

**Using Mediation to Solve Fisheries Issues  
in the  
*Guidelines for Voluntary Resource Sharing*  
Process**

by

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**FISHERIES**  
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*An earlier version of this paper was presented at the Indian Ocean Conference in Fremantle, November 1999, by Dr Rebecca Metzger and Dr Guy Wright.*

# USING MEDIATION TO SOLVE FISHERIES ISSUES IN THE GUIDELINES FOR VOLUNTARY RESOURCE SHARING PROCESS

Guy Wright, Rebecca Metzner, and Hugh Chevis

*This paper describes a cooperative way of generating new management arrangements between stakeholders in Western Australian fisheries. The Guidelines for Voluntary Resource Sharing process uses mediated negotiation as the technique for producing participant-designed management solutions. An advantage of doing this is that participants are able to capture the energy that is otherwise wasted in disputation and put it toward lateral thinking about solutions. A result is that resource users - including the general community and the government management agency (Fisheries Western Australia) - have an enhanced role in cooperative management design.*

## 1. INTRODUCTION

Traditionally, fisheries, forests and similar renewable resources have been managed directly by government. Today, the public is demanding more involvement in the way these resources are allocated. The Western Australian (WA) Government is adjusting to these concerns.

The relatively new Fisheries Western Australia (Fisheries WA) *Guidelines for Voluntary Resource Sharing* process is built around the idea of using mediation to solve fisheries issues. This process is showing considerable promise as an alternative to top-down rules as a way of resolving disputes over fishery resources and catch-sharing issues. The process has shown a way to harness the energy and emotion of the participants to develop constructive new ideas.

Often, there is more agreement between the people at either end of a polarised dispute than the antagonists, or those watching, might imagine. The *Guidelines* process tries to get people to concentrate on their common purposes, not on what divides them, and it uses mediated negotiation as the tool for doing this complicated, but not insurmountable, task.

The first part of the paper tells about the development of the *Guidelines* process and describes the three fishery cases where it - and mediated negotiation - have been applied to date. The second portion of the paper gives a more detailed description of the basics of mediation.

## 2. WHEN DOES FISHERIES WA USE MEDIATION?

The *Guidelines for Voluntary Resource Sharing* process resulted from a partnership between Fisheries Western Australia (FWA); the recreational fishing sector, represented by the Recreational Fishing Advisory Committee (RFAC); and the fishing industry, represented by the Western Australian Fishing Industry Council (WAFIC).

The construction of the process - and the idea of using mediation as a key part of it - was very much shaped by the backgrounds of its creators. Guy Leyland of WAFIC had recently had training in alternative dispute resolution techniques and saw the inherent strength of cooperative decision making processes. Rebecca Metzner (Fisheries WA) was very aware of emerging resource sharing issues and the politics surrounding them, having recently come to Western Australia from the Australian National Fisheries Adjustment Scheme project. Lindsay Harbord (RFAC), as owner of a private company serving recreational fishers, had a fine sense of realism about public demands.

The goals facing the development team were to:

1. capture and use stakeholder energy to resolve resource sharing issues;
2. increase support for and defensibility of resource sharing decisions; and
3. enhance the accountability of the management agency implementing such decisions.

Five key steps to achieving this were identified:

1. *Initialization* - when stakeholders put forward resource sharing issues they want resolved;
2. *Discovery* - when Fisheries WA prepares background information;
3. *Assessment & Priority Setting* - when Fisheries WA determines where its resources can be best applied;
4. *Notification, Negotiation and Arrangements* - when stakeholders generate/negotiate defensible outcomes;
5. *Implementation* - when the results are moved by all into action.

Essentially, groups with interests in fisheries - whether commercial, recreational, Aboriginal, or environmental/conservationist - have the opportunity twice a year/every six months, to nominate activation of the *Guidelines* process. Nominations are assessed by Fisheries WA as part of its process of “discovery” and recommendations are made to the Minister for Fisheries as to whether nominations should go forward. When the Minister confirms a fishery’s participation in the process, Fisheries WA notifies all parties that may be interested in the coming negotiations.

## Guidelines for Voluntary Resource Sharing

WHO	WHAT	WHEN
<p><b>Focusing Groups including:</b></p> <ul style="list-style-type: none"> <li>• Management Advisory Committees (MACs)</li> <li>• Prof Fishermen's Associations</li> <li>• WAFIC, Recfishwest</li> <li>• RFAC, Regional RFACS</li> <li>• Shires, Community Groups</li> <li>• or The Minister</li> </ul>	<div style="border: 1px solid black; padding: 10px; margin-bottom: 5px;"> <p style="text-align: center;"><b>INITIALIZATION</b></p> <ul style="list-style-type: none"> <li>• Call for <b>Expressions of Interest</b> for resource reallocation. <i>(Simple, first-cut identification of issues by those who represent the potential beneficiaries.)</i></li> <li>• Referrals from Minister to the Voluntary Resource Sharing Process</li> </ul> </div> <p style="text-align: center;">↓</p>	<ul style="list-style-type: none"> <li>• One month period</li> <li>• Twice a year</li> </ul>
<ul style="list-style-type: none"> <li>• Fisheries Adjustment Officer in conjunction with knowledgeable managers, participants, representatives, etc.</li> </ul>	<div style="border: 1px solid black; padding: 10px; margin-bottom: 5px;"> <p style="text-align: center;"><b>DISCOVERY</b></p> <ul style="list-style-type: none"> <li>• <b>Identification</b> of parties/participants, strategic issues, motivating factors, anticipated short and long term effects</li> </ul> </div> <p style="text-align: center;">↓</p>	<ul style="list-style-type: none"> <li>• Within 3 weeks of closure of <i>Expression of Interest</i> period</li> </ul>
<ul style="list-style-type: none"> <li>• Relevant Fisheries WA fishery managers</li> <li>• Fisheries Adjustment Officer</li> </ul>	<div style="border: 1px solid black; padding: 10px; margin-bottom: 5px;"> <p style="text-align: center;"><b>ASSESSMENT &amp; PRIORITY SETTING</b></p> <ul style="list-style-type: none"> <li>• Advice to Minister re prospects for voluntary arrangements</li> <li>• Prioritization of proposals with respect to negotiation and implementation</li> <li>• Ministerial option to request that otherwise low priority proposals proceed</li> </ul> </div> <p style="text-align: center;">↓</p>	<ul style="list-style-type: none"> <li>• Duration: 10 days</li> </ul>
<ul style="list-style-type: none"> <li>• Notification to all parties who submitted proposals</li> <li>• Arrangements negotiated with external facilitation</li> </ul>	<div style="border: 1px solid black; padding: 10px; margin-bottom: 5px;"> <p style="text-align: center;"><b>NOTIFICATION, NEGOTIATION, &amp; ARRANGEMENTS</b></p> <ul style="list-style-type: none"> <li>• Parties notified regarding respective proposals</li> <li>• Negotiations on various options for voluntary sharing arrangements (organized by adjustment officer, externally facilitated)</li> </ul> <p style="text-align: center;"><i>Arrangements may include advice re surrender of entitlements via buyout, management changes, etc.</i></p> </div> <p style="text-align: center;">↓</p>	<ul style="list-style-type: none"> <li>• Maximum timeframe to be specified (4-8 weeks)</li> </ul>
<ul style="list-style-type: none"> <li>• Relevant Fisheries WA fishery managers</li> <li>• Relevant parties as specified by respective Acts</li> <li>• Fisheries Adjustment Officer</li> </ul>	<div style="border: 1px solid black; padding: 10px; margin-bottom: 5px;"> <p style="text-align: center;"><b>IMPLEMENTATION</b></p> <ul style="list-style-type: none"> <li>• Administrative action <i>(e.g., management changes under the Fish Resources Management Act 1994 (FRMA), Pearling Act 1990; voluntary buyout under Fisheries Adjustment Schemes Act 1987 (FAS).</i></li> </ul> </div>	<ul style="list-style-type: none"> <li>• Statutory time- frames as specified in respective Acts</li> </ul>

