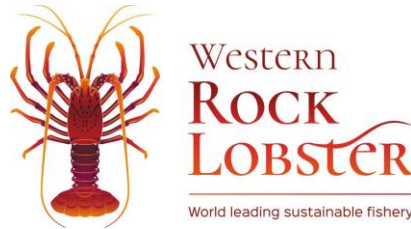


Presentation on ARMA Legislation

This presentation should be read alongside accompanying notes which can be accessed through [here](#)



A Western Rock Lobster funded initiative

Prepared by Peter Rogers and Carey-Ann Harper

Information sourced from a range of documents and prepared with the input of the Department of Primary Industries and Regional Development (DPIRD) and the Western Australian Fishing Industry Council (WAFIC)

Qualification/Disclaimer

- ▶ This brief has been compiled by Dr. Peter Rogers on issues relating to the Aquatic Resources Management Bill. The principal author Dr. Peter Rogers is not a qualified lawyer, does not warrant that the information in this report is free from errors or omissions. The author does not accept any form of liability for the contents of this report or for any consequences arising from its use or any reliance placed upon it. This presentation is intended to provide background information and draws attention to areas of policy and legislation that warrants consideration and does not purport to provide final legal advice on any matter.

Abbreviations

- ▶ **ARMS** - Aquatic Resources Management Strategy
- ▶ **ARUP** - Aquatic Resource Use Plan
- ▶ **ACE** - Annual Catch Entitlement
- ▶ **CE** - Catch Entitlement
- ▶ **CEO** - Refers to the Director General of DPIRD
- ▶ **EPBC Act** - *Environment Protection and Biodiversity Conservation Act 1999 (WA)*
- ▶ **TAC** - Total Allowable Catch

Basis of Law

- ▶ Statute Law vs Common Law
- ▶ Fisheries management Law is modern law based on statutes passed by parliament
- ▶ The Minister, as a member of executive government, is guided by Cabinet and the will of Parliament through statutes and disallowance of subsidiary legislation

What are the guiding instruments of fisheries legislation and policies?

- ▶ The Australian and State Constitutions
- ▶ The statutes
- ▶ Inter-government agreements (e.g. Offshore Constitutional Settlement; Taxation, Council of Australian Governments (COAG); Ministerial Councils etc.)
- ▶ Regulations, Management Plans, orders and various notices, ministerial guidelines and policy documents (e.g. harvest strategies)

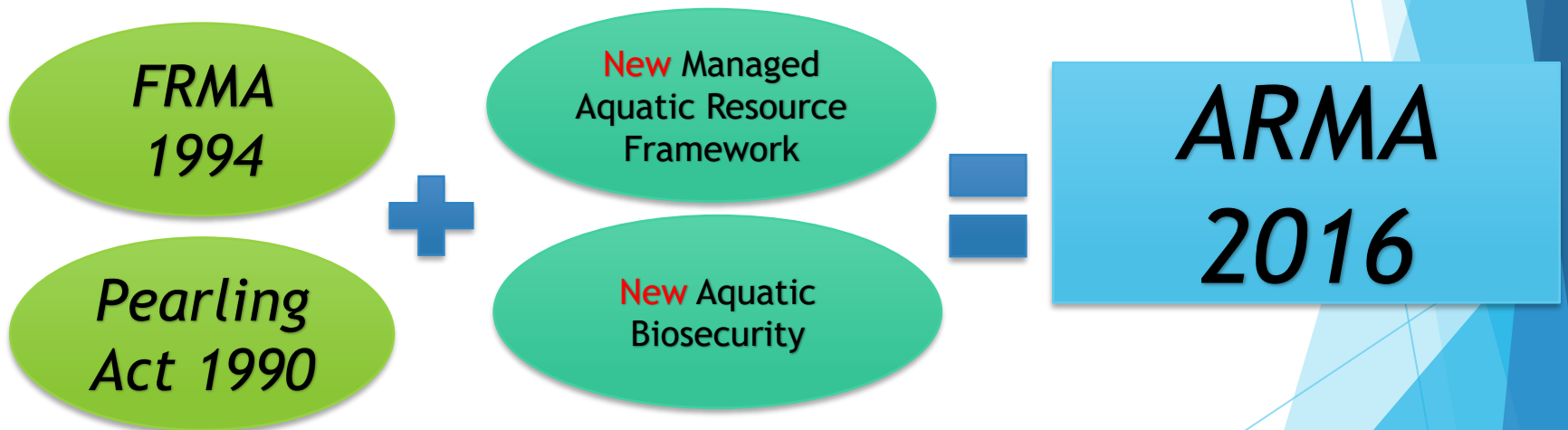
Other guiding instruments impacting decision making

- ▶ Freedom of Information
- ▶ State Administrative Tribunal
- ▶ Administrative Law principles
- ▶ A range of treaties, inter-government agreements, environmental standards, etc.
- ▶ Other statutes, notably EPBC Act, Health Act, Local Government, Occupational Health and various Marine Vessel and Safety legislation.

