**THIRTY-EIGHTH PARLIAMENT**

# REPORT 35

## JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

## *FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO. 3) 2009*

Presented by Mr Joe Francis MLA (Chairman)

and

Hon Robin Chapple MLC (Deputy Chairman)

November 2009

# JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

**Date first appointed:**

28 June 2001

**Terms of Reference:**

The following is an extract from Schedule 1 of the Legislative Council Standing orders:

"**3. Joint Standing Committee on Delegated Legislation**

3.1 A *Joint Standing Committee on Delegated Legislation* is established.

3.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

3.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.

3.4 A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.

3.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

3.6 In its consideration of an instrument, the Committee is to inquire whether the instrument -

(a) is authorized or contemplated by the empowering enactment;

(b) has an adverse effect on existing rights, interests, or legitimate expectations beyond giving effect to a purpose authorized or contemplated by the empowering enactment;

(c) ousts or modifies the rules of fairness;

(d) deprives a person aggrieved by a decision of the ability to obtain review of the merits of that decision or seek judicial review;

(e) imposes terms and conditions regulating any review that would be likely to cause the review to be illusory or impracticable; or

(f) contains provisions that, for any reason, would be more appropriately contained in an Act.

3.7 In this clause -

"**adverse effect**" includes abrogation, deprivation, extinguishment, diminution, and a compulsory acquisition, transfer, or assignment;

"**instrument**" means -

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"**subsidiary legislation**" has the meaning given to it by section 5 of the *Interpretation Act 1984*."

**Members for this inquiry:**

| | |
|---|---|
| Mr Joe Francis MLA (Chairman) | Ms Janine Freeman MLA |
| Hon Kim Chance MLC (Deputy Chairman) until 21 May 2009 | Mr Paul Miles MLA |
| Hon Robin Chapple MLC from 4 June 2009 (Deputy Chairman from 8 June 2009) | Mr Andrew Waddell MLA |
| Hon Shelley Eaton MLC until 21 May 2009 | Hon Jim Chown MLC from 4 June 2009 |
| Hon Ray Halligan MLC until 21 May 2009 | Hon Jock Ferguson MLC from 4 June 2009 |
| Hon Barbara Scott MLC until 21 May 2009 | Hon Alyssa Hayden MLC from 4 June 2009 |

**Staff for this inquiry:**

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| Denise Wong, Advisory Officer (Legal) | David Driscoll, Committee Clerk |

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**Government Response**

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

## LIST OF ABBREVIATIONS AND DEFINED TERMS

| | |
|---|---|
| 2004 Agreement | The 2004 agreement between the Department of Fisheries and the Western Australian Fishing Industry Council which, along with *Future Directions for Fisheries Management in Western Australia*, established the basis for the calculation of access licence fees for minor managed fisheries for 2005/2006 to 2007/2008 initially, and then for 2008/2009 |
| AC | Appeal Cases, 1890-current |
| the Act | *Fish Resources Management Act 1994* |
| Amendment Regulations | *Fish Resources Management Amendment Regulations (No. 3) 2009* |
| CLR | Commonwealth Law Reports, 1903-current |
| Cole/House Agreement | *Future Directions for Fisheries Management in Western Australia*, released jointly by the Minister for Fisheries and the Chairman of the Western Australian Fishing Industry Council in September 1995 |
| Committee | Joint Standing Committee on Delegated Legislation |
| DBIF | Development and Better Interest Fund |
| Department | Department of Fisheries |
| FRDA | Fisheries Research and Development Account |
| GVP | gross value of production |
| Harper Case | *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314 |
| Minister | Minister for Fisheries |
| SSO | State Solicitor's Office |
| WAFIC | Western Australian Fishing Industry Council |

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**REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**

**IN RELATION TO THE**

***FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO. 3) 2009***

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## 1 INTRODUCTION

### Reference and Procedure

1.1 The *Fish Resources Management Amendment Regulations (No. 3) 2009* (**Amendment Regulations**) were published in the *Western Australian Government Gazette* by the Government on 11 February 2009. As the Amendment Regulations fall within the definition of 'instrument' in the Joint Standing Committee on Delegated Legislation's (**Committee**) Terms of Reference, they stood referred to the Committee upon gazettal.[1] A copy of the Amendment Regulations is attached to this Report as **Appendix 1**.

1.2 The Amendment Regulations amend the *Fish Resources Management Regulations 1995*. They effected changes to the fees payable for access licences in relation to the following managed fisheries for 2008/2009:

- Abalone Managed Fishery (greenlip, brownlip and Roe's abalone).
- Abrolhos Islands and Mid West Trawl Managed Fishery.
- Exmouth Gulf Prawn Managed Fishery.
- Shark Bay Prawn Managed Fishery.
- Shark Bay Scallop Managed Fishery.
- West Coast Demersal Gillnet and Demersal Longline Interim Managed Fishery.
- West Coast Purse Seine Managed Fishery.

1.3 The Amendment Regulations were made by the Governor in Executive Council purportedly pursuant to sections 256 and 258(zc) of the *Fish Resources Management Act 1994* (**the Act**). The power to amend the *Fish Resources Management Regulations 1995* is derived from reading these sections with section 43(4) of the *Interpretation Act 1984*.

1.4 The fee changes implemented by the Amendment Regulations are set out in the following table:

**Table 1: Comparison of Managed Fishery Access Licence Fees for 2007/2008 and 2008/2009**

| Managed Fishery | 2007/08 Fee[2] | 2008/09 Fee[3] | Increase/ Decrease | Due Date[4] |
|---|---|---|---|---|
| Abalone Managed Fishery (major) | $10.62 per kg of entitlement (greenlip or brownlip abalone) | $10.80 per kg of entitlement (greenlip or brownlip abalone) | 1.69% | 31.03.09 |
| | $3.30 per kg of entitlement (Roe's abalone) | $3.30 per kg of entitlement (Roe's abalone) | 0.00% | 31.03.09 |
| Abrolhos Islands and Mid West Trawl Managed Fishery (minor) | $5,971 per gear unit | $6,049 per gear unit | 1.31% | 01.03.09 |
| Exmouth Gulf Prawn Managed Fishery (major) | $22,562 per licence | $18,792 per licence | -16.71% | 14.03.09 |
| Shark Bay Prawn Managed Fishery (major) | $34,978 per licence | $33,912 per licence | -3.05% | 01.03.09 |
| Shark Bay Scallop Managed Fishery (major) | $19,816 per Class A boat | $27,223 per Class A boat | 37.38% | 01.03.09 |
| | $2,569 per Class B boat | $3,529 per Class B boat | 37.37% | 01.03.09 |

1 See the Committee's Terms of Reference 3.5 and 3.7.

2 See regulation 137 and Schedule 1, Part 3, item 3 of the *Fish Resources Management Regulations 1995* immediately prior to 12 February 2009.

3 See regulation 137 and Schedule 1, Part 3, item 3 of the *Fish Resources Management Regulations 1995* on and from 12 February 2009.

4 Emails from Ms Pamela Yoon, Legal Officer, Legal & Registry Services Unit, Department of Fisheries, 19 June 2009.

| Managed Fishery | 2007/08 Fee[2] | 2008/09 Fee[3] | Increase/ Decrease | Due Date[4] |
|---|---|---|---|---|
| West Coast Demersal Gillnet and Demersal Longline Interim Managed Fishery (minor) | $63.01 per unit | $3.25 per unit | -94.84% | 31.05.09 |
| West Coast Purse Seine Managed Fishery (minor) | $2,164 per licence | $2,235 per licence | 3.28% | 31.03.09 |

1.5 The new fees came into effect on 12 February 2009.[5] The Department of Fisheries (**Department**) advised that all but one of the affected licensees had renewed their licences.[6]

1.6 On 13 February 2009, the Department provided the Committee with explanatory material relating to the Amendment Regulations. The Committee first considered the Amendment Regulations on 18 May 2009. The Committee resolved to give notice in the Legislative Council that it would move to disallow the Amendment Regulations. This measure preserved the Parliament's right to disallow the Amendment Regulations while the Committee obtained additional information and gave further consideration to the issues at hand.

1.7 Notice of the disallowance motion was given on 19 May 2009[7] and the Minister for Fisheries (**Minister**) and the Department were notified of this by a Committee letter dated 26 May 2009 (attached as **Appendix 2**). The letter also provided a summary of the reasons for the Committee's preliminary view that the licence fees have a taxing element which is not authorised or contemplated by the Act.[8] The Minister and the Department were asked to respond to this preliminary view and to explain how the Committee's concerns would be addressed in the next round of amendments to managed fishery access licence fees.

1.8 A response dated 16 June 2009 was received from the Department (attached as **Appendix 3**). The letter enclosed a *First Supplementary Explanatory Memorandum*

5 Regulation 2 of the *Fish Resources Management Amendment Regulations (No. 3) 2009*.

6 One licence in the West Coast Demersal Gillnet and Demersal Longline Interim Managed Fishery was allowed to expire: Emails from Ms Pamela Yoon, Legal Officer, Legal & Registry Services Unit, Department of Fisheries, 19 June 2009.

7 Hon Kim Chance, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 May 2009, p4100.

8 See the Committee's Term of Reference 3.6(a).

dated 15 June 2009 and a letter of advice to the Department from the State Solicitor's Office dated 5 June 2009. This material did not allay the Committee's concerns. However, given that:

- the Committee's view has ramifications for all managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995*, not just those amended by the Amendment Regulations;
- the disallowance of the Amendment Regulations would have little effect on the new fees, the vast majority of which had already been paid; and
- managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995* have been calculated according to a longstanding fee-setting model introduced in 1995, which was being reviewed at the time of the Committee's inquiry,

the Committee resolved to discharge its disallowance motion from the Notice Paper and prepare this information report for the Parliament.

1.9 Accordingly, the disallowance motion against the Amendment Regulations, which moved *pro forma* under the Legislative Council Standing Orders[9] on 2 June 2009, was discharged from the Notice Paper on 23 June 2009.[10]

**Background to Managed Fishery Access Licence Fees**

1.10 At common law, there is a general public right to fish in the sea and tidal waters.[11] The common law right to fish in non-tidal waters is determined by the ownership of the soil beneath or adjacent to the relevant water body, and therefore, tends to be held privately.[12]

1.11 In Western Australia, the public's common law right to fish has been restricted by the Act, of which the overarching object is to:

> *conserve, develop and share the fish resources of the State for the benefit of present and future generations.*[13]

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9 Standing Order 152(b).

10 Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 June 2009, p5328.

11 Definition of 'right of piscary' in *Encyclopaedic Australian Legal Dictionary*, On-line, LexisNexis; and *The Laws of Australia*, Thomson Reuters, paragraph 14.11.60. See also, *Attorney-General (British Columbia) v Attorney-General (Canada)* [1914] AC 153, at pp170-171 per Viscount Haldane LC; and *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at pp329-330 per Brennan J.

12 Definition of 'right of piscary' in *Encyclopaedic Australian Legal Dictionary*, On-line, LexisNexis; and *The Laws of Australia*, Thomson Reuters, paragraphs 14.11.58 and 14.11.59.

13 Section 3 of the *Fish Resources Management Act 1994*.

1.12 Section 4(1) of the Act defines 'fishery' as meaning:

> *(a) one or more stocks or parts of stocks of fish that can be treated as a unit for the purposes of conservation or management; and*
>
> *(b) a class of fishing activities in respect of those stocks or parts of stocks of fish;*

1.13 Section 4(2) provides that, among other things, a fishery may be defined in an order, management plan, regulation, arrangement, notice, authorisation or other instrument by reference to all or any of the following:

> *(a) a species or type of fish;*
>
> *(b) a description of fish by reference to sex, weight, size, reproductive cycle or any other characteristic;*
>
> *(c) an area of land or waters;*
>
> *(d) a method of fishing;*
>
> *(e) a type of fishing gear;*
>
> *(f) a class of boats, vehicles or aircraft;*
>
> *(g) a class of persons;*
>
> *(h) a purpose of activities.*

1.14 Managed fisheries and interim managed fisheries are those where commercial fishing is controlled to sustainable levels under management plans determined by the Minister under section 54 of the Act. Recreational fishing is managed through various regulations and orders made under the Act.[14] Generally, people wishing to fish commercially in managed fisheries and interim managed fisheries must hold an access licence, known in the Act as a 'managed fishery licence' and an 'interim managed fishery permit',[15] respectively. This requirement to be licensed is found in the clauses of each management plan and is authorised by section 58 of the Act. In this Report, managed fisheries and interim managed fisheries are referred to collectively as managed fisheries.

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[14] Department of Fisheries, *Recreational Fishing Guide - Finfish: West Coast Region*, December 2008, p4.

[15] Sections 4(1) and 53 of the *Fish Resources Management Act 1994*.

1.15 Managed fisheries are classed as either a major or minor managed fishery. Of all the managed fisheries in Western Australia,[16] the following five are considered major managed fisheries:

- Abalone Managed Fishery.
- Exmouth Gulf Prawn Managed Fishery.
- Shark Bay Prawn Managed Fishery.
- Shark Bay Scallop Managed Fishery.
- West Coast Rock Lobster Managed Fishery.[17]

1.16 A management plan may, among other things:

- restrict the number of access licences which can be granted for a managed fishery;[18]
- prescribe the criteria which are to be satisfied by an applicant for an access licence before the Chief Executive Officer of the Department can grant the licence under section 66 of the Act;[19]
- prescribe the capacity of the managed fishery, by reference to:

  *(a) a quantity of fish that may be taken;*

  *(b) a quantity of fishing gear that may be used;*

  *(c) a number of boats that may be used;*

  *(d) a number of persons who may engage in fishing; or*

  *(e) any other thing.*[20]

  and

16 See Schedule 1, Part 3, item 3 of the *Fish Resources Management Regulations 1995* for a list of 33 of the managed fisheries in Western Australia.

17 http://www.fish.wa.gov.au/docs/pub/CommFishinginWA/index.php?0201, (viewed on 10 July 2009).

18 Section 58(2)(b) of the *Fish Resources Management Act 1994*.

19 *Ibid*, section 58(2)(c).

20 *Ibid*, section 59.

