

# FISH RESOURCES MANAGEMENT AMENDMENT BILL 2011

## EXPLANATORY MEMORANDUM

### Overview of the Bill

The amendments contained in this Bill have been prepared to improve various aspects of the legal and administrative framework for the sustainable management of fisheries, aquaculture and the aquatic environment in Western Australia. The amendments introduce a risk-based framework for the assessment of aquaculture licence and lease applications and the management of aquaculture activities, including the capacity to designate aquaculture development zones in WA waters; reduce the categories for which exemptions may be granted under the Act and increase the capacity for the Minister to delegate his powers under the Act to the Chief Executive Officer of the Department of Fisheries; provide express powers for fisheries management plans to include provisions that may be necessary for the protection of aquatic mammals, birds, reptiles, birds and amphibians from fishing activity and increase the range of matters that may be stipulated within a management plan in accordance with contemporary fisheries management requirements; modify the offence and penalty provisions relating to the contravention of commercial fishery management plans; enable the temporary transfer of all entitlements under an authorisation; provide for commercial fisheries authorisations to be treated as property that may become part of the estate of a deceased individual; modify and enhance a number of offence, inspection and evidentiary provisions in the Act including the creation of a new offence relating to the trafficking of high value fish species; modify the confidentiality provisions contained in section 250 of the Act to enable the Department to provide more flexibility in the circumstances where departmental officers may divulge otherwise confidential information, including to masters of vessels and law enforcement agencies under specified circumstances; provide various new head powers to enable the making of regulations including for the granting of new categories of authorisations including permits for the collection of broodstock for use in the aquaculture industry, the licensing of Aboriginal corporations currently involved in commercial fishing under exemptions, the management of customary fishing and bio-prospecting.

Outlined below is an examination of the contents of the Bill on a clause-by-clause basis.

### Clause 1 Short title

Clause 1 provides that the title of this Act is the *Fish Resources Management Amendment Act 2011*.

## **Clause 2 Commencement**

This clause sets out the commencement provisions.

Subclause (a) provides that sections 1 and 2 of the Act will come into force on the day on which the Act receives the Royal Assent.

Subclause (b) provides that the rest of the Act will come into force on a day fixed by proclamation and that different days may be fixed for different provisions.

## **Clause 3 Act amended**

This clause provides that this Act amends the *Fish Resources Management Act 1994*.

## **Clause 4 Long title replaced**

Clause 4 deletes the existing long title and replaces it with a new long title that makes more comprehensive reference to matters covered by the Act, including specific reference to the management of aquaculture and the conservation of fish and other aquatic resources and their habits.

## **Clause 5 Section 3 replaced**

Section 3 contains the Objects of the Act. The existing section 3 is replaced by a new section 3 that recasts the objects of the Act to give a clearer focus on the sustainable development and management of the States fisheries and aquaculture and sharing and conserving the fish and aquatic resources and their habitats for the benefit of present and future generations (section 3(1)), while section 3(2) specifies how the objects will be achieved.

It also includes new section 4A – **Application of precautionary principle**

The precautionary principle is a fundamental component of the concept of ecologically sustainable development (ESD) and has been defined in Principle 15 of the *Rio Declaration (1992)*<sup>1</sup>:

*Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*

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<sup>1</sup> United Nations Conference on Environment and Development, Rio, 1992 (the "*Rio Declaration*").

#### **Clause 6 Section 4 amended**

In section 4, a number of definitions are deleted because they are no longer required or because the definitions are being changed by this Act. A number of definitions are amended and a number of new definitions are inserted.

#### **Clause 7 Section 7 amended**

Section 7 currently provides that the Minister or the CEO of the Department may grant exemptions from specified provisions of the Act – the Minister for any purpose and the CEO for the purposes listed in section 7(3).

The amendment limits the purposes for which the Minister may grant an exemption. These will be restricted to the purposes of research, environmental protection, public safety, public health, commercial purposes, community education about and compliance with the Act and enforcement of the Act. The Act will no longer provide a power for CEO to grant exemptions but the Minister will be able to delegate this power to the CEO and section 12 is also amended to reflect this.

#### **Clause 8 Section 12 amended**

Section 12 provides that the Minister may by instrument in writing delegate any power or duty under the Act, other than the Minister's power of delegation and the powers referred to under section 12(1)(b).

Clause 8 amends section 12(1)(b) to delete the reference to section 7 and section 43. The reference to section 7 is deleted to enable the Minister to delegate the power to grant exemptions to the CEO. If the Minister does delegate these powers to the CEO, the Minister will still have the capacity to grant exemptions if the Minister so wishes. The reference to section 43 is deleted so that the Minister may delegate the powers to the CEO in respect to the making, amendment or revocation of section 43 orders. It is important to note that the Minister still retains the powers under the Act in respect of section 43 orders.

#### **Clause 9 Section 15 amended**

Section 15 defines the terms used in **Part 3 – Commonwealth – State management of fisheries**.

Clause 9(1) deletes the existing definition of ***“fishery”***.