What is ARMA?

- ▶ It's the Aquatic Resources Management Act 2016

ARMA will be the primary piece of legislation managing aquatic resources in WA.



Aquatic Resources Management Act 2016

- ▶ Primarily a “tool box” Act for Management of Aquatic Resources.....Not Fisheries
- ▶ Parts of the Act will cover the management of fisheries, aquaculture, aquatic habitat protection and Abrolhos Islands, register, compliance, legal proceedings, financial provisions, arrangements with other jurisdictions, and ‘miscellaneous’ remains largely unchanged
- ▶ Areas to focus upon in the Act are Parts 2,3,6,13 and 18. These are the ‘Objects of the Act’, ‘Managed Aquatic Resources’, ‘Aquatic Biosecurity’, ‘Administration’ and the ‘Transitional Provisions’
- ▶ The real power of legislation evolves from the application of subsidiary legislation

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

1. Ensuring ecological sustainability (obj.)
2. Risk based assessment and transparent, outcome focused resource use planning(obj.)
3. Integration of resource protection and use across all sectors (part 3)
4. Security of Resource Access and Allocation of proportional harvest entitlements for the fishing sectors (part 3)

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

5. Management of aquaculture activities (part 5)
6. Protection from negative impacts of aquatic disease and harmful organisms (biosecurity)(parts 6 and 8)
7. Devolution and delegation of decision making (parts 3 and 13)
8. Co-operative management arrangements with the non-government sector (part 13)

Benefits of ARMA

- ▶ Holistic approach to management.
- ▶ Explicit recognition of customary fishing priority access and public benefit use.
- ▶ Recognition of commercial and recreational sector allocations.
- ▶ Strengthened fishing access rights.
- ▶ Greater flexibility around the scale of management.

Some of the key outcomes of the ARMA Legislation of vital interest to commercial fishers

- ▶ Existing Management plans continue unless replaced by Aquatic Resource Use Plans (ARUPs) under Part 3. Existing management plans can continue to be amended.
- ▶ All existing access entitlements continue.
- ▶ The '3 black mark' offence provisions continue under the FRMA provisions until fisheries management plans are replaced with an ARMS and ARUP's under part 3 of ARMA. At that time replaced with a surety system of penalty.
- ▶ Regulation licences and management arrangements can be implemented as an additional instrument of resource management outside of Part 3 provisions.
- ▶ There is the potential for co-management of aquatic resources.

ARMA LEGISLATIVE OVERVIEW



Aquatic Resources Management Act 2016

As at 25 Aug 2021 Version 00-e0-00
Published on www.legislation.wa.gov.au

Part 2 - Objects

The objects of this Act are —

- (a) to ensure the **ecological sustainability** of the State's aquatic resources and aquatic ecosystems for the benefit of present and future generations; and
- (b) to ensure that the State's aquatic resources are **managed, developed and used** having regard to the **economic, social and other benefits** that the aquatic resources may provide.

Part 2 cont.

Means of achieving objects of Act

The objects of this Act are to be achieved in particular by –

- (a) **conserving and protecting aquatic resources and aquatic ecosystems** and where necessary, **restoring** aquatic ecosystems; and
- (b) **managing aquatic resources** and aquatic ecosystems on the basis of relevant **scientific data and principles**; and
- (c) **encouraging the sustainable development** of fishing, aquaculture and other activities reliant on aquatic resources; and
- (d) **encouraging members of the public** to actively **participate in decisions** about the management and conservation of aquatic resources and aquatic ecosystems; and
- (e) ensuring that the **interests of different sectors** of the community that use aquatic resources or aquatic ecosystems are **identified and considered**; and
- (f) **managing aquatic resources** and aquatic ecosystems in a manner that is as **practical, efficient and cost effective** as possible.

Part 3

Managed Aquatic Resources

(all licensees should read)

- ▶ Sets out declaration of Aquatic Resource Management Strategy (ARMS), its content, period of consultation of the draft strategy and the determination of the subsequent final strategy;
- ▶ The content covers the resource to be managed, the main objective, minimum quantity for sustainability, activities for regulation, allocation for customary fishing, public benefits use, method of determining the TAC, the proportions available for recreational and commercial fishing, the number of shares available to commercial fishing, etc.
- ▶ Part 3 also includes the requirement of the CEO to consult on the draft ARMS, to consider submissions and to re-submit an amended draft ARMS to the Minister and the approval process.
- ▶ The Minister is subsequently able to determine the final ARMS

Part 3 cont.

