Graduated penalties may include imprisonment, licence cancellation or suspension, fines and reductions in entitlement.

However, provision is also made for a mandatory administrative penalty that results in the suspension of a fishing licence (authorization) after three offences in 10 years (S224). This provision directly impacts on entitlement owners and interest holders who may be at several removes from the commission of any offence.

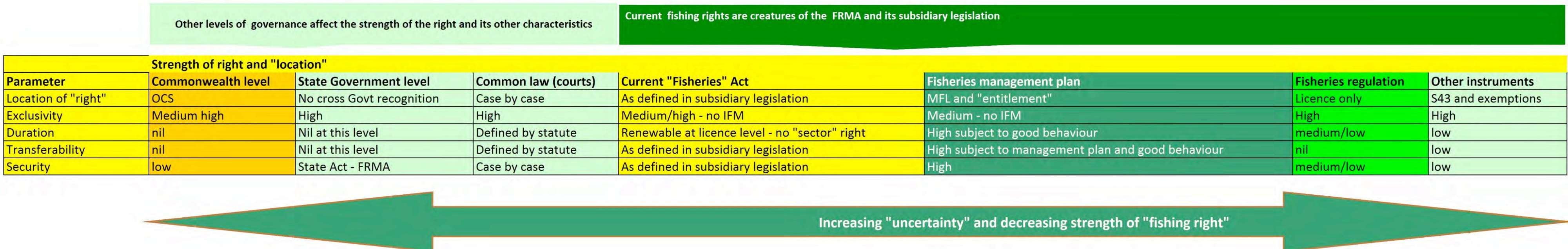
A further issue is that because the penalty is mandatory there is no allowance for appeal, review or graduation of the penalty according to seriousness of the offence. As a consequence three infractions by a person operating under the authority of a managed fishery licence may result in the owner being penalized by the suspension of any fishing rights under the licence.

In addition to the various penalties prescribed within the Act, there are also a series of administrative sanctions that may affect the rights owner through the cancellation or suspension of licences due to administrative process infractions. These include automatic cancellation if the licence is not renewed within 60 days of expiry (FRMA S139).

Protections and penalties as they apply to fishing rights are examined in more depth in the following section of this paper.

WHAT ARE THE “PROPERTY” CHARACTERISTICS OF THE RIGHTS IN QUESTION?

The property-like characteristics of various forms of fishing access right are explored in later sections of this paper.



	Strength of right and "location"						
Parameter	**Commonwealth level**	**State Government level**	**Common law (courts)**	**Current "Fisheries" Act**	**Fisheries management plan**	**Fisheries regulation**	**Other instruments**
Location of "right"	OCS	No cross Govt recognition	Case by case	As defined in subsidiary legislation	MFL and "entitlement"	Licence only	S43 and exemptions
Exclusivity	Medium high	High	High	Medium/high - no IFM	Medium - no IFM	High	High
Duration	nil	Nil at this level	Defined by statute	Renewable at licence level - no "sector" right	High subject to good behaviour	medium/low	low
Transferability	nil	Nil at this level	Defined by statute	As defined in subsidiary legislation	High subject to management plan and good behaviour	nil	low
Security	low	State Act - FRMA	Case by case	As defined in subsidiary legislation	High	medium/low	low

Figure 1: Relative "strength" of access rights in the policy and regulatory environments. As elements of the fishing access right are tested outside the management plans in which they are created the relative strength of their property characteristics decreases in accordance with their recognition in policy and law.

3. ENTITLEMENT MANAGEMENT MODELS

All Australian jurisdictions and New Zealand have recognized the need to provide for a finer division of the commercial fishing rights inherent in a fishing licence for a variety of commercial and governance purposes. However the strengths and nature of the nexus between owner and operator varies considerably from jurisdiction to jurisdiction and fishery to fishery, as does the application of a "rights-based" model.

In Australia most primary legislation for the management of fisheries allows the establishment of commercial "managed fisheries", which have specific sets of subsidiary legislation (plans, regulations, orders or notices) individually tailored to each fishery. However, there are also commercial fishing activities which operate under much less structured arrangements, and have substantially weaker property rights associated with them.

The sets of subsidiary legislation that establish "managed fisheries" create "fishery shares" of various forms. State fisheries legislation (including the FRMA) tends not to "lock in" rights-based management structures at the level of the primary Act of Parliament. Rather the approach taken provides for the creation of rights-based regimes within subsidiary legislation on a fishery by fishery basis. These rights have a degree of permanence, and are generally renewable and transferable on a permanent or temporary basis, and offer other features that equate to the elements of a "property right".

Importantly, in most Australian jurisdictions, including WA, the "property right" (or entitlement) and the right to fish in a managed fishery (managed fishery licence) are essentially indivisible.

From an administrative point of view this legislative structure has allowed considerable flexibility in the approach taken to managing individual fisheries, and allowed the necessarily sequential development of management models. The downside is that it also ultimately creates a diverse range of management and fishery rights models within a single administration, with little common currency in terms of the units of entitlement created by the right.

This level of complexity and inconsistency is likely to inhibit allocations and reallocations between commercial fisheries operating on common stocks, and will most probably render any market-based approach to cross-sectoral reallocation at the level of an ITQ impractical.

In addition the trade or variation (transfer) of all forms of the right (or its sub-units) is administered and recorded by the State, and requires the explicit approval of an official to whom the administrative function and decision-making power has been delegated – usually the Chief Executive or a Director of the Government Department responsible for

the administration of fisheries. General caveats on the transfer of these rights may also be imposed by the State.

In WA, for example, the FRMA provides grounds for refusal on the basis of the transferee not being a “fit and proper” person to hold the licence (FRMA S140: 2), not meeting foreign ownership guidelines, the “rights owner” or their agent being liable to prosecution, or other grounds specified in a management plan. This structure for commercial fisheries is supported by a licensing and administrative system run by the Department of Fisheries. Procedural fairness is provided by a right to administrative review in the FRMA Part 14. A point to note is that, apart from the register of interests in Part 12, the licensing and administrative system is not mandated by the FRMA.

The current legislative framework requires commercial fishers to be granted at least three, and in some cases up to five separate licences, all of which have different “rights” or permissions attached, to carry out a single function i.e. to operate commercially in a managed fishery.

Most Acts provide an explicit “chain of responsibility”, in which rights owners may also be liable for prosecution and Court imposed penalties if their agents act illegally (FRMA, Pt17). In some cases these are reinforced by further administrative penalties on the “owner” of the rights (i.e. the licence holder) such as licence suspension or cancellation for repeated infractions associated with an individual fishing right (FRMA, S224).

This flow of liability and penalties under this system also reinforces the “owner-operator nexus” by binding the rights holder (authorisation holder) to the actions of their agent (person acting for or on behalf of) (FRMA S203).

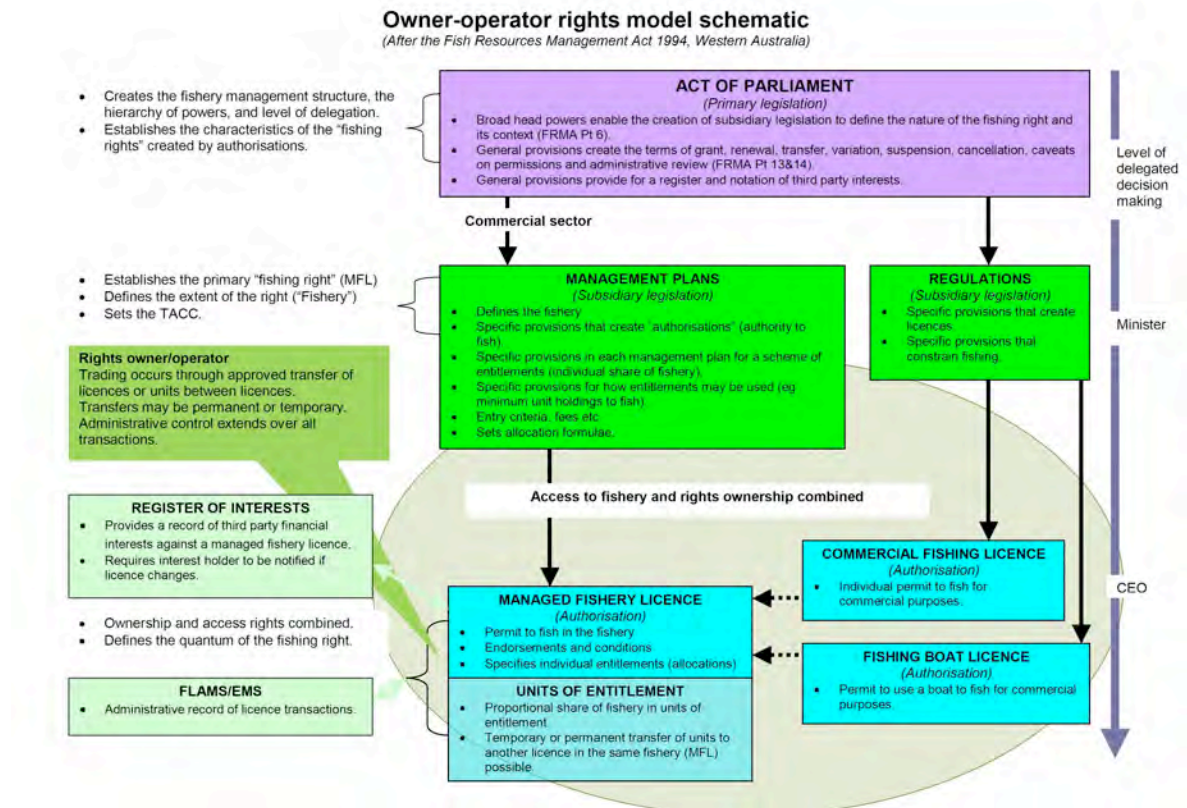


Figure 2: The owner-operator nexus created within the WA *Fish Resources Management Act 1994*, ties responsibility and liability for actions under the licence back to the primary licence holder through a set of administrative permissions and sanctions, as well as Court imposed penalty provisions.