Clause 9(2) inserts a new definition of ***“fishery”*** to mean a class of fishing activities identified in an arrangement between the State and Commonwealth as a fishery to which the arrangement applies. A further amendment defines fishing activities to include aquaculture. The combined effect of these amendments is to enable the State

and Commonwealth to enter into an arrangement for the management of aquaculture in Commonwealth waters. However, this can only occur once Commonwealth takes a decision to amend its legislation in a similar manner. Western Australia has been requested by Primary Industry Ministerial Council to work with the Commonwealth and the States to prepare recommendations relating to the management of aquaculture in Commonwealth waters for consideration by Primary Industry Ministerial Council. This clause also defines “**State**” to include a Territory.

Clause 9(3) deletes the reference to a Territory of the Commonwealth because “**State**” will now be defined to include a Territory.

The amendment of Clause 9(4) is necessary to accommodate the insertion of the new definition of “**State**”.

#### **Clause 10 Section 19 amended**

Section 19 is amended because “**State**” will now be defined to include a Territory.

#### **Clause 11 Section 45 amended**

Section 45 currently allows for a class of fish to be prescribed as totally protected fish or commercially protected fish, by reference to a range of factors such as species of fish, sex, size, weight, area of the state or a period of time as described in section 45(2).

Clause 11 amends section 45(1) to provide greater flexibility as to the purposes for which fish may be protected that fish so that fish may also be prescribed as recreationally protected fish, or fish that may not be taken while recreationally fishing. Cods greater than one metre in length are an example of fish that may be prescribed as recreationally protected. These fish are currently protected through a bag limit of zero, but doubt has been raised as to the appropriateness of this mechanism. Defences are provided for the taking of and dealing in recreationally protected fish by commercial authorisation holders.

#### **Clause 12 Section 48A inserted**

Clause 12 inserts new section 48A creating offences relating to recreationally protected fish.

New section 48A(1) creates an offence for taking recreationally protected fish while engaged in recreational fishing. The offence does not apply to the taking of such fish when fishing under a commercial authorisation, because the offence relates to recreational fishing only. Existing section 47 applies to commercially protected fish that commercial fishers are not able to take or be in possession of, but that recreational fishers can, and existing section 46 applies to totally protected fish that nobody can take or be in possession of.

New section 48A(2) creates the offence of being in possession of, selling, purchasing, consigning or bringing into WA waters any recreationally protected fish. Defences are provided in new section 48(2).

### **Clause 13 Section 48 amended**

Section 48 currently provides defences in respect to proceedings relating to a person charged with offences against the “Totally Protected Fish” and “Commercially Protected Fish” provisions of the Act. Clause 13 amends section 48 provide a new defence for taking or being in possession etc of totally protected fish or commercially protected fish and provides a range of defences for taking or being in possession of etc, recreationally protected fish.

Clause 13(1) inserts a new section 48(ba) which provides a defence for taking or being in possession etc of totally or commercially protected fish if the person can prove that the protected fish were collected for broodstock or other aquaculture purposes in accordance with an authorisation and amends section 48(1)(b) to include within the existing defence fish that were hatched, cultured or harvested in accordance with an aquaculture licence. This Act will also amend the regulations to enable the issuing of permits for the collection of broodstock for aquaculture.

Clause 13(1) also inserts an “or” at the end of section 48(1)(a) consistent with modern drafting practice.

Clause 13(2) inserts new section 48(2) which provides defences for the taking of recreationally protected fish such as returning the fish to the water immediately with the least possible injury (section 48(2)(a)), if the fish were taken in accordance with a commercial authorisation (section 48(2)(b)), if the fish were collected for broodstock in accordance with an authorisation (section 48(2)(c)), if the fish were kept, bred, hatched etc in accordance with an aquaculture licence (section 48(2)(d)), or any other defence prescribed in the regulations (section 48(2)(e))

### **Clause 14 Section 50 amended**

Section 50 provides that the regulations may specify daily bag limits that apply to recreational fishers, creates offences for exceeding the daily bag limit, and provides defences.

Clause 14(1)(a) deletes the reference to “by a person” in section 51(4)(a) because that reference is unnecessary and amends section 50(4)(b) in a similar manner while also inserting a reference to hatched, cultured or harvested in the aquaculture related defence.

Clause 14(2) replaces existing section 50(5) to make it clear that the regulations may specify different recreational bag limits for fish for different areas of the State or for different classes of persons or of different circumstances.

**Clause 15 Section 51 amended**

Clause 15(1) amends section 51(4) by deleting the words “by a person” and “by the person” in paragraphs (a) and (b) respectively, because in each case, the words are unnecessary. Section 51(4)(b) is further amended to refer to “hatched, cultured or harvested” consistent with the amended definition of aquaculture as contained in section 4 of the Act.

In clause 15(2) the inserted clause makes it clear that the regulations may specify different recreational possession limits for different areas of the State or for different classes of persons or for different circumstances.

**Clause 16 Section 52 amended**

The amendment to section 52 applies the general penalty provisions that apply to, among other things, totally and commercially protected fish to recreationally protected fish also.

**Clause 17 Section 56 amended**

Section 56 provides that a management plan must identify the fishery to which it relates, whether the fishery is a managed fishery or interim managed fishery, whether the fishery is a developmental fishery, and in section 56(3) states a management plan may include any provision that in the Minister’s opinion is necessary for the protection or management of the fishery or any part of the fishery.