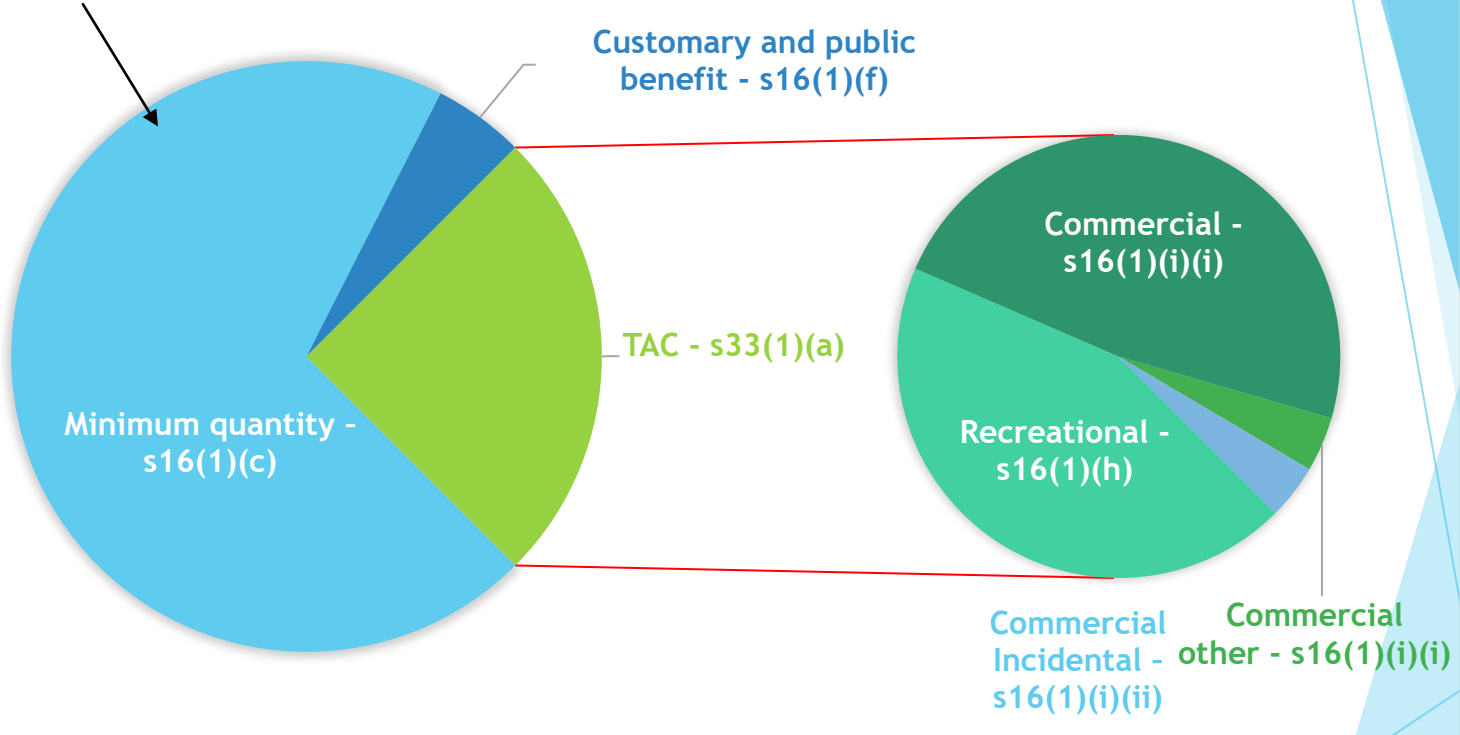
What is an ARMS?

- ▶ An ARMS is a legislated strategy document approved by the Minister at the ‘whole-of-resource’ level.

- ▶ Key elements:
 - ▶ main objective for managing the resource;
 - ▶ activities that are to be managed;
 - ▶ how the resource is to be allocated;
 - ▶ method for determining the TAC;
 - ▶ how the status of the resource is to be assessed.

Resource use under an ARMS

Description of Managed Aquatic Resource - 16(1)(a)



Part 3 cont.

Managed Aquatic Resources

(all licensees should read)

- ▶ Part 3 also includes:
 - ▶ The preparation of Aquatic Resource Use Plans (**ARUPs**) by the CEO which will include all relevant detail for the management of activities and allocation detail (similar to a management plan under the FRMA)) for approval by the Minister.
 - ▶ The requirement for the CEO to set for each prescribed fishing period, the level of TAC and flowing from this the respective quantum of TAC and values per unit share, 30 days before fishing commences (see S.33) or commercial and recreational
 - ▶ Other matters pertaining to revocation, future allocation of shares in a new ARUP, levels of penalties for breaches of an ARUP, the administration of entitlements and resource shares, their transfer and registration, including a system of surety being applied for individuals who breach the legislation.

