PEARL PRODUCERS ASSOCIATION
Australian South Sea Pearls

SUBMISSION:

Standing Committee on Public Administration – Inquiry into the issue of Property Rights

31 July 2019

Attn: Ms Kristina Crichton, Committee Clerk. Standing Committee on Public Administration Parliament House, 4 Harvest Terrace, West Perth, WA 6005

via email:
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1. BACKGROUND

1.1 The Pearl Producers Association

The Pearl Producers Association (PPA) is the peak industry representative body for the *Pinctada maxima* pearling industry licensees regulated under the Western Australian Pearling Act (1990). PPA membership includes 100% of all pearl licensees from both WA and the NT, covering all licenses issued under the legislation that operate in Western Australia. At peak production The Pearling Industry has up to 150 vessels (of various sizes and functions) conducting pearling operations throughout Northern Australia in both open water and on aquaculture farms within the North-west Bioregion. The PPA represents pearling licensees on a range of issues including:

- Legislation, Regulation and Policy Development
- Resource Access Policy
- Sustainable Resource Management and Ecological Sustainable Development
- Work Safety and Training Policy

The Pearling Industry is the only pearling industry utilising wild oysters for the production of Australian south sea pearls, and relies almost exclusively on oysters from the *P. maxima* fishery at Eighty Mile Beach south of Broome which "*is the only remaining significant wild-stock fishery for [wild P. maxima] pearl oysters in the world*."[1]

At the outset it is important to highlight that the Australian pearling industry:

- Requires close integration between fishing activities and preliminary culture activities at various stages of the process of producing pearls (without this integration it is not possible to culture pearls)
- Is proven to be an industry with benign impacts on the environment.[2] It has a long history of responsible and beneficial environmental practices which can be demonstrated in the recent Marine Stewardship Council certification of the *P. maxima* fisheries of Western Australia & the Northern Territory; and

The production of pearls from *P. maxima* pearl oysters requires the fishing of an oyster from the wild fishery at Eighty Mile Beach., it is rested and then seeded; after seeding, the pearl is grown in nutrient rich tropical waters of North-Western Australia, for at least two years, under reliable husbandry systems. Pearls that are grown in other parts of the world are not able to combine all these variables to produce pearls of comparable quality or rarity.

1.2 Submission to the Standing Committee on Public Administration – Inquiry into the issue of Property Rights

The PPA appreciates and thanks the Standing Committee on Public Administration for the opportunity to provide a submission to the committee on the inquiry on the issue of property as they relate to pearling licences involving the fishing, seeding and the culturing of pearls in *Pinctada maxima* pearl oysters.

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[1] A. Hart, D. Murphy and R. Jones. (2015). Pearl Oyster Managed Fishery Status Report. In: Status Reports of the Fisheries and Aquatic Resources of Western Australia 2014/15: The State of the Fisheries eds. W.J. Fletcher and K. Santoro, Department of Fisheries, Western Australia, p211.

[2] J.E. Jelbart, *et al*., (2011) An investigation of benthic sediments and macrofauna within pearl farms of Western Australia. *Aquaculture*. Vol 319: 466-478 (October 2011) http://dx.doi.org/10.1016/j.aquaculture.2011.07.011

The PPA submission refers to the following relevant terms of reference for the inquiry into property rights the refer to property and compensation. These terms provide that the house:

> (c) recognises the property rights of government-issued licenses and authorities including commercial fishing;
> (d) asserts that fair and reasonable compensation must be paid to the owner of private property if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit;

With respect to other submissions received by the Committee the PPA supports the submission of the Western Australian Fishing Industry Council (WAFIC) and of the Western Rock Lobster Industry Council (WRLIC) and to this end will submit (in this submission) only on those issues that are relevant to pearling.

The PPA remains happy to speak to the Committee regarding out submission should the Committee require.

2. PPA SUBMISSIONS

2.1 The recognition of property rights of government-issued licenses and authorities including commercial fishing;

The *P. maxima* fishery is a managed resource subject to the Pearling Act 1990 and is being transitioned to the Management Framework that is set up by the Aquatic Resources Management Act (ARMA).