Clause 17 deletes section 56(3) and replaces it with a new section 56(3) to provide that, in addition to a management plan including any provision that in the Minister’s opinion is necessary for the protection or management of the fishery or any part of the fishery, a management plan may also include any provision in that the Minister’s opinion is necessary for the protection of aquatic mammals, aquatic reptiles, aquatic birds, amphibians or pearl oysters from fishing activities in the fishery. Some management plans already include measures for the protection of sea lions and turtles for example, by requiring fishers to use gear such as sea lion exclusion devices and turtle exclusion devices and the new section removes any doubt as to capacity of management plans to include such provisions.

**Clause 18 Section 58 amended**

This clause amends section 58(2)(k) as a result of an amendment to section 141 contained in this Act. The amendment to section 141 will now allow the CEO to

temporarily transfer all of an entitlement under an authorisation for a limited period. A decision whether to transfer under section 141 is a matter of general discretion. The amendment to section 58(2)(k) clarifies that “grounds” in a management plan apply to create the discretion to refuse a transfer under section 140, not section 141, of the Act.

#### **Clause 19 Section 60 amended**

Section 60 provides that a management plan may provide for a scheme relating to the extent of the entitlements conferred by an authorisation under a management plan for a fishery. These matters are specified in section 60(2).

Clause 19(a) amends section 60(2) by inserting section 60(2)(ba) to provide that a management plan may provide for minimum entitlements. This amendment removes any doubt relating to current practice, say, in the rock lobster fishery where the management plan states that a person may not fish in the fishery if the licence confers less than 63 units of entitlement.

Clause 19(b) amends section 60(2) by:

- inserting section 60(2)(ha) to provide for the expiation (atonement for) of an offence for exceeding entitlement or quota in a fishery, whereby the offender may pay an amount equal to the prescribed value of the fish the subject of the offence into the Fisheries Research and Development Account. Management plans for a number of quota managed fisheries already include such provisions for minor entitlement (quota) overruns with the strong support of industry. This amendment will remove any doubt as to the validity of such clauses.
- inserting section 60(2)(hb) to provide and that the authority conferred by the authorisation is of no effect if the entitlement under the authorisation is less than the minimum entitlement, respectively.

#### **Clause 20 Section 62 amended**

Section 62 provides for a range of other miscellaneous matters that may be included within a management plan. Section 62(a) provides that a management plan may regulate fishing in the fishery or the possession of fish taken in the fishery. Clause 20(a) deletes section 62(a) and replaces it with sections 62(a) and 62(ba) in recognition of the two separate concepts that were previously contained within section 62(a) i.e. regulating fishing, and regulating the possession of fish taken in the fishery.

Section 62(b) enables a management plan to prohibit or regulate matters relating to the use of boats, vehicles or aircraft used in the fishery. Clause 20(b) amends section 62(b) to enable a management plan to prohibit or regulate matters relating to the **possession or use** of boats, vehicles or aircraft used in the fishery.

The effect of the amendment contained within clause 20(c) is to remove the comma and is entirely grammatical.

Clause 20(d) amends section 62(e) to make it clear that a management plan may require specific gear or equipment to be used or installed on boats in the fishery including equipment for the purposes of research monitoring or compliance programs. An example of this is equipment necessary in relation to the Department's electronic and satellite Vessel Monitoring System.

Clause 20(e) deletes sections 62(k) to (n) and inserts a modified section 62(k) to provide more specificity about the powers of a management plan to regulate bycatch in a fishery, including the use of bycatch reduction devices.

Clause 20(f) deletes section 62(p) and replaces it with sections 62(p)(i) and (ii). This amendment still enables a management plan to impose obligations on the holders of authorisations or persons acting on their behalf or on the masters of vessels, but more logically makes a distinction between the holder of the authorisation with persons acting on their behalf, such as an employee or a private contractor on the one hand, and a person who is the master of a boat (whether or not the person is also acting on behalf of the licence holder), on the other.

Clause 20(g) inserts the words "or lodged" in section 62(q) to impart the meaning that it is up to persons who are required to submit specified records and returns to assist the Department in the sustainable management of fisheries to ensure that the records and returns are actually received by the Department.

Clause 20(h) amends section 62(q)(i) to make it clear that a management plan may require both the holder of an authorisation or persons acting on their behalf to submit or lodge specified returns. As the Act currently stands, this requirement is on persons acting under the authority of authorisations.

Clause 20(i) amends section 62(q)(ii) to delete the word "other" because it is superfluous.

Clause 20(j) amends section 62(r) by inserting the words "or lodged" for consistency with the amendment to section 62(q) above.

Clause 20(k):

- deletes section 62(u) which provides the power for a management plan to prohibit or regulate the handling, transfer, landing, unloading etc of fish and inserts a new section 62(u) which includes all the elements currently in section 62(u) but includes the additional elements of possession and receipt of fish.
- Inserts a new section 62(v) which enables a management plan to prohibit or regulate the disposal of fish (whether taken in the fishery or otherwise).

- Inserts a new section 62(w) to make it clear that a management plan may require a person proposing to engage in any activities covered by a management plan or any other activities connected to the fishery to make a nomination with respect to that proposed engagement including matters relating to where the activity will be engaged in, the time during the which the activity will be engaged in, the nature of the activities that will be engaged in, and the types of gear or equipment intended to be used.
- Inserts a new section 62(x) that prohibits a person from contravening a nomination made under section 62(w).

## **Clause 21 Sections 74 and 75 replaced**

Clause 21 deletes sections 74 and 75 of the Act. The existing section 74 makes it an offence to contravene specified provisions of a management plan, where that provision is a provision, the contravention of which, is specified within the plan to be an offence.