By contrast, the New Zealand *Fisheries Act 1996* (Parliament of New Zealand, 1996) requires the Minister to establish "quota managed fisheries" unless other measures are considered sufficient to ensure sustainability. The NZ Act goes on to further delineate the manner in which fishery "quota shares" are to be created, allocated and administered, and the methods by which catch and trading is accounted for.

Unlike most Australian jurisdictions, the NZ model provides for shares in a defined fish resource (stock, species or area in combination), not a "fishery". In Western Australia for single-species fisheries such as rock lobster and abalone where there is little intra-sectoral overlap this distinction may make little difference to the way in which management and resource allocation operates, but for multi-species, multi-stock or gear-based fisheries the difference is likely to be significant for both scientific assessment and management as well as the nature of the fishing rights.

Since 2001 New Zealand has adopted a two-tiered rights-based (ownership) regime in which the initial allocation (quota share) determines a secondary allocation in the form of an Annual Catch Entitlement (ACE). The "quota shares" (the asset) are fully transferable, while the annual catch entitlement may be transferred to another entity on an annual basis, but effectively returns to the quota holder when the new ACE is calculated for the next year. Once allocated both the quota shares and ACE are administered quite discretely

from the rights to take fish commercially (the fishing permit) (see Lock, K. and Leslie, S. 2007).

Under the current system trading in quota rights and annual catch entitlements, as well as collection of catch and other data is carried out through a computer database “Fishserve”, operated by the New Zealand Seafood Council under a specific Order which delegates these functions to a non-government organisation (NZFA, Part 15A). Since 2004 an online auctioning service (www.fishstock.co.nz) has allowed quota holders to auction their annual catch entitlements or buyers to run a “wanted to buy” auction for specific ACE via the internet. A listing fee and two per cent commission on the winning bid is charged for the service. A further degree of sophistication is provided by a private sector service that facilitates trading of ACE towards the end of the year in order to minimise individual liability for “deemed value” payments for over-quota catches, and redistribute unfished ACE (FishTech Ltd).

The rights-based (ownership) regime is supported by an almost discrete operating regime (NZFA Part 6) which actively targets management to fishing operations. Fishing permits are issued by the CEO of the Ministry of Agriculture and Fisheries (MAF), and generally provide a 5-year right to take fish for the purpose of sale. The permits are not transferable (NZFA S89:10), but also cover the take of fish by employees, agents or the crew of registered vessels without the need separate individual permits (NZFA S89:3).

While a fishing permit authorises the (commercial) take of both quota managed and unmanaged “stocks or species”, and may have a variety of conditions on its use, it does not provide any specific right to take fish from a quota managed resource unless the permit holder also owns registered annual catch entitlement (i.e. ownership is recorded on the ACE register).

A key point of difference between NZ and WA is that in NZ no administrative permission is required for the transfer of either quota or annual catch entitlement, however MAF retains the ability to suspend or refuse to issue a fishing permit for specific reasons. A similar right of administrative review to that in WA applies.

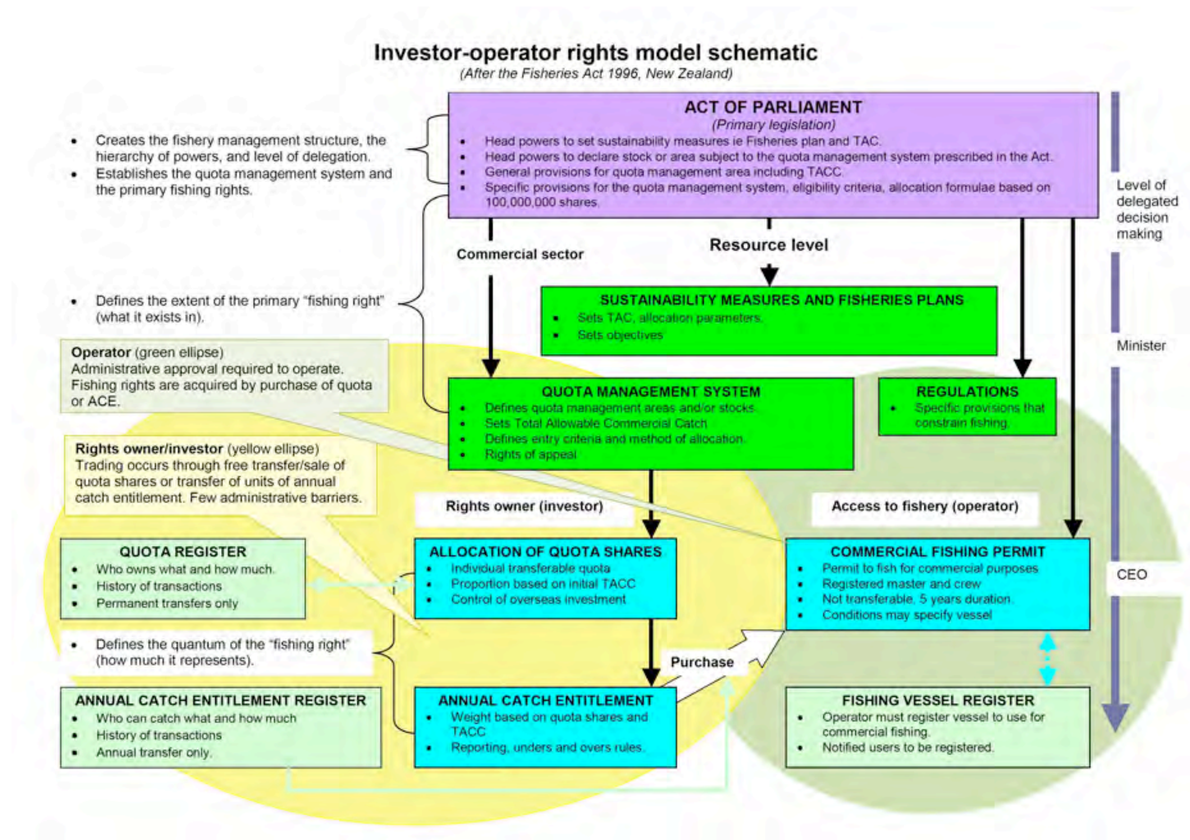


Figure 3: The "investor-operator" model created by the New Zealand Fisheries Act allows quota holders to trade in permanent (quota) and temporary (ACE) catch allocations with no administrative intervention. Activity licences (fishing permits) have few property characteristics, and are administratively controlled**.**

Significantly NZ defines the fishing access rights (quota shares) and the manner in which they must be dealt with and allocated within its primary legislation, creating a mandatory consistency across fisheries which does not involve a separate decision on each fishery.

A critical assumption in this system, which now comprises 97 species groups and 629 stocks managed in 10 Fisheries Management Areas, is that a sensible sustainable TAC can be set based on the data available.

The concept of "total allowable effort" used to manage many of WA's commercial finfish fisheries is not easily accommodated in the NZ system, and would need to be considered in the operation of a stronger rights management system.

Penalties for commercial fishing offences in the New Zealand Fisheries Act (S79) appear to be focused on breaches by permit holders of catch entitlement levels (including dumping and trucking), maintaining the validity of reporting and registers (misreporting), and illegal fishing (gear, closed areas etc). Apart from any penalties imposed by the Courts, administrative penalties such as fishing permit suspension, and requirements to pay the "deemed value" for ACE "overs" may apply to the individual who commits the offence or exceed the ACE, rather than the quota owner (Kazmierow, B., Booth, K. and Mossman, E., 2010).

The models for management in Australia and NZ may be considered as variations on a spectrum of approaches which range from a "owner-operator" model, where the right to fish (activity) and the ownership of a proportional share of the allowable catch (asset/rights in the fishery) are essentially indivisible, to an "investor-operator" model, where the ownership of the "assets" is administered discretely from the activity of fishing.

The degree of liability that passes from the operator to the owner generally links to the extent and manner in which the "fishery shares" and administrative requirements are defined in the primary legislation.

Some key points of difference in select jurisdictions, as understood by the working group, are outlined below:

AUSTRALIAN GOVERNMENT – SOME SEPARATION OF "ASSETS" FROM OPERATIONS (FMA 1991).

