Report on ARMA and arising implications

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For Western Rock Lobster

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Foreword

This report has been prepared for the Western Rock Lobster Council Board to inform its directors on the implications of the *Aquatic Resources Management Act 2016* (ARMA) which is expected to be fully proclaimed by early 2023. A brief summary of the significant changes to the *Fish Resources Management Act 1994* (FRMA) relative to the new legislation is summarised early in this report.

The report is produced as a living document and to be updated as information comes available during the process of the Department of Primary Industries and Regional Development (DPIRD) finalising the ARMA Regulations and transition of all elements of existing subsidiary legislation and policy during the coming months.

Whilst there has been a range of risks identified with implementation of the legislation, the majority are well known to the Council and continue to apply due to having an incomplete framework for resource access security in the context of a license-based property rights management system. Similar to the FRMA, ARMA essentially provides a tool box of legislation with increased scope properly applied to provide a range of opportunities for WRL and the management of the State's rock lobster resource.

These opportunities are outlined in this report. How WRL wishes to progress these especially under the umbrella of co-management is open to the willingness of industry to embrace change and Directors of WRL to lead. Further advice on some elements of legislation and policy development is proposed to be sought including in practice how the Pearling Industry and DPIRD manages its development of Aquatic Resource Management Strategy (ARMS) and Aquatic Resource Use Plans (ARUP's) which must be in place for pearling before the totality of ARMA is proclaimed. These will have vital significance to the future application of ARMA. Importantly if WRL can take the lead in the development of its own future as managers, there is no better opportunity then now in determining its own future.

1. Introduction to paper

1.1. Purpose of paper

a. To provide a brief summary content of the Aquatic Resources Management Bill 2015 (the Bill) and the current Aquatic Resources Management Act 2016 (hereinafter referred to as ARMA) as amended by the Aquatic Resources Management Amendment Bill 2020 (Bill No. 174-1).

b. To identify for Western Rock Lobster risks and opportunities arising from full proclamation of the ARMA legislation following the finalisation of the ARMA Regulations and subsidiary legislation, including touching on the transition from the *Fish Resources Management Act* 1994 (**FRMA**) and eventual ceasing of the *Pearling Act 1990* (WA).

c. Outline background information on co-management and arising opportunities provided by the full proclamation of ARMA anticipated by DPIRD in early 2023.

d. Identify key areas:
- requiring investigation; and
- for future WRLC engagement, including in drafting of subsidiary legislation for the management of the Western Rock lobster Fishery.

1.2. Summary Content of ARMA (once fully proclaimed)

ARMA and the ARMA Regulations will replace FRMA and its associated regulations. Savings provisions[1] in the legislation will allow existing exemptions, licences and authorisations to continue to operate in accordance with the terms issued, as will management plans for existing fisheries. The current management plans will continue to have effect and can be amended until such time the new provisions covering the development of Aquatic Resource Management Strategy (**ARMS**) and related Aquatic Resource Use Plan(s) (**ARUP**(s)) for a particular resource (e.g. Western rock lobster) are developed and come into effect replacing the current management plan.

The content of the Bill has drawn heavily from the existing FRMA with the vast majority of the legislative provisions remaining the same. Like the FRMA, the ARMA provides a 'tool box' of head powers that enables the development of subsidiary legislation. These are applied to provide for the management of an aquatic resource covering all aspects of its use, including allocation of resources,

[1] A savings provision preserves, whether wholly or partly, an existing legal rule or an existing right, privilege, obligation or liability that would otherwise be repealed or cease to have effect because of a new Act or other new legislation (or an amendment or repeal of an existing Act or other existing legislation).

setting sustainable catch limits, management of commercial and recreational fisheries, control and management of access authorisations, registration of security interests, nature and form of offences, provision of penalties and their application, etc.

The Act provides the legal framework for improved governance in eight key policy areas:

- Ensuring Ecological sustainability (contained in ARMA's objectives);
- Risk based Assessment and transparent, outcome focused resource use planning (obj.);
- Integration of resource protection and use across all sectors (Part 3);
- Security of Resource Access and Allocation of proportional harvest entitlements for the fishing sectors (Part 3);
- Management of aquaculture activities and increased security around access (Part 5);
- Protection from negative impacts of aquatic disease and harmful organisms (biosecurity), (Parts 6 and 8);
- Devolution and delegation of decision making (Parts 3 and 13); and
- Co-operative management arrangements with the non-government sector (Part 13) – which provide the opportunity for outsourcing of roles by the Department.

ARMA provides a holistic approach to management and explicit recognition of customary fishing, priority access and public benefit use. Recognition of commercial and recreational sector allocations will be reliant on DPIRD's ability to affect the compliance of the catch shares and catch targets through timely reporting and taking action with the support of the Minister. ARMA will provide strengthened fishing access rights, however this will apply to both commercial and recreational sectors. ARMA will also provide greater flexibility around the scale of management, as some fisheries could be merged under one framework.

However, it is noted that Government has not determined which aquatic resources are to follow pearling into the Managed Aquatic Resource framework at this stage. Priority for resources to be transitioned from a managed fishery to a managed aquatic resource under Part 3 of ARMA will need to be determined, having regard to current management arrangements (e.g. has there been an allocation decision, is the resource unitised or could it easily be unitised) in discussion with commercial and recreational fishers.

One might take the view that those fisheries which are essentially only commercially exploited would remain as managed fisheries under Part 4 of the Act. The most likely fisheries to come under Part 3 of the Act are those that involve significant resource sharing issues and of vital importance to all sectors and the state. Obviously the state's rock lobster and demersal finfish resources fall within that scope and likely to become the focus of all stakeholders and Government as a priority.

Whilst WRL has undertaken considerable work on the further development of ARMA towards improving resource security for commercial fishing access rights, the recent ARMA amendments will effectively delay any amendments being implemented to beyond 2028. This is because a formal review of the legislation has been set by parliament at five years beyond the time of full proclamation. In the interim, negotiations with Government must proceed if further increases in resource security under a fishing rights access arrangements are to succeed. This includes:

- policy-based developments around resource allocation and reallocation as pressures from other sectors operating in the marine domain impacts on the commercial fishing industry; and
- improving the basis of compensatory adjustment for losses in resource access rights and where appropriate market-based mechanisms for changes in aquatic resource use.

Part 3 of ARMA should be closely examined by all commercial fishers. A declaration of rock lobster as an aquatic resource opens the opportunity to WRL or any other fishery to the following benefits:

- Setting of total allowable catch and associated prescribed science approach set in its determination in legislation.
- Resource shares for commercial and recreational sectors set by legislation rather than policy.
- All management rules for a commercial exploitation of a resource in a single ARUP.
- Shares will remain in the fishery and cannot be removed.
- With the correct approach by authorisation holders, greater protection of resource access rights both in terms of transitioning from one management plan to another and in the application of penalty provisions for offences under surety provisions.

Part 13 of ARMA covering Administration widens significantly the opportunity for co-management arrangements between DPIRD and industry for a wide range of functions with the support of the Minister. So significant are these arrangements that a more detailed summary can be found at the end of this report.

The opportunities arising from ARMA which are also covered in this report are more about improving uncertainty in the administration of ARMA through comprehensive administrative guidelines being developed. It is anticipated that these guidelines will be published and made readily available to industry. The guidelines operate through delegations under the Act guiding decision makers within DPIRD and the State Administrative Tribunal (**SAT**) and facilitate their consideration of appeals. More needs to be done in this area to improve transparency and effectiveness of administration.

A list of guidelines to transition across to ARMA are listed below:

- Determining a 'fit and proper person' for rock lobster authorisations;
- The aquaculture and recreational fishing stock enhancement of the non-endemic species in Western Australia;
- The abalone managed fishery in Western Australia;
- Ministerial policy guideline relating to the Shark Bay snapper managed fishery in Western Australia;
- Pearl Oyster Fishery. Issued pursuant to Section 24 of the *Pearling Act 1990* as amended to 16 August 2001;
- Matters of importance in respect of the 'fit and proper person' criterion for authorisation under the FRMA;
- Assessment of applications for authorisation with regards to rock lobster aquaculture;
- Matters related to the 2010 funding reform decisions of government issued pursuant to section 246 of the FRMA and section 24 of the *Pearling Act 1990*.

The risks identified from ARMA may occur should stakeholders fail to engage effectively. Some of those risks listed have occurred previously under the FRMA and others are now arising from new legislative provisions. The more significant risks are further identified in this report. Like most risks, mitigation approaches fall within the scope of the leadership of industry and others by the professionalism of authorisation holders and individual operators using Western Australia's aquatic resources.

At the end of this report is a brief section outlining to WRL specific recommendations suggesting further actions arising from the report's findings. In addition, a comprehensive power point presentation supported with an explanatory statement on each slide is currently being drafted for those seeking a more detailed briefing.