Part 3 cont.

What is an ARUP?

- ▶ An ARUP is an operational document which implements an ARMS.
- ▶ Much like an existing ‘Management Plan’.
- ▶ Can be sector specific i.e. commercial or recreational or charter?
- ▶ Theoretically all rules and regs for a commercial fishery could fit into a single ARUP.

Part 3 cont.

Commercial ARUP- e.g. Pearling

For example, the ARUP for Pearling could include information as follows:

- ▶ That it applies to all WA water;
- ▶ Specify the number of shares (in ARMS and ARUP);
- ▶ Provide provisions for dump sites;
- ▶ Provide operational fishing requirements;
- ▶ Mandate electronic reporting.

Part 3 cont.

Resource Shares and Catch Entitlement

- ▶ On commencement of an ARUP, persons meeting the allocation criteria are able to apply to have resource shares registered in their name.
- ▶ At the start of each fishing period, registered share holders are able to register Catch Entitlement (CE) in their name.
- ▶ Annual access fees are payable by the share holder on registration of CE.
- ▶ CE can be catch (e.g. kgs) or effort (e.g. days) etc.
- ▶ CE may fished by the registered CE holder or transferred to another person.

ARUP
commences

Apply to have
resource shares
registered in
your name

Resource share
holders register
Annual Catch
Entitlement (ACE)
in their name

ACE can
be
leased!

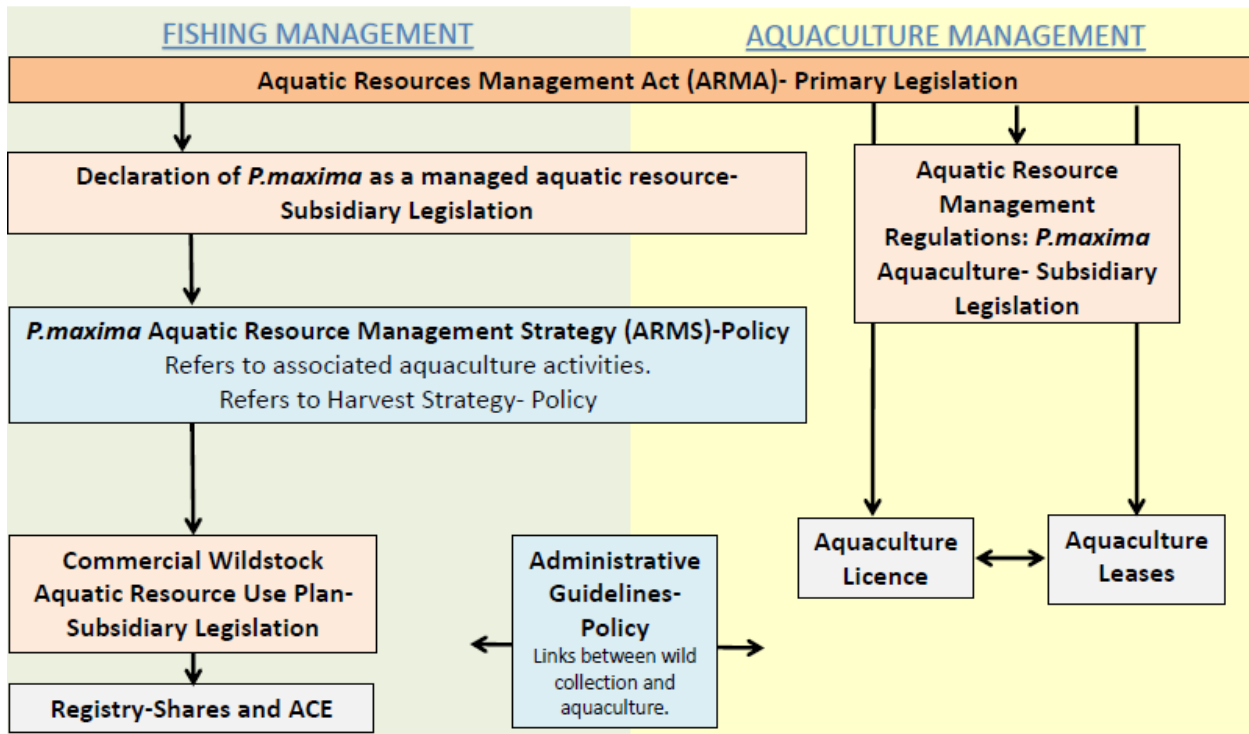
Part 3 cont.