The *P. maxima* fishery is fully allocated and fully utilised by an integrated industry which includes pearl culture activities, transport, seeding operations to induce a pearl, holding oysters in the wild and harvesting. The integration of **all** of these extrinsic activities is required to produce a pearl; and what is more, all of these activities are expressively provided in the Pearling Act 1990 and for the purpose of pearl production

> In the context of pearling, it is important that there is broad recognition of pearling property right as being not just comprising one activity (e.g. fishing pearl oysters) but a number of interdependent and integrated activities that combine to produce a quality pearl. Should any '**one**' any of these interdependent activities be diminished or injuriously affected as a result of Government action or interaction, it is felt adversely in **all** the other integrated activities, and the **total effect is the undermining of the disposition of the property right, and the investment is infrastructure, jobs and property, or what is in effect the removal of the property right altogether.**

Essentially, the Pearling Act 1990 provides for the culturing of Australian South Sea Pearls. The Act and the subsidiary regulations provide the holder of a Pearling Licence with the enduring right to access (collect) a set proportion of the total allowable catch (TAC) of pearl oysters from the managed Pearl Oyster Fishery (using "licensed' pearl divers only), seeding them (that is undertake a culture technique where a nucleus is carefully inserted into the oyster for the purpose of coaxing the growth of a pearl), transporting them to a farm for the purpose of growing out a pearl (which takes a minimum of two years to grow the first pearl) and using reliable husbandry techniques 1-3 cultured pearls per oyster which can result in a production cycle of 10 years for one oyster.

The production of a pearl requires significant long-term investment, in not only infrastructure but also in people. Requiring dedicated diving boats to support professional pearl divers (who are licensed as such) to collect pearl oysters one by one by hand. Highly skilled seeding technicians who are able to undertake the delicate technical operation to insert the nucleus in an oyster in the right way to produce a quality pearl or it will be rejected by the oyster or worse affect the oyster. It takes years of learning for a technician to be successfully skilled. Seeded oysters after being rested and turned by divers, need to be transported thousands of kilometres back to the pearl farm to grow out the pearl. In addition to trained on farm staff (divers, shell cleaners, support staff etc) to husband the oyster, investment is R&D and diving infrastructure (e.g. a hyperbaric medical unit) also contribute to ongoing investment with is effectuated by the enduring nature of property rights. In addition to having water space to grow out the pearls, the culturing of pearls takes significant infrastructure, including transport and support vessels, long line and anchoring systems, cleaning systems.

This investment can only occur if it is based on secure and enduring property rights, that effectuate investment for long term benefit. Without enduring property rights, a pearling licence holder is not able to receive the benefit of their licence, not only because the production cycle for pearl production is a minimum of 10 years, but also without them they are exposing themselves to significant risk.

These integrated rights that derive from a pearling licence are all essential components, and it follows that should one component be affected, all components will be subsequently and proportionally affected. Should impediments or adverse conditions be placed on one pearling activity (e.g. being precluded from fishing oysters at Eighty Mile Beach due to the acceptance by Government of another inconsistent activity like a seismic survey or having access to water for grow-out being put at risk as a result of exorbitant fees or a change in access policy [noting that almost every pearl farm is located within a State or Commonwealth Marine Park]), then the other activities will be proportionally affected.

With respect to pearling activities, the proprietary rights of licence holders are established by legislation, and notwithstanding the intersection of other rights in a multi-user environment, these proprietary rights which are integrated need to be recognised as such so that they can not only support long-term investment, but also endure so as to support an industry. For pearling, proprietary rights require not only the recognition of an integrated set of activities as different components of the same right; pearling also requires that each of these components is recognised as part of a whole, and that interference with once aspect of the right (e.g. water leases and the *ad hoc* raising of fees by Government) has the same proportional effect on the other aspects of the right.