The main features of likely interest to the commercial rock lobster industry arising from the ARMA legislation are presented in point form below:

- The current management plan for the Western Rock Lobster Fishery will continue to have full effect after the ARMA and the ARMA Regulations are proclaimed.

- WRL will be actively engaged in reviewing the final drafting instructions for the ARMA Regulations.

- It is expected that WRL and Recfishwest will be actively involved in reviewing the drafting instructions for the ARMS and ARUPs for the rock lobster resource and providing formal comment on the final draft in accordance with the ARMA. These are expected to be developed in

conjunction with the planned review of the Harvest Strategy and Control Rules for the rock lobster fishery. Part of this engagement with DPIRD will involve policy clarification and development; so active involvement by WRL is essential.

- The ARMS for a resource essentially sets out the management objectives, allocation requirements for the resource to be ecologically sustainable, activities to be regulated, the method for calculating the TAC, proportions of TAC for commercial fishing, recreational fishing, quantity for customary fishing and public benefit uses and consultation requirements for making, amendment and revocation of ARUPs. For further details see Part 3, Division 2 of the Bill.

- Whilst there is only one ARMS for a declared managed resource, there is the potential for there to be multiple ARUPS. The ARUPs for the rock lobster fishery could take the form of one for the commercial sector and the other for the recreational sector. These ARUP(s) are subsidiary legislation and essentially set the rules for the fishery and are equivalent to the existing management plan. Much of the content will reflect the existing plan under the FRMA with minimal deviation. The ARUP(s) will cover details such as linkage to the ARMS, objectives, activities regulated, class of persons, type of authorisations, surety arrangements, allocation of shares and number, monitoring requirements and process for amendment of provisions. The legislation also helps to protect existing interests requiring the Minister to take account of persons who have entitlements immediately prior to the implementation of the ARUP in the method of allocation. For further details see Part 3, Division 2 of the Bill.

- The ARMA also provides for the drafting of Regulations for the ARMS and ARUPs but at this stage none are proposed.

- In this legislative framework, the rights of access for the recreational sector are also strengthened.

- The ARMA strengthens the form of access rights held by Managed Fishery Licence (MFL) holders through provision of:

  - ✓ permanent resource shares of the commercial TAC and associated annual catch entitlement;

  - ✓ a new system of surety arrangements for 'Black Mark' offences. This has occurred through prescribing penalties and the removal of the CEO's discretion to refuse renewal where surety obligations have been met. In the case of a third 'Black Mark' offence, the court may confiscate the surety and the offending authorisation holder will have an annual catch entitlement in the next season of zero

(leaving the share ownership intact). The surety, if offered in cash or some other form rather than as a share, can protect the owner from total loss of ownership in the share through court confiscation in the event of a third offence prosecuted in a ten-year period.

- The holder of a resource share is entitled to be registered under the ARMA; the lender security provisions applied under the FRMA apply and have been extended in the ARMA to cover resource shares; and similarly, the ARMA allows a resource share to be transferred and is capable of devolution by will or by operation of law.

- The 'Black Mark' provisions under the FRMA will continue as is under the ARMA until the ARMS and ARUPS for the rock lobster fishery come into effect allowing the new surety system to come into effect. This aspect to the legislation will create some urgency for early development of the ARMS and ARUPs for the rock lobster resource noting the high level of leasing of quota entitlements in industry and concerns of the banking industry.

- Part 13 of ARMA also provides the ability for the WRLC to assume formal delegated co-management responsibility for advising on the TAC and TACC as well as evaluating and advising the CEO on market, economic and social implications of changes in the TACC under formal agreement with the Minister. Such arrangements will require negotiation.

- Those parts of the ARMA relating to the Management of fisheries, Aquaculture, Aquatic habitat protection and Abrolhos Islands, Review, Register, Compliance, Legal Proceedings, Financial provisions, Arrangements with other jurisdictions and Miscellaneous have essentially remained unaltered from the FRMA. It was recognised however that an ARUP could be developed for an aquaculture activity involving the collection of brood stock or the management of an aquaculture activity such as closed cycle aquaculture of any species of rock lobster.

2. Risks from Introduction of ARMA for WRL

2.1. Introduction

The *Aquatic Resources Management Act 2016* (WA) (ARMA) similar to the earlier legislation the *Fisheries Resource Management Act 1994* (WA) (FRMA) can be described as a 'tool box' of legislative powers that enable the Minister and the designated CEO and Department to manage the aquatic resources of Western Australia. This is largely achieved through detail provided in subsidiary legislation of the Act's regulations, notices, orders, management plans and various licences and authorisations with the head powers covering compliance and other matters of control, jurisdiction, legal proceedings and administrative arrangements embodied in the Act.

ARMA's contents, like most typical legislation is set out into 'Parts'. These are akin to chapters. There are 19 parts to ARMA. Each individual part is further divided into 'Divisions'. The most significant legislative changes of ARMA compared with its predecessor legislation can be found in the Parts for Objects (Part 2), Managed aquatic resources (Part 3), Aquaculture (Part 5), Aquatic biosecurity (Part 6), Register (Part 10) – and more specifically Division 2 of that Part entitled 'Security interest in registrable interest', Administration (Part 13) and the Financial provisions (Part 14). Most other Parts remain unchanged from the FRMA.

Enclosed for ease of reference is a copy of the second reading speech for the introduction of ARMA into parliament which provides an adequate summary explanation of changes made. A further briefing on the relevance of these provisions is to be provided elsewhere.

The ARMA legislation appropriately applied can effectively deliver the powers to achieve that which is necessary for modern sustainable aquatic resource management with all its complexity and judged by many to be an improvement in a number of areas compared with its predecessor. There continues to be however, a range of **strategic risks** that have been highlighted to the fishing industry and WRL by events post 2016. Those covering resource access security, compensation for loss of resource access, resource allocation and reallocation. All of which operated previously and evolve from an incomplete access rights-based management framework in Western Australia.

In addition, the recent finalisation of amendments to ARMA and the likely full proclamation of the ARMA and its Regulations by 2023, it is timely to highlight for WRL attention the need for better certainty on issues of commercial fisheries administrative policy decision making by DPIRD and **operational risks** faced by fishers and authorisation owners. Many of which existed previously. This paper outlines in summary form those risks.

2.2. Strategic Risks

a. Securing fishing access rights

WRL and WAFIC have already highlighted the inherent risks of having unlimited powers in the hands of a Minister or Government to alter aquatic resource access without due consideration. This has been substantially raised in the WA Legislative Council Public Administration Inquiry into Private Property Rights and adequately reported and defined with proposed amendments to ARMA in the WRL sponsored 2020 report "*Secure fishery resource access rights in Western Australia."*[2]

This report is currently under consideration by the Minister and is expected to be a matter of further negotiation and consideration by a working group of fishing industry representatives and senior DPIRD officials into the future. It is noted that the recent amendment to ARMA has required a review of this legislation five years after its proclamation. Without final legislation implementing the amendments identified, it remains an ongoing risk and needs to be continually advocated by the broader industry as well as worked on by WRL.[3]

b. Resource Allocation and Reallocation

Whilst resource allocation has been resolved for WRL under past IFM policies, and despite a positive stance of support by senior DPIRD officials, there has been no progress with new allocation decisions progressing between commercial and recreational fishing sectors in other fisheries resources. The principles established for IFM reported previously[4]are understood to continue to have currency. Both WAFIC and WRL have sought further direction and support from the Minister and DPIRD on action to address the issues of allocation and reallocation into the future[5]. Whilst preferring a market-based solution to reallocation decisions, until the final policy position on reallocation is determined, uncertainty on the security of resource access entitlements will continue to apply.

It is yet to be known whether resource allocation will become a renewed focus for DPIRD once Western Rock Lobsters[6] are declared a managed resource under s 14 of ARMA. The declaration of a resource triggers the

[2] *Secure fishery resource access rights in Western Australia, Police Position Paper*, Western Rock Lobster Council, September 2020.

[3] Expected time delays associated with both industry and DPIRD considerations on resource security and suggested legislative amendments to ARMA are likely to extend beyond the next 7 years at the earliest.

[4] *Integrated Fisheries Management – Government Policy*, Government of Western Australia Department of Fisheries (http://www.fish.wa.gov.au/Documents/ifm/IFMGovtPolicy_2009.pdf).

[5] *Integrated Fisheries Management – Proposed Amended Policy 2020 – Resource Allocation*, Western Rock Lobster Council/WAFIC, August 2020 (https://www.westernrocklobster.org/wp-content/uploads/2020/09/V11-Integrated-Fisheries-Management-Allocation-3-August-final-draft-.pdf)

[6] Noting that there is the potential that Western Rock Lobsters are not the declared resource and that Western Rock Lobsters may fall under a broader category, such as deep-sea crustaceans.

requirement for an ARMS and accordingly, may bring other issues to light, including allocation of specific prescribed shares between the sectors. This issue is yet to be negotiated, determined or discovered. Now that the recreational rock lobster sector has reportedly exceeded their catch share, the issue of how resource shares are to be controlled, reallocated and managed will come strongly into focus. This will be an ongoing risk for WRL until its current position under Part 3 of ARMA is resolved.