- prescribe a scheme relating to the extent of the entitlements conferred by the access licences in respect of the managed fishery; for example, by prescribing the way in which entitlements are to be fixed and allocated.[21]

1.17 A licensee's entitlement under an access licence may be limited by reference to all or any of the following:

*(a) a quantity of fish that may be taken;*

*(b) a quantity of fishing gear that may be used or carried;*

*(c) a boat, vehicle or aircraft, or a number of boats, vehicles or aircraft, or a class or length of boat, vehicle or aircraft, that may be used;*

*(d) a number of persons that may operate;*

*(e) an area of land or waters;*

*(f) a period of time;*

*(g) any other factor.*[22]

1.18 An access licence generally remains in force for 12 months, unless another period is prescribed in the management plan, and may be renewed.[23] The *Explanatory Memorandum* for the Amendment Regulations provided by the Department (attached as **Appendix 4**) confirms that the access licences remain valid for 12 months because it refers to access licence fees as "*annual fees*".[24]

1.19 Section 256 of the Act is the broad authority for the making of regulations by the Governor, while section 258(zc)(ii) authorises the regulations to prescribe fees and charges for the issue of 'authorisations', which includes access licences for managed fisheries[25]. Regulation 137 and Schedule 1, Part 3, item 3 of *Fish Resources Management Regulations 1995* prescribe the access licence fees which are payable for 33 of the managed fisheries in Western Australia. The Committee understands that the access licence fees for other managed fisheries, if any, are prescribed in either their respective management plans or other subsidiary legislation. For the purposes of

21 *Ibid*, section 60.

22 *Ibid*, section 66(3).

23 *Ibid*, sections 67 and 68.

24 *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, p1.

25 See definition of 'authorisation' in section 4(1) of the *Fish Resources Management Act 1994*.

this inquiry, the Committee confined its research to managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995*.

1.20 Since 1995/1996, access licence fees for managed fisheries have been calculated according to the *Future Directions for Fisheries Management in Western Australia*, known commonly as the *Cole/House Agreement* (**Cole/House Agreement**). The Cole/House Agreement was released jointly by the Minister and the Chairman of the Western Australian Fishing Industry Council (**WAFIC**) in September 1995.[26]

1.21 Under that agreement, the access licence fees consist of two components:

- a cost recovery component (discussed further in paragraphs 1.24 to 1.27 in this Report); and
- a contribution towards the Development and Better Interest Fund (**DBIF**) (discussed further in paragraphs 1.28 to 1.38 in this Report).[27]

1.22 At a basic level, the access licence fee for each managed fishery is calculated by dividing the sum of the fishery's cost recovery and DBIF components by the capacity of the fishery, in order to arrive at a 'per unit' fee. This calculation may be represented as follows:

$$\textbf{Fee} = \frac{\textbf{Cost Recovery Component + DBIF component}}{\textbf{Capacity of Fishery}}$$

where:

**Fee** = $ amount per licence/kg/unit/fishing gear/fishing unit/boat/team

**Cost Recovery Component** = cost recovery component for the whole managed fishery

**DBIF Component** = DBIF component for the whole managed fishery

**Capacity of Fishery** = total number of licences/kg of entitlement/units of entitlement/fishing gear entitlements/fishing unit entitlements/licensed boats/teams for the whole managed fishery (as indicated in paragraph 1.16 of this Report, the capacity of a managed fishery may be prescribed by reference to various things)

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26 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page02.php?0205, (viewed on 16 July 2009); and *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, p1.

27 *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, p1; and Department of Fisheries, *Cost Recovery Guidelines under an Integrated Project and Activity Costing Framework*, October 1999, p3.

1.23 The following discussion about the calculation of access licence fees provides an indication of how these fees, particularly those paid in relation to minor managed fisheries, are affected by fluctuations in a fishery's gross value of production[28] (**GVP**). Where a fishery's GVP figures fluctuate greatly from financial year to year, the access licence fees also tend to fluctuate greatly.

*Cost Recovery Component*

1.24 This component of access licence fees appears to cover:

- the costs directly incurred by the managed fishery, such as compliance monitoring costs, research costs, management costs and other service delivery costs; and
- indirect costs which are allocated to the relevant managed fishery and referred to as "*agency support costs*" in the Department's costing guidelines.[29]

1.25 For major managed fisheries, this component is calculated at full cost recovery.[30] Minor managed fisheries only pay a set contribution towards cost recovery; that is, minor managed fisheries are not achieving full cost recovery. The balance of these costs has been met by the Government. The Department's costing guidelines indicated that the minor managed fisheries' contribution to cost recovery would be reviewed between 2000 and 2004 with the object of moving these fisheries towards full cost recovery.[31] However, this objective does not appear to have been met.

1.26 The cost recovery component of access licence fees for minor managed fisheries are calculated based on their GVP for a reference period of three years, from 2000/2001 to 2002/2003. After the first year that this component is calculated, the component is increased in future years at an annual premium based on the Consumer Price Index and salary increases, rather than being re-calculated from the GVP each year. The basis for this cost recovery component calculation was agreed between the Department and the WAFIC in 2004 (**2004 Agreement**). The 2004 Agreement was due to expire on the setting of the 2007/2008 fees but was extended for 12 months.

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28 In the Department of Fisheries' costing guidelines, 'gross value of production' is defined as follows: "*The gross value of production is the 'whole' weight equivalent of the total catch of the species authorised to be taken by virtue of the respective fisheries management plan for the preceding year multiplied by the estimated average beach price of the 'whole' product for that year*": Department of Fisheries, *Cost Recovery Guidelines under an Integrated Project and Activity Costing Framework*, October 1999, p8.

29 *Ibid*, p3. See also, *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, p3.

30 *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, p1; and Department of Fisheries, *Cost Recovery Guidelines under an Integrated Project and Activity Costing Framework*, October 1999, p4.

31 Department of Fisheries, *Cost Recovery Guidelines under an Integrated Project and Activity Costing Framework*, October 1999, p4.

The Committee was advised that the 2004 Agreement would end with the fee changes implemented by the Amendment Regulations.[32]

1.27 The 2004 Agreement does not cover the Abrolhos Islands and Mid West Trawl Managed Fishery, which is also classed as a minor managed fishery. The basis for calculating the cost recovery component of the access licence fees for this managed fishery was agreed in November 2005.[33]

*Development and Better Interest Fund Component*

1.28 Under the *Cole/House Agreement*, the managed fisheries and the pearling industry (which is not a managed fishery for the purposes of the Act) must contribute either $3.5 million or 0.65 per cent of their GVP, whichever is the greater amount,[34] to the DBIF every financial year. In other words, the DBIF contribution for each financial year must be at least $3.5 million. The relevant GVP figure used for the calculation of the DBIF contribution is based on the GVP for the financial year two years prior to the licensing period under consideration. For example, in 2008/2009, the DBIF contribution was based on 2006/2007 GVP data.[35]

1.29 As the GVP of the managed fisheries and the pearling industry for 2006/2007 was $449,451,363,[36] the percentage required to raise at least $3.5 million for the DBIF in 2008/2009 was 0.78 per cent, which equates to $3,505,721. At 0.65 per cent of the 2006/2007 GVP, the DBIF contribution would have been only $2,921,434.

1.30 In addition to the *Cole/House Agreement*, the DBIF contribution from minor managed fisheries is also dictated by the terms of the 2004 Agreement. Under that agreement, the DBIF contribution from minor managed fisheries, except for the Abrolhos Islands and Mid West Trawl Managed Fishery, is set at 0.662 per cent of the relevant GVP for the term of the agreement, which was extended to cover 2008/2009.[37]

1.31 Pursuant to a separate agreement reached in November 2005, the DBIF contribution from the Abrolhos Islands and Mid West Trawl Managed Fishery is calculated by

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32 *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, pp1 and 3.

33 *Ibid*, p3.

34 This threshold was introduced in 1998/1999. The Development and Better Interest Fund contribution was initially calculated at the rate of 0.41 per cent of the gross value of production in 1995/1996. The rate was increased progressively until 1997/1998, when it reached 0.65 per cent: http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page02.php?0205, (viewed on 16 July 2009).

35 *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, p2; and Department of Fisheries, *Cost Recovery Guidelines under an Integrated Project and Activity Costing Framework*, October 1999, p9.

36 *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 28 January 2009, p2.

37 *Ibid*.

multiplying the fishery's rolling three-year average GVP (with the third financial year being two years prior to the year in question) by the average percentage of GVP paid by the major managed fisheries for the year in question. Therefore, for 2008/2009, the DBIF contribution was 0.78 per cent of the fishery's average GVP from 2004/2005 to 2006/2007.[38]

1.32 The Department advised the Committee that annual shortfalls in the DBIF contribution from managed fisheries and the pearling industry have been occurring due to the 2004 Agreement relating to minor managed fisheries. In 2008/2009, the Department absorbed a $21,228 shortfall in the DBIF contribution. The Department intends to remedy this situation when the 2004 Agreement is renegotiated.[39]

1.33 The *Cole/House Agreement* described the DBIF contribution as:

> *a return from commercial fishers to the Government, as representatives of the community, for application by the Minister for Fisheries to those items that are in the better interest of fisheries, and fish and fish habitat management.*[40]

1.34 The DBIF account is maintained administratively as a sub-account of the Fisheries Research and Development Account (**FRDA**).[41] Unlike the FRDA, which is established under section 238 of the Act, the DBIF is not a statutory fund.

1.35 As an example of how the DBIF is applied, the Committee understands that the commercial fishing industry's peak bodies, such as the WAFIC and Recfishwest, and other organisations, such as the Conservation Council of Western Australia, are partly funded by grants from the DBIF.[42] The Committee understands that these bodies are operated privately. While they work cooperatively with the Department, they are distinct from the Department.

1.36 The Department's website and *State of the Fisheries Report 2007/08* indicate that the DBIF is also used to fund, for example:

- scientific, technological or economic research;[43]
- fish stock assessments;[44]

38 *Ibid*, pp2 and 3.

39 *Ibid*, p2.

40 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004.php?0205, (viewed on 20 May 2009).

41 *Ibid*.

42 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

43 *Ibid*; and Department of Fisheries, *State of the Fisheries Report 2007/08*, 2008, p40.

- projects aimed at rebuilding fish stock, such as the Shark Bay snapper stocks in 1998/1999;[45]
- the employment of additional departmental staff on a case by case basis;[46]
- the development of strategies for the integrated management of fisheries;[47]
- the development of public policy;[48]
- trade and market development, such as the trade mission to Dubai in 2002/2003;[49]
- public education programmes;[50] and
- advertising campaigns, such as the 'Fish for the Future' campaign in 1999/2000, 2000/2001 and 2002/2003.[51]

1.37 Additionally, the Department's costing guidelines indicate that the costs of major managed fisheries **may** be subsidised by the DBIF, as determined by the Minister.[52]

1.38 Major managed fisheries and the pearling industry contribute approximately 93 per cent of the annual income of the DBIF while the minor managed fisheries (and the Department) contribute the balance.[53]

## 2 THE COMMITTEE'S CONCERNS ABOUT MANAGED FISHERY ACCESS LICENCE FEES PRESCRIBED IN THE *FISH RESOURCES MANAGEMENT REGULATIONS 1995*

2.1 The Committee refers to its recently tabled 32nd report, which, among other things, sets out the Committee's position on generic issues relating to fees and taxes.[54]

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44 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009); and Department of Fisheries, *State of the Fisheries Report 2007/08*, 2008, p42.

45 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

46 Department of Fisheries, *State of the Fisheries Report 2007/08*, 2008, p292.

47 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

48 *Ibid*.

49 *Ibid*.

50 *Ibid*.

51 *Ibid*.

52 Department of Fisheries, *Cost Recovery Guidelines under an Integrated Project and Activity Costing Framework*, October 1999, p4.

53 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004.php?0205, (viewed on 6 July 2009).

2.2 As the Amendment Regulations affect access licence fees for managed fisheries, and the pearling industry is not a managed fishery for the purposes of the Act, the following discussion relates to managed fishery access licence fees only.

**The Committee's Preliminary View**

2.3 The Committee observed that, in paying an access licence fee, a licensee is:

- obtaining the right to fish commercially in specified quantities in the particular managed fishery; and
- requesting the provision of services, and accepting the costs of the services, associated with access to the managed fishery and the licensing scheme, including the consideration of the licence applications, the issuing of the licences and the monitoring of compliance with licence conditions.

2.4 With this in mind, the Committee noted the following points about access licence fees for managed fisheries:

- The Department has attempted to relate these fees to the cost of the services associated with the licensing scheme and the provision of access to each managed fishery. This is evidenced by the fact that there is a cost recovery component to the fees.
- At least for major managed fisheries, the fees exceed cost recovery due to the inclusion of the DBIF component.
- The DBIF component is raised for general public purposes; that is, purposes which do not necessarily relate specifically to any of the managed fisheries.
- It is significant that the Department has clearly identified two components in the fees: one to defray the costs of the services provided by the Department to the licensees; and another to pay for any activities which have the general objective of promoting the "*better interest of fisheries, and fish and fish habitat management.*"[55]

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54 Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009.

55 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004.php?0205, (viewed on 20 May 2009).

- Generally, the mere fact that an amount payable under a regulation is in the form of a 'licence fee' does not preclude the classification of that amount as a tax.[56]

2.5 For the purposes of this inquiry, the Committee inquired into the legislative authority for the imposition of the DBIF component of the access licence fees prescribed in the *Fish Resources Management Regulations 1995*.

2.6 In the Committee's preliminary view, the DBIF component appears to be a tax on commercial fishers who operate in managed fisheries (that is, the licensees) because it exhibits the following characteristics of a tax, as endorsed by the High Court:

- It is a compulsory exaction of money. In the case of the DBIF component, the compulsion is practical, as distinct from legal, in nature because only people who wish to fish commercially in a managed fishery must first obtain an access licence. A practical compulsion to pay the relevant exaction is sufficient to satisfy this element of a tax.[57]

- It is enforceable by law.

- It is raised for public or governmental purposes.

- It is not a penalty; that is, a licensee's liability to pay the DBIF component does not arise from any failure by a licensee to discharge his or her antecedent obligations.

- It is not arbitrary; that is, "*Liability* [to pay the exaction] *is imposed by reference to criteria which are sufficiently general in their application and which mark out the objects and subject matter of the tax.*"[58] The objects of the DBIF component are the people wishing to fish commercially in a managed

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56 For example, see *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p467; and *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at p332 per Brennan J, with whom the remaining judges of the High Court agreed. See also, paragraph 1.2 in the Executive Summary of Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009, pi.

57 See, for example, *The General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others* (1980) 145 CLR 532, at p568 per Aickin J and pp561-562 per Gibbs J (who assumed, without deciding, that practical compulsion would be sufficient to render a charge a tax), with whom the remaining judges of the High Court agreed; and *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, at pp189-190 per Gaudron J and p232 per McHugh J.

58 *MacCormick v Federal Commissioner of Taxation; Camad Investments Pty Ltd v Federal Commissioner of Taxation* (1984) 158 CLR 622, at p639 per Gibbs CJ, Wilson, Deane and Dawson JJ.

fishery and the subject matter of the tax is the GVP of the relevant managed fishery.

