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Dear Public Administration Committee Members

RECFISHWEST SUBMISSION TO THE INQUIRY INTO PRIVATE PROPERTY RIGHTS

Recfishwest welcomes the opportunity to make a submission to the Legislative Council's Standing Committee on Public Administration in relation to their inquiry into Private Property Rights. Recfishwest is the peak representative body for recreational fishing (including Charter fishing) in Western Australia. This submission focuses on the Committee's Terms of Reference making particular reference to charter and recreational fishing in Western Australia.

Recognising property rights of government-issued fishing licenses

Property rights as they relate to fishing have changed significantly since the signing of the Magna Carta in the 13th century. The Magna Carta is a charter of rights that has been widely credited as establishing the common law principle of the public right to fish in tidal waters. At the time the Magna Carta was signed fish stocks were large and fishing fleets were small, fish were generally deemed wild animals "*ferae naturae*" or domestic animals "*domitae naturae*" and as such they were generally not susceptible to ownership until captured. At the time there was no call for fishery property rights or government regulation as conventional wisdom considered oceanic fish stocks as an inexhaustible common property resource. As a result, nearly all oceanic fisheries began as unregulated fisheries open to anyone who wanted to catch fish. The unregulated approach to fisheries management led to a classic Tragedy of the Commons scenario.

The theory behind the tragedy of the commons originated in an essay written in 1833 by the economist William Forster Lloyd and it was expanded to include fish stocks in an article written by ecologist Garrett Hardin in 1968. The tragedy of the commons is a situation in a shared-resource system where individual users, acting independently and according to their own self-interest, behave contrary to the common good of all users, by depleting or spoiling that resource through their collective action.

By the mid-19th century, ocean fishing activity had expanded to unsustainable levels and the world's fishers began to realize that they were directly competing with each other for the catch. As they competed, their hours at sea rose and fishers took more risks as they "raced" each other to the fish. Fishers installed more powerful gear, built larger vessels and spent more days at sea to catch the same amount of fish. The competitive responses to the scarcity of fish raised costs resulting in fishers keeping immature fish or fish belonging to non-target species which they would have rejected a few years earlier.

As the world's governments realised fish stocks were exhaustible, they began regulating access to fishing by creating access rights. As regulations increased further these access rights have taken on more and more characteristics of property rights. Increasing the characteristics of fishing authorisations has increased the effective and legal powers a holder of those authorisations has to derive income from harvesting a given fish stock.

This increased regulation has also increased the incentive for fishers to participate in the management of fish stocks and to deal in the transfer of their government issued authorisations. These expanded powers have progressively turned the regime of regulations and licences from one of access rights to one of property rights. It is widely accepted that the institution of fishing property rights averts the tragedy of the commons and leads to more sustainably fisheries management.

Defining property rights as they apply to fisheries is problematic as property rights consists of a collection of different characteristics. While number of distinguishable characteristics of property rights can be high, security of title, exclusivity, longevity and the ability to be transferred are considered the most crucial property rights characteristics as they apply to government issued fishing authorisations. All of these characteristics have a direct relationship with the complexity of fisheries management. In open access management arrangements where access to aquatic resources is readily available these characteristics are weak and in fully managed fisheries these characteristics are high.

Given State and Commonwealth laws prohibit the taking of fish for commercial purposes without the authority of a licence/authority or some other form of authority, the common law right to take fish for commercial purposes has essentially been nullified even for fisheries that have the most basic form of management. In Western Australia this is also true for recreational fishers targeting rock lobster, abalone, marron and freshwater fishing in certain location as well as those who fish from a boat or use a net as these activities all require a government issued licence for which the state government receives over \$8 million annually.

The Fish Resources Management Act 1994 (FRMA) is the primary Act regulating fishing for all sectors in Western Australia. The FRMA enables the use of a range of management tools which can be applied as circumstances require. These tools include but are not limited to temporal and spatial restrictions, species and/or life stage restrictions, effort restrictions and of course bag, size and possession limits. These management tools are utilised in some degree in all of WA's commercial and recreational fisheries.

The management of Western Australia fish stocks has progressed from open access where anyone has access fish stocks to fully managed where no new licences are issued and anyone wanting to enter the fishery is required to come to an agreement with an existing licence holder. All of Western Australia fisheries are currently managed somewhere on this spectrum. In Western Australia there is an increasing trend for fisheries to be managed through the allocation of Individual Transferable Quotas (ITQ). In ITQ fisheries a proportion of the Total Allowable Commercial Catch (TACC) is allocated to lawful authorisations according to predefined formulas. Fisheries managed under an ITQ system are widely regarded as the pinnacle of fisheries management.

There are a number of examples of Australian case law that have considered the issue of whether government issued licences, and frequently fishing licences, constitute property. One of the major themes to emerge from these case law examples is that licences which can be renewed or transferred, even if only with the consent of the relevant licensing authority are considered to have some proprietary

features or value. Put simply, a fishing access right is a form of property right and the more complex and restrictive the management system the stronger the property right.