Once coming within the scope of Part 3 of ARMA and appropriately designed ARMS and ARUP's for commercial and recreational rock lobster resource management are set in place, changes in TAC for recreational fishing under s 48 could potentially be managed under a joint representative body co-management approach. This is referenced in the section titled '*Co-Management Options for Western Rock Lobster (WRL) under ARMA*'.

c. Declaration of the Western Rock Lobster Resource as an Aquatic Resource

Practical advantages following the successful declaration of the Western Rock Lobster under s 14 of ARMA and the eventual gazettal of an Aquatic Resource Management Strategy (ARMS) and Aquatic Resource use Plans (ARUPs) for the management of all sectors of exploitation are as follows:

- All resource management rules for a sector can be defined in a single ARUP. That is, they can be found in one location.
- Resource shares for a resource will be set by legislation for each of the significant sectors. Not by policy.
- Greater protection of entitlements will be provided through a system of surety and financial penalties under the ARMA legislation. The maximum penalty being 12-month suspension of an entitlement from fishing for offences under the legislation, ultimately affording greater protection for entitlement owners.[7]

In a separate approach to WRL, the banking industry has sought early declaration of the WRL fisher as an aquatic resource, in order to improve loan security.

To gain this position, all sectors will require the development of a new harvest strategy, elucidating the information and decision-making rules that will ultimately determine each of the allocation requirements for use of the resource under s 16 of ARMA. The new harvest strategy will contain the necessary detail that will be used to prescribed the definition of the resource, objectives, activities to be regulated, the quantities to be available for customary fishing, public use benefit, the method for setting the TAC, the TAC, the proportions of the TAC for commercial and recreational

[7] The WRL fishery unless coming under ARMA Part 3, the fisher and owners under the three black mark penalty system with loss of entitlements as observed for the reported Geraldton "*Basile* case" will continue to apply for repeated offences under s 209. Aspects of this case are to further clarified.

purposes and what is to be applied to commercial fishing as catch or incidental by catch. A policy decision will also need to be made on whether and how to include charter fishing in the recreational TAC and if within a separate ARUP. The last harvest strategy was published six years ago and contains a raft of detail that requires updating and further development to take into account the advancements in science over the years.

Once an ARMS for the resource has been determined by the Minister, the ARUPs for both the commercial and recreational sectors can be developed. The ARUPs will set out all details of management of the resource. The terms of an ARUP need to be consistent with the terms of the harvest strategy for the resource and any plans for co-management. Ideally all requirements should be progressed in parallel synchronously.

One of the key challenges is to match the expectations around resource shares set at MSY historically for the recreational sector and MEY for the commercial sector. One of the solutions could be defining the proportions for both sectors at MSY within ARMS but redefining shares within the commercial ARUP to be utilised at MEY. It is understood recent 2021 changes to ARMA opens that possibility. The opportunity also exists to explore co-management options for WRL in drafting all three documents.

The challenge and therefore risk facing WRL is the progression of ARMS and respective ARUPS in a timely manner together with the preparation of the harvest strategy for the resource. This presents to WRL a substantial consultative workload in itself with a need by WRL to strategically limit consultation with its constituent membership to key milestones in their respective document development.

d. Compensation for loss in Fishing Access Rights

This area of fisheries policy and action by the Minister and DPIRD is currently covered in statute by the *Fisheries Adjustment Schemes Act 1987* (**FAS Act**) and the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (**FRICMA**). Other means of applying compensation for various actions impacting on fishing access rights by governments, ministers or their respective departments have occasionally occurred through Act of Grace[8] payments. There is nothing in either the FRMA or ARMA that provides any specific reference on compensation.[9] Legislation is equally silent on the

[8] See s 65 the *Public Governance, Performance and Accountability Act 2013*. An act of grace payment is a special 'gift of money' by the State. They are payments that fall outside statutory entitlements. Generally, act of grace payments are a last resort means of providing compensation to persons who may have been unfairly disadvantaged by the State but who have no legal claim against it.

[9] Except for that s 349 of ARMA inserts a s 6A into the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* (WA), which in turn allows a person who holds a resource share in a managed aquatic resource to be entitled to fair compensation for any loss suffered by the person as a result of a 'relevant event'. A 'relevant event' is set out in section 4 of that act and primarily deals with losses resulting from the establishment of marine parks.

issue of compensation being payable either in the determination of resource shares or in the re-allocation of shares from one sector to another.

As noted in the 2020 report "*Secure fishery resource access rights in Western Australia"* "actions of the State may have a dramatic effect on fishing rights and the proprietary interests of those that hold them in their priority of access to aquatic resources. While the State acting for proper purposes unquestionably holds a democratic mandate to legislate in pursuit of public policy objectives, these powers should be exercised cautiously. Further, the foundational principles of the Australian legal system militate that, where actions of the State impinge upon the property rights of citizens, *prima facie* the State should be liable for compensation." [10]

However, despite this view, the high degree of discretion held by the Minister within the FAS Act and FRICMA, and existing lack of certainty around the determination process of levels of compensation, if and when applied, continues to undermine the value of rights of access especially where compensation for compulsory loss of access is to be assessed. Other than FRICMA, there exists no right of compensation for loss of fisheries access entitlements in statute and if applied, done so at the discretion of the Minister for Fisheries. There was one occasion (with the support of the Minister), where a cash settlement was paid under a contractual arrangement facilitated by a private sector resource company to the affected fishing operators. The negotiation process for that outcome followed the administrative steps prescribed by the FAS Act. It is understood settlement compensation payments were made to affected trawler owners without permanent loss of access by withdrawal of access entitlements.

From WAFIC's perspective, the implementation by DPIRD of compensation to the fishing sector impacted by the loss of fisheries resource access to the Ngari Marine Park under FRICMA has been a failure of process and perhaps legislation in many respects. There is considerable angst amongst fishing industry members affected with multiple cases likely to be considered by the State Administrative Tribunal with the potential for individual dispute to progress to the Supreme Court. The extension of right of compensation arising from loss of fishing resource access due to losses attributed to reallocation of resource access to other sectors[11] has been canvased

[10] See above no. 2 at page 31.

[11] Including the recreational fishing sector, other users of the resource domain such as the petroleum and minerals industry, shipping and coastal development.

elsewhere by WRL, WAFIC[12] and more recently by a Standing Committee of the Australian Senate.[13]

There remains a strong likelihood that new legislation replacing the FRICMA legislation and correlated compensatory issues will warrant future policy development and WRL engagement. This is on account of expanding requirements as new parks come into effect along with new demands for exclusive access from other sectors**.** Without an adequate compensatory framework that integrates into a completed rights-base framework as predicated by Part 3 of ARMA, the ability for Governments to facilitate change in the use of fish and altering resource access within the marine domain, will be blighted by ongoing community conflict. While not seen as a major risk for WRL today, that could easily change into the future. A watching brief and awareness of development on compensation principles and legislation is warranted.

2.3. Operational Risks

Whilst ARMA exposes new risks to the industry through the introduction of new subsidiary mechanisms (ARMS and ARUPS) in addition to the introduction of sureties, there are a number of risks outlaid in the discussion below that already existed in the FRMA. If this is the case, then it has been noted in the relevant section. This exercise has been completed to remind readers of those existing risks in tandem to introducing them to new risks.

a. Risk that WRL not consulted in Ministerial approval of ARMS (Section 20(4))

Whilst section 18 and 19 set out the consultation to occur in the drafting of the ARMS, section 19 provides for the revision of the draft strategy following consultation. Section 19 allow the CEO to revisit the draft strategy to any extent the CEO considers appropriate (after considering the submissions made and views expressed by a public authority or body). Similarly, section 20(1) provides that the Minister may refuse to approve a draft strategy by the CEO. If this occurs, the Minister may request the CEO to revise the draft strategy 'taking into account any matters referred to in the request'. This section does not denote any further consultation of these potential changes.

Given the discretion allows within section 20(3), this should be noted by industry as a risk.

[12] *WAFIC Submission to the Legislative Council Standing Committee on Public Administration- Inquiry into Private Property Rights*, July 2019. (https://www.parliament.wa.gov.au/Parliament/commit.nsf/luInquiryPublicSubmissions/697986D6164532C64825846C0010F596/$file/pc.ppr.055.190731.sub.wa%20fishing%20industry%20council.pdf).

[13] See recommendation 10 of *The Senate Environment and Communications References Committee Report. Making waves: the impact of seismic testing on fisheries and the marine environment*. June 2021.

b. Power to set levels of Surety (Section 25(1)(g))

Section 25 of ARMA lays out what must be contained within an ARUP. Notably, section 25(1)(g) provides that the ARUP must 'specify the form and the minimum and maximum amounts of surety (if any) that may be required to be provided for an authorisation to undertake activities regulated under the ARUP'.