### 3. HOW DOES THE *GUIDELINES* PROCESS WORK?

Once an issue has been approved for the *Guidelines* process, the real work - which involves mediation - begins.

*[Mediation is] the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will accommodate their needs (Folberg and Taylor, 1984:7)*

Normally, the first meeting is a 'pre-mediation' meeting that is held between the parties and the potential mediator. It is the start, to give all the participants the basic information about how the *Guidelines* process works and what the process involves for participants.

Following this session, formal mediated negotiations occur between the parties. Nominal time frames are indicated for the various steps of the process, but these are flexible to reflect scheduling, consultation and other needs.

The mediation sessions themselves, involve the

- progressive understanding of underlying interests and issues,
- discovery of common interests, and
- generation of options for the resolution of issues.

There may be instances when the outcomes result in a very specific schedule of management changes; but there may also be instances when participants realise that their differences cannot be solved by changes to fisheries management at all.

Regardless of the specific details, the goal is to find a way of getting all parties to understand all of the issues that need to be addressed and to set out a clear path for cooperatively achieving the goals identified by the group.

## 4. THREE CASE STUDIES

The *Guidelines* style mediation has been tried in three fisheries:

- the Leschenault Estuary,
- the West Coast Beach Bait Fish Net Managed Fishery, and
- the Cockburn Sound Crab Managed Fishery.

The first two cases were not successful in generating cooperatively developed solutions to solve the issues which were identified, but the problems they encountered were quite understandable.

The third case went well, and it has produced a good model for future similar mediation cases.

The details of these three cases are described in the next sections.

### 4.1 CASE 1: LESCHENAULT ESTUARY

#### *THE SETTING*

This case preceded the formal introduction of the *Guidelines for Voluntary Resource Sharing* process, but used a mediated approach to resolving issues about resource sharing between recreational and commercial fishing within the Leschenault Estuary near Bunbury.

The central issue was competition for the same species of fish between recreational fishers and commercial net fishers. There was a perceived decline of recreational fish catches and a consequent demand for all commercial fishing to be stopped within the estuary.

#### *THE MEDIATION*

At the invitation of Fisheries WA, an independent mediator was engaged, and the mediation proceeded in classic fashion.

The parties were identified and agreement to mediate was given in a pre-mediation session. Next, issues were identified. Common concerns and options for settlement of the issues were then identified.

Each of the options was thoroughly explored before coming to an agreed set of outcomes.

#### *THE OUTCOMES*

The outcomes, including an agreed set of actions, were recorded and endorsed by the parties.

At the same time as the mediation was being conducted, Fisheries WA was also negotiating a buyback scheme of at least some of the commercial licences.

In retrospect, it was unwise for these two significant issues to run in parallel, and since the final mediation session in February 1998, there has been a hiatus in relation to some of the agreed outcomes from the mediation. This may be because Fisheries WA has been distracted by the buyback scheme, which has continued.

This confusion is likely to have resulted in some disenchantment on the part of the parties, with the unfortunate result that the use of mediation as a tool for resolving resource sharing issues was not seen as a useful activity.

## 4.2 CASE 2: THE WEST COAST BEACH BAIT FISH NET MANAGED FISHERY

### *THE SETTING*

The West Coast Beach Bait Fish Net Managed Fishery has thirteen participant fishers. It is primarily a beach seine fishery. The fishers operate by driving four-wheel drive vehicles along the beaches and, when they sight a school of fish, they launch a small dinghy to pull a net around the school.

The fishery operates from just north of Mandurah through to the northern metropolitan beaches. There is, therefore, considerable competition with other coastal use. Access to the beach is the main constraining issue as local government authorities are gradually restricting access to the beaches for the fishers. This is primarily because of safety concerns about mixing four-wheel-drive vehicles with other recreational use.

### *THE MEDIATION*

The mediation process commenced in April 1998 by identifying interested parties:

- the commercial fishers themselves;
- the two peak fishing bodies, WAFIC and Recfishwest; and
- the local councils with jurisdictions within the limits of the fishery.

From the beginning, the councils' representatives had difficulty with the confidentiality clauses required for mediation. The representatives made it clear they would need to report back to their elected councils, and that some degree of public disclosure should be anticipated on an issue as sensitive as beach access.

These problems notwithstanding, the parties were able to meet and begin the mediation process by identifying issues and agreeing on a process for working through them. The threshold issue was clearly access to the beach for the commercial fishers:

- whether it could be maintained, or
- where beaches had been closed to commercial fishers, regained.

### *THE OUTCOMES*

At this point the West Coast Beach Bait and Fish Net Fishery's mediation has been adjourned. Because of the jurisdictional issues involved which are beyond fisheries, WAFIC wished to continue its discussions with the local authorities in the legal arena.

This particular mediation has identified the complexities of using a voluntary mediation process when some of the parties are not bound by the same legislative framework as the other parties. It would be possible to investigate the interplay of different legislation - in this case the *Fish Resources Management Act 1994 (FRMA)* and the *Local Government Act (LGA)* through mediation - but this would require the commitment of all parties to the process. Greater support from local authorities might be gained by inclusion of the Western Australian Municipal Association (WAMA), in the same way that WAFIC and Recfishwest have been brought into the process on behalf of their constituents.

At the time of writing, there have been some gains made in this mediation: the key issues have been identified, along with a process for working through options open to the operators once the legal elements have been resolved.