With this in mind charter fishers who hold a Fishing Tour Operator Licence (FTOL) should also be considered to have strong property rights. FTOL's are no longer being issued so new entrants into the Charter sector are required to purchase a licence on the open market. Although there is no official position limiting the issuing of FTOL licences the number of FTOL's issued in recent years clearly demonstrates the government's intent. FTOL's share much more in common with fully managed fisheries than open access fisheries and are deserving of similar property right considerations. FTOL's clearly display all the characteristics of a strong property right. The quality of title is strong, they have a degree of exclusivity and they are permanent and transferable.

Under the current (and soon to be implemented) Fisheries legislation the Western Australian government has a legislative responsibility to manage the states aquatic resources in a way that ensures ecological sustainability while also ensuring the states aquatic resources are shared and developed in a way that provides the best return to the state from our common property aquatic resources.

This best return to the state relates to environmental, societal and economic returns and Recfishwest recognise resource allocations between sectors can and should change over time in line with changing community sentiment about how our publicly owned aquatic resources are expected to be managed. Nevertheless, the way allocations change must be mindful of the rights of recreational, charter, indigenous and commercial fishers as well as the overriding needs of the environment.

There can be little doubt that viewing fishing access rights as property rights provides the best environmental outcomes as it allows a shift from Maximum Sustainable Yield (MSY) to Maximum Economic Yield (MEY). In an MSY scenario as much of a resource that can be sustainably harvested is taken as quickly as possible resulting in the tragedy of the commons mentioned earlier. In a MEY scenario fish stocks are harvested in a way that realises the best economic return for fishers. The ITQ system of management eliminates the race to fish and encourages fisheries to progress from MSY to MEY. Fisheries managed to MEY almost universally result in a lower level of exploitation giving fish stocks greater resilience to changing environmental conditions and providing a higher abundance which is an aspiration of the recreational sector.

MEY models can only work in a management system where fishing access rights also constitute strong property rights. These systems will result in the allocation of a proportion of the allowable harvest and provide authorisation holders with the ability to choose when and if they wish to harvest their allocation.

It should be noted the Explanatory Memorandum for the Aquatic Resources Management Act (ARMA) which passed parliament in 2016 clearly outlined the improved governance that would result from among other things improved security of resource access and allocation of proportional harvest entitlements for the fishing sectors. This Act was presented to all sectors as a method of achieving improved fishing rights (including property rights). The ARMA was designed in part to strengthen the rights of all sectors and this Bill passed with bipartisan support highlighting the governments intent to recognise access rights as property rights.

The issue of compensation

One of the terms of reference for this inquiry relates to the issue of fair and reasonable compensation to 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 Australian Constitution sets out the matters in respect of which the Commonwealth Parliament is entitled to make laws. One of the powers set out in the Australian Constitution is the power to make laws for the peace, order and good government of the Commonwealth with respect to "fisheries in Australian waters beyond the territorial limits". State Parliament has a general power to legislate on any matter (including those in respect of which the Commonwealth has power), subject only to the limitation that the laws are for peace, order and good government of the State.

Section 51 (xxxii) of the Constitution requires the Commonwealth to provide compensation 'on just terms' for acquisition of property from any person. As shown above, fishing rights constitute a form of property rights. As management complexity increases so do the property rights associated with the relevant authorisations and the stronger the argument for compensation should the government act to acquire or diminish these rights.

Unlike the Commonwealth, there is no requirement in the Western Australian Constitution for compensation to be paid for the acquisition of property. However, the purpose of the Fisheries Adjustment Schemes Act of 1987 is to enable the establishment, financing and administration of schemes for the surrender or cancellation of fishery authorisations. This Act provides a pathway and clearly demonstrates the government's intent to provide compensation in a fair and reasonable manner.

It is unreasonable to expect the state to provide compensation as a result of a decrease in the TACC due to environmental conditions. It is also unreasonable to expect the state to provide compensation in situations where the actions of fishers themselves have resulted in sustainability concerns. It is however reasonable to expect the state will provide compensation to fishers when the government has made a deliberate decision to reallocate aquatic resources from one sector to another. It is also reasonable to expect the state will provide compensation when a decision to create increased access to fisheries regarded as fully allocated result in existing authorisation holders receiving proportionally less of the TACC than they otherwise would have.

Between 2007-2010 when management changes were implemented to reduce commercial and recreational demersal fishing effort in the West Coast bioregion a \$5 million compensation package was made available to commercial fishers who exited the fishery and recreational fishers saw a reallocation of the resource however no similar compensation was provided to FTOL holders who were faced with effort closures for two of the busiest months of the year. Consequently, there remains an incredibly high level of latent effort within this sector which has deterred investment and stymied the development of the Charter sector.