The ARMS will set out the required consultation to be carried out in relation to the making of an ARUP. Therefore, it is important for industry to flag that they will not know what the consultation for the creation of the ARUP will be until the ARMS is finalised. During the consultation for the ARUP, the power to set the level of surety is important to advise upon.

c. ARUP sets down how shares are allocated (Section 34(2))

As stated within section 34, when an ARUP comes into operation, any resource shares in an aquatic resource available under the ARUP vest in the Minister. Then, under section 34(2), the Minister '**must** as soon as practicable after an ARUP comes into operation, allocate the resource shares in accordance with the method set out in the ARUP' (emphasis added). The inclusion of 'must' implies that the Minister has no discretion on how the resource shares are allocated, but 'as soon as practicable' can imply that it may not be immediately. It is likely however that this is a low risk, a risk nonetheless.

d. Discretion to require surety from authorisation holder (Section 39(2))

Section 39(2) provides that the CEO may require a person who is the holder of an authorisation…to provide surety for the authorisation if that person is charged with, or convicted of, an offence against:

- The Act;
- A written law other than this Act if the offence relates to the fishing, aquaculture, fishing tour or aquatic eco-tourism industries; or
- a law of the Commonwealth or of another State or Territory, relating to the management/regulation of aquatic resources.

This is a provision to be mindful of in that it is a discretionary power of the CEO.

e. Prosecutorial discretion

Under:

- s 203(2) – Court order for forfeiture of certain things;
- s 208(2) – Court's power to cancel, suspend authorisation;
- s 211(2) Court's power to impose prohibitions on offender.

ARMA imposes a restriction on the Court from making particular orders (such as the forfeiture resource share or catch entitlement the subject of an offence), unless the prosecutor applies for that order. This leaves a large degree of discretion in the hands of the prosecutor. It is recommended that to ensure consistency in these sections application that a prosecutorial guideline is created and information regarding the same be made available to the industry or be subject to regular oversight by an independent expert from time to time. This needs to be further negotiated with DPIRD. As discussed below under section 2.3(i) DPIRD has in place a system of review where compliance/prosecutorial discretion is at play. Whether this is sufficient for purpose under ARMA is yet to be seen. The writer is of the view that the codification of these procedures into guidelines provides clarity to industry and should be implemented.

f. Confiscation controlled by prosecutor (section 203)

Pursuant to this section, if a court convicts a person of an offence against ARMA, the court may order forfeiture to the State of the following:

(a) aquatic organisms the subject of the offence; and
(b) fishing gear or aquaculture gear used, or intended to be used, in the commission of the offence; and
(c) boat, other vehicle or other thing used in the commission of the offence; and
(d) trailer used to transport a boat referred to in paragraph (c); and
(e) resource shares or catch entitlement the subject of the offence; and
(f) money, cheque or other thing that is the proceeds of the sale of any aquatic organism in contravention of ARMA.

The discretion of requesting these items be forfeited ultimately lay with the prosecutor prosecuting the case and ultimately the court (through the Magistrate/Judge) in their orders. It is a risk for this type of discretion not to be underpinned by some type of prosecutorial guideline so that there is consistency in the court's approach.

Notably this provision is largely alike to that of section 218 of FRMA.

g. Extending Liability for Offences

i) A Master's liability (Section 187)

If a person commits an offence against the Act, the master of a boat on which the offence was committed or by use of said boat, is taken to have committed the same offence.

The Act provides defences to the Masters should this event arise. Those defences provide that the Master prove that –

(a) The conduct that constituted the offence was engaged in **without the consent or connivance (i.e. knowing something is illegal but allowing it to occur) of the master; <u>and</u>**

(b) The master took all reasonable measures to prevent the conduct being engaged in.
(Emphasis added)

ii) Liability of person in charge of fishing tour (section 188)

Similarly, section 188 provides for the liability of a 'person in charge of a fishing tour', that person being the individual in charge of the day-to-day operation of the tour, who is not necessarily the person who holds the licence under which the tour is provided. The same defences are available for the person in charge of the fishing tour.

Notably this offence is similar to that of s 202 and s 202A (respectively) under FRMA.

iii) Liability of co-holder of authorisation (section 189)

Again, section 189 provides that 'if an authorisation is held by 2 or more persons and any of those persons commits an offence against this Act while acting or purporting to act as a holder of the authorisation, each of those persons is taken to have committed the offence'. The same defences are available for the co-holder.

The same principles for extending liability for offences to all owners of an authorisation equally apply for offences committed by a agent.[14]

This offence is similar to that of s 202B and s 203 (respectively) under FRMA.

iv) Liability of officers of body corporate for offence by body (section 191)

If a body corporate is guilty of an offence contained within the table under s 191(2), then an officer of that body corporate is also guilty if that officer failed to take all reasonable steps to prevent the commission of the offence by the body corporate.

This offence is similar to s 204 under FRMA.

In all cases of extended liability, the onus is on the master of the fishing vessel and the authorisation holder(s) (and the officers of body corporates), whichever is relevant to demonstrate proof of training, issuance of instructions, advice on legislation, that which is applicable

[14] See s 190.

to escape prosecution. This could extend to contractual arrangements and employment arrangements accompanied with professional record keeping with signed proof of being engaged. Much of that which exist under OHS arrangements. Too much is at risk for holders not to take risk mitigation action. Similar mitigation action is also warranted under section 192.

h. Renewals of managed fishery licence (Section 58)

Pursuant to section 58(3), a person must make an application for the renewal of an MFL before the expiry date. If the expiry date passes, a person can seek renewal of their MFL within 180 days of its expiry date, subject to section 58(4)(a)-(b). It should be noted however that any renewed licence under this section will expire on the date that it would have expired had it been renewed prior to its original expiry date. This means there is no advantages given to MFL licences who renew late (i.e. no extension). They will expire at the same time as it would have had they complied.

Under FRMA it appears that renewals were dealt with more broadly, for example, s 139 of FRMA provides for the renewal of an authorisation. Under ARMA, renewals of managed fishery licences (s 58) and renewals of aquaculture licences (s 75) are dealt with in different sections. This is likely a reflection of the change between the definitions of 'Authorisation' between the two Acts. For instance, under FRMA 'Authorisation' was defined as meaning 'a licence or permit', however under ARMA, it is defined as meaning 'an aquaculture licence, or a managed fishery licence, or any other licence provided for in the regulations.

A notable difference is that expired MFL holders are given more time to apply for a renewal under ARMA than that of FRMA (60 days to 180 days), however the introduction of a requirement for 'special circumstances' still mean that MFL holders seeking renewal after an expiry date may be looked at more favourably if they apply within 60 days after its expiry.

i. Contravening Management Plans (Section 64)

Section 64 provides a definition of 'prohibited conduct', meaning '*conduct that contravenes a provision of a management plan the contravention of which is specified in the plan to be an offence*'. We will not know what conduct is an offence until we have access to the management plan.

This section is the equivalent of s 74(1) and (2) of the FRMA. It is understood that that s 64(2) is to deal with situations where a person deliberately (e.g. intentionally commits quota fraud) or recklessly (e.g. they've had multiple infringements for providing incomplete CDRs, but still aren't getting it right).

There are references within section 65 that will benefit from prosecutorial guidelines, this is in particular reference to prohibited conduct constituting an offence only when a person 'intends to contravene..' and 'is reckless…' Notably these offences carry a fine for $40,000 for a first offence and $80,000 and imprisonment for 12 months for a second offence. If the contravention can't be proved to show intention or recklessness (i.e administrative error or carelessness), then s 65(3) provides a lesser penalty of $15,000. These raft of provisions were applied to encourage the proper completion of catch records amongst other things.

We are informed from DPIRD that where there is a degree of discretion involved on behalf of compliance officers when prosecuting offences, the following applies:

- The set of facts are reviewed by regional managers and discussed in regard to the applicable penalty to be sought and a recommendation is made;
- This recommendation goes to the prosecutorial advisory panel. This panel is made up of a legal legislative services representative, a governance & standards representative and an independent person. The panel decides on the recommendation (support it/amend) and then a further recommendation is made to the Deputy Director General who finalises it to proceed to prosecution.

If someone is convicted of an offence under s 65, they should be aware of the potential impact that s 208 – that being, the court's power to cancel or suspect an authorisation. Similarly, if multiple offences are 'racked up' in a short period of time, the offender becomes more likely to suffer the consequences under s 209 'Automatic suspension of authorisation if three offences committed in 10 year period'. If three or more offences occur in a ten-year period, then the court **must** suspend the authorisation for the period commencing on the day that the authorisation is next renewed (or such other day as is prescribed).