This case has highlighted how seemingly simple concerns - in this case, concerns relating to vehicular beach access - may be symptoms of broader policy issues which need

resolution. It also highlights how there are potential difficulties in involving parties from other jurisdictions (in this case local government), and how these sorts of difficulties need to be resolved by the parties if mediation is to have a better chance of success, particularly in complex circumstances.

### 4.3 CASE 3: THE COCKBURN SOUND CRAB MANAGED FISHERY

#### THE SETTING

Cockburn Sound is the embayment directly south of Fremantle. It is bounded on the west by Garden Island, which contains Western Australia's main naval base. Its eastern shore is lined mainly by the Kwinana heavy industrial area, which contains shipbuilding facilities, an alumina smelter, refineries, a fertiliser plant and other industries. The environmental health of the Sound, especially of its (formerly) extensive seagrass beds, has been a significant public issue for some years. A rapidly growing suburban community, Rockingham, is located at its southern end, and there is significant new residential development interspersed with the industrial areas between Rockingham and Fremantle.

The Cockburn Sound Crab Fishery is managed as a limited entry fishery comprising 16 fishing units, each with an entitlement to work with 100 pots. Of the 16 units, half hold fully transferable 'A' class licences, the other half hold wholly non-transferable 'B' class licences. The 'B' class licences were the result of individual fishers being able to show they had a history of fishing for crabs during a qualifying period in the late 1980s. Most of the Cockburn Sound crab fishers also currently have access to other near-shore fisheries, although crab fishing is their main source of income.

Historically, each boat was allowed to work two tangle nets of 1,200 metres length to catch the blue manna (or 'swimmer') crabs (*Portunus pelagicus*), but restricted to pulling only one net per day. In 1995 fishers were offered the choice of nominating to use pots or to continue with the nets. The total of 100 pots per fishing unit was determined following research advice that this would approximate the amount of crab caught by net. Although fishers may continue to use nets, all 16 have now converted to pot fishing. Re-calculation of the net-to-pot conversion ratio has indicated that 70 pots per fishing unit would better approximate the former catch in nets. Throughout the mediation, the fisheries managers were keen to follow this advice and reduce the allocation of pots to 70 per boat; a level the fishers considered uneconomic.

From a base catch of about 200 tonnes per year prior to the conversion to a pot fishery, the catch soared to 350 tonnes in 1997/98. The reasons for this impressive increase in catch are not clear, but it is known that the fishers now work a significantly greater number of fishing days than they did before changing from nets to pots. However, the boom in crab catch has not lasted; the 1998/99 season was very poor.

There has been virtually no stock assessment done on the fishery. Consequently, it is difficult to understand whether the bad season of 1999 is a result of adverse environmental factors, overfishing, or a combination of these; some fishers believe it is simply a normal, cyclical population downturn.

As dramatically as the commercial catch has been rising in the last three or four years, there is evidence that the recreational catch has been falling. Cockburn Sound has been a prime recreational crabbing ground for many decades. In 1979 there was a boat ramp survey in Cockburn Sound which indicated a recreational crab catch of approximately

200 tonnes.<sup>1</sup> By the 1996 season however, following a creel survey, the recreational catch was estimated to be about 50 tonnes as against the 350 tonne commercial catch.

The widening discrepancy between the two sectors resulted in an increasing number of complaints by recreational fishers to Fisheries WA and the Minister – even though the reasons for the reduced recreational catch were unclear. Given the large increase in the commercial catch, it may be true that the commercial fishers were simply catching the crabs that would otherwise be caught by recreational fishers. However, part of the issue may be that fewer recreational fishers were using Cockburn Sound. Improved roads mean that Perth residents have easier access to good crabbing grounds at Mandurah, a few kilometres further south, where the backdrop is something other than heavy industry. Perhaps there is a decline in interest by recreational fishers for aesthetic reasons, but we have no way of measuring this at present.

### *THE MEDIATION*

The Cockburn Sound Crab Fishery mediation basically followed a classic mediation program. Permission has been received from the participants to explain the process through which successful agreement was achieved.

The commercial fishers, represented by the Cockburn Sound Crab Professional Fishermen's Association (CSCPFA), referred the fishery to the *Guidelines* process on 9 February 1998, in part because they were aware that Fisheries WA was contemplating cuts to their pot entitlements. They were also aware that 'B' class licence holders had at least a case to make, that their licences should include rights to transferability. This followed a decision of the Fisheries Tribunal that granted such an upgrade to a fisher in another fishery. The CSCPFA needed clarification of the position of the licence holders, and the *Guidelines* process seemed to offer a useful way to do this.

Although there had been a meeting of the parties in June 1998, the actual mediation did not begin until October 1998. Two local government councils which were initially identified and represented in the June meeting had dropped out by October, largely due to the belief that the primary participants should be the commercial and recreational communities.

Thus, when the structured mediation began there were three main sets of parties:

1. *Commercial crab fishers*: represented by two full-time crab fishers who were members of the Cockburn Sound Professional Fishermen's Association, and one representative from the Western Australian Fishing Industry Council (WAFIC).
2. *Recreational fishers*: represented by the Executive Director of Recfishwest, an advocacy group. (The Recreational Fisheries Advisory Committee (RFAC), a statutory committee with responsibilities for oversight of recreational fisheries policy, was invited to send a representative, but conflict with other responsibilities meant that the representative could attend only a small number of meetings.)
3. *Fisheries Western Australia*: represented by
  - the manager responsible for the Cockburn Sound Crab Fishery,

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<sup>1</sup> The methodology for conducting this type of survey has since been refined, with the result that the researchers no longer have the same level of confidence in the estimate.

- the administration officer attached to the Fisheries Adjustment Scheme, and
- the principal policy officer who had worked with WAFIC and RFAC to design the *Guidelines* process.

In addition to representing the needs of the specific people engaged in the fishery, the representational professionals on all three sides had responsibilities to further the objectives and work within the policy constraints of their respective agencies. In general, but especially among the fisheries administrators, there was an expectation that a resolution could, and should, be achieved quickly.

The first meeting began with the refusal of a number of key parties to sign a formal *Agreement to Enter Mediation*. They were concerned their signatures would set precedents for future activities under the *Guidelines* process. They needed time to consider matters of confidentiality, and the perception that mediation might bind parties in ways they had not anticipated.

Nonetheless, discussion about the meaning and purpose of the *Agreement* took place, and the parties agreed to consider the matter, to discuss it with their respective associations/agencies, and to attend another meeting. In the interim, the mediator modified some clauses of the *Agreement to Enter Mediation* in light of these discussions.

The second meeting was designed to be an all-day session for identifying and clarifying issues. Some optimistically hoped that it would progress as far as the option generation phase. Most participants found this meeting quite frustrating because it did not generate the solutions which had been hoped for. Instead it became apparent that there were concerns within the group about the *Guidelines* process itself - and that some of the major stakeholder groups needed to consider their position within the overall framework for negotiations.