Substantial penalties as provided in existing section 75 and 222 applied in the event of a conviction for an offence against section 74 by a court, regardless of the seriousness of the offence or whether the offence was no more than an inadvertent or unintentional breach of the management plan.

The new section 74 replaces the old sections 74 and 75. It provides Fisheries Officers with the option of either charging a person with recklessly or intentionally breaching a specified provision of a management plan for which substantial penalties will still apply (section 74(1)), or charging a person with the contravention of a management plan where the contravention may have been unintentional or inadvertent – in which case substantially lesser penalties will apply (section 74(2)).

The new section 74(3) provides that a person charged for an offence under section 74(1) may be convicted of an offence under section 74(2) (i.e. a lesser offence) if the lesser offence is established by the evidence.

Importantly the restructuring of the penalty provisions for the contravention of a management plan will enable the Department to deal with unintentional or inadvertent offences under section 74(2) by way of infringement notice, thereby providing the person charged with the option to pay the modified penalty as provided in the infringement notice instead of having the matter dealt with by the court, with the prospect of incurring what is known in the industry as a “black mark”.

As the Act currently stands, if a person is convicted in a court for an offence against the management plan, the CEO of the Department of Fisheries is required under section 224 of the Act to notify the Registrar to record a “black mark” against the authorisation. Where three “black marks” are accumulated against the authorisation within a ten year period, the authorisation is automatically suspended for one year.

The effect of these amendments is to ensure that for less serious and unintentional offences against management plans that the penalty is commensurate with the nature of the offence.

#### **Clause 22 Section 76 amended**

Section 76 enables a court to reduce an entitlement to take fish or use fishing gear or engage in fishing for a period of time where a person is convicted for an offence against section 74. The amendment to this section is necessary as a result of the changes to section 74 and section 77. The amendment to section 77 is explained below.

#### **Clause 23 Section 77 replaced**

Clause 23 deletes existing section 77 and replaces it with a new section 77. The existing section 77 makes it an offence to contravene a condition of a managed fishery licence or permit. The amendments to section 77 are consistent with the amendments to section 74 in respect of the contravention of a specified provision of a management plan. Substantial penalties as specified in existing section 75 and 222 apply in the event that a person is convicted of an offence against section 77 by a court, regardless of the seriousness of the offence or whether the offence was no more than an inadvertent or unintentional breach of the management plan.

The new section 77 provides Fisheries Officers with the option of either charging a person with recklessly or intentionally breaching a licence or permit for which substantial penalties will apply (section 74(1)) or charging a person with breaching a condition of a licence or permit, where the breach may have been unintentional or inadvertent – in which case substantially lesser penalties apply (section 74(2)).

The new section 77(3) provides that a person charged for an offence under section 77(1) may be convicted of an offence under section 77(2) (i.e. a lesser offence) if the lesser offence is established by the evidence.

Importantly the restructuring of the penalty provisions for the contravention of a licence condition will enable the Department to deal with unintentional or inadvertent offences under section 77(2) by way of infringement notice, thereby providing the person charged with the option to pay the modified penalty as provided in the infringement notice instead of having the matter dealt with by the court, with the prospect of incurring what is known in the industry as a “black mark”.

As the Act currently stands, if a person is convicted in a court for an offence against this section, the CEO of the Department of Fisheries is required under section 224 of the Act to notify the Registrar to record a “black mark” against the authorisation. Where three “black marks” are accumulated against the authorisation within a ten year period, the authorisation is automatically suspended for one year.

The effect of these amendments is to ensure that for less serious and unintentional offences against licence or permit conditions, that the penalty is commensurate with the nature of the offence.

**Clause 24 Section 78A amended**

Section 78A was inserted by the *Fish Resources Management Amendment Act 2009*. The effect of section 78A is to enable regulations to be made to provide for the granting of an authorisation to replace an authorisation that has been cancelled by the operation of section 224, as section 224 was prior to the commencement of the *Fish Resources Management Amendment Act 2009*. Prior to the commencement of that Act, on the accumulation of three “black marks” against an authorisation within a ten year period a licence was cancelled. Since the commencement of the amendments a licence is now suspended for one year on the accumulation of three “black marks” in a ten year period.

This amendment to section 78A is necessary to make it clear that a replacement authorisation is taken to be an authorisation granted under section 66, thereby placing the authorisation on the same legal footing as all other managed fishery licences or interim managed fishery permits.

**Clause 25 Section 78 deleted**

Clause 25 deletes section 78 because section 78 is redundant as a result of the new section 77.

**Clause 26 Section 79 amended**

Section 79 is amended to refer to “hatched, cultured or harvested” consistent with the amended definition of aquaculture as contained in section 4 of the Act.

**Clause 27 Section 82 amended**

Section 82 is amended to refer to “hatched, cultured or harvested” consistent with the amended definition of aquaculture as contained in section 4 of the Act.

**Clause 28 Section 89 amended**

This clause amends section 89 to apply the concept of submitting or lodging returns or records to persons engaged in fish processing, consistent with the amendment to section 62(q).

**Clause 29 Part 8 Division 1 heading inserted**

Clause 29 inserts the following new heading at the beginning of Part 8: **Division 1 – Aquaculture Licences**.