When considering a scenario where one person's offending may result in multiple offences, it is important to note that in accordance with section 209(8)(b) that those offences are to be regarded as one offence (as long as they arose out of one set of facts).

j. CEO to publish notice of certain decisions relating to aquaculture licences (Section 79)

This clause originally required the CEO to publish notice of certain decisions relating to aquaculture licence, including decisions to grant, vary or transfer such an aquaculture licence. This clause has since been deleted in accordance with *Aquatic Resources Management Amendment Bill 2020*.

In the accompanying explanatory memorandum, the reasons for its deletion were as follows:

> *Clause 9 [of the Amendment Bill] deletes section 79 to remove the requirement for the CEO to publish notice of a decision to grant, vary or transfer an aquaculture licence. Aquaculture licences under ARMA will also apply to pearl oyster (Pinctada maxima) aquaculture. Under the Pearling Act 1990, there is no requirement for advertising such decisions. A single licensee may make numerous requests per year to the CEO to vary seeding amount under an aquaculture authorisation. The requirement for the CEO to publish notice of every decision to vary a pearling aquaculture licence would be administratively time consuming and incur extensive publication costs. The deletion of this requirement will reflect the status quo in terms of pearling aquaculture licences. The amendment in clause 15 of this Bill retains the requirement for the CEO to give notice of a decision to the affected person, and to advise the person that they may apply for a review of a decision under section 147.*

The risk evident from the removal of this section is that our industry will now not be guaranteed to be notified upon the decision to grant, vary or transfer a licence, when one might occur within the fishery.[15]

k. Security holders (section 156)

As it was under FRMA, a security holder will only become aware that the holder of a registrable interest (of whom the security holder holds a security interest with) has been convicted of a prescribed offence against the Act at the **time of conviction**. Notably, not when the holder has been charged (i.e before the proceedings are finalised). This is a matter of balance of risk between investor and skipper and their individual contractual arrangements, the involvement of criminal intent and penalty disincentive.

l. Criminal Offences

There are a variety of offences contained in the Act that result in penalties both minor and severe. For minor offences, it is likely that an infringement notice will be issued to the alleged offender. This is because s 186 of ARMA provides that '*if* [ARMA] *is a prescribed Act for the purposes of the Criminal Procedure Act 2004 Part 2, [section 186] applies in relation to the service of an infringement notice under that Part by an authorised officer in relation to an alleged offence under [ARMA]*'. Currently neither FRMA or ARMA are listed in Schedule 1A of the *Criminal Procedure Regulations 2005* as a

[15] Reference should also be made to the Ministerial Guidelines on this issue.

prescribed Act for that section. It is likely that the above regulations will be updated to include ARMA, at which point the position will be clarified.

It is important that this update occurs, as an infringement notice will provide for payment of a fine, but the payment will not result in a criminal record being recorded.

Due to the risk around the negative impact of criminal offences, further advice will be sought.

There are more significant offences, for example, section 31 which sets the penalties for the contravention of the terms of an ARUP or the regulations that relate to an ARUP. The first offence in relation to a commercial ARUP is a fine for $40,000. The second or subsequent offence in relation to a commercial ARUP is a fine of $80,000 **and** imprisonment of 12 months (*emphasis added*).

On the other hand, under section 129 'Trafficking in commercial quantity of priority aquatic organisms', it is specifically clarified that a person who 'traffics in a commercial quantity of priority aquatic organisms without being authorised under [the] Act to do so **commits a crime'**. It should be noted that this is different from the above example of section 31, that being that this section denotes the offence as a crime. As the alleged offence is a crime, it is an 'indictable offence' it would usually be heard by the higher courts, being the District Court or the Supreme Court (not the Magistrates Court). However, the section denotes that there is a 'Summary conviction penalty' available. This means that it is an 'either way' offence, and can be heard in the Magistrates Court. The procedure for prosecuting and dealing with offences is set out in the *Criminal Procedure Act 2004*. It is vital that independent legal advice is obtained if one is ever charged with offences under ARMA.

Readers should be aware that if they are convicted of a crime (such as against s 129) a criminal conviction can be recorded on their criminal record, and such a record can potentially hinder further employment opportunities. If individuals are convicted of lesser offences (including those which they receive infringement notices for), then this will not result in a recording on a criminal record. Notably, DPIRD's enforcement officers will keep a record of this type of 'low level' offending and if an individual is once again brought to the Magistrates Court then DPIRD can tender their record of this offending which will then be used by the Magistrate in deciding the appropriate penalty.

m. Death And Succession Planning - Resource Shares (section 35) & the death of individual who holds authorisation (section 262)

A resource share is capable of being given away by will (or pursuant to intestacy rules).

Under s 262 of the Act upon the death of an individual who holds an authorisation (for example, an MFL), that authorisation is transferred in accordance to how it was held. If MFL was held *jointly* with another, then the survivor takes the MFL, if the MFL was held between two or more people as tenants in common, then the deceased's authorisation holder's share in the authorisation will be held by the his/her personal representative (an executor or administrator).

MFL holders should make sure that their holdings are in accordance to their wishes and seek independent legal advice if unsure.

Notably these provisions are the same as under FRMA. One change is that ARMA does not include a provision similar to s 146A(4) which deals with transfers of authorisation by individuals who died before the commencement of the *Fish Resources Management Amendment Act 2011*. This section was likely viewed as obsolete and unnecessary to transfer over.

Members need to consider how they hold their authorisations if held with another person (or organisation). It may be that the name registered on an authorisation does not correctly reflect the agreements that fishers have or ownership. If this is the case then fishers need to maintain records of sales contracts, partnership agreements, tax records etc. as supporting documents in the event of an ownership dispute arising.

3. Opportunities for Western Rock Lobster under ARMA

This paper should be read in conjunction with the advice provided on co-management under ARMA. The opportunities listed below include as applicable, broader opportunities open to the commercial fishing sector. A list of existing administrative guidelines (often called Ministerial Guidelines) transitioned across from the FRMA and are expected under the ARMA Regulations are listed on page 6.

3.1. Opportunities

a. Prioritisation

WRL and WAFIC could seek the specification and priority of existing managed Fisheries and expected timelines for transferring from managed fisheries to become operational aquatic resource use plans under part 3 of *ARMA*.

The WRL to seek direction from Government on the likely timetable for bringing managed fisheries under part 3 of ARMA in order to benefit the added protections to resource shares and fishery resource access rights provided by the legislation. Some fisheries, especially those substantially exploited by commercial and recreational fishers, should have priority.

b. Licensing Guidelines

Licensing Guidelines to support the administration and suspension of aquatic resource access rights and other authorisations by the CEO of DPIRD. **(s 254 and s214)**

The fishing industry is seeking clarity of roles and delegated responsibilities to licensing staff within DPIRD for the day-to-day administration of authorisations under ARMA. This will add certainty in the administration of fishery resource access rights. Similar policies operate for Commonwealth Fisheries successfully.

c. Harvest Strategies and Ministerial Guidelines

Implementation of harvest strategies which require catch measurement, reporting and performance evaluation of resource shares under Integrated Fisheries Management (IFM). The issue of a Ministerial guideline covering the administration and reporting of Harvest Strategy will strengthen arrangements for WRL specifically and may include other fisheries. **(s254)**

Harvest Strategies set the decision rules for the management of managed fisheries and the presumption is that they will also apply under ARMA inclusive of specifying resource shares as policy or as legislation. Unless catch measurement of all sectors are effectively accounted for, reported and evaluated against existing harvest strategies and results in a management response where non-compliance occurs, the objectives of resource

sustainability under ARMA cannot be met. Transparency through ongoing annual reporting by DPIRD as the resource manager is essential).

d. Co-management delegations

Development of co-management delegations can be achieved through Ministerial Agreement in the performance of functions (**s220-223**) to WRL (See 1.6 below), within subsidiary legislation and operational guidelines to facilitate co-management of the WRL fishery (**s254)** by delegations to DPIRD staff (**s214**) and within defined TACC shares established by policy or legislation under part 3 of ARMA through legislative design within an ARUP.