The PPA submits that the Committee not only recognise the proprietary nature of the current integrated rights that are ensured by the Pearling Act 1990, but recommends that the Aquatic Resource Management Act 2016 (ARMA) be amended to clarify the that these rights are indeed property and recognised as such in other legislation.

The Pearling Management Framework

The Pearling Act 1990 (which is the Act that *regulate[s] pearling and pearl oyster hatchery activities, to provide for the conservation and management of pearl oyster fisheries*) requires that in order to carry out pearling activities a person must have a licence.

> ***7 (1)*** *In the State and in Western Australian waters, a person shall not carry out-*
> *(a) pearling except under a pearling licence or pearling permit; or*
> *(b) hatchery activities except under a hatchery licence or hatchery permit,*

Section 23 of the same Act provides for the Executive director to issue farm leases, licences and permits:

> ***23 (1)*** *The Executive Director may issue a -*
> *(a) pearl oyster farm lease;*
> *(b) pearling licence;*
> *(c) pearl oyster hatchery licence;*
> *[…]*

The same section also requires that a farm lease (for the purpose of growing out the pearl in a seeded oyster) may be issued to any person unless they hold a pearling licence or a hatchery licence:

> ***23 (2)*** *The Executive Director shall not issue a farm lease unless satisfied that the applicant holds -*
>
> *(a) a hatchery licence; or*
>
> *(b) a pearling licence authorising the holder to carry out pearl culture techniques.*

It follows that property rights that stem from the Pearling Act 1990 are interconnected and integrated. With pearling licences which provide for the undertaking of pearling activities forming a crucial component,[3] with the Pearling (General) Regulations 1991 providing for two licences:[4]

- "pearling (seeding) licence […]" means pearling licence or pearling permit which is expressed to be for "hatchery options" or "hatchery quota";[5]
- "pearling (wildstock) licence […]" means a pearling licence or pearling permit under which the holder of the licence is permitted to take wildstock;

The interconnected activity licences all attract fees which are payable pursuant to s 27 of the Act:

> ***27 (1)*** *The annual fee in respect of -*
>
> *(a) a farm lease, pearling licence, hatchery licence or permit shall be of the amount, or calculated in the manner, declared by the Minister in respect of the farm lease, pearling licence, hatchery licence or permit for the year in question by notice published in the Gazette;*

Fee Setting Mechanisms

The setting of fees must reflect the nature and disposition of the property right, and for the benefit of the state and the community must provide for long term planning, and protect investment in infrastructure, stock and wages. To do this, the setting of fees must conform to a clear process that contemplates the activities undertaken in their context – in order to provide for optimal outcomes, foster investment and de-risk activities.

The setting of these fees with respect to the pearling licence was initially guided by Ministerial Policy Guideline 21.[6] This guideline was produced for the "*assistance of the Chief Executive Officer (CEO) and other fisheries personnel, and for the information of the industry and the community by community, decisions taken by the Government in June 2010 in relation to access fees for commercial fishing and aquaculture activities authorized under the Fish Resources Management Act 1994 (FRMA) and* ***pearling activities under the Pearling Act 1990****, and associated Ministerial undertakings relating to access and lease fees prescribed under the FRMA and Pearling Act 1990*."

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[3] S 3 Pearling Act 1990 - "pearling" means all or any of the following activities —
(a) taking, or attempting to take, pearl oysters; (b) removing, or attempting to remove, pearls from pearl oysters; (c) moving, dumping, holding, storing or transporting pearl oysters; or (d) practising, or attempting to practise, pearl culture techniques,

[4] Reg. 3 Pearling (General) Regulations 1991

[5] Noting that in the Act "seeding" means specific pearl culture technique of inserting a nucleus into a pearl oyster;

[6] MGG021 - Funding Reform Decisions Access Fees - 2012

This Guideline provided for the new "*Government introduced a new uniform system for determining access fees for the State's commercial fishing, calculated at 5.75% of the GVP for respective fisheries. Fees for access to marine waters for pearling and aquaculture purposes will also apply. The new system applies to licence renewal fees as they fall due in the licensing period after 1 July 2010*."