Significant time was spent discussing what the process of mediation might mean for the parties, thereby providing a forum for parties to establish their roles in what was still a relatively unfamiliar and untested process.

By early afternoon the mediator was able to bring the participants to focus on common concerns. It quickly became apparent that a common concern was the continuing environmental degradation in Cockburn Sound. It was agreed that one outcome of the mediation would be a joint statement between the commercial and recreational fishing sectors calling for a halt to the reduction of fish habitat in the Sound. Following this agreement, all the parties were more willing to speak freely and a productive brainstorming session ensued.

It was during this brainstorming session that the basis for the eventual agreement emerged. Although a broad range of issues were canvassed and written down, most - including the environmental statement - were set aside for future discussion. Specifically the core issue was the progression of the historical catch over recent years, which all could see was significantly weighted towards the commercial sector. A number of broad options were canvassed which would have the effect of limiting commercial fishing effort, and further exploration of these formed the basis of the next two meetings.

Unfortunately, it was not possible to answer the questions of how the commercial advantage came about. Was it at the expense of the recreational sector? Or at the expense of the manager's responsibility for establishing appropriate levels of catch following the change to a pot-based fishery? Was there any significant negative effect on the stock in any case? These key questions could not be answered because there was insufficient research data.

By the fourth mediation meeting, the framework of what the group considered would be a good outcome began to emerge with more clarity. This allowed a breakthrough.

The Cockburn Sound Professional Fishermen's Association (CSPFA) representatives and the WAFIC representative were able to take a sketchy framework for an agreement to the other crab fishers for further discussion. These discussions were conducted in confidence as side meetings to the main mediation. They included several meetings over the Christmas period and were as difficult and intense for those involved, as were the main *Guidelines* meetings.

When the mediation reconvened on 25 February, the industry people presented and supported a detailed proposal which included:

- a 20 per cent immediate reduction of pot numbers on agreement to the package;
- an increase in the legal carapace size, only for commercial fishers, from 127 mm to 130 mm;
- the removal of the possibility of commercial fishers returning to a net-based fishery;
- resolution of the tradeable/non-tradeable dilemma by allowing a once only opportunity to trade non-transferable pots for transferable pots on a two-for-one basis, in return for,
- support for the use of public moneys, through the Fisheries Adjustment Scheme, to buy out a number of fishers, further reducing the total number of crab pots permitted in the fishery.

The mediation was now at a point where external comment was required. To do this, the confidentiality provisions were eased, by general agreement, to account for the need of the participants to discuss the proposal with their constituents. This shifted the emphasis of the mediation from the generation of issues and options, into reality testing mode.

- The fisheries managers provided an analysis of the possible outcomes from the proposal, based on a range of assumptions as to how the reductions in pot numbers would progress.
- The Research Division of Fisheries WA provided warnings that measurement required for monitoring the outcomes of the new management proposals could be expensive. In any case, they argued, the reduction in pot numbers may not have an obvious corresponding reduction in the commercial catch. The benefits of an increase in the legal commercial size may be contingent on complex biological factors.
- Fisheries WA provided a legal opinion confirming the legal grounds that would enable interested holders to re-nominate their non-transferable licences as transferable licences on a voluntary basis with a concomitant 50 per cent reduction in numbers.

The Recfishwest board was initially sceptical of the proposal and did not support it in principle. However, a meeting was arranged between board members and the crab fishers represented in the mediation group, and following this meeting Recfishwest agreed to give in-principle support - although it remained sceptical and maintained its right to object to the package as it developed further.

Nonetheless, it was important for all parties that the principles enunciated in the very early meetings be maintained; that is, that:

1. there be an explicit resource sharing arrangement that would result in the recreational sector catching - or having the ability to catch - a 3/8ths share of the total blue manna crab catch;
2. the total commercial effort be reduced from 1600 to 800 pots without causing unreasonable financial hardship for any individual commercial participant; and
3. better scientific monitoring be developed.

Through March, April and May of 1999, the mediation participants put considerable effort into honing the basic proposal into a package of workable management propositions.

At the penultimate mediation meeting, held at Fisheries WA head office in Perth 14 May, Recfishwest continued to voice concerns with aspects of the package, and negotiations with the commercial interests over details continued through to the final signing.

### *THE OUTCOMES*

In retrospect, there were three phases to the mediation stage of the *Guidelines* process in this case:

- high hopes and expectations,
- ‘recapitulation’ and ‘retrenchment’, and then
- formulation of specific solutions.

The mediation had an obvious momentum that was born of the commitment of the participants, both to the specific mediation and to the better mode for the resolution of disputes represented by the *Guidelines* process. Throughout, the meetings were intense and emotional. All participants commented throughout the mediation that they found the sessions, and the process as a whole, quite draining. Nonetheless, within the sessions there was considerable focus on common objectives, with issues and options for their resolution being continually developed, until the final package emerged and was agreed to by all.

## Key Features of the Final Package

Key features of the final package include:

1. Two mandatory regulatory changes to take immediate effect: 20 per cent reduction/forfeiture of the number of pots a licensee can currently hold, and an increase in the minimum legal size for commercially caught crabs from 127 mm to 130 mm.
2. Implementation of a Fisheries Adjustment Scheme (FAS), enabling the government to buy out licences and thereby remove participants from the limited access fishery.
3. The standardisation of all licences to a single set of access rights via the opportunity for 'B' class, non-transferable licence holders to opt for either 40 transferable pots or 80 non-transferable pots.
4. The introduction of individual pot transferability, with a threshold requirement of a minimum of 40 pots to fish.
5. Removal of the option for crab fishers to return to a net-based fishery.
6. Consolidation rules reinforced by compulsory triggers to reduce total pot numbers in the fishery by either market-based consolidation or by the imposition of compulsory pro-rata reductions to specified levels:
  - Year 1: 1000 pots, and
  - Year 2: 960 pots.
7. Reassessment of the package after one year.
8. Benchmarking to attain either 800 commercial pots or other management measures that result in an effective resource share of 3/8ths recreational and 5/8ths commercial catch by three years from the official date of the 20 per cent pot forfeiture.
9. Implementation of a catch measuring system to measure the relative catch share between commercial and recreational fishing sectors.
10. Formation of two groups to facilitate the implementation of the agreed arrangements:
  - a Catch Share Technical Group - to devise and implement an effective and inexpensive monitoring program, and
  - a Co-management Council to ensure the integrity of the agreed arrangements package by receiving and considering the advice of the Technical Group and advising the Executive Director of Fisheries WA accordingly.

## 5. ANALYSIS OF MEDIATIONS UNDER THE GUIDELINES PROCESS

### 5.1 OVERALL RESULTS

On the face of it the process of formal mediation, when conducted according to the 'classic formula' has been successful and, thus, a useful tool for developing agreed arrangements under the Fisheries WA *Guidelines* process.