Part of the solution lies with changing the way subsidiary legislation is drafted so that the Minister is able to transfer the decision responsibility for amendment to management plans or ARUPs under ARMA to senior officers within DPIRD, supported by guidelines and subsidiary legislation that facilitate co-management. This approach could extend to by agreement to complete transfer of a function or a number of functions by a recognised body such as WRL.

e. Principles and policy settings

Principles and policy settings for intra-sectoral reallocation of fisheries resource access rights towards bringing multiple managed fisheries within a single aquatic resource management framework under part 3 of ARMA. (s254)

One of the key challenges facing aquatic resource managements under ARMA is the integration of a number of commercial fisheries into single aquatic resource management strategy and use plan. The combining or alteration of access rights or reallocation to different form of access rights are equally part of that challenge. This is not a new issue and certainly been a factor of past decision making in the Western Australian rock lobster industry as well as within commonwealth fisheries. The development of guidelines using similar principles applied in other fisheries jurisdiction(e.g. AFMA Fisheries Management Paper 8 "Allocation of Fishing Concessions where Management Arrangements Change") is seen as critical in addressing future management requirements of reform for commercial fisheries to optimise their future worth to the state). Whilst important for other fisheries, it is perhaps less so for WRL unless at some time in the future the Windy Harbour Rock Lobster Fishery is incorporated in the management arrangements for WRL under the same ARMS.

f. Provision of Guidelines

The provision of guidelines **(s 254)** and supporting legislation **(s 234)** that enable industry bodies of major fisheries or fishery sectors (e.g. WRL) to raise funds to facilitate industry management, promotion and training. Further, under agreement with the Minister (**s220-223**) to access funds for

a range of functions including collection of data and analysis, advising Minister on management, developing plans for management, the management of particular aspects of a resource, restricting access on a specified basis or period to the resource or conduct of trading resource shares (quota units). The agreement facilitates undertaking of any prescribed function. The legislation however does not provide independence from government whilst still complying with aquatic resource sustainability.

The Western Australian Government has committed to funding fisheries management in Western Australia and charges a resource access fee of 5.75% on wild caught fisheries to support fisheries management. However, industry may wish to raise funds to undertake initiatives in the areas listed above without the problem of "free loaders". WRL could progress down the co-management route under these provisions.

g. Clarity of fees through development of Ministerial Policy Guidelines

The further development of a Ministerial Policy Guideline to provide industry with clarity and long-term certainty as to the basis of all fees charged. This can equally apply to WRL

Ongoing update of the existing Ministerial policy guideline and processes for determining access fees, and extension to other fees including lease fees, is essential to maintaining certainty within industry as ARMA legislation comes into force.

h. The potential of obtaining delegated authority

The development of a Ministerial Policy Guideline that provides industry and stakeholders with clarity and long-term direction on fisheries related services (functions) that could be undertaken by private sector interests under delegated authority of the Minister for Fisheries under *ARMA* (**s 254**)**.**

This is seen as a desirable Ministerial policy statement for the information of prospective interests by service providers, including WRL and WAFIC as a peak representative organisation.

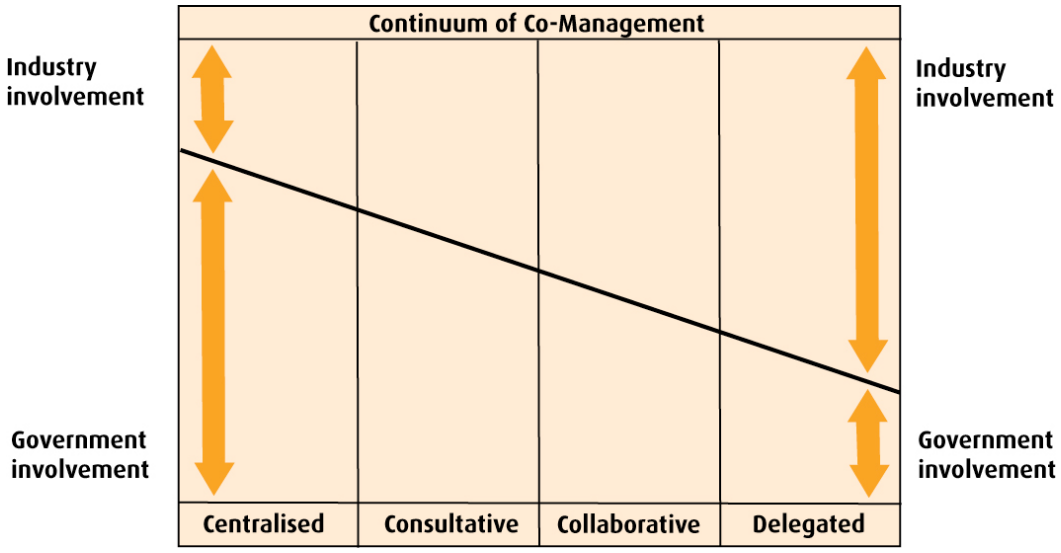
4. Co-Management Options for Western Rock Lobster (WRL) under ARMA

4.1. Background

Co-management can be described as an arrangement where responsibilities and obligations for sustainable fisheries management are negotiated, shared and delegated between government, industry and other stakeholders.[16] In reality the term can be applied to any cooperative arrangement along a continuum depending on the specificity of arrangements entered into between the parties and the overall willingness to share risks and to strive for shared goals in desirably better outcomes for all involved. The prime objective should not be solely focused on cost shifting of responsibilities but on improving efficiency and effectiveness and achievement of resource sustainability in the context of broadly accepted defined objectives for the specific commercial fishing industry body undertaking the role.

Neville (2008)[17] identified four models for fisheries management (presented in Figure 1) as follows: centralised; consultative; collaborative; and delegated. As a fishery moves along the continuum of management, industry has a greater level of decision making and responsibility, and the functions undertaken by government decrease. Whilst it is widely recognised that other stakeholders, including the conservation sector, have an interest in fisheries management, it is unlikely that any specific functions will be delegated to a representative stakeholder body outside of the fishing industry – government relationship.

Figure 1: Levels of partners involved in decision making (Source Neville 2008)



[16] *Report of the Fisheries Research and Development Corporation's National Working Group on the Fisheries Comanagement Initiative* – project no. 2006/068, 2008. Fisheries Research and Development Corporation, Canberra.

[17] Neville, P. (2008). *Co-management: Managing Australia's fisheries through partnership and delegation.* Report of the Fisheries Research and Development Corporation's national working group on the fisheries co-management initiative – project no.2006/068.

Whilst there have been a number of studies on co-management primarily sponsored by FRDC, the ability to progress down this pathway depends significantly on the willingness of parties proceeding especially that of:

- the industry organisation;
- that part of government having the responsibility for fisheries resource management; and
- the attitude of the Minister.

Certainly, history shows co-management has been a feature for many years in the Spencer Gulf Prawn Fishery as well as within the Northern Prawn Fishery. Both fishery sectors having industry engagement incentivised by reductions in cost recovery/fee recovery arrangements amongst other economic objectives. The former possibly much further down the delegated co-management model than the latter.

It is worth noting that a quick review of co-management within Commonwealth fisheries[18] and the Spencer Gulf Prawn Fisheries[19] reports on the subject draws out the following findings:

- Successful co-management requires substantial additional investment, planning and engagement between the parties.
- Commitment by industry must be substantial with (desirably) all members of the fishery fully engaged.
- Expected financial outcomes cannot always be achieved but engagement can lead to other non-financial benefits.
- It is fundamental to have clarity around industry objectives and harvest strategy.
- The need for clear lines of communication, responsibilities supported by appropriate assignment, information and evidence collection, audit processes and decision rules which underpin performance of each particular function.
- Each co-management arrangements need to be independently negotiated fit for purpose.
- The need for a strong, well-managed and cohesive body, strong government/industry relationship and shared support for trials to be successful.
- Policy makers will need to consider the implications of co-management with a view to giving it broad support as a legitimate part of an evolving fisheries management framework.

[18] Bolton, S., Jarrett, A., Moore, J.,Sumner, D., Bray, S., Barwick, M. and Andersen, J. Australian Fisheries Management Authority and Fisheries Research and Development Corporation, *Co-management in Commonwealth Fisheries,* Canberra, March 2015.

[19] K. L. Hollamby, P. E. McShane, S. Sloan and J. Brook. *Competition to collaboration: exploring co-management models for the Spencer Gulf Prawn Fishery.* FRDC Report 2007/025.

- Fishery managers will also need to adapt to the different role they will play in co-management. This would include new skill development in areas such as auditing. More efficient and cost-effective tools for monitoring will be needed to support the evolution of co-management.
- Overall, co-management had been reported as a positive.

4.2. Co-management in WRL

As a concept, co-management has been a feature of WRL for many years. This concept has existed almost all within the continuum of management consultation without the delegation of final decision making. In research, this has been characterised by:

- Working co-operatively in setting priorities; and
- individual fishers providing facilitated assistance to researchers either voluntary or under contractual or legislated data or service provision arrangements.

The western rock lobster industry has been operating effectively in this space of the co-management spectrum as defined by Neville (2008) since the late 1960's. This position in co-management has been strengthened since:

- the abolition of the rock lobster industry advisory committee;
- the shift to output controls in managing the fishery;
- the formation of WRL; and
- changes to FRDC covering IPA funding research agreements direct with the industry.

This has seen the industry body itself become much more engaged in providing advice across a much broader spectrum of issues impacting both within fisheries management and outside the Department of Fisheries (and now DPIRD's purview). Through its various committee processes this has extended into:

- marketing & promotion;
- vessel safety;,
- occupational health and safety;
- matters of regulation and legislation;
- management of PET species; and
- other interactions in the marine domain including other stakeholder interests.