- It does not have the attributes of a fee in the legal sense. For example, the DBIF component does not constitute a payment for services rendered. This is discussed in the next paragraph.[59]

2.7 The Committee was of the view that the DBIF component of access licence fees prescribed in the *Fish Resources Management Regulations 1995* is not a fee at law for the following reasons:

- The DBIF component is not an attempt to recover the Department's costs of delivering the access services and licensing services which are provided to the licensee, as is usually the case with a 'fee for service'[60] and a 'fee for licence'[61]. For example, it does not fall within the classic definition of a fee for service, which is:

  *a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment.*[62]

  Instead, the DBIF component is, to paraphrase the *Cole/House Agreement*, a payment made by the licensee back to the community for the purposes of improving fisheries, and fish and fish habitat management. It appeared to the Committee that the cost recovery component of the fee, as distinct from the DBIF component, is more akin to a 'fee for service' or a 'fee for licence'.

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59 See *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, at p276 per Latham CJ; and *MacCormick v Federal Commissioner of Taxation; Camad Investments Pty Ltd v Federal Commissioner of Taxation* (1984) 158 CLR 622, at p639 per Gibbs CJ, Wilson, Deane and Dawson JJ.

60 See *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p470; and *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, at p177 per Gleeson CJ and Kirby J, at pp190-191 per Gaudron J, and at pp232-235 per McHugh J. See also, Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009, pp56-59.

61 See section 45A of the *Interpretation Act 1984*; and Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009, pp61-62.

62 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p470. For example, this definition was endorsed in *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, at pp189-190 per Gaudron J, p235 per McHugh J and pp280 and 281 per Gummow J.

- The DBIF component does not otherwise have a discernible relationship with the value of the privilege acquired by a licensee on payment of the fee: that is, commercial access to the particular managed fishery and the services related to that access. According to the High Court, this relationship must exist for an impost to be considered a fee at law.[63] In the Committee's view, the DBIF component does not satisfy this requirement because:

  (a) it is raised to help fund organisations (for example, the Conservation Council of Western Australia) and some activities (for example, the project to rebuild the Shark Bay snapper stock) which are not necessarily specific to a licensee's particular managed fishery or even managed fisheries as a whole.[64] It appeared to the Committee that the DBIF is expended on whatever activities are, at the time, considered to be in the better interest of fisheries, and fish and fish habitat management, regardless of whether they are related to managed fisheries. In effect, by paying the DBIF component, a licensee is subsidising organisations and some activities which may not benefit that particular licensee;

  (b) the organisations which are partly funded by DBIF grants are operated privately, and are distinct from the Department. That is, a component of a licensee's fee is contributing to services and activities which are not offered by the department which is exacting the fee; and

  (c) some of the organisations (for example, the Conservation Council of Western Australia) and activities (for example, public education programmes and the development of public policy) which are funded by the DBIF benefit the public at large, not just the licensees. Where a government agency undertakes activities which have a high degree of public benefit, the Productivity Commission has recommended that these activities be funded through general taxation revenue, as opposed to fees or authorised, specific-purpose taxes.[65] In addition, the Committee has previously indicated that, for the purposes of determining whether an impost is a fee or a tax, the person required to pay the impost should obtain a direct and personal benefit in return

63 See *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p467. This aspect of the decision was cited with approval by the *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at pp336-337 per Dawson, Toohey and McHugh JJ; *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, at p190 per Gaudron J, pp233-234 per McHugh J, and p280 per Gummow J; and in *Luton v Lessels and Another* (2002) 210 CLR 333, at p383 per Callinan J.

64 Refer to paragraphs 1.35 to 1.37 in this Report for other examples of how the Development and Better Interest Fund is expended.

65 Commonwealth Government, Productivity Commission, *Cost Recovery by Government Agencies*, Report No 15, 16 August 2001, ppXXIX, XLII, XLIV, 16, 22, 33 and 163.

for the payment, as opposed to a benefit which is enjoyed by the general public.[66]

2.8 The Committee's preliminary view that the DBIF component is a tax is significant because of the fundamental principle that the Executive Government cannot impose taxes unless the Parliament has clearly authorised that imposition.[67] This is why taxes are usually imposed through Acts of Parliament. Where, for example, the Executive Government seeks to impose taxes through subsidiary legislation which is made under legislative powers delegated by the Parliament to the Executive Government, this imposition must be clearly authorised by an Act.

2.9 In keeping with this principle, the *Fish Resources Management Regulations 1995*, which are made by the Executive Government, can only impose taxes if they are authorised to do so by an Act of Parliament. In the Committee's preliminary view, there is no primary legislation which expressly or implicitly authorises the imposition of the DBIF component of access licence fees through the *Fish Resources Management Regulations 1995*. Sections 256 and 258(zc) of the Act, under which the provisions of the *Fish Resources Management Regulations 1995* which pertain to the prescription of fees are purportedly made, only authorise the imposition of **fees** by regulations, not taxes.[68] The relevant parts of these sections are reproduced here for the information of the House:

> ***256. Regulations — general power***
>
> *(1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.*
>
> …
>
> ***258. Regulations — miscellaneous***
>
> *The regulations may —*
>
> …

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66 See paragraphs 3.68 to 3.73 and 4.8 to 4.9 in Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009, pp43-44 and 57.

67 Refer to *ibid*, p36.

68 A similar observation was made in *The General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others* (1980) 145 CLR 532, at p562 per Gibbs J, with whom the remaining judges of the High Court agreed.

> *(zc) prescribe fees and charges for the purposes of this Act, including fees and charges payable in respect of —*
>
> *(i) applications, other than an application to the State Administrative Tribunal for a review;*
>
> *(ii) the issue of authorisations;*[69] *and*
>
> *(iii) the provision of any service or information;*

2.10 As the DBIF component of managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995* appears to be an unauthorised tax, the Committee's preliminary view was that the fees, as a whole, are taxes which are not authorised or contemplated by the Act.[70] That is, although these access licence fees are described as 'fees', they are, in reality, unauthorised taxes.

**The Department of Fisheries' View**

2.11 The Committee was not persuaded by the Department's legal arguments as to the legislative authorisation for managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995*. The premise of the Department's arguments was that the access licence fees are fees, not taxes, and are therefore authorised by sections 256 and 258(zc) of the Act. These arguments were provided in a letter from the Department dated 16 June 2009 (see **Appendix 3**). The letter enclosed a *First Supplementary Explanatory Memorandum* dated 15 June 2009 and a letter of advice to the Department from the State Solicitor's Office (**SSO**) dated 5 June 2009.

2.12 The Department considered that the issue of whether an impost is characterised as a fee or a tax is to be determined by:

> *whether a relevant relationship can be established between the value of the right conferred by the licence and the amount of the fee. Once that relationship is established it does not matter on what the fee revenue is expended upon.*[71]

2.13 In applying the SSO's advice on this issue, the Department indicated to the Committee that:

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69 "*In this Act, unless the contrary intention appears — … **authorisation** means a licence or permit*": section 4(1) of the *Fish Resources Management Act 1994*.

70 See the Committee's Term of Reference 3.6(a).

71 *First Supplementary Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*, 15 June 2009, p1.

> *it appears that a relationship can be established between the value of the right to take fish in the relevant fishery and the amount of the fee. On that basis, the Department's view is that the licence fees cannot be categorised as a tax.*[72]

2.14 The Committee agreed with the Department that it is critical to be able to establish a discernible relationship between the amount of the impost and the value of the right to access the relevant fishery for commercial purposes and all of the services associated with that access. However, the Committee was not of the view that this relationship could be established between the DBIF component of the access licence fees prescribed in the *Fish Resources Management Regulations 1995* and the right of access.

*Significance of the DBIF Component*

2.15 The SSO's advice failed to address the significance of the DBIF component of the access licence fees prescribed in the *Fish Resources Management Regulations 1995*, except to say that the DBIF has no statutory identity and that the types of expenditure to which the DBIF are applied are authorised under section 238(5) of the Act. The SSO appeared to view the DBIF purely as a mechanism through which fee revenue is to be expended, not as a purpose for which a component of the access licence fees is imposed.[73] Therefore, the SSO essentially ignored the existence of the DBIF component of access licence fees and provided its advice to the Department in relation to the access licence fees as a whole.

2.16 In the Committee's view, the existence of the DBIF component cannot be ignored simply because it is not provided for in the Act and its regulations. The reality is that the Executive Government charges commercial fishers an amount of money, at essentially a pre-determined rate, for the purpose of raising funds for the DBIF. While this amount is incorporated into access licence fees, it is still an easily identifiable and distinct component of these fees.

*Application of Funds vs Purpose for which Amount is Charged*

2.17 In the Committee's view, the SSO misunderstood the nature of the Committee's concerns about the DBIF component of managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995*:

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72 *Ibid.*

73 Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, pp5-6.

> *I do not consider that the matters on which the fees are expended, referred to in the Committee's letter, is of any significant assistance in considering whether the fee is to be characterised as a tax.*[74]

2.18 The Committee was concerned about the purpose for which the DBIF component is charged, not by the expenditure of the DBIF. This is because the nature of an impost (that is, whether it is a fee or a tax) is not necessarily determined by what is done with it after its receipt[75] but by the purpose for which it is charged. As the purpose of the DBIF in the *Cole/House Agreement* is stated in vague and broad terms,[76] the Committee undertook its own research into the actual expenditure of the DBIF in order to confirm and clarify that stated purpose. The results of that research, much of which were listed in the Committee's letter to the Department, are contained in paragraphs 1.35 to 1.37 of this Report.

2.19 To put it another way, the Committee was of the view that the raising of funds through the imposition of a DBIF component is unauthorised; it was not concerned with authorisation for the expenditure of the funds. Despite this, the SSO indicated that section 238(5) of the Act is authority for the funds in the FRDA, and therefore the DBIF, to be spent on the matters which are identified by the Committee in paragraphs 1.35 to 1.37 of this Report. The SSO then suggests that this legislative authority to **expend** FRDA (and DBIF) money on these matters is an indication that "*The Act expressly contemplates that the fees can be* ***imposed*** *for*" (emphasis added) such purposes.[77] The Committee did not agree with this reasoning.

2.20 Section 238(4) of the Act provides that the FRDA, and therefore the DBIF, is to be credited with the fees paid in respect of access licences, among other payments made to the Department. Section 238(5) then prescribes how the FRDA (and DBIF) funds may be spent:

> *(5) The Account may be applied by the Minister for all or any of the following purposes —*
>
> *(a) the purposes set out in sections 37(3), 41 and 55(4) and (5) of the* Pearling Act 1990*;*
>
> *(b) scientific, technological or economic research;*

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74 *Ibid*, p6.

75 *The General Practitioners Society in Australia and Others v The Commonwealth of Australia and Others* (1980) 145 CLR 532, at p562 per Gibbs J, with whom the remaining judges of the High Court agreed.

76 Refer to paragraph 1.33 in this Report.

77 Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, p6.

*(c)* *the exploration and development of commercial fisheries;*

*(d)* *to defray the costs of the administration and management of commercial fisheries;*

*(e)* *to purchase any authorisation, entitlement, boat or fishing gear for the benefit of the fishing industry, the fish processing industry or the aquaculture industry;*

*(ea)* *to provide payment in consideration for the surrender of an aquaculture lease;*

*(f)* *the purposes set out in section 115(2) for which an area may be set aside as a fish habitat protection area;*

*(fa)* *the care, control and management of the Abrolhos Islands reserve;*

*(g)* *the development of aquaculture;*

*(h)* *to conduct programmes and provide extension services relating to fisheries, fish processing or aquaculture, including publicity programmes;*

*(i)* *to conduct enforcement, operations and compliance programmes;*

*(j)* *to purchase capital assets required for the management or administration of fisheries, fish processing or aquaculture;*

*(k)* *to the credit of the Fisheries Adjustment Schemes Trust Account under the* Fisheries Adjustment Schemes Act 1987 *for the benefit of the fishing industry or the aquaculture industry;*

*(ka)* *in payment of compensation under section 12 of the* Fishing and Related Industries Compensation (Marine Reserves) Act 1997 *and of the costs of administering that Act;*

*(l)* *to assist the fishing industry or any body (whether incorporated or not) whose objects include the*

*provision of assistance to, or the promotion of, the fishing industry;*

*(m)* *in payment of any administrative costs under Part 14;*

*(ma)* *to defray any costs, incurred in the management of a marine park or marine management area under the* Conservation and Land Management Act 1984*, which are attributable to the authorisation under this Act or the* Pearling Act 1990 *of aquaculture or pearling activity in the park or management area;*

*(n)* *in payment of the costs of administering the Account;*

*(o)* *any other purpose for which moneys may be lawfully paid from the Account.*

2.21 The Committee agreed with the SSO that section 238(5) authorises the **expenditure** of money from the FRDA (and the DBIF) for the purposes prescribed in that section. However, in the Committee's view, this does not translate to the section authorising the **imposition** of charges through licence fees for those purposes, as was also suggested by the SSO. Instead, the Committee considered that:

- the power to impose managed fishery access licence fees in the *Fish Resources Management Regulations 1995* is derived from sections 256 and 258(zc) of the Act; and
- for the reasons stated in its preliminary view, these sections do not authorise the imposition of the DBIF component of the access licence fees because of its characterisation as a tax.

2.22 Section 238 of the Act is predicated on the lawful raising of funds through fees and other imposts. While section 238 dictates what is to be done with the funds once they have been raised, it does not empower the actual raising of the funds.

*Reliance on the Harper Case and Characterisation of the Fees as either Fees or Taxes*

2.23 The SSO considered that access licence fees prescribed in the *Fish Resources Management Regulations 1995* avoid characterisation as a tax because they represent "*the* quid pro quo *for the property* [that is, the fish] *which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder*".[78] The SSO relied heavily on the High Court's decision in *Harper v*

[78] Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, p6, quoting Mason CJ, Deane and Gaudron JJ in *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at p325.

*Minister for Sea Fisheries and Others* (1989) 168 CLR 314 (**Harper Case**) in reaching this view.

2.24 In the Harper Case, the public's common law right to fish for abalone in the tidal waters of Tasmania had been abrogated by legislation. People wishing to fish for abalone commercially and non-commercially were required to first obtain a licence. The High Court was required to consider whether the fee payable to obtain a commercial licence to fish for abalone in the coastal waters of Tasmania was a tax and a duty of excise. The fee was imposed, and the amount of the fee was prescribed, by regulations.