- The first mediation - between commercial and recreational fishing interests at Leschenault Inlet - was successful in generating a set of agreed arrangements between the disputing parties, even though subsequent confusion with the buy-back program made the follow-through problematic.
- The second mediation, basically between the beach fishers and local councils, has adjourned, but the reasons, differing jurisdictional responsibilities and expectations make the adjournment understandable. The lesson learned is that these issues have to be resolved outside the management agency's jurisdiction before the parties can do further fisheries-related work.
- The third mediation, between commercial and recreational crab fishers in Cockburn Sound, has been thoroughly successful and can be expected to generate the support for, and defensibility of, resource sharing decisions as envisaged by the *Guideline's* architects.

All of the mediations have provided opportunities for three sectors of fishing interests - recreational, commercial, and managerial - to openly discuss their respective needs in relation to specific fisheries and concrete problems. Nonetheless, even the most successful mediation was not quick or easily accomplished.

### 5.2 TIME AND COSTS

In the Cockburn Sound Crab mediation, the participants were well aware that time was a crucial factor. Initially some people thought the issues might be resolved in a meeting or two, and there was a perception within the Minister's office, and some sections of Fisheries WA, that a quick resolution was both desirable and possible.

However, as the participants in the mediation soon came to realise, the process could not be rushed. Important matters were at stake:

- *for the commercial fishers* - too restrictive an outcome could seriously jeopardise their ability to earn a living;
- *for the managers* - there was a responsibility to behave conservatively in relation to crab stocks, and this could have meant reducing the total allocation of pots to a level which, if distributed equally across all the existing fishery, would be below the level which the fishers considered realistic;
- *for the recreational fishing representatives and the Fisheries WA managers* - there was both anxiety about the growing number of public complaints and the need to be seen to be active in addressing them; and
- *for all* - there was tension between the need to find resolution and the appreciation that this could be a complex task which consumed much time and energy.

For the Cockburn Sound Crab Fishery, the actual formal mediation sessions took a total of 30 hours, over a series of 10 meetings between October 1998 and July 1999. This included the initial meeting where the parties walked away from each other after refusing to sign an agreement to mediate, to the final handshakes and group photos with the signed-off Agreement.

Outside of the mediation sessions, there were two meetings directly between Recfishwest and the representatives of the Cockburn Sound Professional Fishermen's Association (CSPFA), with WAFIC in attendance. The mediator attended one of these.

The WAFIC, CSPFA and Recfishwest representatives spent significant time discussing and explaining the new *Guidelines* process to their constituents. This was especially true of the WAFIC representative, Guy Leyland, who together with the CSPFA representatives Lance Moss and Warwick Abbott, worked directly with the 16 affected crab fishers to gain their endorsement for the final package.

The fact that the Cockburn Sound Crab mediation took approximately eight months to complete was largely a feature of scheduling. The people engaged in the mediation are busy people, and coordinating the schedules of seven such people requires considerable lead-time. Added to this was the need to coordinate external groups and experts. Legal opinions, advice from Fisheries WA's Research Division, and the views of both the commercial crab fishers, and the boards and executives of Recfishwest, RFAC, WAFIC and FWA were all obtained reasonably promptly, but they still took significant time.

It is also important to note the order in which the Cockburn Sound Crab mediation progressed. Of the 30-hour total, about four to five hours were spent on what might be termed 'preliminaries' where the discussion focussed on:

- the Agreement to Mediate; and
- the implications of the *Guidelines* process as a whole, which needed to be worked through before the specific mediation could continue.

These preliminaries were particularly crucial for the main representational bodies. They had to be sure they behaved strategically in relation to each other and with Fisheries WA because of the precedents being set for any future use of the *Guidelines* process and their involvement and participation in it. It was also important for the professional representatives of WAFIC and Recfishwest to ensure their organisations were as comfortable as possible with this novel approach to resolving differences.

Once these preliminaries were dealt with, agreement about what were the main issues came quickly. There then ensued significant discussion about creative ways to resolve these issues. The breakthrough from which the final agreement took shape occurred halfway through the 30 hours of direct mediation time.

Following this breakthrough, the mediation discussion became progressively focussed on technical concerns as the group worked to give practical effect to what had been generally agreed. This is also the stage which generated discussion with each group's constituents, and which entailed getting expert advice on various aspects of the plan. Thus, significant time was spent working outside the direct mediation sessions, pulling together support and material towards the final agreement. Although the mediation took considerable time and effort for the participants, the actual costs do not seem high, especially when viewed in the context of the possible costs of continuing disputation. Roughly estimated, the total real cost of the mediation, including the mediator's fees, venue hire, and replacement time from other work by participants, is likely to be below \$30,000.

### 5.3 HOW DO THE RESULTS STAND UP?

Mediation makes three main claims to efficiency:

1. It reduces direct expenditures, on lawyers and ‘experts’;
2. It saves time – by generally avoiding or minimising the formal structural baggage of a court or other arbitration system; and
3. It can result in *pareto optimal* outcomes where no negotiating party could derive any greater benefit without it involving a loss for another party (Boulle 1996:53).<sup>2</sup>

It could be argued that fisheries disputes lend themselves to ‘command and control,’ features of traditional government management. Fisheries Western Australia, as the responsible agency, could use its relationship to the Government, through the Minister for Fisheries, to control the fisheries and rely on the arbitration mechanisms built into that system to resolve conflicts. However, if such a ‘top-down’ approach had been used in the Cockburn Sound Crab case, a possible result could have been:

- *uneconomic commercial operations* - with the reduction of the total pots per licensee to 70, a figure below the number the fishers considered economically viable;
- *perpetuation of discriminatory and anti-competitive rules* – via retention of the distinction between transferable ‘A’ and non-transferable ‘B’ licences;
- *retention of a potential regulatory loophole* – thereby allowing for *ad hoc* changes to licence entitlements by allowing the upgrade of ‘B’ to ‘A’ licences; and
- *continuing deterioration of the relationship* - between recreational and commercial fishers.

In contrast, the mediation facilitated a situation in which the commercial fishers could express ideas, such as *their* desire to:

- increase their own legal size limits,
- remove the ‘A’/‘B’ licensing distinction, and
- reduce the number of licence holders in the fishery to below what would likely result from the direct imposition of new regulations.

These were all options which could also meet the objectives of Fisheries WA but which would be delivered in a cooperative, ‘bottom up’ manner.

Of course, government might have also subsequently reduced commercial catches in the fishery to lower levels in response to an adverse stock assessment, but the reality was that the agency had no historical scientific work to form the basis of such an assessment. Thus, if Fisheries WA had *imposed* a resource reallocation regime, the commercial industry would have been vociferous in its objections. Such a response would have transformed a relatively simple regulatory change into a difficult and potentially antagonistic relationship with the agency. This would have escalated the time and costs for all parties.