- *Statutory fishing rights defined in managed fisheries.*
- *Rights may be defined in terms of both use and proportion.*
- *Rights are defined as "property" and may be "dealt with".*
- *May be conditional.*
- *Continuity of rights provided as "options" if a management plan is revoked.*

NEW SOUTH WALES – SOME SEPARATION OF "ASSETS" FROM OPERATIONS (FMA 1994)

- *Share management fisheries – anyone can own a share.*
- *Rights created under a management plan (S57). Maximum shareholding of 5%.*
- *Share register (S90).*
- *Register of fishing businesses.*
- *Operators must be "nominated" by a shareholder.*
- *S66 – "Fishing rights" – specify "minimum shareholdings" to authorise fishing on an endorsed licence. Endorsements may be cancelled or suspended and shareholders prevented from nominating another person.*

SOUTH AUSTRALIA – STRONG "OWNER/OPERATOR" NEXUS (FMA 2007).

- *Management plans – S43. Activities or reserves (policy document).*
- *Licences, permits and registrations – issued by Minister.*
- *Not transferable unless specified. Duration of "management plan" or 10 years.*
- *Register of authorities and notations.*
- *Includes court orders*
- *Disqualification and demerit points against a person.*
- *Quota system and entitlements under regulation to licence holders.*

TASMANIA – STRONG "OWNER/OPERATOR" NEXUS (LMRMA 1995)

- *Similar management plan provisions to WA – Part 3, S35&36.*
- *Separate allocation provisions under the management plan.*
- *Similar liability provisions to WA.*

NEW ZEALAND – STRONG "INVESTOR- OPERATOR NEXUS" (FA 1996)

- *Act level quota management system prescribed.*
- *Fisheries may be declared quota managed.*
- *100,000,000 shares issued, allocated according to fishing history.*
- *Annual catch entitlement (ACE) issued to quota (share) holders.*
- *ACE fully transferable.*
- *Fishing permits – individuals must hold ACE to fish in a quota fishery.*
- *Penalties focus on individuals, not owners.*

4. THEORETICAL FRAMEWORK FOR "PROPERTY RIGHTS"

Four key features of property and non-possessory rights are widely recognised in the international literature and law. These are:

- **exclusivity** (the impact of others on the right);
- **duration** (the degree of permanence, temporal duration and renewability of the right);
- **transferability** (including the divisibility of the right and ease of temporary leasing and permanent transfer); and
- **security** (referring to the quality of the right, including ease of cancellation or change and degree of legal protection).

(Department of Fisheries 2005, Shotton, R. (Ed.) 2000, Stewart, C. 2004).

The Working Group has used these characteristics as a qualitative tool to map and compare the relative strength of the various forms of commercial fishing right currently created under the FRMA. Case studies using this approach are provided in the next section of this report. In addition the Working Group has also considered the wider context of resource management, government policy and law in which these rights exist.

It is important to note that the "robustness" of these rights and their extent varies considerably, depending on their basis. In a general sense most Australian jurisdictions classify fisheries in terms of their stability and the maturity of their management and scientific assessment processes. The higher the risk to the resource or resources, and the lower the level of scientific knowledge about the resource and the fisheries that operate upon it, the greater the perceived need for adaptive management and hence frequent regulatory adjustment. This is reflected in the type of legislative control and consequently "fishing right" that has been applied.

In managed fisheries there is a fundamental assumption that fisheries science can confidently predict sustainable yields over long periods of time, and that the management controls, if properly set, can effectively contain the impact of fishing.

Where data is insufficient, key elements of the stock assessment are based on broad assumptions, or management controls are of unproven effectiveness the nature of the fishing rights issued is likely to be significantly less robust than in lower risk scenarios.

A threshold question that must be answered before adopting stronger rights-based management regimes is "will the use of a rights-based management regime increase or decrease the risk of unsustainable fishing on the aquatic resources in question?".

In an ecosystem-based management model this question also includes the effects of fishing on non-target species, food chains and habitats.

A number of recent studies have commented on or examined the question of whether rights-based systems improve the ecological sustainability of fisheries (Worm *et al* 2009, Costello *et al* 2008). In general the consensus view is that rights-based management appears to provide a strong economic incentive for better behaviour by participants in the fishery and in a practical sense is leading to significantly improved sustainability outcomes. Costello *et al* estimate that, across 11,135 global fisheries by 2003, the rate of fishery collapse in ITQ managed fisheries was about half that of non-ITQ fisheries, and that in many cases ITQ management was instrumental in reversing the trend of global fishery collapse observed by Worm *et al*. However the authors do not look at the specific institutional or legal arrangements by which catch shares are created and managed, or the sustainability parameters used by management authorities to gauge the condition of exploited fish resources.

CASE STUDIES IN WESTERN AUSTRALIA

OPEN ACCESS FISHING RIGHTS

Fishing rights that exist in relation to open access resources are generally not robust, have few characteristics of property and are easily encroached upon by external factors. Individual rights are defined by way of privileged access or possession.

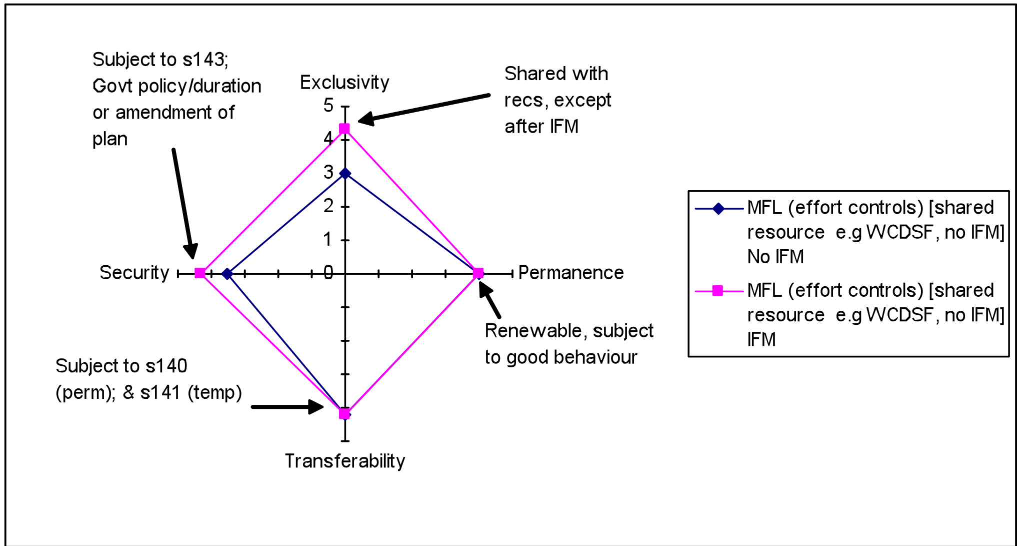
Management tends to be adaptive and directive in nature, and lack of data may inhibit the development of effective regulatory or rights-based management regimes. Most recreational angling fits into this category.

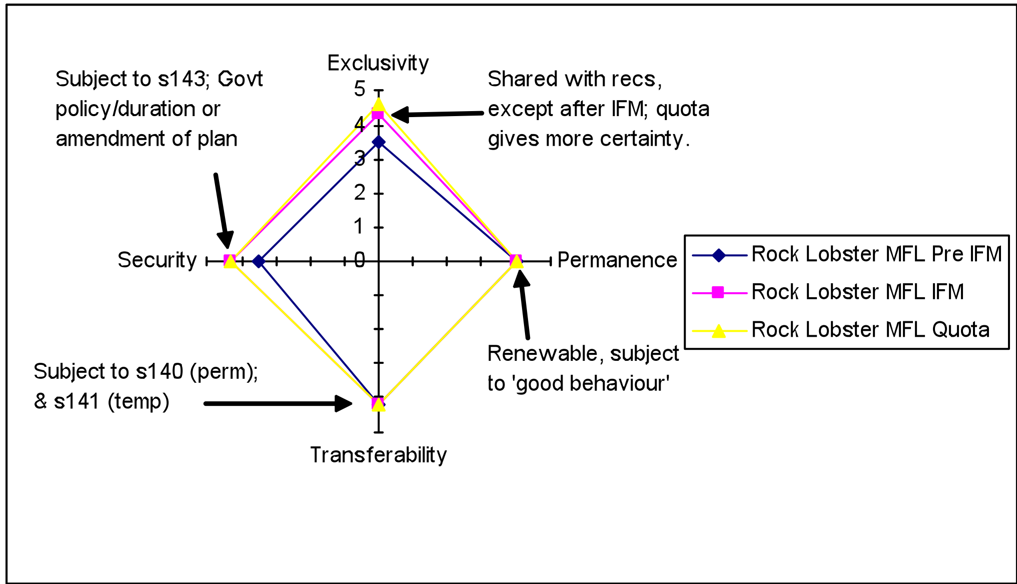
MANAGED FISHERIES

The FRMA provides relatively strong property rights at an operational level in commercial fisheries managed under a Part 6 management plan, where a scheme of entitlement has been implemented. However, in the extended context of resource management the rights appear decreasingly robust due to the influence of other sectors and fluidity in government policy in relation to marine resource use.

Some improvements in the strength of the right (and its flexibility) in these fisheries can often be achieved by adjusting elements of the management plan itself, or streamlining administrative process.