2.25 During the period in question, 1987 to 1999, the unit fee was calculated in various ways but the total fee was always imposed be reference to the weight of abalone which a licensee was entitled to take under his or her licence. For example, in 1987, the licence fee was $360 per tonne of abalone which the licensee was authorised to take, but there was no evidence of how this fee rate was conceived. In 1988, the unit fee was calculated as a percentage of the GVP for the entire commercial abalone industry divided by the total tonnage of abalone which all of the commercial abalone licensees were authorised to take. This unit fee was then multiplied by the number of tonnes of abalone which the licensee was authorised to take, in order to arrive at the total fee.[79] Apart from the 1989 fee, which was either $28,200 or $40,000 depending on the weight of abalone which the licensee was authorised to take, plus $100 for the issue of the licence,[80] there was no evidence that the fee was calculated for the purpose of recovering the costs of the department's administration of the licensing scheme. There was also no evidence of the fee incorporating a charge that was in the nature of the DBIF component in access licence fees prescribed in the *Fish Resources Management Regulations 1995*.

2.26 It was held unanimously that the fee was not a tax, and was therefore, not a duty of excise. In the leading judgment, Brennan J found that the licence amounted to a statutory right that is analogous to a *profit a prendre*[81]:

> *When a natural resource* [such as abalone] *is limited so that it is liable to damage, exhaustion or destruction by uncontrolled exploitation by the public, a statute which prohibits the public from exercising a common law right to exploit the resource and confers statutory rights on licensees to exploit the resource to a limited extent confers on those licensees a privilege analogous to a profit a prendre in or over the property of another. … A fee paid to obtain such a*

79 *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at pp327-328 per Brennan J.

80 *Ibid*, at p328 per Brennan J.

81 "*A right to take something off another person's land, or to take something out of the soil*": *Encyclopaedic Australian Legal Dictionary*, On-line, LexisNexis.

> *privilege is analogous to the price of a profit a prendre; it is a charge for the acquisition of a right akin to property.*[82]

2.27 His Honour cited the High Court's decision in *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 as authority for the proposition that:

- a charge for the acquisition or use of property;
- a fee for a privilege; and
- a fine or penalty imposed for criminal conduct or breach of statutory obligation,

are, like fees or payments for services rendered, special types of exaction which **may not** be taxes even though they exhibit the positive attributes[83] of a tax.[84] As Brennan J found the fee to be of the same character as a charge for the acquisition of property, he held that the fee did not bear the character of a tax and was not a duty of excise.[85] That is, Brennan J was of the view that the statutory right to take abalone for commercial purposes was the 'property' being acquired and for which payment was being made.

2.28 In their joint judgment, Mason CJ, Deane and Gaudron JJ, agreed generally with the reasons in Brennan J's judgment. However, Their Honours viewed the abalone as the 'property' which commercial licensees were acquiring for the price of the licence fee.[86]

2.29 In another joint judgment, Dawson, Toohey and McHugh JJ also agreed with Brennan J, but made the following further observations:

> ***Whilst the proper conclusion is that the amount paid for a commercial abalone licence is not a tax and, therefore, is not a duty of excise, that conclusion flows from all the circumstances of the case. Most important is the fact that it is possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence, namely the right to acquire abalone for commercial purposes in specified quantities.*** *In discerning that relationship it is significant that abalone constitute a finite but*

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82 *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at p335 per Brennan J.

83 The positive attributes of a tax are listed in the first three bullet points at paragraph 2.6 of this Report.

84 *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at p336 per Brennan J, quoting *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p467.

85 *Ibid*, at p336 per Brennan J.

86 *Ibid*, at p325 per Mason CJ, Deane and Gaudron JJ.

> *renewable resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence.*
>
> *However, the conclusion reached by Brennan J. by no means carries with it the consequence that no exaction of money can constitute a tax if it is demanded for the purpose of conserving a public natural resource. If such an exaction otherwise exhibits the characteristics of a tax it will properly be seen as such.* ***In particular, if the exaction "has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax":*** Air Caledonie International v The Commonwealth. … *Clearly the line between a price paid for the right to appropriate a public natural resource and a tax upon the activity of appropriating it may often be difficult to draw. But what is otherwise a tax is not converted into something else merely because it serves the purpose of conserving a natural public resource.*[87] (emphases added)

2.30 In applying the Harper Case to access licence fees prescribed by the *Fish Resources Management Regulations 1995*, the SSO only considered the fees which were increased by the Amendment Regulations, "*as any reduction in fees will only ameliorate rather than aggravate any difficulty* [which the Committee has] *with the manner in which fees are imposed.*"[88] This further demonstrated the SSO's misunderstanding of the Committee's concerns; the Committee was inquiring into the legislative authority for the imposition of the DBIF component of all access licence fees prescribed in the *Fish Resources Management Regulations 1995*, regardless of how the fee amounts had been affected by the Amendment Regulations.

2.31 The SSO's direct application of the Harper Case principles to the access licence fees in this inquiry assumes that all of the relevant facts associated with access licence fees are analogous to those for commercial abalone licences in the Harper Case. However, that approach ignores the fact that there is a fundamental difference in the way the fees are set. Unlike the fees currently under review, there was no evidence in the Harper Case that the commercial abalone licence fee:

- was an attempt by the Tasmanian Government to recover the costs of services provided to the commercial licensees, apart from the $100 charge for the issue of the licence in 1989; and
- included a component in the nature of the DBIF component.

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87 *Ibid*, at pp336-337 per Dawson, Toohey and McHugh JJ.

88 Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, p7.

2.32 Due to these distinguishing differences in facts, the Committee was of the view that the Harper Case principles cannot be applied to characterise the DBIF component of access licence fees as a fee at law.

2.33 As stated in paragraph 2.7 of this Report, the Committee was of the view that the DBIF component of access licence fees is not a fee because it cannot be characterised as a fee for service or a fee for a licence, and does not otherwise have a discernible relationship with the value of the privilege that is obtained by the licensee. The SSO minimised the importance of the 'discernible relationship' element in characterising access licence fees as either fees or taxes. In the Committee's view, this element must be present for any impost to be characterised as a fee.

2.34 The SSO suggested that Dawson, Toohey and McHugh JJ's view that the discernible relationship element is critical to an impost being characterised as a fee was a minority view in the Harper Case because it was only noted by three of the seven judges.[89] This assumes that the remaining four judges had a different view. In fact, Mason CJ, Deane, Gaudron and Brennan JJ simply did not raise this issue. Their Honours were satisfied that the impost in question was the price paid for what was acquired by the licensee, whether that be the right to take abalone or the abalone itself, implying that the discernible relationship was clear and self-evident. Dawson, Toohey and McHugh JJ raised the requirement for the presence of a discernible relationship and indicated that the requirement was clearly met.

2.35 Even if, contrary to the Committee's view, that aspect of the Dawson, Toohey and McHugh JJ judgment is considered to be a minority view, it can be persuasive authority. At the very least, the judges' comments are considered to be *obiter dicta*, which is defined as:

> [*Obiter dictum* means] … *a remark in passing. Judicial observations that do not form part of the reasoning of a case … . Unlike rationes decidendi, obiter dicta are not binding on lower courts nor subsequently on the court that makes them … . However, obiter dicta may be of persuasive authority; the obiter dicta of eminent judges on questions with which they are familiar are 'not without considerable weight' … .*[90]

2.36 Further, the Committee noted that Dawson, Toohey and McHugh JJ's judgment in the Harper Case was cited with approval in the High Court decision of *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133.[91]

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89 *Ibid*, pp4 and 6.

90 *Encyclopaedic Australian Legal Dictionary*, On-line, LexisNexis.

91 At p191 per Gaudron J, p233 per McHugh J and p283 per Gummow J.

2.37 The SSO's minimisation of the importance of the discernible relationship element also ignores the following comments in the joint judgment of all seven judges of the High Court in *Air Caledonie International v Commonwealth* (1988) 165 CLR 462:

> *a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a "fee for services". If the person required to pay the exaction is given no choice about whether or not he acquires the services and* ***the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax.***[92] (emphasis added)

2.38 Therefore, the Committee was of the view that a discernible relationship element must be present in order for an impost to be classified as a fee. It is the common factor in all fees, yet it may be evidenced in various ways.[93] For example, in relation to fees for identifiable services, the discernible relationship is established by reference to the cost of the services provided or the cost of providing the services. In relation to fees for access licences, there is a discernible relationship if the amount paid is *quid pro quo* for the property or the right obtained. In the Harper Case, which concerned commercial abalone access licence fees, no issue was made of how the fee was calculated.

2.39 Although the SSO doubted the importance of the discernible relationship element in the fee/tax dichotomy, it nevertheless attempted to demonstrate the presence of this element in the access licence fees which were increased by the Amendment Regulations. As already indicated, the SSO essentially ignored the significance of the DBIF component of access licence fees when it undertook this process. The conclusions of the SSO in relation to this issue are summarised as follows:

- Abalone Managed Fishery (a major managed fishery): this access licence fee is charged at 'X dollars' per kilogram of entitlement authorised under the licence.[94] The SSO concluded that this fee has a discernible relationship with the value of the rights obtained by the licensees because:

  (a) the fee is charged by reference to the weight of abalone which each licensee is authorised to take; and

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92 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p467.

93 This was recognised in *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, at p234 per McHugh J.

94 Refer to paragraphs 1.22 to 1.38 in this Report for an explanation of how access licence fees for managed fisheries are calculated and imposed.

(b) the fee reflects approximately seven to eight per cent of the market value of the abalone which may be taken under the authority of a licence.[95]

- Abrolhos Islands and Mid West Trawl Managed Fishery (a minor managed fishery): this access licence fee is charged at 'X dollars' per gear unit which the licensee is authorised to use. Unlike in the Abalone Managed Fishery, the SSO observed that there is no direct correlation between the fee and the value of the fish which may be taken under the licence. However, the SSO argued that this is not critical. It concluded that this fee has a discernible relationship with the value of the rights obtained by the licensees because the fee is calculated by obtaining a certain percentage of the fishery's GVP over a three-year reference period and then dividing that figure by the number of gear units available in the fishery.[96]

- Shark Bay Scallop Managed Fishery (a major managed fishery): this access licence fee is charged at 'X dollars' per licensed boat. The SSO observed that this fee is similar to the fee charged for the Abrolhos Islands and Mid West Trawl Managed Fishery in many respects. For instance, there is also no direct correlation between this fee and the value of the fish which may be taken under the licence. However, the SSO concluded that the discernible relationship element is present in this fee because:

  (a) the DBIF component is calculated as a percentage of the fishery's GVP for the reference financial year; and

  (b) the total amount of fees recoverable from licensees equates to six per cent of the fishery's GVP for the reference financial year.[97]

- West Coast Purse Seine Managed Fishery (a minor managed fishery): this access licence fee is charged at 'X dollars' per licence. The SSO concluded that the discernible relationship element is present in this fee because the total amount of fees recoverable from licensees equates to 2.97 per cent of the fishery's GVP for the reference period.[98]

2.40 The Committee was not persuaded by the SSO's attempts to demonstrate the presence of the discernible relationship element in access licence fees prescribed in the *Fish Resources Management Regulations 1995*. The arguments employed by the SSO focus on the form of the fees, such as the way in which they are charged or calculated,

95 Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, pp7-8.

96 *Ibid*, p9.

97 *Ibid*, p10.

98 *Ibid*, pp11-12.

rather than the reasons for which they are imposed. In the Committee's view, it is not sufficient merely to show that a fee is calculated by reference to the fishery's GVP or that the total amount recoverable through the fees can be quoted as a percentage of the fishery's GVP. After all, any figure, however it is arrived at, can be expressed as a percentage of another, unrelated figure. Based on the SSO's reasoning, recreational abalone licence fees would have a discernible relationship with the value of commercial access to the Abalone Managed Fishery because the total amount recoverable from these fees can be expressed as a percentage of the managed fishery's GVP. The Committee considered that such arbitrary comparisons are not, in themselves, sufficient to evidence the discernible relationship that is required for an impost to be classified as a fee; what is important is the purpose for which a fee is charged.

2.41 With respect to the access licence fees in this inquiry, the Committee acknowledges that the DBIF component for each managed fishery's access licence fee is calculated as a percentage of the fishery's GVP. However, the size of that percentage is determined purely by how much money is needed to achieve the minimum DBIF contribution for each financial year, a contribution which appears to have been set arbitrarily.[99] The DBIF component has a mathematical relationship to each managed fishery's GVP, but the purposes for which the component is raised have very little to do with each fishery or even managed fisheries as a whole.[100] The Committee could not regard the DBIF component as part of the price exacted for commercial access to the relevant managed fishery, especially where the Department has decided that the cost of the services it provides to licensees is a measure of the value of the privilege obtained by licensees. The DBIF component is something else entirely; it is an amount of money charged for the purpose of raising funds which the Minister can expend on "*items that are in the better interest of fisheries, and fish and fish habitat management*"[101].

2.42 In *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, which involved a fee imposed on persons entering Australia under the *Migration Amendment Act 1987*, all seven judges of the High Court analysed the purpose for which the relevant fee was imposed in order to determine whether the requisite discernible relationship existed. Their Honours found the fee to be a tax:

> *Indeed, one need do no more than refer to the second reading speech of the responsible Minister … to confirm that the moneys intended to be raised by the purported impost were not related to particular*

99 Refer to paragraphs 1.28 to 1.38 in this Report for a discussion about the Development and Better Interest Fund and an explanation of how the contribution is calculated.

100 Refer to paragraphs 1.35 to 1.37 of this Report for discussion about how the Development and Better Interest Fund is applied.

101 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004.php?0205, (viewed on 20 May 2009).

> *services to be supplied to particular passengers but were intended to provide, when paid into consolidated revenue, a general off-setting of the administrative costs of certain areas of the relevant Commonwealth Department, including, for example, the administrative costs involved in maintaining facilities for the issue of visas in overseas countries and "general administrative overheads". Therefore, the fee which s 34A purported to exact was, at least in so far as it related to passengers who were Australian citizens, a tax and the provisions of the section were, for relevant purposes, a law "imposing taxation".*[102]

2.43 The Committee was confident that its approach to characterising fees and taxes is consistent with that of the High Court.

2.44 The access licence fees in this inquiry have the appearance of a charge for the acquisition of property, or something akin to property. However, these fees do not automatically escape characterisation as taxes merely because of their form.[103] If an impost exhibits elements which are associated more with taxes than fees, it should properly be characterised as a tax. In the Committee's view, for all of the above reasons, the DBIF component of access licence fees is a tax, and as such, the fees as a whole are taxes.

*Characterisation of the Fees as Excise Duties*

2.45 The SSO identified the possibility that, if access licence fees amount to taxes, at least some of them could constitute duties of excise.[104] Under section 90 of the Commonwealth Constitution, the power to impose duties of excise is held exclusively by the Commonwealth Parliament. Any attempts by a State or Territory, whether under primary or delegated legislation, to impose such duties are invalid. Accordingly, and as recognised by the SSO,[105] the Act cannot authorise regulations which purport to impose duties of excise.