Despite this broadening of roles little progress has been achieved in final delegation of primary decision making to WRL for specific functions of fisheries management by the Minister for Fisheries or by delegations under the *Fisheries Resource Management Act 1995*.

In 2009, the following legislative principles were espoused for facilitating greater involvement of co-management arrangements within fisheries management by industry including decision making:[20]

1. The objects of the relevant Fisheries Act need to be modified to ensure that any other person or bodies required to consider the operation or application of the Act, must act consistently with, and seek to further the objects of the Act.

2. The Minister will need to have the power to be able to delegate a function of power of the Minister under this Act for the purpose of management of a fishery, or part thereof, to:
   a. the Chief Executive Officer;
   b. any other person or body (including a person for the time being holding or acting in a specified office or position).

3. The Chief Executive Officer may delegate a function or power of the Chief Executive Officer to a Public Sector Employee (including a person for the time being holding or acting in a specified office or position).

4. A delegation under this section –

   c. must be by instrument in writing; and
   d. may be absolute or conditional; and
   e. does not derogate from the power of the delegator to act in a matter, and
   f. is revocable at will.
   g. (N.B. Clause (c) allows the delegator to retrieve a situation should circumstances require this to occur).

5. In legal proceedings, an apparently genuine certificate, purportedly signed by the Minister or the Chief Executive Officer containing particulars of a delegation or revocation under this section, will in the absence of proof to the contrary, be accepted as proof that the delegation or revocation was made in accordance with the particulars.

6. At the time a delegation for the management of a fishery is assigned to a person or body other than the Chief Executive Officer, the Chief Executive Officer should ensure written guidelines have been issued to assist that person or body to meet the obligations of the delegation.

7. The guidelines as a minimum must specify –

   a. the purpose of the delegation;
   b. the specific fishery management objectives to be met;
   c. the key performance indicators to be measured and reported upon;

[20] P.P. Rogers. 2009. *Co-management strategies for W.A. State Managed Fisheries using the Exmouth Gulf Prawn (Trawl) Fishery as a case study.* 2008/059 Co-management strategies for W.A. State. FRDC Report.

d. the requirements for reporting and audit of performance by the delegated person or body;
e. the actions to take place if (d) is not met;
f. the scope of discretion in delegated decision making to be exercised or acted upon by the person or body;
g. the time period for the delegation but not more than 10 years for any single delegation;
h. any other matter or function pertaining to the management of a fishery[21];
i. in delegating management of a commercial fishery to a person or body other than the Chief Executive Officer, permit the Chief Executive Officer to provide guidelines or conditions to be met on:
    i. stock management;
    ii. harvest strategies rules and levels;
    iii. assessment of stock status;
    iv. retained species;
    v. by-catch;
    vi. incidental levels of endangered, threatened or prohibited species;
    vii. habitat structure;
    viii. ecosystem structure and function;
    ix. administration & governance; or
    x. any other matter considered to be relevant for the fishery.

These may be modified or amended at any time by formal advice from the Chief Executive Officer through the issue of a duly dated, new guideline.

8. The Minister or the Chief Executive Officer may issue a Direction in writing to a person or body that has been issued a delegation under section (4) to facilitate improvement in the performance of the management of the fishery or part thereof as provided under section (7) within a specified time period but for a period not more than 6 months.

9. A failure by the person or body to meet the Direction in writing issued under section within a specified time should constitute an offence.

10. Any data or information provided to the person or body as a consequence of the delegation assigned, should be available to the Minister, the Chief Executive Officer, or their staff, without limitation.

11. Any data or information collected by a person or body as a consequence of the delegation assigned should be subject to the confidentiality provisions of the Fisheries Act.

[21] the undertaking of research, compliance, education or data collection of the management of a fishery or part thereof but should not extend to allocation issues pertaining to rights in existence or pertaining to other stakeholders.

12. The Minister to have the power to determine and appoint members to a management committee for a particular fishery, to undertake decisions delegated to the committee through the instrument of delegation (see principles 2 and 6).

These principles have been further developed within the scope of ARMA and in the mind of the author of this paper, provides the necessary toolbox to craft most arrangements of co-management required by WRL or the fishing industry. This could include delegation of decision making to WRL into a specific management function or number of functions as appropriate. The case for doing so is expected to be subject to an appropriate business case and adequately demonstrated support by the licensed entitlement holders in the fishery.

WRL also need to be mindful that cost recovery arrangements in setting fees in Western Australia no longer operate. This potentially requires industry to manage the risks of agency costs being transferred to the industry where shifts in functions between industry and government takes place. The ARMA legislation allows payments for shifts in costs in the delivery functions by WRL instead of DPIRD, with the will of the Minister, to be met.

At face value the ARMA legislation provides the full scope of delegated decision making under the Neville model of co-management. With clever drafting of a deed in establishing an AR Ministerial body and other documents including Ministerial guidelines, it is potentially feasible to establish a "statutory body "with industry-based decision responsibilities for a function or a number of functions assisted by Ministerial decision guidelines. This may need to be legally tested into the future.

4.3. ARMA legislative provisions relevant to Co-management

This section reviews the relevant legislative provisions under ARMA that relate to co-management and expand on the author's views on how such provisions could potentially be implemented by WRL and the industry more broadly.

a. Committees

Section 224 of ARMA – 'Establishment and functions of advisory committees' enables both the Minister and CEO by instrument to establish management advisory committees to advise on:

(a) the protection and management of an aquatic resource;

(b) the management of a fishing activity;

(c) the management of aquaculture;

(d) the administration of this Act.

Comment: In essence the formal committees could advise on co-management arrangements and decision making on functions prescribed above and identify committee members and operational requirements. Final decisions under this power remain with either the Minister or CEO. Regulations can be applied to further clarify operational requirements. Most informal process of consultation do and

often taken place however, without the requirement for legislative committees but through mutual co-operation of the parties.

b. Under Other Administrative Arrangements

Section 215 of ARMA allows the Minister to "*cause to be carried out any research, exploration, experiments, works or operations of any kind for the purposes of this Act*."

Comment: These functions fall within the scope of S 222 and costs can be met through S 232 where relevant to WRL as a recognised body and can be applied under any manner of agreement with support of the Minister.

Part14 Division 3- Aquatic Resources Research and Development Account Financial Provisions, enables payments by and to the Minister (s 232 (4) (b) and s 232 (3) (b)) for the purposes of s 222 to be administered through this Account without going to Consolidated Revenue.

Comment: Examination of s 232 shows the wide spread of fees and charges that are met by the commercial sector of the fishing and aquaculture industry under ARMA that fall in scope of this Account. Any of the functions that falls within this provision that could reasonably be undertaken by WRL could arguably with the agreement of the Minister be under taken by a co management approach under s 222.

Examples include:

232 (4) The R&D Account may be applied by the Minister for the following purposes —

(a) to develop and manage aquaculture or aquatic resources for commercial purposes including by means of one or more of the following —

(i) the conduct of scientific, technological or economic research;

(iii) the conduct of programmes and provision of extension services, including publicity programmes;

….

(v) the provision of assistance to 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;

(e) the care, control and management of the Abrolhos Islands reserve;[22]

[22] The example of subsection (e) being outside of WRL core business but not outside of scope given those part of the Abrolhos Islands are actively used by the rock lobster industry and others in the commercial sector.

There is also scope under s 232 (3) and s 222 for WRL to manage registrations specific to the industry and potentially matters of registration of resource shares, catch entitlements and with appropriate guidelines (see s 255) registration of foreign interests in resource shares. The business case would be needed to address feasibility.

Similarly as ARMA specifically allows development of plans for the management of an aquatic resource to be assigned by the Minister to a recognised body, it is not beyond scope to extend under s 222 the specific development of administrative guideline(s) (s 254) to a recognised body for the Minister to consider. Again this is at the discretion of the Minister.

c. By Formal Agreement

Part 13 Division 3- Use of outside bodies in performance of functions provides the power for the Minister to enter into agreement (s 220 and s 222) with a recognized body (s 221), in this case with WRL to carry out a function or functions as prescribed by s 222(2). The agreement needs to be in a form set down by s 222 (3) and once finalised between the parties cause notice of the agreement to be published in the *Gazette* and make the agreement available for inspection by the public at a specified location. The Minister's powers in this agreement are unlimited with fees subject to operational requirements of the agreement overriding any inconsistency with the regulations (s 223).

Comment: The provisions of Part 13 Division 3 are virtually unlimited in scope for the practical transfer of any function under the ARMA legislation to WRL in the management of the rock lobster fishery solely at the discretion of the Minister within a co-management "agreement" signed between the parties. In saying this realistically Government are unlikely to agree to the transfer of legislative, compliance or prosecution functions or foregoing their broad policy roles. However, the ARMA legislation does allow specifically:

(a) collection and analysis of data relevant to an aquatic resource;

(b) advising the Minister about the management of an aquatic resource;

(c) developing plans for the management of an aquatic resource;

(d) the management of specified aspects of an aquatic resource;

(e) restricting access to an aquatic resource on a specified basis, including for a specified period;

(f) the conduct of trading resource shares in an aquatic resource;

(g) representing the interests of the commercial fishing sector;

(h) providing education and training about the management of an aquatic resource to persons who have, or want to have, access to the aquatic resource;

(i) any other prescribed functions.