Resource Shares and Catch Entitlement cont.

- ▶ CE can only be used during the fishing period for which it was issued.
- ▶ CE can be prescribed for any period within the ARMS for a resource but normally likely to be annual in most circumstances.
- ▶ At the end of each fishing period all unused CE 'disappears' and the holder of resource shares once again becomes eligible to register the next year's CE in their name etc. (assuming CE is annual).
- ▶ Resource shares are held for the life of an ARMS and are capable of being transferred to another entity.
- ▶ Where an ARMS or ARUP is revoked, share holders are granted 'share options' which must be considered under any new ARMS/ARUP for the resource.

Example of ARMA Management Framework (Pearling)

MANAGEMENT FRAMEWORK FOR THE PEARLING INDUSTRY UNDER ARMA- INTERACTION OF KEY LEGISLATION AND POLICY



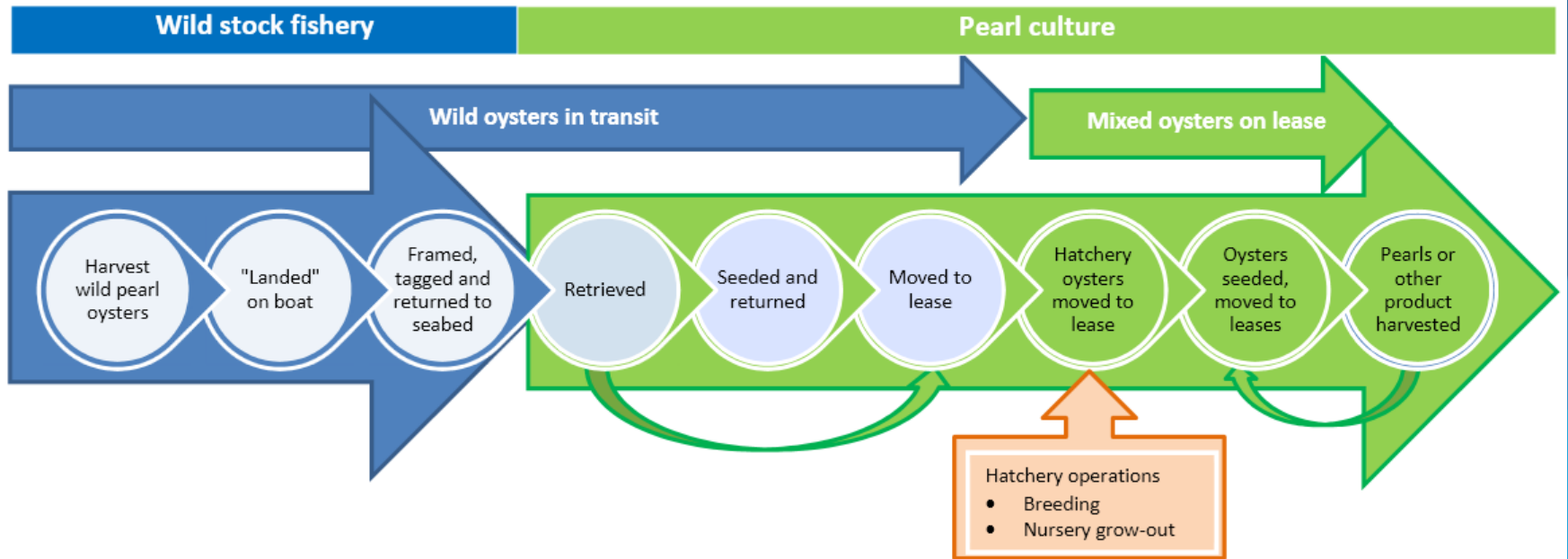
Pearling Industry ARMA management framework

Aquatic Resources Management Act 2016

Aquatic Resource Management Strategy- Policy Document

Aquatic resource use plan

Aquaculture provisions and licences



Part 3 cont.

Security Interests & Surety Provisions

- ▶ Security Interests under ARMA remain largely alike to those contained under FRMA, except to the extent of the inclusion of sureties under ARMA.
- ▶ Section 39 of ARMA empowers the CEO to require an authorisation holder to provide a surety if that authorisation holder is **charged with or convicted of an offence** against the Act, another law relating to fishing etc, or a Commonwealth law or other state law relating to fishing etc.
- ▶ **The form** of a surety can be a **monetary bond** to be paid to the CEO, a **nomination of a number of resource shares in the resource** or a **surety in the form prescribed** (i.e. specified within an ARMS or ARUP).
- ▶ Notably, if an authorisation holder elects to put up their **resource share** as a surety, then the CEO must, as soon as practicable, give to a person who is noted on the register as having a security interest in the registrable interest written details of the holder's intention to nominate the share(s) as surety for an authorisation.
- ▶ The surety will not be registered unless:
 - ▶ *21 days lapsing since details being given; or*
 - ▶ *The CEO obtaining the written consent of the resource share holder & security holder in writing.*
- ▶ The provision of administrative guidelines from the department would assist industry in understanding the event in which a security interest holder objects to a resource share already the subject of a security interest being put up as surety.
- ▶ The intent of surety is to provide a “downward pressure” to encourage responsible fishing behaviour. This provision provides a similar disincentive in the new framework to the “three black marks” provisions in section 224 of the FRMA.