In drafting the amendments to Part 8, the opportunity has been taken to provide a better structure for the provisions governing the licensing of aquaculture operations in the Act which will now be dealt with under Division 1 of Part 8, and the granting of aquaculture leases which will now be dealt with under Division 2 of Part 8.

**Clause 30 Section 91 amended**

Section 91 is amended for consistency with the amended definition of aquaculture as contained in section 4 of the Act.

**Clause 31 Section 92A inserted**

Clause 31 inserts section 92A – **Management and environmental monitoring plans**. This new section 92A(1) will require an applicant for an aquaculture licence to submit a management and environmental monitoring plan (a MEMP) identifying how the applicant will manage any risks to the environment and public safety as a result of the proposed aquaculture activity.

This is a new requirement which is designed to assist in the timely assessment of the application by the Department of Fisheries and the management of the aquaculture sector based on risk assessment. This approach has been developed in the liaison with industry and the Department of Environment and Conservation (DEC) and is the subject of an MOU for the assessment of aquaculture proposals between the Department of Fisheries and DEC.

The CEO of the Department of Fisheries may exempt a person from this requirement if the person is engaged in the aquaculture of prescribed fish on private land.

Section 92A(2) specifies the matters that a proponent can expect to be required to address in a MEMP.

Section 92A(3) requires a person who held an aquaculture licence prior to the commencement of section 92A to prepare and submit a MEMP to the Department within 2 years after the commencement of section 92A, unless the CEO of the Department of Fisheries exempts the person from this requirement because the person is engaged in the aquaculture of prescribed fish on private land.

**Clause 32 Section 92 amended**

Section 92 specifies the circumstances in which the CEO may grant an aquaculture licence.

Clause 32 amends section 92(1) in the following manner:

- (a) by deleting “satisfied that” and inserting “satisfied with all of the following” to make it clear to proponents that all of the factors specified in section 92 must be satisfied before the CEO may grant an aquaculture licence.
- (b) by inserting a new 92(ba) that provides that the CEO must be satisfied, as one of the factors in section 92, that the applicant has, or will have, appropriate tenure over the land or waters where the aquaculture is to be undertaken. This will generally be in the form of a lease over crown or other land, or ownership of land.
- (c) by amending section 92(1)(b) to provide that the CEO must be satisfied, as one of the factors in section 92, that the grant of the licence will be in the better interests of the state and the community, as opposed to the better interests of the aquaculture industry, as the Act currently stands.
- (d) by amending section 92(1)(c) by deleting “environment; and” and inserting “environment”. This amendment is only necessary because a new paragraph (e) is inserted at the end of section 92.
- (e) by inserting a new section 92(1)(e) to provide that the regulations may also prescribe additional matters that the CEO may be required to satisfy himself of in respect to the aquaculture licence application.

**Clause 33 Section 95 amended**

Clause 33 amends section 95(1) which states that an aquaculture licence is subject to any prescribed conditions and any conditions imposed by the CEO under that section. The amendment inserts a new section 95(1)(ba) to provide that an aquaculture licence may also be subject to the provisions of any MEMP for the licence.

The effect of this amendment is to provide the capacity for the Department to require an aquaculture licensee to conduct aquaculture activities under the licence in accordance with the MEMP.

**Clause 34 Sections 97A and 97B, Part 8 Division 2 heading and section 97C inserted**

This clause inserts sections 97A to 97C.

Section 97A creates an offence for contravening a requirement of a MEMP for an aquaculture licence.

Section 97B(1) provides that the CEO may grant a temporary aquaculture permit to allow an aquaculture licensee to relocate an aquaculture operation from one area to another in the event of an emergency.

Section 97B(2) provides that a temporary aquaculture permit can only be granted for purposes prescribed in this section eg an oil spill which has the potential to threaten the operation if left in it’s current location.

Section 97B(3) states that a temporary aquaculture permit cannot be granted for more than twelve months.

Section 97B(4) provides the effect of a temporary aquaculture permit is to suspend the licence in respect to the original area and authorise the carrying out of aquaculture activities in accordance with the permit in the area that is subject to the permit.

Before new section 97C is inserted, the heading **Division 2 – Aquaculture leases** is inserted.

Section 97C provides that the Minister may offer areas of land or WA waters for aquaculture leases by means of public auction, public tender, ballot or private treaty.

### **Clause 35 Section 97 amended**

Clause 35 amends section 97. Section 97(3) provides that subject to the provisions of this Act, a lease granted by the Minister vests in the lessee exclusive rights to carry on aquaculture within the lease area and ownership of all fish within the lease area that are kept, bread, hatched or cultured. The amendments to section 97(3) have the effect of more appropriately vesting these rights in the licence holder and not the lease holder, as all these activities are in fact authorised by the licence and not the lease.

After section 97(4), a new section 97(5A) is inserted that requires that the Minister must be satisfied that a person is fit and proper to hold a lease; its in the better interest of the State and the community to grant or renew the lease, the applicant will make or has made effective use of the lease area for aquaculture purposes; the activities being, or to be, conducted under the lease will not adversely effect fish or the aquatic environment and other prescribed matters, before the Minister may grant a renewal lease.

Clause 35(3) deletes section 97(7) of the Act. Section 97(7) currently states that a lease may be varied in the manner provided in the lease. This section is replaced by sections 97(7A) and 97(7).