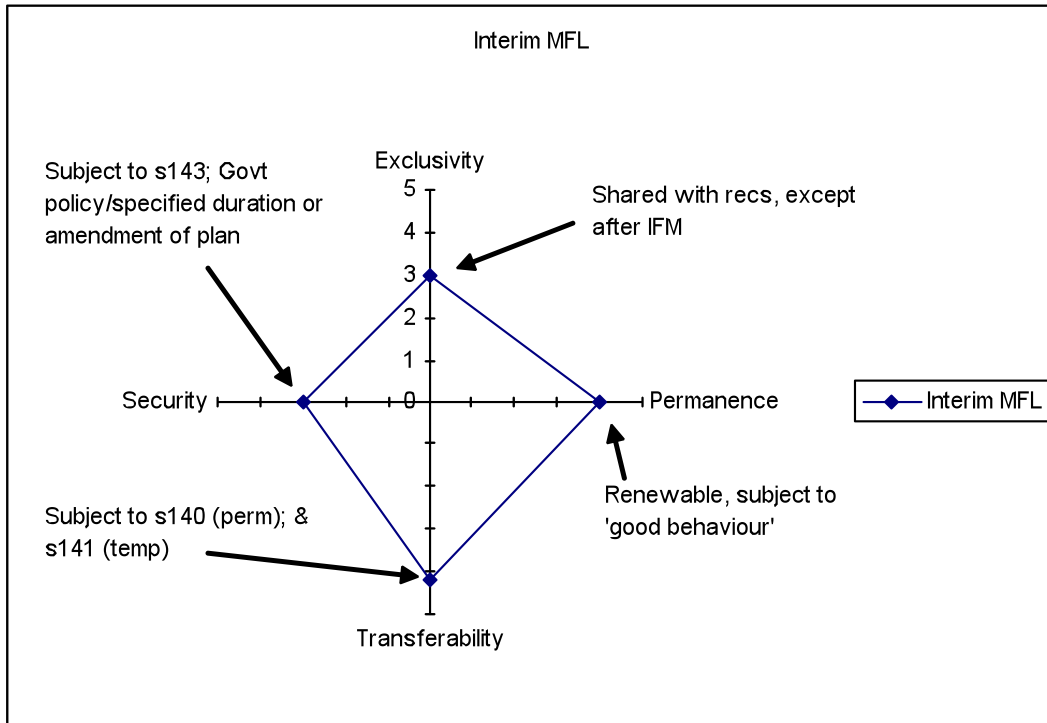
In the wider context the key areas that need to be addressed are the management of other competing sectors, statutory definition of the nature of the rights, interactions with, and recognition by, other Acts of Parliament, and overarching government policy in relation to marine resource use.





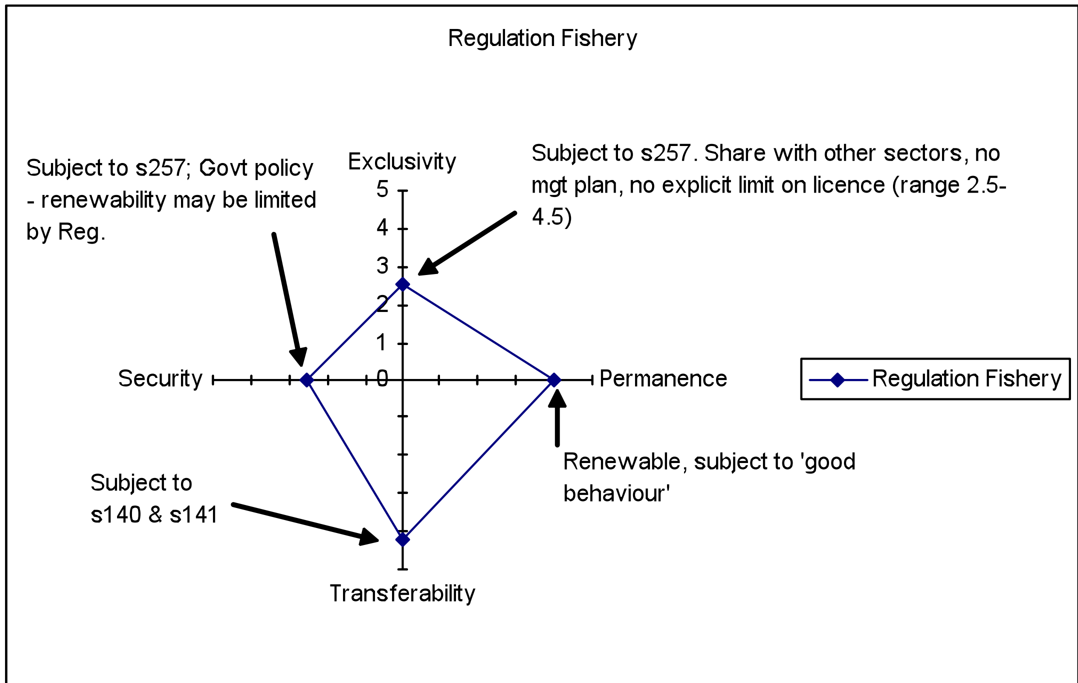
INTERIM MANAGED FISHERIES

Rights in interim managed fisheries exhibit similar characteristics as managed fisheries, but may be less secure, less exclusive and possibly less permanent. The absence of schemes of entitlement significantly decreases the transferability (and hence flexibility) of components of the right.



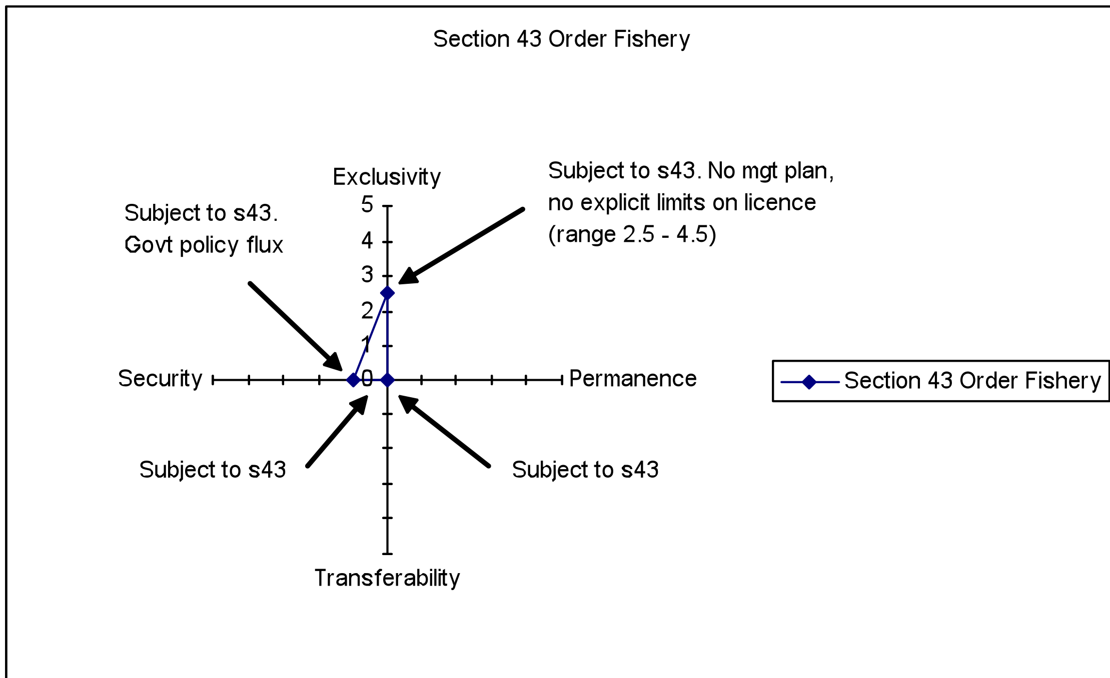
FRMA SECTION 257 LICENCE AND REGULATION

Fishing rights associated with licences (including fishing tour operator licences) created by regulation have some of the characteristics of managed fishery licences, particularly where access is limited, but are likely to be less exclusive and secure. Recreational fishing rights associated with species licences under this section have strong transferability and permanence features, but in the absence of a clearly defined collective (or individual) access right, they exhibit weak exclusivity and security.



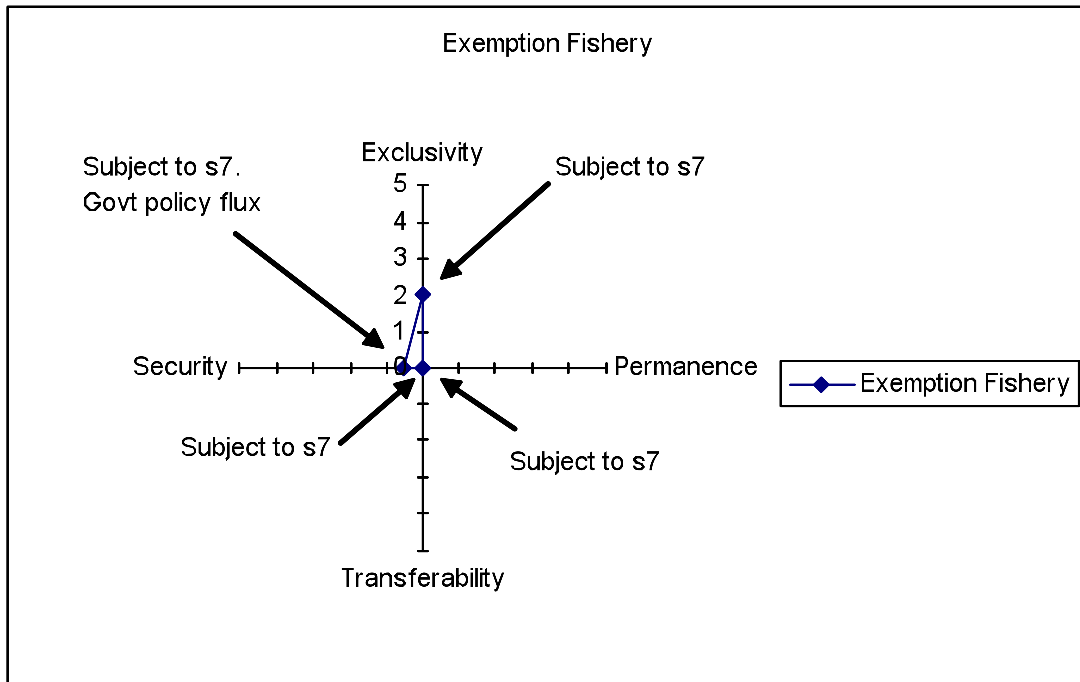
FRMA SECTION 43 ORDERS

Fishing rights in activities managed by Section 43 Orders have little security, permanence and duration or transferability.