In August 2017, Administrative Guideline No. 1, which was again issued pursuant to section 246 of the Fish Resources Management Act 1994 and Section 24 of the Pearling Act 1990, replaced MPG8 to "*streamline the process for assessment of applications under s.92 and s.97 of the FRMA for aquaculture licences and leases and under s.23 of the PA for pearl oyster farm leases; and certain applications to vary a pearling lease or aquaculture licence.1 The Guideline is intended to provide guidance to the Department of Primary Industries and Regional Development Fisheries Division (Fisheries) and continued certainty and transparency to the public and industry regarding decisions on these matters*."

This latter guideline restates policy with respect to leases, but unlike MPG21 is silent on the process as to how to value a pearl lease. This is significant because as already stated a pearl lease is required to grow out the pearl in a seeded oyster. Without the ability to do this, there is not much point investing in a pearling licence and seeding licence, if it is not possible or affordable to grow them out on a pearl farm that has the requisite conditions to do so.

To realise the benefit of a pearling licence, the licence holder requires certainty and transparency with respect to the characterisation and the nature of the access right – so the licence holder can invest in long-term enduring infrastructure which is hand in hand with the nature of the right! The pearl growout process also requires extensive investment in long term infrastructure that is consistent with both the nature of the access right and reflects the biological aspects of the subject of the licence (P maxima oysters) which require infrastructure for a >10-year production cycle per oyster. To this end growout "leases' were given a tenure of 21 years (with another 21-year renewal option) and a long-term fee structure that was based on meeting the costs of management.

The establishment of clear, consistent and certain fee structure mechanisms not only recognizes the enduring nature of pearling property rights but understands not doing so puts at risk the long-term viability of the industry.

Currently there is no formalized mechanism that works within the pearling framework in contemplation of all the interdependent activities that form the basis of the pearling property rights, to value pearling water leases where pearls are grown out, as one component of an integrated property right.

The Pearling Act 1990 has wide powers of ministerial administrative discretion for the purposes of setting fees and making administrative decisions. These wide discretionary powers are in the Act to enable the Minister to make requisite decisions that notwithstanding the other legislative principles such as ESD and the precautionary principal, ensure decisions are able to be made. Pursuant to this Act, there is no formalized process that provides any guidance or policy framework with respect to a fee that reflects the nature of the rights provided. Under this current system there are no safeguards that preclude a Minister from contemplating a 500% increase in fees in one calendar year.

In December 2018, the PPA was given 3 weeks' notice that pearling fees were going to increase from $7 per hectare to a total fee of $5 million per annum (an increase of over 500%). Yet if there are no formal mechanisms that set parameters that are congruent with the nature and uses of the rights provided and the activities undertaken – there is nothing stopping what is already an arbitrary process from setting fees that are entirely government driven and in doing so undermine the existence of the property right (in this case a pearling right) in the first place.

The ability to set fees for property rights in any given year without a formal clear and transparent process that provides certainty and is built on clear agreed principles of "good quality Rights Based Management" is problematic in that in undermines Rights Based Management. Unstructured fee mechanisms that are imposed on structure rights-based systems have a destabilizing effect; inserting uncertainty and investment risk into an activity that relies on investment and certainty. In the case of pearling, this investment in jobs and infrastructure is spread across several different, but integrated components that come together to form one activity (the production a pearl). Each of these components of the same activity require fees in addition to considerable investment. And where we see clarity of process with respect to the framework provided by MPG21 and the ability for a pearling licence holder to plan and invest, the lack of a mechanism for setting pearling water leases not only destabilises the Industry and puts at risk current and future investment because of the lack of certainty and long-term planning the current arbitrary water lease fee setting structure provides; it also has a destabilising effect on the pearling right itself **creating a chasm between one aspect of the production process (fishing and seeding) and another (growing out the oysters) and in doing so essentially removing any rights that the licence holder has**.