Section 97(7A) provides that without limiting section 97(5) and section 97(6) (relating to conditions, covenants etc on leases) a lease may be subject to a condition requiring an amount to secure payment (eg a bond) that becomes necessary under section 101(2)(b).

Section 101(2)(b) enables the CEO to recover any reasonable costs incurred in cleaning up and rehabilitating a former leased area after a lease is terminated or expired and where the former lease holder has contravened a direction from the CEO to rehabilitate the area.

Section 97(7) provides that the lease may be varied in the manner provided in the lease or in the manner prescribed in section 102(c). Section 102(c) provides that regulations may be made for matters relating to aquaculture leases including the transfer of aquaculture leases.

### **Clause 36 Section 100A inserted**

New section 100A creates offences for the contravention of an aquaculture lease.

Section 100A(1) makes it an offence for the lease holder to contravene a condition of the lease.

Section 100A(2) creates an offence if the holder of an aquaculture licence in relation to an aquaculture lease does an act or makes an omission that would have been a contravention of a lease condition if the act or omission had been done by the lease holder.

Section 100A(3) provides that if an aquaculture licence is held by two or more persons and any of those persons commits an offence under section 100A(2) then each of the persons holding the licence is taken to have committed the offence.

Section 100A(4) states that if an aquaculture licence holder in relation to a leased area commits or is taken to have committed an offence under section 100A(2) or section 100A(3), then the lease holder is taken to have also committed the offence.

Section 100A(5) provides that if an aquaculture lease is held by two or more persons and an offence has been committed or is taken to have been committed under sections 100A(1) to 100A(4) in respect of the lease, then each of the lease holders are taken to have committed the offence.

Section 100A(6) provides the penalties for offences against this section.

Section 100A(7) provides that it is a defence for a person charged with an offence under section 100A(3), 100A(4) or 10A(5) to prove that the offence occurred without the person's consent or connivance and that the person had taken all reasonable measures to prevent the offence occurring.

Section 100A(8) provides that a person may be charged and convicted of an offence under section 100A(3), 100A(4) or 10A(5) as a licensee or lessee as the case may be, even though another person may have been charged and convicted of an offence arising out of the same set of circumstances.

### **Clause 37 Section 101 inserted**

Clause 37 inserts a new section 101 – **Clean-up and rehabilitation of former leased area**.

Section 101(1) provides that CEO may direct the former lease holder to clean up and rehabilitate the former lease area following the expiry of termination of an aquaculture lease.

Section 101(2) provides that if the former lease holder contravenes a direction given under section 101(1), then the CEO may clean up and rehabilitate the area and take steps to recover any reasonable costs incurred in the process from the former lease holder.

### **Clause 38 Part 8 Division 3 heading inserted**

Clause 38 inserts the heading “**Division 3 – Miscellaneous matters**” before section 101A.

### **Clause 39 Section 101A amended**

Section 101A is amended by inserting sections 101A(2A) and 101A(2B) and by amending section 101A(2).

Section 101A(2A) provides that the Minister for Fisheries may declare an area of WA waters to be an aquaculture development zone, subject to section 101A(2B). The meaning of “WA waters” is provided in section 5 of the Act. The effect of the definition is that WA waters includes all waters within the limits of the state and coastal waters, and waters out to 200 nautical miles for the purpose of managing commercial fisheries that straddle State and Commonwealth waters.

Section 101A(2B) provides that the Minister may only make a declaration under section 101A(2A) in relation to waters within the limits of the state or coastal waters with the concurrence of the “Lands” Minister and after consulting with the “Environment” Minister. The amendment to section 101A(2) is necessary as a result of the insertion of section 101A(2A).

### **Clause 40 Section 102 amended**

Section 102 enables the making of regulations relating to aquaculture.

Section 102 is amended by deleting paragraph (c) and replacing it with new paragraphs (ca), (cb) and (c) and amending paragraph (d)(ii).

New paragraph (ca) will allow the making of regulations relating to the collection of broodstock for aquaculture purposes.

New paragraph (cb) will allow the making of regulations relating to the imposition or variation of permit conditions, the suspension and cancellation of permits and the review by the State Administrative Tribunal of decisions by the CEO in relation to temporary aquaculture permits.

New paragraph (c) will enable regulations to be made for all the matters contained in the deleted paragraph (c) as well as for the additional matters of the subdivision, subletting and amalgamation of leases.

The amendment to paragraph (d)(ii) is for consistency with other amendments that now require returns to be lodged with instead of submitted to the Department.

#### **Clause 41 Part 9A inserted**

Clause 41 inserts **Part 9A – Exotic Fish** and section **103A Accidental introduction of exotic fish into WA waters**

Section 103A(1) defines the term “*intervene*” for the purposes of this section to include inspect, seize and destroy fish.

Section 103A(2) applies this section to any fish that are kept for aquaculture purposes but for which an aquaculture licence is not required because of the operation of section 91(a). Section 91(a) provides exceptions to the requirement to hold an aquaculture licence if a person is involved in the aquaculture of prescribed fish for a prescribed purpose or in a prescribed area of the state. For example current regulations under section 91 exclude persons who are involved in aquaculture for a non-commercial purpose, such as hobbyists with a home aquarium, from the requirement to hold an aquaculture licence.

Section 103A(3) allows the CEO to direct a fisheries officer to inspect seize or destroy fish if those actions will or could minimise the risk of the accidental introduction of exotic fish into WA waters.