FRMA SECTION 7 EXEMPTIONS

Permission to fish granted by way of exemption under S7 is more akin to an administrative privilege than a fishing right, and while it may exhibit strong exclusivity, there are few other strengths as of right.



5. CONCLUSIONS AND FINDINGS

Having considered the matter of property rights and their relationship to fishing access and other resource use rights under current State legislation, within the limitations of the time available to examine this question, the Working Group has come to the view that there are important long term community and economic benefits to be gained by strengthening the property characteristics of these rights for the fishing sectors and the pearling and aquaculture industries.

The key public policy and community benefits from strengthened access rights include:

IMPROVED SUSTAINABILITY FOR AQUATIC RESOURCES

The global and WA experience indicates that a robust legislative framework which provides for clear sustainability targets, takes specific account of current science, and sets and allocates explicit harvest limits will deliver improved ecological sustainability, and is capable of reversing the negative trends evident in many global fisheries (Worm *et al* 2009). A number of international studies strongly support the view that key elements in the success or failure of fisheries management systems include the manner in which they set sustainability targets, the level at which they set harvest limits, the way in which fishing access rights are created, assigned and administered, and the degree to which all fishing sectors voluntarily abide within those limits (Costello *et al* 2008).

A PLACE FOR FISHING IN AN INCREASINGLY CROWDED MARINE ENVIRONMENT

Western Australia is entering a phase of development in which population levels are increasing significantly, placing unprecedented pressure and a range of demands on the coastal and nearshore marine environment. These demands may come from industrial and infrastructure development, tourism, and conservation policies. However a key issue is that the level of the demand is seldom constrained by government policy, and some of these uses are seen as mutually exclusive or incompatible with each other.

In a sense the usual policy response to a demand for specific consideration is to use property law to make a specific allocation (usually in a spatial sense) for that purpose through the revesting of crown land to create exclusive or semi-exclusive rights of tenure for a specific purpose. A direct effect of this response is the displacement of existing fishing and other non-proprietal activities, irrespective of any non-proprietal rights that already exist, and irrespective of whether or not those activities are operating within sustainable limits.

Because these allocations of community space occur sequentially, in the absence of a State marine planning framework and a clear policy on the continued place of sustainable fishing as a valued community activity, they represent a significant threat to the scope of the

fishing access rights which the WA community currently enjoys. The Working Group believes that this is a fundamental issue, and would be best addressed at this time by establishing a clear policy and legal position on the nature and scope of fishing access rights and their tenure as they relate to other forms of law.

IMPROVED SECURITY FOR THE SUPPLY OF COMMERCIALLY CAUGHT FISH TO THE COMMUNITY

The commercial fishing industry has had an important place in WA's regional economy and social fabric for over 100 years, and is responsible for the supply of locally caught fish to the Western Australian community. WA's fisheries are generally not highly productive (in volume) by world standards, and have thrived on relatively high value products for specialized markets, including the local fresh fish market. The industry itself covers a broad spectrum of activities from small scale "artisanal" fishing, to export-oriented industrial fishing. An important point is that despite policies that have allowed "developmental fishing" and the discovery of new resources, the reality is that such opportunities in WA are probably at or near their end. There are few if any undiscovered fish resources, however global and Australian market and environmental forces are likely to create significant opportunities for previously lower-value fish resources from sustainable fisheries. This trend is evident across Australia, and the primary focus for fishing industry development will continue to be improving product quality, value adding, servicing niche markets and improving the sustainability of fish resources. Quite clearly secure access to fishing grounds and fish, to areas for fish farming, and to a professional, environmentally-attuned harvest sector are critical elements in ensuring that the fishing industry can continue to contribute to a sustainable food supply for the WA community and other markets.

A key point to note is that at present there is little by way of statutory protection of fishing rights outside the specific legislation under which they are created. Two notable exceptions are the compensation provisions in the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997,* (to the extent of Marine Parks and Marine Nature Reserves) and the *Fisheries Adjustment Schemes Act 1987.*

IMPROVED SECURITY FOR RECREATIONAL FISHING AND OTHER HARVEST SECTORS

The Working Group also considered the place of recreational and other fishing interests in the overall scheme of sustainable fisheries, and strongly supports the view that an effective resource management framework needs to clearly assign a quantum of rights and responsibilities to all harvest sectors. The Working Group considers that the management framework and thinking for recreational fisheries and other sectors lags considerably behind that of the commercial sector. Despite many positive changes in community attitudes and a plethora of regulations to constrain individual catches, the fundamental

principle of containing effort or catch within the limits of an allocated sustainable catch share has yet to be broadly accepted or acted upon, and has no legal expression in the *FRMA 1994*. Unconstrained growth in effective recreational fishing effort, coupled with access to affordable high-precision fish finding and fishing technologies are already key elements in the exploitation of nearshore fish populations. The working group considers that the establishment of clear, legally constituted fishing access rights for the recreational sector will provide a significant incentive for this sector to seek more effective management solutions within a total sustainable harvest framework.

IMPROVED ECONOMIC AND SOCIAL PERFORMANCE FROM WA'S COMMERCIAL FISHERIES

A key problem that besets the management of fisheries world-wide is the "top-down" nature of most management systems, which while they may produce sustainability outcomes, often do so without enhancing either social stability or economic profitability. In commercial fisheries a key cause is overcapitalization driven by the "race to fish" which, even in sustainably managed fisheries, dominates the thinking and behaviour of fishers as they seek to optimize their catch, rather than their economic (or social) returns. In the non-commercial harvest sector similar trends are evident, although the drivers are more likely to be factors such as affluence, leisure time and the relative cost and perceived benefits of participation in fishing. The Working Group considers that properly constituted, transferable, fishery shares provide a powerful incentive for fishery participants and investors to move away from world view that seeks to maximize catch (Maximum Sustainable Yield) to a world view that accepts the concept of "pretty good yield" which delivers long-term environmental, economic and social benefits through lower levels of catch in proportion to unfished biomass.

IMPROVED ADMINISTRATION AND ALLOCATION PROCESSES FOR THE USE OF MARINE BIOLOGICAL RESOURCES

The Working Group regards the creation of a flexible and efficient market environment for the allocation and transfer of fishing and other access rights as a key strategy in improving the economic performance of individual fisheries and the pearling and aquaculture sectors as well as reducing the administrative burden. In addition the establishment of a "rights-based" trading framework which is not constrained by the permission to fish offers a potential solution for the future movement of catch shares both within and between sectors. In addition such a system could lay the groundwork for new approaches to fisheries management which allow greater flexibility in participation and the development of specialized fishing operations for niche markets.

6. RECOMMENDATIONS

The Working Group considered that the issues associated with fishing access rights are best divided into three broad tiers of public policy:

- *those that can be addressed through changes in policy, or through amendments to the FRMA, management plans or subsidiary legislation;*
- *strategic policy issues, which are best progressed through the proposed new Fisheries and Aquatic Resources Management Act (the new Act), and amendments to other State legislation; and*
- *high level policy issues that may need to be addressed at State and/or Commonwealth Government levels, such as a clear state policy on the longer term use of aquatic resources and the place of fishing in State and Commonwealth waters (e.g. OCS and marine park planning);*

A summary report at Appendix 3 outlines progress by the Working Group to 21 October, 2010 and puts forward some proposals for short-term changes to existing legislation and administrative practice which will provide some immediate improvements to the trading aspects of fishing rights created under Part 6 (Management Plans) of the FRMA.

OPERATIONAL POLICY ISSUES

IMPROVING TRANSFERABILITY, SECURITY, AND DURATION WITHIN THE EXISTING FRAMEWORK

The working group recommends that the following amendments be made to the FRMA and its subsidiary legislation to improve the transferability, security and duration characteristics of fishing access rights created under FRMA Part 6 management plans within the existing rights management approach.

Recommendations 1 – 5 were provided in the progress report to the Minister for Fisheries in October 2010, and have been approved.

1. Introduction of "inactive" managed fishery licences in Part 6 management plans

That relevant management plans be amended to provide for the grant of managed fishery licences at levels of unit entitlement of one or more units and that complementary amendments be made to enable active and inactive fishing licences to be given effect.

That Part 6, Section 60 be amended to expressly provide for a minimum entitlement to fish in a management plan.