Recommendation: The PPA recommends the establishment of a formal process based on agree principles and parameters, that sets the water lease fees not only in the context of a bundle of rights that exist in the marine space, but also in the context of a right that is composed of a number of interdependent and integrated activities and components that make up one right.'

2.2 Fair and reasonable compensation must be paid to the owner of private property if the value of the property is diminished by a government encumbrance or resumption in order to derive a public benefit;

The PPA supports the WAFIC submission with respect to the question of the circumstances where compensation might be payable when rights holders suffer loss or diminution of their property rights (injurious affection) by Acts of the State; including where rights that are fully allocated rights are reallocated, where the value of a property right is diminished as a result of a change in spatial management arrangements or other access policy or where access resources that are central to the rights are diminished or interrupted (e.g. exclusion from fishing areas as a result of allocation of marine area to other sectors such as Oil and Gas to undertake other activities that exclude or prevent the undertaking of the activities expressly provided for by right; or excluding access to areas where activities were undertaken due to a the installation of a marine park).

2.2.1 The recognition of 'ancillary' or pearling related activities of pearling

As submitted above, pearling requires the integration of several activities that come together to provide for property rights. While in a number of instruments these activities are expressly provided for, in many the definition of "pearling" and whether it includes activities other than harvesting/fishing, seeding or farming is not always clear. There that there are a number of 'ancillary' activities critical to pearl oyster fishing that need to be recognised as such, including shell holding activities and support activities, such as:

- Resting pearl oysters immediately after fishing within the vicinity of the fishing grounds,
- Bringing the seeding technicians to the fishing grounds to seed the rested pearl oysters (as opposed to transporting oysters vast distances to pearl farms to be seeded)
- Implementing additional resting and turning periods after seeding to avoid further stress and maximise acceptance of the nucleus by the oyster.
- Transporting seeded pearl oysters to holding farms in the Kimberley. This stage takes place several months after the first capture of the pearl oyster
- The disposition of pearling support vessels, which could include the landing of amphibious aircraft

The inclusion of the provision for 'anciliary' or 'pearling-related activities' represents formal recognition of activities 'ancillary to pearl oyster fishing' as falling within the ambit of 'Pearling' for the purposes of legislative and regulatory adjustment processes; for example the Pearling industry acknowledges the optimal importance that express recognition of 'pearling-related activities' provides with respect to the Management of North-western State Marine Parks.

The PPA notes that in the near future the Pearling Act 1990 will be repealed in favour of the (WA) Aquatic Resources Management Act (ARMA), which is to become the enabling legislation with respect to Pearling Activity within Western Australia. It is important that all proprietary rights that are outlined in this Act are clearly defined and recognised by the State and incorporated or enabled in other legislation that touches on the disposition of those rights. It is long understood that pearling rights are property rights and that, as such, compensation needs to be paid for the loss or injurious affectation of those rights, or where they are reallocated for other for the same use or a different use.

Recommendation: The PPA reiterates WAFIC's submissions that "*compensation should be paid in those circumstances where those priorities are re-ordered by the State and rights re-allocated away from current rights holders and directed to other users, or for other uses*;" and that "*as a first step that existing policies*[7] *implementing Rights Based Management, including compensation be consolidated and published as guidelines under Section 254 to 257 of the ARMA*."

2.2.2 The Allocation & Reallocation of Pearling Rights

The managed *Pinctada maxima* resource is fully allocated and fully utilized, and allocations within the managed fishery reflect catch history, participation, principles of sustainability and biosecurity and other principles that are outlined in the Integrated Fisheries Management (IFM) Policy.

With respect to allocation and reallocation the PPA reiterates WAFIC's submissions that from a standpoint of good administration and optimal return to the State; allocation and re-allocation processes need to be kept separate (noting that allocation occurs expressly as a process pursuant to the ARMA); and that with respect to both re-allocation and allocation, "ad hoc, secretive and opaque processes" need to be replaced with agreed, clear and transparent processes that provide certainty, reasonableness and are built of clear agreed principles.