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102 At pp470-471.

103 For example, see *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p467; and *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at p332 per Brennan J, with whom the remaining judges of the High Court agreed. See also, paragraph 1.2 in the Executive Summary of Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009, pi.

104 Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, p2.

105 *Ibid*.

2.46 Duties of excise are a subclass of taxes. They have been defined by a majority of the High Court as follows:

> *duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods.*[106]

2.47 An impost cannot be characterised as a duty of excise unless it is first considered to be a tax.[107] When determining whether an impost is an excise duty, one must analyse both the form and the substance, or practical operation, of the impost.[108] The SSO acknowledged the correctness of this approach to characterising an impost as an excise duty,[109] but, as discussed below, failed to follow this approach.

2.48 Fish are considered 'goods' for the purposes of determining whether an impost is an excise duty.[110] The SSO was of the view that, at the very least, access licence fees which are imposed by reference to the quantity of fish which may be taken under the licence, if considered a tax, will "*probably*" be a "*tax on the production of fish; ie a duty of excise*". 'Flat fees' per licence and the fees imposed by reference to the quantity of fishing equipment which is authorised to be used were considered by the SSO to be less likely to be characterised as excise duties.[111]

2.49 Access licence fees for the Abalone Managed Fishery are an example of the fees which the SSO thought would be most susceptible to characterisation as duties of excise. These fees are imposed as 'X dollars' per kilogram of abalone which may be taken under the licence. On that reasoning, access licence fees for the West Coast Purse Seine Managed Fishery would be less likely to be deemed excise duties because they are charged at 'X dollars' per licence.[112] However, the Committee did not agree

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106 *Ha and Another v State of New South Wales and Others; Walter Hammond & Associates Pty Ltd v State of New South Wales and Others* (1997) 189 CLR 465, at p498 per Brennan CJ, McHugh, Gummow and Kirby JJ.

107 See, for example, *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314; and *Ha and Another v State of New South Wales and Others; Walter Hammond & Associates Pty Ltd v State of New South Wales and Others* (1997) 189 CLR 465, at p503 per Brennan CJ, McHugh, Gummow and Kirby JJ.

108 *Ha and Another v State of New South Wales and Others; Walter Hammond & Associates Pty Ltd v State of New South Wales and Others* (1997) 189 CLR 465, at p499 per Brennan CJ, McHugh, Gummow and Kirby JJ, and at p514 per Dawson, Toohey and Gaudron JJ.

109 Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, p2.

110 *MG Kailis (1962) Pty Ltd v The State of Western Australia and Another* (1974) 130 CLR 245.

111 Letter from Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, to Ms Pamela Yoon, Legal Officer, Department of Fisheries, 5 June 2009, p2.

112 Refer to paragraphs 1.22 to 1.38 in this Report for an explanation of how access licence fees for managed fisheries are calculated and imposed.

with this reasoning because it is based on the form rather than the substance or practical operation of the fee in question.

2.50 As already indicated in this Report, the Committee identified the DBIF component of access licence fees as a tax. The DBIF contribution for a particular managed fishery is calculated as a certain, essentially pre-determined, percentage of the relevant fishery's GVP from pre-determined, previous financial years. Once calculated, the liability to pay the DBIF contribution is 'shared' between the licensees in the fishery: the DBIF component of the access licence fee which is paid by each licensee is charged to the licensee according to various determinants, for example, the quantity of fish the licensee is entitled to take, the quantity of fishing equipment the licensee is entitled to use, or per licence.[113]

2.51 In the Committee's view, the SSO focused inappropriately on the method of imposition of the fees when it is the effect of the fees which is most important. For example:

- imposts can be, and have been, characterised as excise duties even if they are imposed as 'fees';[114] and

- it is not necessary for an excise duty to have a strict mathematical relationship with the quantity or value of the relevant goods,[115] even though many imposts which have been held to be excise duties exhibited this relationship.[116]

2.52 In the case of access licence fees, the DBIF component does have a mathematical relationship to the value of fish, as it is calculated as a percentage of the relevant managed fishery's GVP in pre-determined, previous financial years. However, this aspect of the DBIF component is only one, indicative but non-determinative, factor to be considered. The Committee was of the view that the DBIF component, regardless

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113 Refer to paragraphs 1.22 to 1.38 in this Report for an explanation of how access licence fees for managed fisheries are calculated and imposed. Refer to paragraphs 1.28 to 1.38 for more information about the Development and Better Interest Fund.

114 See, for example, *MG Kailis (1962) Pty Ltd v The State of Western Australia and Another* (1974) 130 CLR 245; *Capital Duplicators Pty Ltd and Another v Australian Capital Territory and Another (No 2)* (1993) 178 CLR 561; and *Ha and Another v State of New South Wales and Others; Walter Hammond & Associates Pty Ltd v State of New South Wales and Others* (1997) 189 CLR 465.

115 See, for example, *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, at pp302-304 per Dixon J; *MG Kailis (1962) Pty Ltd v The State of Western Australia and Another* (1974) 130 CLR 245, at pp250-251 per McTiernan J; *Hematite Petroleum Pty Ltd and Another v The State of Victoria* (1983) 151 CLR 599; *Capital Duplicators Pty Ltd and Another v Australian Capital Territory and Another (No 2)* (1993) 178 CLR 561, at pp602 and 616 per Dawson J; and *Ha and Another v State of New South Wales and Others; Walter Hammond & Associates Pty Ltd v State of New South Wales and Others* (1997) 189 CLR 465, at p510 per Dawson, Toohey and Gaudron JJ.

116 See, for example, *MG Kailis (1962) Pty Ltd v The State of Western Australia and Another* (1974) 130 CLR 245; *Capital Duplicators Pty Ltd and Another v Australian Capital Territory and Another (No 2)* (1993) 178 CLR 561; and *Ha and Another v State of New South Wales and Others; Walter Hammond & Associates Pty Ltd v State of New South Wales and Others* (1997) 189 CLR 465.

of how it is calculated and imposed, can be classed as a tax on the production of fish. Consequently:

- all access licence fees for managed fisheries, not just those charged at 'X dollars' per kilogram of entitlement, can be characterised as excise duties; and

- regulation 137 and Schedule 1, Part 3, item 3 of the *Fish Resources Management Regulations 1995*, to the extent that they impose access licence fees for managed fisheries, are invalid because they are in breach of section 90 of the Commonwealth Constitution.

2.53 The Committee noted that there have been High Court cases which similarly involved a 'fee' with a component which was considered to be a tax and an excise duty. The characterisation of the component as an excise duty resulted in the whole fee being deemed an excise duty, leading to the decision that the State or Territory legislation which imposed the fee was invalid.[117]

## 3 CONCLUSION

3.1 The Committee made the following findings:

**Finding 1: The Committee finds that the Development and Better Interest Fund component of managed fishery access licence fees is a tax and a duty of excise which is imposed under the guise of access licence fees.**

**Finding 2: The Committee finds that the managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995*, due to their Development and Better Interest Fund component, are taxes and duties of excise.**

[117] For example, *Capital Duplicators Pty Ltd and Another v Australian Capital Territory and Another (No 2)* (1993) 178 CLR 561; and *Ha and Another v State of New South Wales and Others; Walter Hammond & Associates Pty Ltd v State of New South Wales and Others* (1997) 189 CLR 465. Both of these cases involved fees which had a fixed component and a variable component that was calculated as a percentage of the value of the goods sold in a period prior to the licence period.

**Finding 3: The Committee finds that regulation 137 and Schedule 1, Part 3, item 3 of the *Fish Resources Management Regulations 1995*, to the extent that they impose access licence fees for managed fisheries:**

**(a) are not authorised or contemplated by the *Fish Resources Management Act 1994*, in breach of the Committee's Term of Reference 3.6(a); and**

**(b) are invalid for breaching section 90 of the Commonwealth Constitution.**

3.2 Accordingly, the Committee makes the following recommendations:

**Recommendation 1: The Committee recommends that the Government cease imposing the Development and Better Interest Fund component of the managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995* as soon as is practicable.**

**Recommendation 2: The Committee recommends that, if the Government does not agree with Recommendation 1, Schedule 1, Part 3, item 3 of the *Fish Resources Management Regulations 1995* be deleted by both Houses of Parliament pursuant to section 42(4)(a) of the *Interpretation Act 1984*.**

3.3 The Committee understood, from correspondence between its staff and the Department, that the fee-setting model under the Cole/House Agreement is being reviewed. As part of that review, the Committee urges the Government to consider and accept the findings and recommendations in this Report.

**Recommendation 3: The Committee recommends that the Government consider and accept the findings and recommendations in this Report as part of its review of the fee-setting model under *Future Directions for Fisheries Management in Western Australia*, released jointly by the Minister for Fisheries and the Chairman of the Western Australian Fishing Industry Council in September 1995.**

3.4 Further to the above findings and recommendations, the Committee advises the House that it will recommend the disallowance of any future regulations seeking to amend managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995* if the DBIF component of those fees continues to be imposed.

3.5 The Committee notes that the findings and recommendations made in this Report relate to managed fishery access licence fees prescribed in the *Fish Resources Management Regulations 1995* only. The Committee has made no comment as to the validity of any managed fishery access licence fees prescribed in management plans or other subsidiary legislation. However, the Committee is concerned that the findings in this Report may apply to such managed fishery access licence fees if they also contain a DBIF component.

**Mr Joe Francis MLA**

**Chairman**
**19 November 2009**

# APPENDIX 1

## *FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO. 3) 2009*

# *APPENDIX 1*

# *FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO.3) 2009*

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Fish Resources Management Act 1994

## Fish Resources Management Amendment Regulations (No. 3) 2009

Made by the Governor in Executive Council.

**1. Citation**

These regulations are the *Fish Resources Management Amendment Regulations (No. 3) 2009*.

**2. Commencement**

These regulations come into operation as follows —

(a) regulations 1 and 2 — on the day on which these regulations are published in the *Gazette*;

(b) the rest of the regulations — on the day after that day.

**3. Regulations amended**

These regulations amend the *Fish Resources Management Regulations 1995*.

**4. Schedule 1 Part 3 item 3 amended**

(1) In Schedule 1 Part 3 item 3(1) paragraphs (a) and (b) delete "10.62" and insert:

10.80

***Fish Resources Management Amendment Regulations (No. 3) 2009***

**r. 4**

(2) In Schedule 1 Part 3 item 3(2) delete "5 971.00" and insert:

6 049.00

(3) In Schedule 1 Part 3 item 3(9) delete "22 562.00" and insert:

18 792.00

(4) In Schedule 1 Part 3 item 3(19) delete "34 978.00" and insert:

33 912.00

(5) In Schedule 1 Part 3 item 3(20):

(a) in paragraph (a) delete "19 816.00" and insert:

27 223.00

(b) in paragraph (b) delete "2 569.00" and insert:

3 529.00

(6) In Schedule 1 Part 3 item 3(30) delete "63.01" and insert:

3.25

***Fish Resources Management Amendment Regulations (No. 3) 2009***

**r. 4**

(7) In Schedule 1 Part 3 item 3(31) delete "2 164.00" and insert:

2 235.00

By Command of the Governor,

P. CONRAN, Clerk of the Executive Council.

# APPENDIX 2

## COMMITTEE'S LETTER TO THE MINISTER FOR FISHERIES DATED 26 MAY 2009

# APPENDIX 2

# COMMITTEE'S LETTER TO THE MINISTER FOR FISHERIES, DATED 26 MAY 2009

**JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**

Your Ref: 300/98 [896]
Our Ref: 3806/11

Hon Norman Moore MLC
Minister for Fisheries
4th Floor, London House
216 St Georges Terrace
West Perth WA 6005

**By Facsimile: 9422 3001**

26 May 2009

Dear Minister

**Fish Resources Management Amendment Regulations (No. 3) 2009**

The Joint Standing Committee on Delegated Legislation considered the above amending regulations at its meeting on 18 May 2009 and resolved to write to you about its concerns regarding managed fishery access licence fees, some of which are affected by these amending regulations.

The Committee is concerned that there is a taxing element in managed fishery access licence fees which is not authorised or contemplated by the *Fish Resources Management Act 1994* (**Act**), the empowering Act of the amending regulations. The Committee is particularly concerned with the component of the fees which is raised for the purpose of contributing to the Development and Better Interest Fund (**DBIF**).

The Committee understands that the current method of fee-setting, which includes the DBIF contribution, was introduced by the *Cole/House Agreement* in 1995.[1] That agreement described the DBIF contribution as:

> *a return from commercial fishers to the Government, as representatives of the community, for application by the Minister for Fisheries to those items that are in the better interest of fisheries, and fish and fish habitat management.*[2]

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1 *Explanatory Memorandum* for the *Fish Resources Management Amendment Regulations (No. 3) 2009*; and http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004.php?0205, (viewed on 20 May 2009).

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EMAIL (GENERAL OFFICE): council@parliament.wa.gov.au

As an example of how the DBIF may be applied, the Committee understands that the commercial fishing industry's peak bodies, such as the Western Australian Fishing Industry Council, and other organisations, such as the Conservation Council of Western Australia, are partly funded by grants from the DBIF.[3] The Committee understands that these bodies are operated privately. While they work cooperatively with the Department of Fisheries, they are distinct from the Department.

The Department's website and *State of the Fisheries Report 2007/08* indicate that the DBIF is also used to fund, for example:

- scientific, technological or economic research;[4]
- fish stock assessments;[5]
- projects aimed at rebuilding fish stock, such as the Shark Bay snapper stocks in 1998/1999;[6]
- the employment of additional departmental staff on a case by case basis;[7]
- the development of strategies for the integrated management of fisheries;[8]
- the development of public policy;[9]
- trade and market development, such as the trade mission to Dubai in 2002/2003;[10]
- public education programmes;[11] and
- advertising campaigns, such as the 'Fish for the Future' campaign in 1999/2000, 2000/2001 and 2002/2003.[12]

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2 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004.php?0205, (viewed on 20 May 2009).

3 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

4 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009); and Government of Western Australia, Department of Fisheries, *State of the Fisheries Report2007/08*, 2008, p40.

5 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009); and Government of Western Australia, Department of Fisheries, *State of the Fisheries Report2007/08*, 2008, p42.

6 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

7 Government of Western Australia, Department of Fisheries, *State of the Fisheries Report2007/08*, 2008, p292.

8 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

9 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

10 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

11 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

12 http://www.fish.wa.gov.au/docs/pub/DBIF/dbif012004Page03.php?0205, (viewed on 21 May 2009).