Policy considerations

Removing the current minimum holding levels in fisheries which have a scheme of entitlement (unitised fisheries) would allow for improved security for persons who have invested in the fishing industry at levels below that required for the grant of a licence at current minimum unit holdings. Although this will result in the number of licences increasing, the absolute number of units for the fishery (i.e. the fishery capacity) remains the same. They would simply be distributed across a larger licence base.

Amending relevant management plans to permit the grant of 'inactive' licences would allow investors and others (such as family members etc.) who are the beneficial holders of the units of entitlement, to be registered and recognised. This approach provides all the benefits of the so-called "unit register" at a much lower cost and in a framework consistent with current licensing practices.

Investors and others who do not own an MFL currently rely on another managed fishery holder to recognise their beneficial interest. Beneficial holders of such entitlement are not currently recognised in the licensing system and financial institutions lending to these beneficial holders of entitlement are unable to notify their security interest.

Under the "inactive" licence proposal, an investor could buy units and have these units listed under their name, using an 'inactive' MFL. These units could be temporarily transferred off the 'inactive' MFL to an 'active' MFL for use in the fishery, but the ownership would remain with the investor. Minimum holding criteria in the management plan would prevent these MFLs from being actively fished.

This system will allow the ownership of entitlements to be more accurately recorded in the register.

This proposal represents significant improvements in the transferability (and tradability) of fishing rights, and may enhance the security of some investors in each fishery.

The proposal is also likely to assist in securing the capital value of units by ensuring that the security and tradability of units is robust and the market is open. For example in the Tasmanian abalone industry the changes in that fishery have led to investors being able to purchase abalone quota units directly and 450 people own the 3,500 quota units in the fishery[5].

An amendment to S60 of the Act has been considered necessary by the Department, and is supported by the Working Group, to expressly provide for power in management plans that require a minimum entitlement before a person can be authorised to fish in a

[5] Source website Department of Primary Industries & Water, Tasmania

managed fishery. This reinforces the provisions for minimum holdings already existing in management plans and assists in identifying authorisations which are inactive under a managed fishery plan.

2. Amendment of the Act to permit temporary and permanent transfers of all units of entitlement from a managed fishery licence

That Section 141 be amended to permit the transfer of part or all of an entitlement[6] *and that relevant amendments be made to management plans where necessary.*

That Section 140 be amended to permit the transfer of part or all of an entitlement and that relevant amendments be made to management plans where necessary.

Policy considerations

This is also an issue that has been receiving concurrent consideration by the Department and the Working Group's recommendations on this issue with respect to 141 are consistent with the Department's proposals.

The Act (S140 and S141) currently only provides for part of an entitlement to be transferred, either temporarily or permanently to another authorisation. Therefore, in all unitised fisheries, there is the potential for units of entitlement to remain unfished. For example, at the present time there are around 300 West Coast Rock Lobster Managed Fishery Licences (MFLs) that have only one unit attached to them. These units cannot be used because they fall under the minimum unit holding specified in the management plan for the fishery, but cannot be transferred to an active licence. This means that the value of 300 units in the fishery cannot be realised by MFL holders.

All of the unitised commercial fisheries are in a similar situation and would benefit from amending Sections 140 and 141 to provide for the CEO to transfer all of the entitlement from an authorization. (Note that where all entitlement is transferred permanently, the MFL would be cancelled, as a licence with no permanent entitlement holds no rights in the fishery.

The Working Group proposes that MFL holders have the ability to temporarily transfer all the entitlements off their authorisation and in the case of permanent transfers, transfer all of the entitlement without the associated impacts of cancellation of a Fishing Boat Licence, as currently happens under the Rock Lobster Management Plan.

The Working Group supports the Department's recommendation of amending S141 of the Act, and would also like to see S140 of the Act amended to support the temporary and permanent transfer of all entitlements from a managed fishery licence.

3. Continuity of right on death

That the Act be amended so that an authorisation can continue after the death of the individual holding the authorisation, as an individual or as a joint tenant and can be transferred as part of the estate.

Policy considerations

The Working Group endorses the Department's amendment to the Act whereby an authorisation would continue after the death of an individual if the authorisation is held in an individual's name or as a tenant in common, and enabling the authorisation's transfer as part of the deceased estate. In the case of joint tenants, the Working Group supports enabling the authorisation to be held by the remaining joint tenants.

4. Issuing of Infringement Notices for minor management plan offences

That amendments be made to enable infringement notices to be issued by Fisheries Marine Officers for management plan offences and that provide for 45 days for the issue of infringement notices

Improvements to access rights to enable infringement notices to be issued for management plan offences (under S 228[1]) where, in the opinion of a Fisheries Marine Officer, the offence is not intentional or reckless and the degree of the offence against a provision is minor, are endorsed by the Working Group. The Working Group also supports amendments to S228 which provide for 45 days to issue an infringement notice, which reduce the risk of matters moving to prosecution through expiry of the current 21 day period.

In instances where the Department proceeds by way of infringement notice, there would be no associated recording of a "black mark" against an authorisation under S224, because if the infringement penalty is paid, the matter would not proceed to court, and S224 only applies if the person is convicted of an offence by a court. This would provide greater security and permanency for the holder of the authorisation.

5. Review of registry system

That Landgate be requested to review the Department of Fisheries' Register of Licences and report on how to improve its administration and security of interest holder aspects.[7]

[7] The Working Group notes that this review has now commenced.

Policy considerations

The Working Group identified an industry concern regarding the quality and robustness of the current system used to record and manage authorisations on the Fisheries Licence Register, including the manner in which security interests are notated under Part 12 of the Act and access to information on the Register. The Working Group was advised by users of the Register (banks, boat brokers) that improving the "business friendliness" of the Register would be a desirable enhancement.

Given that authorisations are the formal recognition and documentation of a commercial fishery access right, the Working Group is of the view that improving the perception of the Fisheries Licence Register as a quality and robust system would be one of a number of ways in which fishing access rights could be better recognised. In this respect the quality and robustness of the State's Land Titles Registry was considered as a standard against which the Register could be benchmarked.

To determine how the Fisheries Licence Register compares to the State's Land Titles Registry, it is proposed that the Fisheries Licence Register be reviewed by Landgate with a view to recommendations for improvement (if any)

Terms of Reference for the review should focus on:

1. *advice on how the Fisheries Licence Register compares in terms of its quality and robustness with other Register systems (and with particular reference to the State's Land Titles Registry) and recommendations for any desirable improvements; and*
2. *recommendations on how access to the Register for the purposes of improving the efficiency of transactions could be improved.*
3. *Include the need to look at the legal structure behind this system and how it be reshaped to better record and track access rights.*

6. Requirement to inform owner if a prosecution against a licence proceeding.

That the Department be required to notify the rights owner if prosecution action in relation to the exercise of those rights is proceeding.

Policy considerations

The owner-operator nexus in the FRMA provides for the prosecution of both the fishing operator and the owner of the managed fishery licence if an offence has been committed. In a scenario where the MFL holder (rights owner) has sub-let the use of all or part of their entitlement to a third party it is possible that court action may occur without the knowledge of the MFL owner, leading to further difficulties in managing the use of the entitlement.

7. Modify administrative sanctions provisions to suspension only for managed fishery licences in owner-operator model.

That administrative sanctions in Part 13 that relate to the cancellation of authorizations be modified to suspension only in relation to managed fishery licences, particularly where these have schemes of entitlement.

Policy considerations

At present the entirety of the fishing right may be subject to cancellation due to late application for renewal (S139) or other grounds (S143). Once a managed fishery licence has been cancelled, unless the applicant meets the entry criteria in the management plan (which may be irrelevant due to the time since the plan was enacted) a licence may not be re-issued.

The working group considers that this undermines the security of the fishing access right, as well as creating administrative difficulties. A more appropriate approach would be to suspend the use of the fishing entitlements until the CEO is satisfied administrative requirements have been met.

In a rights management model, where the administration of the fishery shares are decoupled from the fishing permit, penalties should flow to the permit holder.

STRATEGIC POLICY ISSUES

8. Statutory aquatic resource use rights and their property elements to be strengthened across government

The State Government should legislate to establish stronger statutory fishing access rights that are recognized across government and statutory planning provisions that can deliver a better integrated approach to marine resource use and management.

In particular the Government should ensure better recognition of existing fishing rights and co- ordination across agencies and Acts of Parliament which grant or affect rights in the aquatic environment.

Specifically:

- *The proposed Aquatic Resources Management Act have a section that describes its relationship to other Acts.*
- *That the Wildlife Conservation Act specifically excludes "fish" as defined in the FRMA.*
- *That the CALM Act 1985 is amended to recognize resource management strategies and other plans under the FRMA (or the proposed new Act) as evidence of "proper conservation and protection" of fish. (CALM Act Division 3, S13B). Other provisions of*

the Act not to affect the operation of the FRMA, except in Marine Nature Reserves (S4) or other negotiated areas.
- *That the FRICMR Act includes compensation in relation to the removal or reduction in the quality fishing access rights (as considered in the property rights model) through the operation of any Act of Parliament.*

Policy considerations

The working group considers that some of the primary influences on (and indeed, threats to) the security and continuity of statutory fishing rights flow from the degree of flux in Government policy in relation to marine biological resource use, and the changing nature of tenure in the marine environment.