Part 3 cont.

Mandatory Court confiscation - shares as surety (s 31 & s 49)

If a court convicts someone of an offence against s 31(2) or (3) (contravention of an ARUP or its regulations) or s 49(2) or (3) (contravening condition of authorisation) then s 50(2) of ARMA states that the court **must** order **that any surety** for a relevant authorisation **be forfeited** to the State to the **determined value*** if the court is satisfied that –

- (a) the person was the holder of the relevant authorisation when the offence was committed; and
- (b) the offence relates to the taking of a quantity of the aquatic resource for which the person **did not hold catch entitlement at a time, or during a period...;**
- (c) the quantity of the resource for which the person did not hold catch entitlement can be ascertained by the court.

*In relation to surety in the form of **nominated resource shares**, '**Determined Value**' is defined as ***the number of resource shares in a managed aquatic resource that corresponds to the quantity of the resource for which the person did not hold catch entitlement calculated in accordance with the regulations.***

Part 3 cont.

Mandatory Court confiscation - shares as surety cont...

Notably s 50(5) states:

If a resource share is forfeited under this section the CEO must, before allocating the forfeited share —

- a) **remove the notation of any security interest** in respect of that share that was recorded in the register; and
- b) cancel the nomination of the resource share as surety for the authorisation in respect of which it was nominated; and
- c) remove the details of any conviction that was recorded in respect of the share in accordance with section 210(1).

In terms of shares that are forfeited, sections 50(4) and 206 of ARMA are of note. Section 50(4) states that if the court orders the forfeiture of surety that is in the form of a number of nominated resource shares, the CEO may allocate the forfeited resource shares in the way specified in an ARUP. It could be, with the correct drafting that a situation could be created where all shares remain in the fishery.

Further, under s 205, *‘Any thing forfeited to the State under [ARMA] may be sold, destroyed or otherwise disposed of in the prescribed way.’*

If the forfeited shares are sold, then the proceeds of the sale are to be paid into one of the following accounts that is prescribed: Aquatic Resources Research Development Account, Recreational Fishing Account or Fishing Industry Promotion Training and Management Levy Account. If no account is prescribed, the proceeds will be paid into the Consolidated Account.

Part 5 - Aquaculture

- ▶ This Part is consistent with Part 8 of the FRMA - Aquaculture. On repeal of the Pearling Act 1990, pearl culture activities will be regulated under this Part of the Act. Wildstock pearl fishing will be managed under an Aquatic Resource Management Strategy (ARMS).
- ▶ Some key changes include (but not limited to):
 - ▶ Section 68(4)(b) which provides that if an aquaculture lease terminates or expires and an aquaculture licence covers that lease area, and one or more other leased areas, then the licence is varied so that it no longer authorises activities in the lease area that was terminated or expired. This is a new provision that recognises that pearling licences authorise activities to be undertaken in more than one lease area.
 - ▶ Part 5, Division 4 (Aquaculture Licences) revises and consolidates provisions for the issue of aquaculture licences previously established under Parts 8 and 13 of the FRMA and Parts 2 and 3 of the Pearling Act.
 - ▶ Section 83 provides that subject to clauses 85 (relating to the grant or renewal of aquaculture licences in certain marine reserves) and clause 134 (relating to the suspension, non-renewal and cancellation of authorisations) the CEO must renew an aquaculture licence if the application is received more than 30 days prior to the day on which the licence expires. The clause further provides the CEO with discretion as to whether to renew an aquaculture licence if the application is made within 30 days of a licence expiring.
 - ▶ Part 5 - Division 5 consolidates lease provisions for the aquaculture and pearling industries currently provided in the FRMA and the Pearling Act.

Part 6

Aquatic Biosecurity -

(warrants a read by those involved in aquaculture and dealing in organisms with detail to be found in regulations)

- ▶ Facilitates the control and management of identified aquatic diseases and declared organisms(pests) in specific categories further defined in the regulations for parts of the state or the entire state.
- ▶ Requires the preparation of aquatic biosecurity management plan in specific circumstances, compliance with the plan and penalties for non-compliance.
- ▶ For the regulation of declared organisms, there import, export, reporting, dealing, presence on a fishing vessel, duty to control and penalties.