#### **Clause 42 Section 120 amended**

Section 120 enables the making of regulations for the protection and management of fish habitat protection areas. Clause 42 amends section 120 to tidy-up the drafting of the existing section and provide recast and new heads of power in relation to fish habitat protection areas (FHPAs).

The overall effect of the amendment is to provide clear and separate heads of power in relation to the following existing and new matters:

- entry to a FHPA by persons, boats aircraft and other things (existing section 120(a));
- aquatic ecotourism in FHPAs and any other activity that may affect a FHPA (existing section 120 (b). The regulation of fishing as previously contained in section 120(b) is now contained in new section 120(ca)as explained below;
- fishing in a FHPA (new section 120(ca), but previously contained in existing section 120(b));
- moorings jetties , rafts and other constructions in a FHPA (existing section 120(c)) redrafted);
- the ability to prescribe fees or charges for admission to a FHPA or for the use of any land or facilities in a FHPA and for related matters. (Section 120(d) - new head of power).

#### **Clause 43 Section 125 amended**

Section 125 requires the Registrar to keep a register of authorisations, aquaculture leases and exemptions. The amendment to section 125 will ensure that temporary aquaculture permits are also recorded on the register.

#### **Clause 44 Section 126 amended**

The amendment to Section 126 specifies the details that must be included in the register, and provides that those same details must be included in the register in respect to temporary aquaculture permits.

#### **Clause 45 Section 130 amended**

By way of background, section 127 of the Act provides that the holder of an authorisation or aquaculture lease may apply to the Registrar to have noted on the register that a specified person has a security interest in the authorisation or lease. Section 128 provides that on receipt of the application the Registrar must note the security interest on the register. Section 130 specifies that where a security interest is noted on the register in accordance with section 128, the Registrar must notify the security holder if certain events occur, such as if the authorisation holder is convicted of an offence against the Act, or the authorisation holder applies to transfer or vary the authorisation etc.

Section 130(b) requires the Registrar to notify a security interest holder if the authorisation applies to vary the authorisation or to transfer the authorisation or **part** of the entitlement under the authorisation. Clause 45 amends section 130(b) to require the Registrar to notify a security interest holder if the authorisation applies to vary the authorisation or to transfer the authorisation or the **whole or part** of the entitlement under the authorisation.

This amendment is necessary as a result of the amendment to section 141 (Clause 49) which will enable the CEO to approve the temporary transfer of the **whole or part** of the entitlement under an authorisation. As section 141 currently stands the whole of the entitlement under an authorisation could not be transferred on a temporary basis – at least one unit of entitlement has to remain under an authorisation leading to sub-optimal use of entitlements under an authorisation. For example, if an entitlement under a management plan authorises a rock lobster fisherman to use 100 pots and the fisherman wants to have a year off, he could only transfer a maximum of 99 pots to other fishermen for that year. The other pot would have to remain attached to his authorisation for the year and could not be fished. With the movement to catch limits (quota) under licences for the 2010/11 fishing period, this has become an issue because without the capacity to temporarily transfer all units of entitlement, the catch limit (quota) for the last remaining unit would be unfished during the year. The Minister has issued a class exemption to address this issue during the 2010/11 season.

#### **Clause 46 Section 135 amended**

This amendment is also necessary as a result of the amendment to section 141. Section 135 relates to the making of applications to the CEO for the grant renewal or variation of an authorisation or the transfer of an authorisation or **part** of an entitlement under an authorisation. Following the amendment, section 135 will now refer to applications for, among other things, the transfer of the **whole or part** of an entitlement.

#### **Clause 47 Section 139 amended**

Section 139 provides that if a person applies to the CEO for the renewal of an authorisation within 60 days after the expiry of the authorisation, the authorisation may be renewed, even though it has expired. Section 139(3) provides that the regulations or management plan may provide for a fee to be payable if the authorisation is renewed in this manner. The amendment to section 139(3) has the effect of making the fee payable under the regulations or the management plan with the application to renew the authorisation.

#### **Clause 48 Section 140 amended**

Section 140 specifies matters relating to the transfer of an authorisation. As section 140 currently stands it applies to all authorisations. The amendment to section 140 makes it clear that personal licences, such as commercial fishing licences and recreational fishing licences, may not be transferred to another person.

#### **Clause 49 Section 141 amended**

Section 141 relates to the temporary transfer of entitlements under an authorisation. Where an authorisation holder applies to the CEO to transfer **part** of an entitlement for a specified period, and such a (temporary) transfer is authorised by the relevant

management plan or regulations, then the CEO may transfer part of the entitlement for that period. At the end of the specified period the licences and entitlements automatically return to the position existing before the temporary transfer.

Clause 49 amends section 141(1) and 141(2) to enable an authorisation holder to apply to the CEO for the temporary transfer of the **whole or part** of an entitlement under an authorisation, and ensure that the existing registry, security interest and consent provisions applying to transfers of entitlement apply to the temporary transfer of the **whole or part** of an entitlement under section 141, respectively.

#### **Clause 50 Section 143 amended**

Section 143(1) specifies the circumstances in which the CEO may suspend or refuse to renew an authorisation.