It considers that a key weakness in Fisheries legislation formulated in the early 1990s is that it does not generally create or vest clear rights of tenure(in any form including a "usufruct") over the areas associated with fishing access rights.

In an environment and an era in which the State is increasingly choosing to deal with areas of water as "land") fishing access rights should be given comparable status to any other form of crown lease or vesting. i.e. State waters now have status as Crown Land under the Land Administration Act. Other Acts of Parliament (e.g. the CALM Act) operate using spatial vesting as a primary tool.

A consequence of this, the working group believes, is that pre-existing fishing rights have not been given due weight in many planning processes associated with use of the marine environment due to the emphasis on spatial tenure and GIS as the fundamental tool for marine area planning.

It believes that the State Government should seek legal opinion on the best method of providing a more spatially robust property right associated with a fishing access rights, including those of pearling and aquaculture.

Options to achieve this might include:

- *Vesting of fishing grounds defined in management plans in the Minister for Fisheries as non-exclusive A Class reserves for this purpose (akin to land tenure).*
- *Registration of fishery areas and fishing as a statutory use with the Department of Land Administration, and the inclusion of fishery boundaries in planning documentation.*
- *Inclusion or recognition of a specific "crown lease" (akin to a pastoral lease in intent) for the specific purposes of fishing, pearling or aquaculture.*
- *Administration of fishing/aquaculture/pearling lease areas under the Land Administration Act as an alternative or complement to the fisheries legislation.*

In addition the operation of other Acts of Parliamant which excise crown land from common use have had an ongoing impact on the operation and value of fishing rights, and

continue to promulgate a mechanism by which these rights may be arbitrarily withdrawn through shifts in policy, without proper consideration of the biological outcomes already achieved through sustainable managed fisheries.

Importantly, while compensation is provided for in relation to marine parks and nature reserves under the FRICMR Act, other forms of excision under the CALM Act are not.

The nature and extent of the compensation, and the manner in which it relates to "market value", rather than "property value" also reflects a narrow view of the long-term nature of fishing access rights.

9. The proposed Aquatic Resources Management Act to include specific provisions to strengthen fishing access rights.

The proposed Aquatic Resources Management Act should be structured around the concept of rights-based fisheries management, and make specific provision for establishing and managing these rights in a robust and integrated manner. Specifically the new Act should provide for:

a) A separate Part or Division which describes the rights of resource users and their degrees of exclusivity, duration, transferability, and security.
b) Power to establish the maximum level to which a given resource or set of resources should be harvested.
c) Power to set and enforce sectoral and individual harvest levels (allocations) for all sectors.
d) Clear objectives for resource and sectoral use plans.
e) How fishing access rights can be dealt with and how they are to be managed.
f) Provision for continuity of fishing rights if a plan is revoked.
g) Penalty provisions should focus on the perpetrator/operator and not unfairly penalize rights owners.
h) Review the need for and effectiveness of administrative penalties (S224) in addition to court imposed penalties.
i) Provide for compensation for the revocation of rights on grounds other than sustainability.

Policy considerations

The policy considerations on which these proposals are based form the substance of this report. A key consideration in the new Act needs to be the manner in which fishing access rights are established in the new legislation, the nexus between "owners" and "operators", the fall of liability and the degree of administrative intervention in the exercise of those rights. These issues are discussed more fully in Parts 2 and 3 of this report.

10. Consider a new rights management structure

For the purpose of developing a new Act, consideration should be given to the replacement or modification of the owner-operator model for rights management inherent in the FRMA 1994 with a new system for the creation, trading and administration of fishing access rights (fishery shares) discrete from fishing activity (fishing permits). A new system could facilitate rights trading by improving rights ownership and reducing the degree of unnecessary administrative intervention in transactions concerning fishing access rights.

Consideration should also be given to the flow of liability as provided in FRMA Part 17 and its impact on compliance and the property right elements of the licence.

The Department should work closely with WAFIC and other stakeholders to develop options for inclusion in the new Act as a matter of priority, noting the intention to have a new Act before Parliament in 2011.

The process should include an examination of the experience in New Zealand and other jurisdictions with quota rights and fishery share management, including a workshop involving an expert group to further develop a framework.

Policy considerations

The Working Group considers that this recommendation is the most fundamental structural question posed by this review, and a decision about the rights management model to adopt in the new Act is critical to the future of fishing in Western Australia. Recommendations 10, 11 and 12 are considered linked because they relate to interactions between rights ownership, permission to fish, the flow of liability for offence and the degree of administrative intervention required by Government.

The features associated with these models are explored in Section 3 of this report. A key consideration in moving to a model which involves less bureaucratic control is the degree of risk to the resource as it relates to compliance, versus the benefits of opening a less regulated market for fishing access rights.

The Working Group notes that WAFIC is very interested in, and generally supportive of an examination of options for an alternative rights management system for inclusion in the new Act.

The New Zealand experience appears to indicate that such a system provides for improved capitalization due to benefits in terms of financial securities, and facilitates a wider degree of involvement by investors.

The consequences of loosening the owner-operator nexus in the FRMA, and the pressure the current Act places on rights owners to ensure that their entitlement is used lawfully, remain unclear and require further investigation.

Further considerations also remain around foreign ownership of fishing rights, and food and fishery security issues associated with offshore control.

Importantly such a system needs to consider the rights between sectors, as well as the individual rights within sectors. The establishment of a system which clearly defines the fishing rights and allocations between and within sectors and allows the transfer of rights through market, rather than administrative, mechanisms may also facilitate the allocation and reallocation of resource shares – in whole or part – both within and between sectors.

11. Rationalisation of commercial licensing framework.

That the current licensing requirements of the FRMA be rationalised to better reflect rights-based management and focus on resource use. Specifically the multi-tiered requirements to hold managed fishery licences, fishing boat licences, commercial fishing licences and fish processing licences concurrently be streamlined to focus on resource use.

Within the current owner-operator framework, the working group suggests that only three licence types, each with explicit rights and permissions attached, are required:

- *A managed fishery (resource) licence. This provides access and sub-units of entitlement to a sustainably managed resource.*
- *A commercial fishing master's licence (fishing permit). This provides permission to fish commercially, and to run a commercial fishing operation. It provides no right of access without assigned entitlement in a resource.*
- *A licence created by regulation: This provides permission to fish commercially and access to "unmanaged resources i.e. those without a management plan. It is temporary in nature and allows for exploratory or short-term fishing for a range of purposes.*

Any need to identify boats, gear or crew should be implemented as a registration against the fishing permit.

Policy considerations

The current legislative framework requires commercial fishers to be granted at least three, and in some cases up to five separate licences, all of which have different "rights" or permissions attached, to carry out a single function i.e. to operate commercially in a managed fishery. All licences are considered "authorisations" under the FRMA, and are by nature renewable and transferable, subject to conditions around good behaviour.

Some of these requirements date back as far as 1899, and have become increasingly irrelevant as the rights associated with them have been re-assigned into managed fisheries.

In an "investor-operator" model the licence requirements could be further simplified to a single permit system in which the only fishing permit required is to conduct a commercial fishing operation. Management of the "fishery shares" would be conducted via registers of ownership.

Current requirements should be reviewed in the light of the need to provide minimum effective regulation.

12. Ensure the proposed Entitlement Management System (EMS) accommodates or can be modified to accommodate future models of management which de-couple the owner-operator provisions of the FRMA.

The working group recommends that the proposed Entitlement Management System be scoped and constructed in a manner which will facilitate future models of management, including rights trading within and between sectors, as well as within and between fisheries.

HIGH LEVEL POLICY ISSUES

13. Commonwealth/State jurisdictional arrangements

That as a matter of priority WA negotiates more robust and clear jurisdictional arrangements with the Commonwealth in relation to the management of all aquatic biological resources out to the boundaries (200nm) of the AFZ.

14. Commonwealth/State policy and legislation.

The settlement of these arrangements should give particular regard to ensuring the continuity of fishing access rights of all fisheries sectors which operate within a recognised ecologically sustainable management framework, as provided for in the EPBC Act, and provide for a consistent approach to integrated management of marine resource use under either wholly State or wholly Commonwealth jurisdiction, depending on the specific nature of the resources in question.

15. National fisheries policy

WA should open discussions with the Commonwealth with a view to developing a national fisheries policy which sets out Commonwealth/State intentions at a national level on the position of sustainable fishing in the context of ecologically sustainable development and the conservation of biodiversity.

Policy considerations

Arrangements under the Offshore Constitutional Settlement (1995 and 1998) form the basis for managing commercial fisheries out to 200nm. They provide a clear and agreed

basis between the Commonwealth and State for assigning responsibility and accountability for the management for specific fisheries. In practice this ensures a single suite of fisheries legislation, policy and licensing arrangements apply to commercial sector activities.

Although the OCS is general in nature, the specific arrangements in relation to fisheries only have effect in relation to commercial fishing. For the management of recreational, charter and customary fishing and marine conservation areas and issues no proper jurisdictional/legal arrangements exist other than the generic considerations around territorial waters and the extent of jurisdictional competence.

In effect the State takes responsibility for these other activities in the interests of proper governance (peace and good order) while there is an absence of Commonwealth legislation that affects these matters.

Given that jurisdiction and the process for allocation provides the foundation for secure fishing access rights, it is the working group's view that the current OCS is too narrow in scope, and it, or a similar arrangement should be broadened to encompass all marine biological resources and all sector interest groups.