In paying the access licence fee, a licensee is:

- obtaining the right to fish commercially in specified quantities in the particular managed fishery; and

- requesting the provision of services, and accepting the costs of the services, associated with access to the managed fishery and the licensing scheme, including the consideration of the licence applications, the issuing of the licences and the monitoring of compliance with licence conditions.

I refer you to the Committee's recently tabled 32nd report, which, among other things, sets out the Committee's position on generic issues relating to fees and taxes.[13] In the Committee's preliminary view, the DBIF contribution appears to be a tax on commercial fishers who operate in managed fisheries (that is, the licensees) because it is a compulsory exaction of money which is raised for public or governmental purposes and does not have the attributes of a fee in the legal sense.[14] The Committee is of the view that the DBIF contribution is not a fee for the following reasons:

- The DBIF contribution is not an attempt to recover the costs of delivering the access services and licensing services which are provided to the licensee, as is usually the case with a 'fee for service'[15] and a 'fee for licence'[16]. Instead, the DBIF contribution is, to paraphrase the *Cole/House Agreement*, a payment made by the licensee back to the community for the purposes of improving fisheries, and fish and fish habitat management. It appears to the Committee that the cost recovery component of the fee, as distinct from the DBIF component, is more akin to a 'fee for service' or a 'fee for licence'.

- The DBIF contribution does not have a discernible relationship with the value of the privilege acquired by a licensee on payment of the fee: that is, commercial access to the particular managed fishery and the services related to that access. This relationship must exist for an impost to be considered a fee at law.[17] In the Committee's view, the DBIF contribution does not satisfy this requirement because:

  a) it is used to help fund organisations (for example, the Conservation Council of Western Australia) and some activities (for example, the project to rebuild the Shark Bay snapper stock) which are not necessarily specific to a particular managed fishery

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13 Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009.

14 See *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, at p276 per Latham CJ; and *MacCormick v Federal Commissioner of Taxation; Camad Investments Pty Ltd v Federal Commissioner of Taxation* (1984) 158 CLR 622, at p639 per Gibbs CJ, Wilson, Deane and Dawson JJ.

15 See *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p470; and *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133, at p177 per Gleeson CJ and Kirby J, at pp190-191 per Gaudron J, and at pp232-235 per McHugh J.

16 See section 45A of the *Interpretation Act 1984*.

17 See *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, at p467; and *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314, at pp336-337 per Dawson, Toohey and McHugh JJ.

or even managed fisheries as a whole. It appears to the Committee that the DBIF is expended on whatever activities are, at the time, considered to be in the better interest of fisheries, and fish and fish habitat management, regardless of whether they are related to managed fisheries. In effect, by paying the DBIF contribution, a licensee is subsidising organisations and some activities which may not benefit that particular licensee;

b) the organisations which are partly funded by DBIF grants are operated privately, and are distinct from the Department. That is, a component of a licensee's fee is contributing to services and activities which are not offered by the Department which is exacting the fee; and

c) some of the organisations (for example, the Conservation Council of Western Australia) and activities (for example, public education programmes and the development of public policy) which are funded by the DBIF benefit the public at large, not just the licensees. Where a government agency undertakes activities which have a high degree of public benefit, the Productivity Commission has recommended that these activities be funded through general taxation revenue, as opposed to fees or authorised, specific-purpose taxes.[18]

As the DBIF component of the managed fishery access licence fees appears to be an unauthorised tax, the Committee's preliminary view is that the fees, as a whole, are not authorised or contemplated by the Act.

Due to the above concerns, the Committee resolved to move a protective notice of motion in the Legislative Council on 19 May 2009 to disallow the amending regulations. The reason for giving notice is to protect the Parliament's right to disallow the amending regulations should the Committee recommend disallowance, and to provide the Committee with additional time to scrutinise the amending regulations once further information is provided. The giving of notice should not be taken as indicating that the Committee has resolved to recommend disallowance at this stage.

The Committee requests your written response to its above-mentioned concerns and an explanation of how these concerns will be addressed prior to the next round of amendments to managed fishery access licence fees. It would be appreciated if your response is provided by **4pm on 5 June 2009**.

Notwithstanding the above comments, the Committee acknowledges the longstanding nature of the fee-setting model under the *Cole/House Agreement*, which the Committee understands is being reviewed, with an outcome anticipated in mid-2009. The Committee also notes that its concerns have ramifications for all managed fishery access licence fees, not just those amended by the amending regulations. Therefore, I advise that the Committee's actions in this matter were taken after giving considerable thought to the issues involved.

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[18] Commonwealth Government, Productivity Commission, *Cost Recovery by Government Agencies*, Report No 15, 16 August 2001, ppXXIX, XLII, XLIV, 16, 22, 33 and 163.

Please direct any queries you may have to the Committee's Advisory Officer, Ms Denise Wong, on 9222 7456 or dwong@parliament.wa.gov.au.

Yours sincerely

**Mr Joe Francis MLA**
**Chairman**

cc Mr Stuart Smith, Chief Executive Officer, Department of Fisheries
**Attention: Ms Pamela Yoon, Legal Officer, Legal & Registry Services Unit, and Mr Mike Cranley, Policy Officer, Department of Fisheries**
**By Facsimile: 9482 7389**

*Note that this document (including any attachments) is privileged. You should only use, disclose or copy the material if you are authorised by the Committee to do so. Please contact Committee staff if you have any queries.*

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# APPENDIX 3

## DEPARTMENT OF FISHERIES' LETTER TO THE COMMITTEE DATED 16 JUNE 2009

# APPENDIX 3

## DEPARTMENT OF FISHERIES' LETTER TO THE COMMITTEE DATED 16 JUNE 2009

Department of Fisheries
Government of Western Australia

Fish for the future

Our Ref: 300/98 [896]
Enquiries: Pamela Yoon (08) 9482 7280

The Chairman
Joint Standing Committee on Delegated Legislation
C/- Legislative Council Committee Office
18-32 Parliament Place
WEST PERTH WA 6005

**FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO. 3) 2009**

Please find enclosed the First Supplementary Explanatory Memorandum for the above regulation amendment, which has been prepared in response to the Chairman's (Joe Francis MLA) letter to the Minister for Fisheries dated 26 May 2009 seeking further information in relation to licence fees.

Should you have any further queries, please do not hesitate to contact me.

Yours faithfully

Pamela Yoon
Legal Officer
Legal & Registry Services Unit

16 June 2009

Atts

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## FIRST SUPPLEMENTARY EXPLANATORY MEMORANDUM

**For the JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**
C/- Legislative Council Committee Office
18-32 Parliament Place
WEST PERTH WA 6005

### *FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO. 3) 2009*

### Introduction

This First Supplementary Explanatory Memorandum is prepared in response to the Chairman's (Mr Joe Francis MLA) letter to the Minister for Fisheries ("the Minister") dated 26 May 2009 seeking further information in relation to licence fees.

### Information relating to licence fees and the Development and Better Interest Fund ("DBIF")

The Joint Standing Committee on Delegated Legislation ("the Committee") considers the DBIF component of the managed fishery access licence fees to be an unauthorised tax and therefore views the fees, as a whole, as not authorised or contemplated by the *Fish Resources Management Act 1994*.

The Department of Fisheries ("the Department") has sought legal advice from the State Solicitor's Office ("SSO") in relation to the matters raised by the Committee in their letter of 26 May 2009.

SSO's legal advice is attached. Please note that SSO has advised the Department that the legal advice can be provided to the Committee.

For the reasons outlined in SSO's advice, the Department does not consider that the DBIF component of the managed fishery access licence fees is an unauthorised tax. In determining the characterisation of an impost the Department considers that the issue to be determined is whether a relevant relationship can be established between the value of the right conferred by the licence and the amount of the fee. Once that relationship is established it does not matter on what the fee revenue is expended upon.

In applying SSO's advice to each of the managed fishery licence fees (in *Fish Resources Management Amendment Regulations (No. 3) 2009*), it appears that a relationship can be established between the value of the right to take fish in the relevant fishery and the amount of the fee. On that basis, the Department's view is that the licence fees cannot be categorised as a tax.

**Disclaimer**

This First Supplementary Explanatory Memorandum is for information only and is an aid to the understanding of the amendment and must not be substituted for the amendment nor is it to be made available to any person other than the members of the Committee on Delegated Legislation.

S J Smith
Chief Executive Officer

15 June 2009

Noted by Minister for Fisheries.
17/6/09

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**Date:** 5 June 2009

Pamela Yoon
Legal Officer
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**FISH RESOURCES AMENDMENT REGULATIONS (NO 3) 2009**

**Request for Advice**

1. You have requested my advice in relation to matters raised by the Joint Standing Committee on Delegated Legislation ("the Committee") in their letter dated 26 May 2009. In that letter the Committee expresses its concern as to the validity of the managed fishery access licence fees affected by the *Fish Resources Management Amendment Regulations (No 3) 2009* ("the Amendment Regulations"). The Committee has made a protective disallowance motion while asking your Department to address these concerns.

2. The Amendment Regulations increase and decrease various managed fishery access fees prescribed by the *Fish Resources Management Regulations 1995* ("the Regulations").

3. The Explanatory Memorandum to the Amendment Regulations indicates that the access fees consist of "two components", being:

   (a) cost recovery (major fisheries), or a contribution to cost recovery (minor fisheries); and

   (b) a contribution to the Development and Better Interest Fund (DBIF).

4. The DBIF is, according to the Committee's letter, used to fund a variety of public purposes relating to fishing but not necessarily related to particular licenses, and to provide funding to various non-government organisations (such as the Western Australian Fishing Industry Council and the Conservation Council of Western Australia).

5. The Committee has expressed the preliminary view that "the DBIF contribution appears to be a tax on commercial fishers who operate in managed fisheries (that

is, the licensees) because it is a compulsory exaction on money which is raised for public or government purposes and does not have the attributes of a fee in the legal sense".

**A Difference of Approach**

6. As emerges from the Committee's Report 32 in relation to various court fees, the Committee has taken an approach to questions of this kind which differs from that regarded as correct by this Office and the Solicitor General. Both the Solicitor General and I expressed the view in relation to court fees that the relevant question was not whether the impost was a tax but whether it was authorised by the relevant Act. The Committee did not accept that advice in its Report.

7. However, in the present case the question of whether the licence fees amount to a tax does, in my opinion, have greater significance. This is because at least some of the access fees, if they are taxes, are likely to constitute a duty of excise.

8. Section 90 of the Commonwealth Constitution prohibits the States from imposing duties of excise. Contravention of s. 90 would result in invalidity of the legislation purporting to impose the duty of excise. The majority judgment of the most recent decision of the High Court regarding s. 90 defined "duties of excise" as:

> "taxes on production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on importation of goods. Both are taxes on goods, that is to say, they are taxes on some step in dealing with goods".[1]

9. A duty of excise is therefore essentially a tax on goods. Fish are "goods" for the purpose of this definition.[2] Therefore, whether the impost is a "duty of excise" depends on whether the impost can be classified as a "tax" on the production, manufacture, sale or distribution of fish. That is a question of substance, not form.[3]

10. The amount of the fees provided for by the Regulations are calculated in different ways for different managed fisheries. In some cases the fee is calculated by reference to the amount of fish which may be taken, in others by reference to the gear authorised to be used and in others a flat fee is applied to the licence. At least in the first case, if the fee is to be characterised as a tax it will be probably a tax on the production of fish; ie a duty of excise.

11. Therefore, at least in the case of some of the fees, the question of whether the fee is a tax will assume critical importance. The *Fish Resources Management Act 1994* ("the Act") cannot validly authorise the imposition of a duty of excise, so the Regulations will be invalid to any extent that they purport to do so.

12. A "tax" has been traditionally defined as a compulsory exaction of money by a public authority for public purposes, which is enforceable by law and which is not

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1 *Ha v New South Wales* (1997) 189 CLR 465 at 499.
2 *MG Kailis Pty Ltd v Western Australia* (1974) 130 CLR 245.
3 Ibid at 498, 514.

a payment for services or goods rendered.[4] However, that definition is not exhaustive and an impost may still be a tax where it is imposed by a non-public authority for a non-public purpose.[5]

13. In this context it is important to bear in mind the following admonition of the High Court in *Air Caledonie International v The Commonwealth*[6]:

> "... the negative attribute - 'not a payment for services rendered' - should be seen as intended to be but an example of various special types of exaction which may not be taxes even though the positive attributes mentioned by Latham CJ are all present. Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterized as a tax notwithstanding that they exhibit those positive attributes. On the other hand, a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a 'fee for services'. If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax."

14. This passage illustrates that the fact that, in order to avoid an impost being characterised as a tax, it is not necessary that there be some identifiable "service". It also illustrates that the fact that the cost of providing the "service", or the cost of administering the licensing regime, is not necessarily critical. Rather, it may be appropriate to look to the relationship of the impost to "the value of what is acquired". This last point is further illustrated by the decision discussed under the following heading.

**Harper's Case**

15. The question of whether a fee for a licence to take fish, calculated by reference to the quantity of fish authorised to be taken under the licence, was a duty of excise was considered by the High Court in *Harper v Minister for Sea Fisheries*[7]. The Court held that the licence fee was not a tax, and therefore was not a duty of excise.

16. *Harper* involved a challenge to the validity of reg 17A of the *Sea Fisheries Regulations 1962* (Tas), which prohibited the taking of abalone from the waters of Tasmania without a commercial abalone licence. The fee for that licence was prescribed in a variety of ways over time, but always related to the amount of abalone which the licensee was authorised to take[8].

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4 *Matthews v Chicory Marketing Board (Vic)* (1983) 60 CLR 263 at 276.
5 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.
6 (1988) 165 CLR 462 at 467.
7 (1989) 168 CLR 314.
8 The various provisions for the calculation of the fee are set out at 168 CLR 327-8.

17. Mason CJ, Deane and Gaudron JJ expressed their views shortly in the following terms[9]:

> "The licensing system which the *Fisheries Act 1959* (Tas) and the *Sea Fisheries Regulations 1962* (Tas) establish in relation to abalone fisheries in Tasmanian waters is not a mere device for tax collecting. Its basis lies in environmental and conservational considerations which require that exploitation, particularly commercial exploitation, of limited public natural resources be carefully monitored, and legislatively curtailed if their existence is to be preserved. Under that licensing system, the general public is deprived of the right of unfettered exploitation of the Tasmanian abalone fisheries. What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold licences. The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. This privilege can be compared to a profit a prendre. In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content.
>
> In that context, the commercial licence fee is properly to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who, by their own choice, acquire or retain commercial licences. So seen, the fee is the *quid pro quo* for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder. It is not a tax. That being so, it is not a duty of excise."