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<sup>2</sup> Vilfredo Pareto 1848-1923, was an Italian economist famous for producing the first account of society as a self-regulating and interdependent system that operates independently of human attempts at voluntary control (Hutchison Softback Encyclopedia, 1994).

There is no obvious way to measure the costs of time saved and of lawyers and other experts not engaged if a more disputatious situation arose in Cockburn Sound. However, the costs of any significant dispute - if it were measured in terms of direct costs and in the time taken by Fisheries officers to deal with it, even before the lawyers become involved - seem likely to add up to \$30,000 quite quickly.

In terms of the balance of interests implied by the *pareto optimality* idea, the Cockburn Sound Crab case of facilitated mediation did achieve such a balance. The recreational sector pressed for further concessions from the commercial fishers virtually right up to the final sign-off but, ultimately, conceded that further concessions could not be gained without significantly damaging the positions of individual commercial fishers.

The commercial crab fishers achieved their desires in terms of Fisheries WA support for a buy-back program and mechanisms which would allow for market-based rationalisation of the fishery. They pressed those responsible for the management of the fishery and for the appropriate expenditure of public money. In short, there are few gaps left where parties could have bargained for more from the other parties without causing the others significant harm. This was largely due to an important aspect of the Cockburn Sound Crab mediation: it allowed for significant canvassing of interests, and the parties had, and took, ample opportunities to air differences and to have the time to think about innovative ways of resolving them.

### ***Recommendation 1***

Mediation, as envisaged in the *Guidelines for Voluntary Resource Sharing*, is an efficient and effective way to address management issues in fisheries and should be continued and extended where appropriate.

## 6. KEY ISSUES WHEN USING THE GUIDELINES PROCESS

### 6.1 AUTHORITY AND DELEGATION

In all three cases, participants had to get guidance and clarification from their respective organisations about the ways in which they could participate. Or, to put it another way, in each of the three cases the issues of 'authority' and 'delegation' were prominent. Mostly, the issues related to whether the process had priority over other activities Fisheries WA was organising at the same time, and the extent to which individuals could speak on behalf of their respective organisations.

In the Leschenault Estuary case, the question of whether the mediation process had authority relative to the concurrent buy-back activities was an issue that was never clearly resolved.

In the West Coast Beach Bait Fishery an issue of authority arose in which the employees of the local councils were unable to represent the wishes of their councils without referral back to the councils, making it difficult to ensure the confidentiality of the mediated discussions. It also created a situation where the actual parties to the mediation had to be the councils themselves - made up of individual councillors, each with their own representational constituencies - thereby creating an imbalance in the representation of the respective parties.

In the Cockburn Sound Crab mediation, the parties' respective understanding of the authority with which they came to the mediation developed as the mediation progressed, and all learned more about the realities of using the *Guidelines* process. Although all the participants were genuine representatives (of Fisheries WA, WAFIC, Recfishwest and CSCPFA), there were uncertainties about how far each individual could commit on behalf of the groups he/she represented.

The authority and delegation issue was raised early in the mediation and there were attempts to resolve it. Fisheries WA representatives worked with the Fisheries WA Executive Director to clarify the agency's position. The WAFIC and Recfishwest professionals worked to keep their respective boards informed of the process, without breaching agreed confidences.

As it became clear that a satisfactory outcome would be reached in the mediation, it became necessary for all the participants to ensure that they had support from their organisations. Getting support involved a significant amount of basic explanation about the mediation process - in addition to the specific solutions proposed to the resource sharing issues - because the entire *Guidelines* process and how it works was so new.

#### ***Recommendation 2***

Where there are ongoing matters that might compete with or otherwise create confusion with the issues in mediation, these should be suspended as much as possible prior to the mediation.

### ***Recommendation 3***

In future mediations, representational participants should seek clear guidance from their organisations as to the range of possibilities they may make a commitment to in the course of negotiations.

The mediator should be asked to ensure this guidance has been given as part of the preliminaries to the formal mediation meetings. This information would not necessarily be shared with the other parties, although it may be convenient to let the mediator know, in confidence, what are the limitations.

## **6.2 SCOPE AND PARAMETERS**

When fisheries issues are not well defined, they may be quite difficult to mediate. If the negotiations are to have a better chance at success it is important to clearly define their scope. There should be clear recognition of the problems to be addressed, and who are the appropriate parties in the mediation. The numbers of parties and their possible interests need to be contained to those with a significant common focus. This is necessary to balance the risk of excluding relevant parties who have involvement in the issues, against the risk of having so many groups participating that holding negotiations becomes an operational problem.

There should be some definition of the fishery that reflects its management, whether by stock, by participants, or by the issue(s) of concern. For large and complex concerns it may be useful to break down the issues involved so that a number of more manageable sub-mediations are undertaken. For example, it may be convenient to deal with sections of a fishery that spans a large geographic area, perhaps by holding mediation meetings in a range of localised home-ports. However, the particular circumstances of each fishery and the nature of the problems it faces will determine the usefulness of such arrangements.

The Leschenault Estuary and West Coast Beach Bait Fisheries mediations were quite 'contained' if defined in terms of the specific commercial fisheries involved. However, the Beach Bait Fishery mediation was less contained in terms of the broad jurisdictional issues - which were well outside the realm of fisheries legislation. This was the main reason why it was adjourned. It is now being pursued in the legal arena, where there is specific authority for defining and settling jurisdiction issues.

The Cockburn Sound Crab mediation was also 'well contained' in terms of the participants and the issues. There were only 16 commercial fishers, belonging to a well-functioning cooperative body, who worked within a well-defined geographic area. These people had all recently changed their catching technique from net to pots, and there was a reasonable expectation among them that some adjustments to the new catching method would need to be made. Additionally, the commercial fishermen were aware that Fisheries WA was considering significant further restrictions, and they knew that recreational fishers were lobbying for greater restrictions on the commercial catch. It was the commercial fishermen who referred the fishery to the *Guidelines* process.

The recreational component of the Cockburn Sound Crab negotiations was less contained, as it frequently will be, because of the large and diverse group who are recreational fishers. There was not, for example, a clearly defined recreational group

specifically comprised of all recreational fishermen crabbing in Cockburn Sound. Nonetheless, the professionals lobbying on behalf of the recreational community at large were able to focus on the fishery as defined and contained by the management regime set up for the commercial sector.

There are, of course, interests other than fishing interests that may need to be accounted for in the *Guidelines* process. The two obvious groups are Aboriginal people and conservationists. Where Aboriginal people have a history of catching species for traditional purposes, there will be a need to include them in the process separately from the general recreational interest. It may be necessary to do some networking to discover to whom to talk. Where registered native title claims exist, the claimant groups, and/or the relevant Native Title representative body, should be approached as part of the pre-mediation process. If there is a direct interest, such as an asserted Native Title right that might be at stake, then appropriate invitations to participate in the mediation should be tendered.