Part 6

Aquatic Biosecurity cont.

- ▶ Management of pollution in the aquatic environment with a focus on activities that may cause harm including refuse, environmental damage from pollutants or waste.
- ▶ Provision of specific emergency powers for the CEO of DPIRD to take action on a biological threat and to apply resources to limit or remove a declared organism and to recover the cost of doing so from an offending party.
- ▶ **Note the Western Australia's *Biosecurity and Agriculture Management Act 2007* (BAM Act) is being reviewed for the first time. How the regulations under ARMA and interactions with the BAM Act is yet to be clarified.**

Part 13

Administration

- ▶ Specifies the delegations and how they can be assigned by the Minister to another person and those which cannot be so assigned.
- ▶ Specifies similarly the delegations that can be assigned by the CEO.
- ▶ Specifies activities the Minister can undertake
- ▶ Provides for the creation of an AR Ministerial body, its powers as a body corporate, procedures etc. that can perform any of the functions assigned by the Act where the Minister is assisted through the creation of such a body. Specific steps are to be taken to formally make decisions.

Part 13

Administration cont.

- ▶ The Minister can enter into agreement with a recognised body to undertake a range of functions including data collection and analysis, advising on and preparing management plans, managing specific aspects of a plan, representing interests of a sector, conducting trading of rights and any other prescribed function.
- ▶ The agreements to follow a specific format.
- ▶ The ability of the Minister and CEO to establish advisory committees for specific needs.

Part 18 -

Transitional Provisions

- ▶ Retains fisheries management plans until Part 3 of ARMA applies.
- ▶ Retains all leases, authorisations, licences, permits, entitlements, exemptions continue to apply.
- ▶ Interim management plans transition to management plans.
- ▶ Permissive conditions on licences disappear unless covered by orders.
- ▶ General continuation of various applications, security arrangements, maintenance of the registry, offences, confiscations, the accounts (although renamed), certain Pearling Act provisions, etc.

FREQUENTLY ASKED QUESTIONS

When will ARMA be implemented?

- ▶ Full commencement was scheduled for 1 January 2019.
- ▶ Implementation of ARMA has been deferred.
- ▶ New date for commencement to be advised early 2023.

Why was ARMA's implementation deferred?

- Department was preparing for full implementation of ARMA in 2019.
- During preparations an issue was identified with the structure of ARMA.
- The issue called into question the ability to implement fishing zones and associated fishing entitlement.
- The Minister has decided to defer ARMA implementation until necessary ARMA amendments and Regulations have been finalised. The ARMA amendments are in place. Public comment on Draft Regulations planned for end 2023. DPIRD have also taken the opportunity to develop the framework policy for Resource Allocation and revision of both Harvest Strategy Policy and Compensation. This will provide certainty for Government and stakeholders.
- Both the ARMS and ARUP's for the Pearl Oyster resource must be ready for immediate implementation before full proclamation of ARMA can proceed.

What will happen to existing subsidiary legislation?

- ▶ All existing subsidiary legislation in force will automatically transition under ARMA including; Management Plans, FRMA s.43 Orders (as s.125 Orders under ARMA), Exemptions, s.115 FHPA Orders and CEO determinations etc.
- ▶ A new s.125 Order will be required to recreate all of the existing protected species framework (e.g. size limits, protection for breeding females etc.) - these are currently in the FRMR.

What new regulations can be expected under ARMA?

- ▶ Outside of ARMS and ARUPs, new *Aquatic Resource Management Regulations* are being developed to replace the *Fish Resources Management Regulations 1994* on implementation of ARMA.
- ▶ The new ARMA regulations will transition most of the FRMR on a like-for-like basis, and also includes new regulations for the management of pearling aquaculture activities.
- ▶ A significant area of new regulation development is taking place for managing biosecurity.

Will commercial fishing licences still exist?

- ▶ Commercial Fishing Licences (CFLs) will be replaced by a Fishing Master's Licence (FML) under the new regulations.
- ▶ Only persons actively in charge of a commercial fishing operation will require a FML (usually the master of the boat).
- ▶ CFL holders will be advised of the transition process ahead of implementation of ARMA.

Does ARMA provide more resource access security?

- ▶ Compared with FRMA, new legislation is better for industry once Management is implemented under Part 3 of ARMA
- ▶ WRL and WAFIC have made the case to Government to further improve resource security under ARMA and has commitment from DPIRD to work through the issues.
- ▶ Other areas need addressing particularly on matters of Resource Access Allocation, Re-Allocation and Compensation arising from loss of access from change in the priority of use of the Marine Domain and aquatic resources.
- ▶ Other risks re extending liability for offences, criminal offences, management plan offences remain the same.