The issue of compensation is also very relevant for the recreational fishing community which hold government issued fishing licences (therefore meeting the Committee's Terms of Reference). As individual recreational fishing licences are non-transferrable, they do not display the recognised distinguishable characteristics of property rights and therefore it is unlikely government can be legally compelled to compensate individual recreational fishers for government decisions that result in decreased access to fish stocks. Governments however may choose to compensate individual recreational

fishing licence holders as recreational fishers represent the largest aquatic stakeholder group with 740,000 Western Australians going fishing every year. Recreational fishers also directly contribute \$2.4 billion into the Western Australian economy annually making them extremely important for many regional and rural areas. Any government who is not mindful of the impact a government decision will have on fishing experiences can reasonably expect to see a measurable response come election time.

A recent example of where the state government was mindful towards recreational fishing licence holders can be seen in the way the Ngari Capes marine park was implemented following gazettal under the CALM Act. Once this park was gazetted there were no changes to the fishing rules within the park for 12 months. This 12-month implementation period allowed fishers who had already bought a fishing licence to get the full benefit of their licence before it expired. At the end of the 12-month transition period fishers were expected to comply with the new marine park fishing rules as they were in place at the time a new fishing licence was purchased. While this example should in no way be seen as an endorsement of the marine park itself it does demonstrate how the implementation of government policy can be undertaken in a way that is mindful of individual stakeholders.

While it is unlikely governments can be legally compelled to compensate individual recreational fishing licence holders the recreational fishing community as a whole has an extremely strong case for compensation when governments make decisions that adversely impact on recreational fishing experiences. This compensation does not necessarily need to take the form of financial remuneration but would more likely take the form of offsets to minimise impacts on the recreational sector.

The types of offsets that are appropriate will need to be agreed in consultation with recreational fishers but could include but not be limited to the installation of artificial reefs and FADs, the stocking of popular fish species, building and restoration of jetties, improvements to boat ramps, grants to fishing clubs and associations, sponsorship of fishing events, improved access or reallocation of other species towards the recreational sector.

Under the Aquatic Resources Management Act (ARMA) once an aquatic resource has been declared an Aquatic Resource Management Strategy (ARMS) must be developed and approved. Section 16 (h) of the ARMA states that an ARMS must determine *the proportion of the TAC that is to be available for recreational fishing*. The ARMA was designed in part to improve the rights of the recreational fishing sector and a legislative requirement to consider how much of a given resource should be allocated to the fishing community should be seen as a very strong property right on behalf of the recreational fishing sector.

The Department of Primary Industries and Regional Development rightly recognise resource allocations between sectors can and should change over time in line with changing community expectations about how community owned aquatic resources should be managed. In reallocation circumstances it is only fair and reasonable that people are compensated for any reduction in rights provided by a pre-existing government licence. The level of compensation should be mindful of the strength of the lost right, catch history, the price paid for rights that are lost, investment warnings that had been issued, the reduction in the relative proportion of the allocated allowable harvest level, the length of time the right has been held, changing community expectations and the subsequent viability of any remaining rights held (if any).

The government's policy on Integrated Fisheries Management states where a reallocation of resources from one sector to another results in demonstrable financial loss there should be consideration of compensation. It is only fair and reasonable to expect people should be provided compensation when as

a result of a government policy decision they lose something of value. Although reallocation mechanisms are not well developed the lack of well-defined reallocation processes should not be seen as an excuse not to proceed with reallocation on just terms.

Conclusion

Perhaps the most important issue regarding property rights and fisheries management is the fact that rights-based management creates incentives (motivating forces) for the participants that are very different from those created by command and control fisheries management programs which largely consist of input restrictions and total catch limits. These command and control management regimes fail to provide incentives to fish efficiently and in a manner that gives industry a long-term stake in the future of the fishery.

Acknowledging different management systems create different management outcomes and results in terms of the sustainability of fishing activities is the first step in understanding how regarding fishing rights as a form of property rights provides incentives to conservatively manage fisheries. Recognition of fishing property rights results in less fish being harvested for a larger value, less conflicts between sectors and a higher abundance of fish which in turn provides for greater resilience of fish stocks. Fisheries management has steadily been progressing towards clearly defined property rights and this progress should be embraced and encouraged rather than stymied.

Property rights should be recognised for all sectors (including the recreational sector). Charter fishers who hold a FTOL are especially deserving of recognition as the absence of recognised property rights for FTOL holders will only serve to impede the development of the sector.

As can be seen by the recent purchase of commercial fishing entitlement close to Derby and the Voluntary Fisheries Adjustment Scheme in the Peel-Harvey estuarine fishery that is currently underway the lack of a defined reallocation process should not be a barrier to reallocation to meet community expectations. Thank you for the opportunity to provide comment.

Should you require any further information in this regard, please do not hesitate to contact me on 9246 3366.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Andrew Rowland', written in a cursive style.

Dr Andrew Rowland
Chief Executive Officer

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