Depending on the issue, conservationists may have interests similar in structure to the recreational fishers. There will be acute local interests, but also an overarching State-wide interest. However, conservationists may not have an interest in every resource sharing issue to be raised by the *Guidelines*. As a preference, an appropriate peak body should represent conservationists. This would allow for a level of professional representation.

#### ***Recommendation 4***

Fisheries WA should have an experienced mediator as part of the team which assesses the applications for referral to mediation through the *Guidelines* process.

### **6.3 ENSURING BALANCE AND FAIRNESS**

A persistent criticism of mediation is that it inadequately deals with issues of power imbalances (Astor and Chinkin 1992:89-92, Boulle 1996:57-59). Optimal outcomes would obviously be difficult, if not impossible, to achieve if one or more of the parties lacks the capacity to resist the pressures applied by another.

Another unrealistic assumption is that mediation is necessarily voluntary. It may not be. In general, the *Guidelines* process, once engaged, is only truly voluntary for the group that has initiated the use of the process. The other parties will, to a variable extent, feel coerced to be a part of the process to avoid ‘missing out’ on developments. The only ‘escape’ mechanism for parties occurs if the Fisheries Adjustment Officer who administers the process considers there is little prospect of a voluntary outcome and advises the Minister accordingly. However, it is likely that Fisheries WA would come under real pressure from disenfranchised participants if this option were exercised.

Thus, although the *Guidelines* process is defined as a voluntary undertaking, it does have a coercive element. There are three circumstances in which parties are likely to refer a problem to the process:

1. negotiation between parties may reduce perception by one of the parties that Government may enter a situation and use a 'heavy hand', and that the situation may be improved by negotiation;
2. where a lobby group sees a strategic advantage in bringing on a negotiation with other parties; and
3. where there are concerns which government may have identified as benefiting from the *Guidelines* process. An example is a recent report on the South Coast Estuarine Fishery that recommends using the *Guidelines* process to negotiate access arrangements to a number of estuaries (Fisheries Management Paper 126 section 4.10).

One of the strengths of the *Guidelines* is that by engaging the main representative lobby groups, it has a built-in check against the most obvious power differences. These lobby groups function well and are professionally staffed. They can be relied upon to ensure that power issues are kept in balance.

However, the weakness of involving these groups is that their capacity to devote sufficient resources to mediation work, while maintaining their other responsibilities, is limited. It was obvious during the Cockburn Sound Crab mediation that the representational groups - Recfishwest, RFAC and WAFIC - felt stretched by the need to participate in the mediation.

If Fisheries WA and the Government wish to develop and extend the use of the *Guidelines* process, it will be a necessary part of ensuring fairness, that the representational groups are resourced to provide appropriate levels of assistance to smaller parties.

### ***Recommendation 5***

Fisheries WA should consider options for arranging resourcing for Recfishwest, RFAC, WAFIC and other relevant groups to cope with any increased level of referral of fisheries resource sharing issues to the *Guidelines* process.

## **6.4 SUPPORT AND FOLLOW-THROUGH**

Very considerable emotional, economic and social issues can be laid bare in mediated negotiations. The process may involve parties showing potential adversaries more of themselves, their plans, and strategic thinking than they would in traditional negotiations.

These features make it important that the recommendations that result from mediation are followed through in a consistent, transparent, and timely manner. Where recommendations are not supported, for example by the Executive Director, or rejected by the Minister, these decisions should be fully explained to the parties as soon as practicable.

It may assist mediations and save time with preliminaries if a letter of support from the Minister or Executive Director for the specific mediation process were presented at the start of each mediation.

***Recommendation 6***

The Minister or Executive Director should acknowledge support for each mediation in written form, at the beginning of each mediation.

**6.5 BETTER UNDERSTANDING NEEDED**

There needs to be an understanding of the major principles and elements of mediation and their suitability for the resolution of conflicts between user groups. This is particularly true of the senior levels of the recreational, commercial and governmental fisheries communities. This is understandable given that processes such as the *Guidelines* process represent a significant departure from traditional decision-making and are still not widely used.

Greater understanding of, and support for, the outcomes of mediation may result if people have the opportunity to experience mediation first-hand and to gain a more instinctive feel for it.

***Recommendation 7***

The board members of major organisations who are likely to have ongoing roles and participation in the *Guidelines* process, together with appropriate directors from Fisheries WA, should participate in a mediation or mediation training.

## SUMMARY OF RECOMMENDATIONS

### RECOMMENDATIONS FOR MEDIATION

1. Mediation, as envisaged in the *Guidelines for Voluntary Resource Sharing*, is an efficient and effective way to address management issues in fisheries and should be continued and extended where appropriate.
2. Where there are ongoing matters that might compete or otherwise create confusion with the issues in mediation, these should be suspended as much as possible prior to the mediation.
3. In future mediation, representational participants should seek clear guidance from their organisations as to the range of possibilities they may make a commitment to in the course of negotiations.

The mediator should be asked to ensure this guidance has been given as part of the preliminaries to the formal mediation meetings. This information would not necessarily be shared with the other parties, although it may be convenient to let the mediator know, in confidence, what the limitations are.

4. Fisheries WA should have an experienced mediator as part of the team which assesses the applications for referral to mediation through the *Guidelines* process.
5. Fisheries WA should consider options for arranging resourcing for Recfishwest, RFAC, WAFIC, and other relevant groups to cope with any increased level of referral of fisheries resource sharing issues to the *Guidelines* process.
6. The Minister or Executive Director should acknowledge support for each mediation in written form at the beginning of each mediation.
7. The board members of major organisations who are likely to have ongoing roles and participation in the *Guidelines* process, together with appropriate directors from Fisheries WA, should participate in a mediation or mediation training.

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## APPENDIX: MEDIATION AS USED IN THE GUIDELINES PROCESS

*“Mediation is a decision-making process in which the parties are assisted by a third party, the mediator; the mediator attempts to improve the process of decision-making and to assist the parties reach an outcome to which each of them can assent.”*

*(Boulle 1996:3).*

### A1. Mediation: principles and process

Of four models of mediation identified by Boulle - settlement, facilitative, therapeutic, and evaluative - facilitative mediation is the most likely to result in the *pareto-optimal* balance that ensures greatest efficiency of outcome (Boulle 1996:29). All the mediations conducted under the *Guidelines* process are *facilitative*,

“... by assisting the parties to interpret the problem in all its diversity... allows them to take account of a wider spread of needs and interests, including procedural and psychological interests... The mediation process itself can also be efficiency-producing, for example by enhancing the accuracy of communications between the parties, by increasing the amount and quality of information which parties disclose...”