18. The more detailed judgment of Brennan J was to similar effect. Dawson, Toohey and McHugh JJ agreed with Brennan J, subject to limiting the conclusion to the circumstances in which:

> "... it is possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence, namely, the right to acquire abalone for commercial purposes in specified quantities. In discerning that relationship it is significant that abalone constitute a finite but renewable resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence." [10]

19. It may be noted that only 3 members of the Court saw the relationship between the "amount paid and the value of the privilege conferred by the licence" as critical. That relationship was not based on the cost of administering the licensing system (a fact that was not agreed). It could only have been based on the relationship between the amount of the licence fee and the amount of abalone which could be lawfully taken. The stated case indicated that the meat price paid by processors to fishermen was between $13.12 and $17 per kg during the relevant period[11]. The initial fee was $360 per tonne of abalone which would have represented up to 3% of the value of the abalone taken. The final fee was $40,000 where the quantity of abalone authorised to be taken exceeds 15 tonnes, so that the percentage of value would be up to 16% (assuming sale price of $17/kg and licence entitlement of 15,001 kg). It should be noted that Dawson, Toohey

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9 Ibid at 325.
10 Ibid at 314.
11 Ibid at 317.

and McHugh did not undertake an analysis in these terms, but these facts illustrate the kind of relationship which existed.

**The Statutory Framework in Western Australia**

20. In comparing the regime in this State to that considered in *Harper*, it is appropriate to begin with the provisions of the Act relating to managed fisheries.

21. Section 54 of the Act authorises the Minister for Fisheries ("the Minister") to determine a management plan for a fishery which may, under s. 56(1)(b)(i) of the Act, declare the fishery to be a managed fishery. Under s. 58 of the Act, a management plan may prohibit a person from engaging in fishing or any fishing activity otherwise than in accordance with an authorisation.

22. Section 59 of the Act allows for a management plan to specify the capacity of a fishery or any part thereof. The capacity of the fishery can be specified by reference to the quantity of fish that may be taken and the quantity of fishing gear that may be used, as well as other means. Section 60 of the Act provides for a management plan to provide for a scheme relating to the extent of entitlements conferred by authorisations with respect to the fishery or part thereof.

23. Section 66 of the Act provides for the grant of an authorisation by the Executive Director of the Department of Fisheries for fishing in a managed fishery, if satisfied that the criteria specified in the management plan for the grant of the authorisation have been satisfied. Section 66(3) provides that the entitlement a person has under the authorisation may be limited by reference to matters including the quantity of fish that can be taken, the quantity of fishing gear that can be taken or used and a variety of other factors.

24. An authorisation generally remains in force for 12 months (s. 67), although the holder of an authorisation is generally entitled to a renewal of that authorisation under s. 68 of the Act. The limited circumstances where renewal may be refused are specified in s. 143 of the Act.

25. Section 257(zc) of the Act enables regulations to be made prescribing fees and charges for the purposes of the Act, including fees and charges in respect of the issue of authorisations.

26. Regulation 137 of the Regulations prescribes the fees for the grant or renewal of an authorisation by reference to Part 3 of Schedule 1 to the Regulations. Item 3 of Part 3 of Schedule 1 ("Item 3") provides for managed fishery licence fees.

**Significance of the DBIF**

27. It is apparent from the above discussion that neither the Act nor the Regulations provide for a "component" of the licence fee. The fee is simply charged for renewal of a managed fishery authorisation.

28. Under s. 238 of the Act the fees prescribed by Item 3 are to be applied to the "Fisheries Research and Development Fund" ("the FRDF"). The DBIF is a non-statutory part of the FRDF, and not a separate fund. Payments into and out of the

DBIF are the subject of particular accounting arrangements which separately identify those transactions.

29. The FRDF may be applied by the Minister for all or any of the purposes identified in s. 238(5) of the Act. Only one of those purposes is "to defray the costs of the administration and management of commercial fisheries". Other purposes of the DBIF described in the Committee's letter appear to be consistent with the purposes for which the FRDF can be applied.

30. If the expenditure of fee revenue on matters other than the costs of administration and management of managed fisheries causes the fee to be a tax, then this result would appear to follow from s. 238 of the Act. It is certainly not a product of the Regulations, which do not refer to the manner in which fee revenue is to be expended. The Act expressly contemplates that the fees can be imposed for those other purposes identified in s. 238(5) of the Act.

31. In any event, it seems clear from the explanatory memorandum that the licence fees do not avoid characterisation as a tax by virtue of being set at a level which is reasonably related to the cost of administering the licence provisions. At least in the case of major fisheries, the fees are set at a level intended to exceed the cost of managing and administering the fishery.

32. Rather, the fees will avoid characterisation as a tax on the basis that they represent "the *quid pro quo* for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder" (to quote Mason CJ, Deane and Gaudron JJ in *Harper*). On the view taken by Dawson, Toohey and Gaudron JJ in *Harper* (which I would regard as a minority view in that case) it may also be necessary to consider the "relationship between the amount paid and the value of the privilege conferred by the licence". On either view, the purposes for which revenue derived from licence fees is expended is irrelevant. Any relevant relationship must be between the value of the right conferred by the licence and the amount of the fee. Once that relationship, if necessary, is established it does not matter what the fee revenue is proposed to be expended upon.

33. Therefore, I do not consider that the matters on which the fees are expended, referred to in the Committee's letter, is of any significant assistance in considering whether the fee is to be characterised as a tax. That expenditure is authorised by s. 238(5) of the Act, and the characterisation of the fee as a charge in the nature of a royalty or *profit a prendre* is not affected by that expenditure.

**Characterisation of the Fees**

34. In considering whether the licence fees constitute a charge of the kind held not to constitute a tax in *Harper*, it is necessary to separately consider the fees imposed in respect of different management plans. This is because it is necessary to consider the extent to which a management plan restricts the general public right of fishing and, on the view taken by Dawson, Toohey and Gaudron JJ in *Harper*, the relationship between the amount of the fee and the value of the privilege conferred by the authorisation, which may change between management plans.

35. Because the Committee is concerned with the Amendment Regulations, it is appropriate to confine my consideration to the fees affected by the Amendment Regulations. I will also confine my consideration to the fees which are increased by the Regulations, as any reduction in fees will only ameliorate rather than aggravate any difficulty with the manner in which fees are imposed. The fees which are increased are those imposed for the grant or renewal of an authorisation under:

(a) The Abalone Managed Fishery (an increase of 1.69%);

(b) The Abrolhos Islands and Mid-west Trawl Managed Fishery (an increase of 1.31%;

(c) The Shark Bay Scallop Managed Fishery (an increase of 37.37% or 37.38%);

(d) The West Coast Purse Seine Managed Fishery (an increase of 3.28%).

**The Abalone Managed Fishery**

36. Clause 3 of the *Abalone Management Plan* ("the Abalone Plan") declares waters off the Western Australian coast to be the Abalone Managed Fishery. Clause 4 of the Abalone Plan prohibits fishing for abalone in the fishery other than in accordance with the Plan and under the authority of a licence. Contravention of that provision is an offence: see clause 23A of the Abalone Plan and s. 74 of the Act. The Plan provides for the allocation of units of entitlement to licence holders, which under clause 17A of the Plan limit the amount of abalone which can be taken from the Fishery under the authority of a licence.

37. Prior to amendment, Item 3(1) provided for the fee to be as follows:

| | | | |
|---|---|---|---|
| 3. | Managed fishery licence fees | | |
| | (1) | Abalone Managed Fishery, the sum obtained by multiplying the total kg of entitlement conferred by the licence (but excluding any entitlement transferred to or from the licence under section 141 of the Act) by the fee for each kg, as follows — | |
| | | (a) for greenlip abalone, per kg ..... | 10.62 |
| | | (b) for brownlip abalone, per kg ..... | 10.62 |
| | | (c) for Roe's abalone, per kg ..... | 3.30 |

38. Regulation 4(1) of the Amendment Regulations increases the fee provided by Item 3(1)(a) and (b) to $10.80. I am instructed that the licence fees reflect approximately 7-8% of the market value of the abalone that may be taken under the authority of the licence.

39. In my opinion the comments in *Harper* of Mason CJ, Deane and Gaudron JJ, as well as Brennan J, referred to above, are equally apposite to the licence fees imposed on the grant or renewal of a licence for the Abalone Managed Fishery. The general public is deprived of its former right to unfettered exploitation of the Western Australian abalone fishery. What was formerly in the public domain is

converted into the exclusive but controlled preserve of those who hold licences. The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. In that context, the commercial licence fee is properly to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who, by their own choice, acquire or retain commercial licences. So seen, the fee is the *quid pro quo* for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder. It is not a tax.

40. If one were to adopt the (in my view minority) approach of Dawson, Toohey and McHugh JJ and also ask whether the fee has a relationship to the value to the holder of the rights conferred by the licence, an affirmative answer to that additional question must be given. Imposed by reference to the fish which a licence authorises the holder to take, at a rate of 7-8% of the market value of those fish, the fee has a relationship to the value to the holder of the rights conferred by the licence. In my opinion, the Western Australian provisions referred to above are not materially distinguishable from those held valid in *Harper*. In my opinion they do not impose a tax.

**The Abrolhos Islands and Mid-west Trawl Managed Fishery**

41. The *Abrolhos Islands and Midwest Trawl Management Plan* ("the Abrolhos Plan") applies to the use of trawl nets to take prawns and scallops in the waters described in the Schedule to the Abrolhos Plan. Clause 4 of the Abrolhos Plan prohibits a person from taking prawns or scallops in the fishery other than in accordance with the plan and under the authority of a licence. The fishery is closed to further licences (clauses 6 and 7), although both licences and gear units are transferable (clause 13).

42. Clause 9A of the Abrolhos Plan defines the capacity of the fishery by reference to the "maximum amount of headrope length of net ... that may be used by all the licenses in the waters of the fishery". A "headrope" is defined to mean " the rope onto which is attached the upper half of the mouth of the trawl net". "Headrope length" is defined to mean the distance measured along the headrope from where the net attaches to one end of the headrope to where it attaches to the other end of the headrope.

43. Clause 8(f) of the Abrolhos Plan requires a licence to specify the number of gear units conferred by the licence. Clause 10(6) of the Plan provides that, subject to one exception, a boat, when being operated in the in the waters of the fishery shall not be used to take, or attempt to take, prawns or scallops with more net measured at the headrope than the amount specified in gear units on the licence for that boat and one try net. A "gear unit" is 7.31 metres of net measured at the headrope. Contravention of clause 10(6) of the Plan is an offence: see clause 20A of the Abrolhos Plan and s. 74 of the Act.

44. The management arrangements for the 2007 season are described in the current *State of the Fisheries Report 2007/08* ("the SoF Report") as constituting an "input control system" in the following terms:

> "The AIMWTF operates under an input control system, with restrictions on boat numbers and trawl gear size as well as seasonal closures and significant spatial closures protecting all near-shore waters. The fishery operates to a threshold catch level to cease fishing for the season at an agreed minimum catch rate of 250 kg (meat weight) per 24 hours trawling (fleet average).
>
> The fishing gear (net size) in this fishery is unitised, with one headrope unit being equivalent to 4 fathoms (7.32 m) – a total maximum headrope length of 184 fathoms.
>
> In 2007, the scallop season opened on 17 April and closed on 17 June."

45. Item 3(2), prior to amendment, fixed the fee for the grant or renewal of a licence under the Abrolhos Plan at $5,971 per gear unit conferred by the licence. Regulation 4(2) of the Amendment Regulations increases this fee to $6,049 per gear unit conferred by the licence.

46. I am instructed that the fee per gear unit for the current year is calculated as 3.65% of the average annual Gross Value of Production (GVP) in the fishery over the 2005/05, 2005/06 and 2006/07 financial years, divided by the number of gear units in the fishery.

47. The comments of Mason CJ, Brennan, Deane and Gaudron JJ in *Harper* are again apposite here. The commercial exploitation of prawn and scallops is limited to those who hold a licence, which confers an entitlement to use a fixed amount of trawl net. The licence fee is the price paid for that benefit.

48. To the extent that it is necessary to look for a relationship between the amount of the fee and the benefit conferred, that relationship is found by virtue of the imposition of the fee by reference to the number of gear units conferred by the licence. The gear units are the measure of entitlement conferred by the Abrolhos Plan, and are transferable under that plan. While there is no direct correlation between the value of fish which may be taken under the licence and a fee set by reference to gear units, that does not appear to me to be critical. There was no direct correlation in *Harper* where the fee was a set amount for a licence which conferred an entitlement of more than 15 tonnes of Abalone. The relationship between gear units and the capacity to take fish forms the basis for the regulation of the fishery. The relationship also exists in the calculation of the licence fee as a percentage of the average annual GVP of the fishery over a 3 year period.

49. Having regard to all of the above matters, in my opinion the fee as amended by the Amendment Regulations is not to be characterised as a tax.

**The Shark Bay Scallop Managed Fishery**

50. The Shark Bay Scallop Management Plan ("the Shark Bay Plan") applies to scallops in the specified waters of Shark Bay. Clause 5 of the Shark Bay Plan prohibits a person from fishing for scallops in the fishery other than in accordance with the plan and under the authority of a licence. Clause 6 provides that a person shall not operate in a fishery unless the person holds a professional fisherman's licence issued under the Regulations and is operating from an authorised boat. An authorised boat may be a class A boat or class B boat depending on the

endorsement on the boat licence. The fishery remains closed to further licences (clause 7), although licences may be transferred (clause 17).

51. Under clause 11 of the Shark Bay Plan, class A boats and class B boats are under different restrictions as to the nets which may be used. Clause 11(1) provides that a class A boat may use a maximum of two 7-fathom nets and one try net. A class B licence as a maximum of two, three or four 8-fathom lengths (as endorsed on the licence) and one try net. Class B boats are allocated a "net entitlement", being the total number of nets the boat is authorised to use, which is transferable under clause 17 of the Shark Bay Plan. The boat may use that many 8-fathom nets, or it may use four 6-fathom nets when the licence entitlement is three 8-fathom nets (Clause 11(1)(b) and (4)).

52. The SOF Report describes, at page 100, the input controls applied to the fishery. Total scallop landings for both A and B class boats were 2,273 tonnes whole weight, of which A class boats landed 1,562 tonnes and the B class boats 711 tonnes.

53. I understand that the reason for the difference in the amount of scallops landed by A and B class boats is that the 14 A class boats only target scallops, while the 27 B class boats also have Shark Bay Prawn Fishery licences, and take scallops as a secondary product. The fees are set by reference to historical catch levels, so that A class licences are charged 80% of the total amount of fees sought to be recovered from the fishery, while B class licences are charged 20% of that amount.