What are the benefits for a resource being made a 'Declared Aquatic Resource' under Part 3 of ARMA?

- ▶ 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.

What opportunities are provided by ARMA?

- ▶ Prioritisation of Implementation under Part 3
- ▶ Licensing Guidelines proposed to be developed to manage Administration of Register and Surety arrangements.
- ▶ Co-Management Guidelines could be developed covering an array of alternatives. This could include a recognised body, an Aquatic Resource Ministerial Body, Administrative Guidelines for both delegated decision making as well as cooperative arrangements, for single or multiple functions. The scope of that which is feasible is considerable.
- ▶ The review and publication of all Ministerial Administrative Guidelines

What improvements could be made to ARMA?

- ▶ ARMA fails to address all aspects of rights based aquatic resource access management and security within a multi-use marine domain.
- ▶ Need to recognise the reality of longer term resource reallocation between sectors and the mechanisms by which this could be achieved.
- ▶ Should also focus on the issues of compensation and potential changes to the *Fisheries Adjustment Schemes Act 1987*.
- ▶ There continues to be industry issues over the effectiveness of compensation under FRICMA and urgent action for review.
- ▶ Policy development is being progressed by DPIRD in a number of these topics.

What improvements could be made to ARMA? (Cont.)

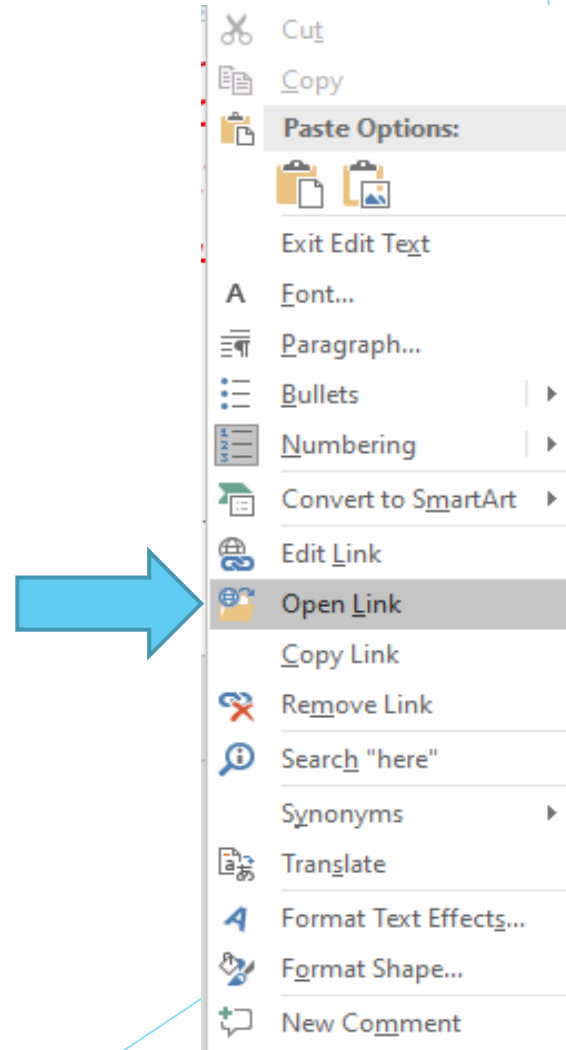
- ▶ Permissive licence conditions (i.e. conditions purporting to allow an activity that is otherwise prohibited) are of no effect in law and will continue to be of no effect under ARMA, however, the policy underpinning these conditions may continue to be recognised by government.
- ▶ As such, access to a fishery/activity through a permissive condition represents a weak access right
- ▶ It's the responsibility of relevant fisheries managers/affected fishers to discuss future access under FRMA/ARMA.
- ▶ Future options under ARMA which provide a stronger access right include; regulation licences and resource shares under an ARMS/ARUP.

How do I access ARMA legislation and other legislation on the internet

DPIRD's Fisheries website contains a page which allows you to view fisheries legislation. You can access this [here](#). Hover your mouse over the blue word 'here'. PRESS and HOLD the CTRL button and then left click the mouse. This should open the website.

If this doesn't work, right mouse click the blue word 'here' which will open a dialogue box, scroll down until you see 'open link'. Click 'open link'

Use this technique on the following PowerPoint slide to access further legislation



Direct Legislation Links provided below

- ▶ Click [here](#) for the ARMA Act (only in force sections)
- ▶ Click [here](#) for the full ARMA bill (including sections not yet in force)
- ▶ Click [here](#) the Fish Resources Management Act 1994
- ▶ Click [here](#) for Subsidiary Legislation