(Boulle 1996:54)

The particular style for discussion and principles used by the external mediators - Guy Wright and Hugh Chevis, who were contracted by Fisheries WA - is based on the so-called ‘Harvard School’ of mediation (especially, Fisher and Ury etc.). These principles are promoted in the Australian context by LEADR (Lawyers Engaged in Alternative Dispute Resolution), which offers training in mediation (and who had also trained one of the designers and participants, Guy Leyland of WAFIC).

This form of mediation consists of a set of fairly basic principles and techniques which are adaptable to a range of circumstances. It is used, for example, in family law and counselling situations for problems involving small numbers of individuals engaged in intensely personal negotiation.

These principles and techniques have also been adapted for use by organisations such as the National Native Title Tribunal (which is charged with conducting large, multi-party, mediations) in situations where there is a significant degree of representation of parties by advocates and governments.

There are numerous commentaries and critiques of mediation principles and practice (e.g., Astor and Chinkin 1992; Boulle 1996; Charlton and Dewdney 1995; Wolski n.d.). However, the fundamentals are easy to grasp, and its general effectiveness and fairness, when properly applied, are not seriously questioned.

### A2. Interests-based mediation

The over-arching principle of this style is that these mediated negotiations are ‘interests based’. The intent is to have the participants explore, in as broad a fashion as possible, their underlying interests.

These interests exist at a number of levels. Obviously the commercial fishers have a direct economic interest; but they also have significant attachments to the lifestyle they enjoy as a result. Recreational fishers have interests in enjoying a refreshing experience and a realistic opportunity to catch fish. The fisheries management agency has an interest in the orderly management of the fisheries. Others, such as local government councils, have interests that relate to their responsibilities, such as the safety and amenity of coastal areas within their jurisdictions.

In addition to these obvious institutional interests, there are the interests of those of the people representing them. Advocacy professionals have responsibilities to reflect the goals and desires of their boards of management and, through them, the desires of the people they represent. Agency officials reflect their agency's goals and responsibilities, and may have the further requirement that they need to bear in mind whole-of-government policy directions. The professional fishers who represent their local fishers association often have the most direct contact with their constituents and perhaps the most direct line of reporting.

The key issue for any mediation is that these various interests need to coalesce in the meeting room.

In the meeting room the personal interests of the players become significant. Individuals will have their own agendas, and professional kudos may attach to getting 'the right' outcome, from whichever point of view. There may be personal antagonisms that are brought into the room, or develop within the meetings. People may have complaints about other parties that they wish to express. Alternatively they may feel too much personal sympathy for other parties, which their role demands they be in opposition to. The mediator will acknowledge these very human attributes, but will work to 'separate the people from the problem' (Fisher and Ury, 1992: 27-40).

The art of the mediator is to bring the participants to focus their energy and their expertise on the *problem*. The *problem* is to find solutions to the outstanding issues, that will satisfy each party's interests, without the need to resort to a forced compromise.

To do this, the group must generate synergies that raise the levels of energy and thought beyond that which the individual players would be able to bring to the discussion. Typically these synergies will be captured by 'brainstorming sessions' in which ideas are generated and noted, regardless of whether they seem to be 'right' at the time. Often the group's thinking will take them in directions that the individuals had not previously considered.

Ultimately, if the group is made up of the main players, and the representatives attend with sufficient authority - and solutions are possible - then solutions should emerge.

This way of finding agreement is fundamentally different from positional bargaining - in which each party tries to maintain a position while forcing the others into compromise. The mediator will ask the parties to consider and develop their Best Alternative To a Negotiated Agreement - their BATNA. This is basically each player's fallback position should the negotiation fail. None of the parties should be expected to accept a compromised position that is less satisfactory than their BATNA.

Even though some compromise is usually inevitable, the intent is to use the synergies available to the group to find solutions that are better than the alternatives that have previously been contemplated. The solutions should satisfy real interests, not mere positions.

The parties are also asked to keep in mind their Worst Alternative To a Negotiated Agreement – their WATNA. Consequences will flow from a failed mediation.

The usual consequence is that some form of arbitrator will make a decision. Depending on the circumstance the arbitrator might be the agency with direct jurisdiction over the issue, a board set up for the purpose, a minister, or the courts. However contrived, such a decision is certain to be more arbitrary than arrangements arrived at by consensus. Although it may favour one or more of the parties, there is a greater likelihood that it will generate subsequent problems as those aggrieved by the decision continue to assert their rights and interests, usually from increasingly entrenched positions.

### **A3. Issues and options**

The mediation should begin with the discovery and recognition of the matters that are at issue. It is important to canvas these matters as widely as possible and to ensure that all parties are able to bring to the table all their concerns.

Confidentiality is important here. Before opening the mediation the parties are asked to sign an Agreement to Mediate in which they agree to behave in good faith and to keep matters that rise in the meetings confidential. There are obvious practical benefits to the confidentiality provisions, in terms of ensuring the mediation is as free as possible from externally generated diversions. However, the more important aspect is that the people within the group should feel as free as possible to engage in open discussion without fear that their positions or interests will be exposed beyond the immediate group.

When the issues are written up in front of the group, the group can participate in framing the context for dealing with the issues. Typically, sets of similar or related issues may be grouped together, with some issues being set aside for future discussion. Central versus peripheral issues become easier to see and logical priority orders for discussion becomes more apparent.

This process of discovery and ordering can take some time, especially where the participants contest the priorities among themselves. After asking for as broad an exploration of issues as possible, the mediator then works to distil those that appear to be of key relevance to the overall outcome.

Options to resolve the priority issues can then be generated. The process is broadened out again, and the participants are asked to think laterally about how the issues might be resolved. This is the central part of the negotiation. And, although participants may behave strategically in terms of their presentation of options for solutions, the difference from a standard negotiation is fundamental: the emphasis is *not* on positional bargaining; rather, the emphasis is on generating ideas to assist a common good.

#### A4. Reality checks

Where there is a well-balanced set of parties in which the participants have a level of expertise and experience in the specific fishery and in the management of fisheries generally, the outcomes can be expected to be within a range that allows for realistic future management.

A significant benefit of the *Guidelines* process, explicitly recognised by Fisheries WA, is that "... bottom-up, stakeholder driven processes can have greater opportunities for resolving resource sharing issues than can top-down, command and control approaches" (Metzner, 1998:540).

It is important, however, that reality testing (Fisher and Ury, 1992) be undertaken as the options for resolving the issues are developed. Successful final outcomes should combine resolution of the issues with the generation of better management arrangements.

The arrangements should be sustainable and certain. They should be reasonably immune from legal challenge. They should offer an elegant solution that is not contingent on a lot of external people or agencies for success, and they should be appropriately compatible with relevant biological assessments.