The PPA notes the Integrated Fisheries Management (IFM) Policy provides for an allocation process that is consistent with the 2002 Toohey Report which recognized the importance of a formal to process to resolve allocation issues.[8] The 2009 IFM Policy provides for an allocation process to be formally, inclusively and transparently administered by an Allocation Advisory Committee.[9]

While the IFM process (which is still in force) relied on an Integrated Fisheries Allocation Advisory Committee (IFAAC) (which is no longer in force) to provide a confidential Allocation Report to provide for Ministerial advice, the fact that the committee found its basis in clear and transparent principles provided certainty around the process.

IFAAC's Guiding Principles:

I. *Fish resources are a common property resource managed by the Government for the benefit of present and future generations.*
II. *Sustainability is paramount and ecological requirements must be considered in the determination of appropriate harvest levels.*
III. *Decisions must be made on best available information and where this information is uncertain, unreliable, inadequate or not available, a precautionary approach adopted to manage risk to fish stocks, marine communities and the environment. The absence of, or any uncertainty in, information should not be used as a reason for delaying or failing to make a decision.*

[7] IFM 2009 and the WA Government 2012 Policy Paper read in conjunction with the Toohey Report (referred to above).
[8] Toohey, John et al, 'Report to the Minister for Fisheries by the Integrated Fisheries Management Review Committee: Fisheries Management Paper 165.' (Fisheries Department of Western Australia, 2002), 22 ('The Toohey Report'). The Committee was headed by Mr Justice Toohey who was the first Western Australian to serve on the High Court of Australia.
[9] IFM Policy 2009.

IV. *A harvest level, that as far as possible includes the total mortality consequent upon the fishing activity of each sector, should be set for each fishery1 and the allocation designated for use by the commercial sector, the recreational sector, the Customary sector, and the aquaculture sector should be made explicit.*

V. *The total harvest across all user groups should not exceed the allowable harvest level. If this occurs, steps consistent with the impacts of each sector should be taken to reduce the take to a level that does not compromise future sustainability.*

VI. *Appropriate management structures and processes should be introduced to manage each sector within their prescribed allocation. These should incorporate pre-determined actions that are invoked if that group's catch increases above its allocation.*

VII. *Allocation decisions should aim to achieve the optimal benefit to the Western Australian community from the use of fish stocks and take account of economic, social, cultural and environmental factors. Realistically, this will take time to achieve and the implementation of these objectives is likely to be incremental over time.*

VIII. *It should remain open to government policy to determine the priority use of fish resources where there is a clear case to do so.*

IX. *Management arrangements must provide sectors with the opportunity to access their allocation. There should be a limited capacity for transferring allocations unutilised by a sector for that sector's use in future years, provided the outcome does not affect resource sustainability.*

While the PPA acknowledges that the IFAAC process is no longer the current allocation mechanism, that PPA supports WAFIC's submission that a new allocation mechanism that is built on "good quality Rights Based Management" needs to be implemented and adhered to. The PPA note's WAFIC's recommendation of the adoption of a mechanism that is consistent with the Australian Fisheries Management Authority's (AFMA) 'Policy on Allocations where Management Arrangements Changes.

Recommendation: Allocation and Re-allocation processes need to be kept separate (noting that allocation occurs expressly as a process pursuant to the ARMA); and that with respect to both re-allocation and allocation, "ad hoc, secretive and opaque processes" need to be replaced with agreed, clear and transparent processes that provide certainty, reasonableness and are built of clear agreed principles of "good quality Rights Based Management." The PPA note's WAFIC's recommendation of the adoption of a mechanism that is consistent with the Australian Fisheries Management Authority's (AFMA) 'Policy on Allocations where Management Arrangements Changes."

SUMMARY

The PPA appreciates the opportunity to make a submission on the Standing Committee on Public Administration – Inquiry into the issue of Property Rights.

PPA asks that our following submissions be provided with due consideration and reiterate that we would appreciate the opportunity to speak to our submission c=should the Committee require it.