In addition the Working Group is of the view that the Commonwealth and State should act to remove the "double-jeopardy" inherent in the policy contradictions between marine protected areas planning processes, the EPBC Act sustainability assessments and the Fisheries Management requirements, and ensure that fishing rights for all sectors in sustainable fisheries receive proper recognition and consideration at all levels of government.

16. State policy on sustainable fishing

That the State Government develop a policy statement on the long-term place of sustainable fishing by all sectors as a key use of WA's living aquatic resources, and underwrite the fishing access rights created as a component of ecologically sustainable management.

This policy should be accompanied by appropriate changes to legislation to support long-term sustainable fishing as a key element of Western Australia's lifestyle and economy.

Policy considerations

As with the Commonwealth, changes in government policy in relation to the use of marine biological resources, and lack of provision for robust spatial tenure for the purposes of fishing have resulted in the past two decades in a gradual encroachment on fishing access rights to the point where increasingly large areas of fishing ground are now under public consideration for excision.

Due to the nearshore nature of most of WA's fisheries, the long-term effect of this process on sustainable fisheries may be a significant reduction in their capacity over and above that required for sustainability.

This in turn means a reduction in the supply of locally caught fresh fish, reduced opportunities and increasing crowding for recreational fishing, and the loss of business and recreational opportunities based on these industries.

In particular, this trend is likely to have a disproportionate impact on regional and rural communities, where fishing remains strongly integrated into the values, lifestyle and regional economy.

The end-point of this process of excision is unclear, but there is public pressure for as much as 30 per cent of WA's fishing grounds to be closed to fishing. If these closures are effected around the areas of highest productivity, as seems likely, the proportional reduction in productivity is likely to exceed the proportional area of closure (i.e. more than 30%).

It is the working group's belief that the fundamental public policy question "Should fishing be restricted over and above any sustainability considerations and if so, how far and for what purpose?" has yet to be properly considered or answered by any Government in Australia.

The Working Group believes that the time is now opportune for the Government to clearly spell out its long term position on the future for fishing in this State in both policy and law.

As a basis for this policy the Working Group strongly supports the Minister's commitments made to WAFIC at its 2010 AGM. These included Government commitments to:

- *Improved consultation.*
- *Management based on sound science and research.*
- *Industry to contribute to the development of the new Act.*
- *Balanced marine park planning that will help to ensure the new marine parks will not adversely affect sustainable commercial fishing.*
- *Recognition of the differing needs and aspirations of the commercial and recreational fishers.*
- *Recognition of the role the industry plays in the sustainable supply of quality local seafood and in the viability of regional communities and small businesses.*
- *Ensuring the local fishing industry continues to meet the highest standards of environmental management and sustainability.*
- *Strengthened commercial fishing access rights.*

7. APPENDICES

APPENDIX 1 – FISHING ACCESS RIGHTS AS CONSTRAINED BY THE FRMA 1994

LICENCES AND ACCESS RIGHTS – FRMA 1994

	Open access		Degree of access to a biological resource					No access
Administrative purpose	**Public right to fish**	**Constrained right to fish**	**General prohibition/broad class permission**	**General prohibition/Narrow class permission**	**General prohibition/individual permission**	**Selective prohibition**	**Exclusive access**	**Total closure**
Act level powers	Non-statutory/common law	Part 5 – Div 3. S50-51	S4 Interpretation	Pt 6 Management plan	S7 - Exemptions	S43	S251 - Exclusive licence.	S43 – Prohibited fishing
(Minister/Governor)		S56-258 Regulations	"Commercial fishing"			S45-49		S45- 49 – Protected fish
			"Recreational Fishing"					
			"Aquaculture".					
Subsidiary instrument					S7 (3) - Exemptions			
(CEO)					S58 – MFL authorisations			
					S60 - Entitlements			
					S66 - IMF permit			
					S7 – Exemptions			
					S82 – Fish processor's licence			
					S92 – Aquaculture Licence			
					S257- Licences under regulation.			
					CFL			
					FBL			
					RFL – various classes			
					Fishing tours			
					Eco-tours			
					Charter boats			
					Selling aquacultured fish			
					S256 - General regs/R178 - Scientific fishing?			
Specific instrument					S59 – MFL Endorsements and conditions			
(CEO)					S87 – FP conditions			
					S95 – Aquaculture licence conditions			
					Reg 178 - "written authority"/scientific fishing			

APPENDIX 2 – LICENCES IN THE FRMA

FRMA LICENSING SUMMARY						
Licence or permit type	**Entitlement/ legal permit/admin purpose**	**Duration**	**Fee structure**	**FRMA refs**	**FRMR refs**	**Comments**
COMMERCIAL FISHING						
Commercial fishing licence	Right to engage in commercial fishing. Authorizes fishing for a commercial purpose i.e. the right to sell fish as well as catch them. Creating differential regulations for the commercial fishing sector. Being on board an LFB.	R133. 12 months	Application fee only	Pt 1, S4. 2 refs. Pt 6, S73. Pt 19, S257. S266 Sched 3. List of defined terms.	Pt 3. Pt 4, Div 2: R12. Div 5: R31, R32, R33, R35. Div 6: R39, R41, R42, R56. Div 8: R57, R64. Pt 4A, Div 2: R64E, F, I, J, K, L, Q, Pt 5: R66. Pt 11, R117, R121, R122. Div 2: R123, R124A. Sched 1, Pt 2. Sched 2, Pt 2.	Established in Pt 1 definitions. Created under S257 and Regulation 121.
Managed Fishery Licence	To fish in a managed fishery.	Pt 6, S67. 12 months or as per authorisation or management plan	Cost recovery fees. DBIF fees Application and transfer fees Access fees	Pt 6, Div 4. S66.		Links to management plan entitlements and hence “fishery access rights”
Interim managed fishery permit	To fish in an interim managed fishery.	Pt 6, S67. 12 months or as per authorisation or management plan		Pt 6, Div 4. S66.		
Fishing Boat Licence	To use a boat for commercial fishing. Fishing history links to CAESS	R133. 12 months	Application fees - $76 Transfer and Variation fees - $420.	Pt 1 – definitions. S257.	Part 11. R118 etc Div 7A. R56. R64. R117.	Fishing history – data held against FBL no. R118A. Of no effect if MFL granted. R55B. Must install ALC.

	Provides LFB registration no.		Grant or renewal - $85/$315.			R64. Must keep records. R117. Identification of boat. Only CFLs permitted aboard. R118 – Grant.
Rock lobster pot licence	Commercial fishing outside managed fisheries with a lobster pot.	R133. 12 months		S257.	Pt 11, Div 3: R125.	
Carrier boat licence	Transporting fish caught by another boat.	R133. 12 months		S257	R119, R120.	
COMMERCIAL INDUSTRY						
Fish processor's licence	Licence to operate a fish processing facility.	12 months S84.		Pt 7. S82		
Fish processors permit	Approval to establish a fish processing facility.	One-off – no duration		Pt 7.S79		
Fishing Tour operator's licence	Conduct a fishing tour for a commercial purpose. Spatial access entitlement. May be restricted. Prevent parallel commercial fishing or sale of catch.	Specified on licence. R128J (c).			Pt 11. Div 5: R128I, J, N.	Controls gear. Prohibits sale Controls passenger numbers Controls boats, vehicles etc. Identification of boat, vehicles etc
Aquatic eco-tourism operator's licence	Conduct an eco-tour for a commercial purpose. Spatial access entitlement. Prevent fishing.	Specified on licence. R128B (2) (c).			Pt 11. Div 4, R128A, R128B.	
Aquaculture		12 months Pt 8, S93.				
Exclusive licence				S257?	Pt17, Div 2, R166	
RECREATIONAL ACTIVITY						
Recreational fishing licence	Permit for an activity.	R133.	Application fee.	S257	R123, R124.	

	Fishing for: Rock lobster Marron Abalone SW freshwater angling Net fishing Boat fishing. Fishing from a charter boat	12 months	50 per cent discount R136.			

APPENDIX 3 - Summary of working group recommendations for short term improvements to access rights as per progress report October 2010

1. That relevant management plans be amended, in line with the Department's proposals, to provide for the grant of managed fishery licences at levels of unit entitlement of one or more units and that complementary amendments be made to enable active and inactive fishing licences to be given effect.
2. That Section 60 be amended, in line with the Department's proposals, to expressly provide for a minimum entitlement to fish in a management plan.
3. That Section 141 be amended, in line with the Department's proposals, to permit the transfer of part or all of an entitlement and that relevant amendments be made to management plans where necessary.
4. That Section 140 be amended to permit the transfer of part or all of an entitlement and that relevant amendments be made to management plans where necessary.
5. That the Act be amended, in line with the Department's proposals, so that an authorisation can continue after the death of the individual holding the authorisation, as an individual or as a tenant in common and can be transferred as part of the estate.
6. That the Act be amended, in line with the Department's proposals, so that when an individual who is a joint tenant dies, the authorisation is able to be held by the remaining joint tenants.
7. That, in line with the Department's proposals, amendments be made to enable infringement notices to be issued by Fisheries and Marine Officers for management plan offences and that provide for 45 days for the issue of infringement notices.
8. That Landgate be requested to review the Department of Fisheries' Register of Licences and report on how to improve its administration and security of interest holder aspects.

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