There is equally sufficient financial flexibility within an agreement to set down arrangements for fees and payments as follows:

(d) the financial arrangements under which the agreement is to operate which may include arrangements in relation to any of the following matters —

(i) payments to be made by the Minister to the body for carrying out functions under the agreement;

(ii) fees that may be payable to the body by persons other than the Minister;

(iii) fees or payments to be made by the body to the Minister;

Comment: As with most agreement arrangements there must be conditions under which penalties can apply for non-performance as well as conditions under which agreements may be varied or terminated.

The critical issue in any co-management approach for WRL is the appropriateness of any negotiated agreement, the fiduciary responsibilities that come with it and whether there exists real advantage for the industry as a whole in undertaking the function sought.

In total 34 categories of functions[23] were identified as being potentially undertaken by fishers in fisheries administration, compliance, research and development, monitoring and assessment, management planning or communications and extension.

The following functions should always remain the responsibility of government:

(a) government policy development.
(b) enactment of legislation.
(c) initial creation of property rights and authority to fish.
(d) fisheries access and allocation issues among all fishers and other stakeholders.
(e) establishment of sustainability performance indicators and controls.
(f) enforcement and prosecution.
(g) legislated fee setting.
(h) audit and compliance with contractual arrangements.
(i) foreign and international fisheries matters.
(j) regional and development matters.

[23] See FRDC National Working Group Report – Project No. 2006/068.

Whilst the above core functions are primarily the responsibility of government similarly those activities such as in resource sharing, compensation and dispute or appeal processes should remain at arm's length to co-management arrangements due to their perceived conflict in interests. However it is not beyond the possibility to arrange third party independent audit, development of draft legislations especially ARUPS for the fishery or third party or industry surveillance under specific circumstances.

Sections 216-219 establish an AR Ministerial Body as a body corporate having the same status, immunities and privileges of the Crown through which the Minister can perform any of the Minister's functions under the ARMA Act. The Body to fall within the scope of the *Financial Management Act 2006* (section 52), operations of DPIRD for the purposes of Part 5 of that Act and the appointment of Ministerial officers under the *Public Service Management Act 1994* but not as an organisation. Section 219 sets down how deeds and other documents are to be executed and delegations of Ministerial authority applied. That delegation could extend to the CEO or another person. It is understood that a person appointed on the Ministerial staff could be an independent part time person who could be delegated the role of the Minister for carrying out the management responsibilities of a fishery within an ARUP (noting not for the purposes of approving an ARMS (see s 213(1)).This option could be further extended under corporation law giving the decision function within an ARUP to the Chairman or CEO of WRL with the will and written agreement of the Minister and their part time appointment on staff. A matter requiring investigation for existing examples under other similar legislation within other Western Australian Acts.

Comment: At face value it would appear through the appointment of an AR Ministerial body, there is scope for industry by appointment to a Ministerial staffing position(s) to undertake by delegation a direct responsibility in fisheries management decision roles and other Act functions. This needs further exploration opening the way for clear delegation of decision making beyond the Minister, to the CEO and another person. Whether a deed and appointments can ultimately extend to a statutory delegation of a function to an AR Ministerial Body needs exploration. An AR Ministerial Body (if created by the Minister) could be used to provide substantial co-management decision responsibilities directly, especially coupled with a s 222 agreement.

Should a decision ever be taken to establish all responsibilities for fisheries management within a Statutory Authority, it would be preferable to develop specific legislation rather than attempting to draft such an arrangement in its entirety under s222.

d. Administrative Guidelines

Section 254 provides for the creation of guidelines to persons who have duties or obligations under ARMA or any other Act administered by the Minister. This section also provides for their modification, creation, revoking and publication in a prescribed way. Section 255 extends the use of administrative guidelines on foreign interests or control of resource share, catch entitlements or authorisations under ARMA.

When preparing or changing guidelines the Minister is required to consult with the industry body or persons considered appropriate (see s 256).

The guidelines relevant to a particular function must be taken into account by the decision maker when making a decision but does not remove the role of the decision maker from taking properly into account matters not covered by the guidelines, the proper exercise of discretion under administrative law or inconsistencies with relevant Acts (see s 257).

Comment: These guidelines once developed and approved by the Minister, can be used widely to extend decision making in a wide range of delegated decision-making responsibilities both within DPIRD and to representatives of various bodies established under formal agreements with the Minister under ARMA.

The importance of these administrative guidelines in relieving the Minister of the burden of day-to-day decision making under ARMA and assisting in providing flexibility over time in policy development and facilitating certainty in business makes the use of such guidelines essential. It is feasible for such guidelines to be developed not only by DPIRD staff but by industry under Ministerial fiat. It is interesting to note that the saving provisions of ARMA do not cover Ministerial guidelines under the FRMA but expected to be achieved through changes within the ARMA regulations.

The scope for Administrative Guidelines in assisting delegation of decision making under co-management arrangements is considerable. Numerous examples are provided under identified opportunities under ARMA point to some of the possibilities.

4.4. Conclusions on Co-Management

ARMA provides a wide range of alternative co-management offerings between DPIRD and WRL. These offerings sit across the full range of the co-management continuum reported for fisheries. Increasing the development and use of administrative guidelines should improve administrative efficiency and certainty for industry. Any shift to delivery of specific functions of fisheries management by WRL will require:

(a) the authority of the Minister;

(b) formal agreement between the two parties;

(c) a full understanding of the respective financials involved; and

(d) business case with changes to current services delivered by DPIRD.

The options are considerable with WRL best placed to consider the merits of the opportunities with particular attention being taken to assess the risks of cost transfers vis-a vis the benefits from industry gaining full responsibility for the management of the commercial TACC under ARMA. This could include delegation of decision making within an operational commercial ARUP in the context of an updated harvest strategy and supportive administrative guidelines and detail of formal agreement with the Minister. How far this could extend within the deed of AR Ministerial body could be guided by researching the application of similar arrangements under other Western Australian legislation and Ministerial portfolios.

Where delegated decision making occurs, s 253 of ARMA provides protection against action in tort for anything that a person has done in good faith in the performance of a function under the Act without relieving the liability from the State. This is an important aspect for those persons granted decision making authority by the Minister or CEO under the Act.

Whilst co-management arrangements could feasibly extend to other stakeholders, it should not extend to those functions defined earlier that are the core responsibility of Government or those that are conflicted, such as in resource sharing, compensation and dispute or appeal processes. However, with the correct framework, WRL together with Recfishwest could jointly manage the changes to the annual recreational TAC for western rock lobster under s 48 under a co-management market-based agreement between all parties linked to respective ARUPS for both sectors.

Finally, effective co-management arrangement will not happen without considerable resourcing and commitment by the parties. The experience from other jurisdictions suggests the benefits achieved go beyond the simplicity of cost savings but can extend more broadly through a working partnership into broader social and economic outcomes underpinning political and community wide support for the commercial fishery.

5. Concluding Comments for consideration by WRL

This report should be managed as a living document and updated from time to time to take into account ongoing legal and policy changes as ARMA is progressively implemented. This will need to be revisited once the ARMA Regulations are gazetted and when the residual content of the 2015 ARMA Bill becomes fully proclaimed. Version control based on time of updating to be provided.

As indicated within this report aspects of the legislation warrant further attention:

- Further clarification advice on description of a Criminal Offence and what it means for persons convicted under ARMA (see page 20).
- Further advice on the use of Aquatic Resource Ministerial Body under legislation (s 216-219) and its potential application in the management of aquatic resources inside and outside of DPIRD drawing upon similar examples under other legislation (see page 23).
- DPIRD to establish administrative guidelines regarding the implementation of surety provisions.
- The extension of liability for offences (see page 16– 17discussion).
- That DPIRD be requested to develop administrative guidelines for all administrative matters that involve discretionary decisions which can be appealed and referred to the SAT.

All of these matters could be formerly referred to DPIRD by WRL for further advice.

Industry would be assisted by further communications on ARMA. This needs to be timed once the Regulations are close to finalisation and WRL are better informed by DPIRD on expected timing of ARMA implementation of Part 3 provisions as it relates to the rock lobster resource, including considerations around ARMS, ARUP, updating of the Harvest Strategy and policy options on co-management and resource reallocation.

A detailed slide preparation on ARMA with a supporting explanatory statement for the commercial fishing sector is currently being drafted. When completed, it can be used as a resource by WRL and if acceptable, placed on a number of web sites inclusive of WAFIC and SSPWA. The content has been reviewed by DPIRD staff. Most of the presentation development has occurred outside this particular project and updated for WRL use.