54. Prior to the amendment, item 3(2) provided a renewal fee of $19,816 per boat for a class A boat and $2,569 per boat for a class B boat. Regulation 4(5) of the Amendment Regulations increases these fees to $27,223 and $3,529 respectively.

55. I am instructed that the total amount of fees sought to be recovered from the Fishery was calculated as the total administration costs relating to the fishery plus 0.78% of the GVP of the fishery in 2006/07, which was $8,054,688. The costs were $413,575, and 0.78% of GVP was $62,827, so that the total amount sought to be recovered from the fishery was $476,402. 80% of this amount is equally divided among the 14 A class licence holders, while 20% is divided amoung the 27 B class licence holders. The total amount of fees to be recovered from the fishery amount to 6% of GVP of that fishery in 2006/07.

56. The Shark Bay Plan is similar in may respects to the Abrolhos Plan, except that the capacity of the fishery is not defined by reference to gear units. Different limitations on fishing gear apply to class A and B boats, as indicated above.

57. However it remains the case that the licence fee can be described as the price paid for the benefit of participating in the fishery from which all others are excluded. Consistently with the approach of Mason CJ, Brennan, Deane and Gaudron JJ in *Harper*, the fees do not constitute a tax. On the approach of Dawson, Toohey and McHugh JJ there is a relationship between the value of the benefit conferred by the licence and the amount of the fee, described above.

58. Having regard to all of the above matters, in my opinion the fee amended by the Amendment Regulations is not to be characterised as a tax.

**West Coast Purse Seine Managed Fishery**

59. The *West Coast Purse Seine Management Plan* ("the West Coast Plan") applies to the fishery of certain kinds of small pelagic fish by means of lampara nets or purse seine nets in scheduled waters. Subject to limited exceptions, a person may not take small pelagic fish in the fishery except in accordance with the Plan. Only a closed category of licensed boats may operate in the fishery, which are subject to certain restrictions including as to the type but not the number of nets which may be used.

60. The boundaries and management arrangements for the fishery were described at page 65 of the SoF Report in the following terms:

> "**Boundaries**
>
> The fishery operates between 33° S latitude and 31° S latitude (the Perth metropolitan fishery) and there are also two purse seine development zones currently operating north and south of this area. The Southern Development Zone, for which there are three operators, covers the waters between 33° S latitude and Cape Leeuwin. The Northern Development Zone covers the waters between 31° S latitude and 22° S latitude and consists of one active operator (whose catch is not currently reported for confidentiality reasons). The Perth metropolitan fishery mainly targets pilchards and sardinella, the Southern Development Zone targets pilchards and the Northern Development Zone targets sardinella.
>
> **Management arrangements**
>
> This fishery is managed though a combination of input and output controls incorporating limited entry, capacity setting and controls on gear and boat size.
>
> Currently a combined total allowable catch (TAC), covering both the Perth metropolitan fishery and the Southern Development Zone, is set for pilchards and another for other small pelagic species. These TACs are divided amongst the fishery participants, but are not able to be traded. For the 2006/07 licensing period (1 April 2007 – 31 March 2008) there was a TAC of 2,328 t for pilchards, with another 672 t TAC allowed for the other small pelagic species (including sardinella) permitted to be taken by licensees. The Northern Development Zone has a separate TAC."

61. The manner in which fees are calculated for this fishery is, on my instructions, the subject of an agreement between the State and the Western Australian Fishing Industry Council. Under that agreement, the annual average GVP for 2000/01 to 2002/03 is used as a basis for the calculation of the fee, with an adjustment for inflation. The total amount sought to be recovered from the fishery is 2.97% of that average annual GVP with an adjustment for inflation. The total amount to be received is equally divided between the 12 licence holders.

62. Again, the licence fee can be described as the price paid for the benefit of participating in a fishery from which all others are excluded. Consistently with the approach of Mason CJ, Brennan, Deane and Gaudron JJ in Harper, the fees do not constitute a tax. On the approach of Dawson, Toohey and McHugh JJ there is

a relationship between the value of the benefit conferred by the licence and the amount of the fee, described above.

63. Having regard to all of the above matters, in my opinion the fee amended by the Amendment Regulations is not to be characterised as a tax.

**Conclusion as to the Validity of the Amendment Regulations**

64. In my opinion none of the above fees are taxes, so that none of the fees can be said to constitute a duty of excise which the State is prohibited from imposing by s. 90 of the Constitution. It is therefore unnecessary to consider whether the fees, if taxes, should be characterised as taxes on the production of fish in a manner prohibited by s. 90 of the Constitution. The fees are otherwise set in a manner which is authorised by the Act.

**ROBERT MITCHELL SC**
**DEPUTY STATE SOLICITOR**

# APPENDIX 4

## EXPLANATORY MEMORANDUM - *FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO. 3) 2009*

# APPENDIX 4

## EXPLANATORY MEMORANDUM - *FISH RESOURCES MANAGEMENT AMENDMENT REGULATIONS (NO. 3) 2009*

**EXPLANATORY MEMORANDUM**

**For the JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION**
Parliament House
PERTH WA 6000

***Fish Resources Management Amendment Regulations (No. 3) 2009***

**Outline of the purposes of the amendments**

The purpose of the amendments to the *Fish Resources Management Regulations 1995* ('FRMR') is to amend the fee payable to renew a managed fishery licence in a number of managed fisheries.

These fisheries include the Abalone Fishery, the Shark Bay Scallop Fishery, the Shark Bay Prawn Fishery, the Exmouth Gulf Prawn Fishery, the Abrolhos Islands and Mid-West Trawl Fishery, the West Coast Purse Seine Fishery and the West Coast Demersal Gillnet and Demersal Longline Fishery.

**Identification of the sections of the statute under which the subsidiary legislation is made**

The regulations have been amended under sections 256 and 258(zc) of the *Fish Resources Management Act 1994* ('FRMA').

**Purpose and effect of, and justification for, the amended regulations**

General

Commercial managed fishery and pearling access fees consist of two components –

1. cost recovery (major fisheries), or a contribution to cost recovery (minor fisheries); and

2. a contribution to the Development and Better Interest Fund (DBIF).

The annual fees for the major and minor fisheries are set in accordance with the 1995 Cole House Cost Recovery Agreement. In addition, there is a further agreement with the Western Australian Fishing Industry Council (WAFIC) in respect to setting fees for the minor commercial fisheries, where the minor fisheries fees are calculated based on the value of their Gross Value of Production (GVP) for fixed three-year periods.

Under the WAFIC agreement, the GVP's of minor commercial fisheries for the period 2000-01 to 2002-03 (inclusive) would be used as a basis for calculating fees for financial years from 2005-06 to 2007-08. An annual premium to adjust for inflation and salary increases is then added to the cost recovery component of the fees.

The current WAFIC agreement was to have expired with the setting of the 2008-08 fees but has been extended for 12 months pending the outcomes of the review of the Cole House Agreement.

Development and Better Interest Fund (DBIF)

*Cost Recovered Fisheries*

The minimum contribution to the DBIF required from the managed fisheries and the pearling industry on the basis agreed between Government and the Western Australian Fishing Industry Council is 0.65% of the Gross Value of Production (GVP) or $3.5 million, whichever is the larger amount. The GVP values used are based on the financial year two years previous to the licensing period under consideration.

The 2008-09 DBIP contribution by the commercial managed fisheries and pearling is based on the 2006-07 GVP data. In that year, the GVP of all managed commercial fisheries and pealing is valued at $449,451,363. At 0.65% of GVP, this would result in a total contribution of $2.917 million, a shortfall of $583,000.

Setting the contribution level at 0.78% of GVP should result in total revenue to DBIF of $3,505,721.

The Minister has approved that the 2008-09 DBIF contribution for the managed fisheries and pearling be set at 0.78% of the 2006-07 GVP.

This is an increase in the DBIF rate from the previous year, where the contribution rate was set at 0.685%. However, it needs to be noted that the previous years fees and DBIP contribution were calculated on the 2005-06 GVP valued at $511,694,854, which was 12% higher than the 2006-07 GVP value.

*Minor commercial fisheries*

Setting the 2008-09 DBIF rate at 0.78% would result in a contribution of $3,209,148 (only) from the cost recovered fisheries and pearling, with the minor fisheries expected to contribute the outstanding balance to make $3.5 million. However, under the current WAFIC agreement, the minor fisheries DBIF is fixed at 0.662% for the term of the agreement, excluding the Abrolhos Islands and Mid-West Trawl Fishery. Given this, the minor fisheries would only (notionally) contribute $215,879 to DBIF instead of $296,572, calculated at 0.78%, which represents a notional shortfall of $80,693.

However, with the inclusion of the Abrolhos Islands and Mid-West Trawl Fishery DBIF, calculated at $59,465, the actual minor fisheries contribution will be $275,344 so the shortfall on the required $3.5 million amount is $21,228. The Department of Fisheries is to absorb this shortfall to maintain the minimum $3.5 million annual DBIF contribution. There have been annual shortfalls each year with the current WAFIC agreement and it is intended to remedy this situation when a new minor fisheries fee setting agreement is negotiated with WAFIC.

2008-09 Access Fees

Fully Cost Recovered Fisheries

*Abalone Fishery*

An access fee setting Memorandum of Understanding is in place for the Abalone Fishery and is due to expire 2008-09.

*Shark Bay Prawn, Shark Bay Scallop and Exmouth Gulf Prawn Fisheries*

The total amount to be recovered from the Shark Bay Scallop Fishery has increased from $346,786 in the 2007-08 licensing year to $476,402 in the current 2008-09 licensing year. This is an increase of approximately $130,000 and will result in a 37% increase in the 2008-09 licence fee.

This increase is a consequence of an approximate:

- $70,000 increase in the salaries component for agreed service delivery in management and research minimising resource sharing conflicts through trialling square mesh cod ends;

- $31,000 in the DBIF contribution, as the GVP increased from $4.6 million in 2005-06 to $8 million in 2006-07; and

- $29,000 variance in the under and over recoveries (i.e. $25,000 was repaid to the licensees as an over recovery in the 2007-08 licensing year, and $4,000 is to be recouped as an under recovery in the 2008-09 licensing year).

Minor Commercial Fisheries

In 2004, the three-year WAFIC agreement was approved for the setting of fees for minor fisheries (excluding the Abrolhos Islands and Mid-West Trawl Fishery). Under the agreement, the GVP of minor commercial fisheries for the period 2000-01 to 2002-03 (inclusive) is used as a basis for calculating fees for financial years from 2005-06 to 2007-08. An annual premium to adjust for inflation and salary increases is then added to the cost recovery component of the fees. The DBIF component is also fixed at an approved rate of 0.662%, based on the GVP for the period 2000-01, 2001-02 and 2002-03.

The WAFIC agreement has been extended to include the 2008-09 fees pending the review of the Cole House Agreement.

In November 2005, it was approved that the cost recovery component for the Abrolhos Islands and Mid-West Trawl Fishery be the (average) percentage of GVP paid by cost recovered fisheries multiplied by a rolling three-year average GVP for the Abrolhos Islands and Mid-West Trawl Fishery.

Based on this formula, in 2008-09, the Abrolhos Islands and Mid-West Trawl Fishery is to pay a DBIF contribution based on 0.78% of the average GVP from 2004-05 to 2006-07.

**Effect of the amended regulations**

Managed fishery licence fees in the affected fisheries have increased or decreased as specified below –

| Fishery | 2007-08 Fee | Proposed 2008-09 Fee | Percentage increase/decrease |
|---|---|---|---|
| Abalone Managed Fishery | $10.62 per Greenlip or Brownlip kg | $10.80 per Greenlip or Brownlip kg | 1.69% inc |
| | $3.30 per Roe's kg | $3.30 per Roe's kg | |
| Abrolhos Islands and Mid West Trawl Mgd Fishery | $5,971 per gear unit | $6,049 per gear unit | 1.31% inc |
| Exmouth Gulf Prawn Mgd Fishery | $22,562 per licence | $18,792 per licence | 16.71% dec |
| Shark Bay Prawn Mgd Fishery | $34,978 per licence | $33,912 per licence | 3.05% dec |
| Shark Bay Scallop Mgd Fishery | $19,816 per Class A licence | $27,223 per Class A licence | 37.38% inc |
| | $2,569 per Class B licence | $3,529 per Class B licence | 37.37% inc |
| West Coast Demersal Gillnet and Demersal Longline Mgd Fishery | $63.01 per unit | $3.25 per unit | 94.84% dec |
| West Coast Purse Seine Mgd Fishery | 2,164 per licence | $2,235 per licence | 3.28% inc |

**Consultation**

*Abalone*

The *Memorandum of Understanding 2006/07 to 2008-09* between the WA Abalone Industry Association and the Department of Fisheries to support fixed fee setting for the Abalone Fishery, was finalised and signed off on 9 August 2006.

*Shark Bay Prawn, Shark Bay Scallop and Exmouth Gulf Prawn Fisheries*

Meetings between the Department and industry representatives to discuss the 2008-09 budgets for the Exmouth Fishery was held on 25 November 2008, and for the Shark Bay Prawn and Scallop Fisheries was held on 2 December 2008.

*Shark Bay Prawn, Shark Bay Scallop and Exmouth Gulf Prawn Fisheries*

Meetings between DoF and industry representatives to discuss the 2008-09 budgets for the Exmouth Fishery was held on 25 November 2008, and for the Shark Bay Prawn and Scallop Fisheries was held on 2 December 2008.

Industry members agreed to support the revised budget to the extent of hours and the related direct costs but resolved not to support the existing cost recovery model, the allocation of overhead costs and the related licence fees. The Exmouth Gulf budget was agreed with a reduction in budgeted activity.

*Abrolhos Islands and Mid-West Trawl Fishery*

Correspondence on the approved means to determine the Abrolhos Islands and Mid-West Trawl Fishery was sent to WAFIC and the West Coast Trawl Association in July 2005, and was subsequently supported by WAFIC.

*West Coast Purse Seine and West Coast Demersal Gillnet and Demersal Longline Fisheries*

The general minor fisheries agreement between DoF and WAFIC was discussed through the Integrated Project and Activity Costing Committee in late 2004 and a continuation of the arrangement, which has now been extended to include the 2008-09 fees, was supported by WAFIC.

**Disclaimer**

This Explanatory Memorandum is for information only and is an aid to the understanding of the amending regulations. It must not be substituted for the amending regulations nor is it to be made available to any person other than the members of the Committee on Delegated Legislation.

**S J Smith**
**CHIEF EXECUTIVE OFFICER**

**28 January 2009**

**Noted by the Minister for Fisheries**

29/1/09