Section 143(1)(a)(ii) provides that the CEO may suspend or refuse to renew an authorisation if the holder is convicted of an offence against a written law other than the *Fish Resources Management Act 1994* if the offence relates to the fishing industry. However authorisations are issued under the FRMA for aquaculture and the charter industry. Clause 50 amends section 143(1)(a)(ii) to include as grounds for the suspension or non renewal of an authorisation, offences against another written law relating to these industries as well as offences against the fishing industry.

Section 143(1)(b) provides that the CEO may suspend or refuse to renew an authorisation if a condition of an authorisation has been contravened. Clause 50 amends section 143(1)(b) to provide that the CEO may suspend or refuse to renew an authorisation if a condition of an authorisation has been, or is being, contravened.

Clause 50 also inserts new sections 143(1)(ca), 143(1)(cb) 143(1)(cc) that contain additional grounds upon which the CEO may suspend or refuse to renew an authorisation. These are:

- if the authorisation is an aquaculture licence, and in the CEO's opinion, a requirement of any MEMP has been, or is being, contravened, and as a consequence of that contravention, pollution or environmental harm, as defined in the *Environmental Protection Act 1986* has been or is being caused (Section 143(1)(ca)); or
- if the authorisation is an aquaculture licence, and the holder no longer has appropriate tenure over the area of the licence (section 143(1)(cb)); or
- if the CEO is satisfied that the holder is no longer a fit and proper person to hold the authorisation (section 143(1)(cc)).

Section 143(1)(e)(i) provides that the CEO may suspend or refuse to renew an authorisation if the holder has among other things failed to submit a return required to be submitted under the Act. Clauses 50(d) and (e) amend this section so that the CEO will

now be able to suspend or refuse to renew an authorisation if a return is not submitted or **lodged**.

Clause 50(f) amends section 143(1)(g) to provide that the CEO may suspend or refuse to renew an authorisation if any other amount payable by the holder under Act remains unpaid when it becomes due, in addition to any fees, charges or levies as currently provided under section 143(1)(g).

Clause 50(g) inserts “or” between the paragraphs consistent with contemporary drafting practice.

#### **Clause 51 Section 146A inserted**

Clause 51 inserts new section **146A - Death of an individual who holds an authorisation**. This section has been inserted to clarify the position that an authorisation held by an individual survives that person’s death. This is how the department has historically treated authorisations on the death of an individual, however doubt has been raised as to the legislative power to do so. There can be substantial value in managed fishery licences and a managed fishery licence may form a significant part of an individual’s assets, and there has long been an expectation in the fishing industry that such licences are capable of being inherited. A good example is a West Coast Rock Lobster Managed Fishery Licence. In addition, lending institutions would be reluctant to secure money lent against an individual’s managed fishery licence if it did not survive the individual’s death. The amendments provide for the authorisation to be treated as part of the deceased’s estate where the authorisation the deceased person held the authorisation exclusively or as a tenant in common.

In cases where the deceased individual held the authorisation as a joint tenant, then it will pass to the surviving tenant or tenants.

The new section also validates previous actions of the Department in this regard.

Section 146A(1) provides that this section applies to all authorisations other than commercial or recreational fishing licences. Commercial and recreational fishing licences are personal licences and can not be transferred to other persons, in much the same way as a driver’s licence can not be transferred from one person to another.

Section 146A(2) provides that on the death of an individual who immediately before death held an authorisation exclusively or as a tenant in common, the deceased person’s share of the authorisation is taken to be held by the deceased’s personal representative.

Section 146A(3) provides that on the death of an individual who immediately before death held an authorisation as joint tenant, the deceased person’s share of the authorisation is taken to be held by the surviving joint tenants.

Section 146A(4) is a validation clause that validates all transfers of authorisations or shares in authorisations held by an individual who died before the commencement of this section of this Act.

#### **Clause 52 Section 147 amended**

Section 147 provides that, prior to giving effect to decisions relating to an authorisation, the CEO is to give each affected person notice in writing containing the details of the decision, advise that affected persons that they may make application (to the State Administrative Tribunal) for a review of the decision and allow sufficient time for this to occur.

Clause 52 amends section 147(1)(e) that will require the CEO to give notice to affected persons if the CEO refuses to transfer an authorisation or the **whole or part** of an entitlement under an authorisation, after a person has applied for the transfer. This amendment is necessary as a consequence of the amendment to section 141 which will allow the temporary transfer of the whole or part of an entitlement under an authorisation.

#### **Clause 53 Section 150 amended**

Section 150 provides that if a person has applied for the renewal of an authorisation, and the CEO has decided not to renew it, and the persons has made an application (to the State Administrative Tribunal) to review the CEO's decision, the authorisation remains in force until the application (to the SAT) is determined.

Clause 53 amends section 150 so that the licence remains in force in such circumstances until the matter is determined by the State Administrative Tribunal, unless the State Administrative Tribunal determines otherwise.

#### **Clause 54 Part 15A inserted**

Clause 54 inserts after section 152 a new **Part 15A – Fish trafficking** to create offences for the trafficking or unauthorised dealing in commercial quantities of specified priority fish, as declared in the regulations. Examples of fish likely to be declared priority fish are abalone, rock lobster, and dhufish.

New section 153 – **Terms used** - defines the terms used in this Part.

New section 154 – **Trafficking in fish** - defines what “trafficking in fish” is. Section 154(1) provides that trafficking in fish includes a person taking fish, possessing or controlling fish, selling fish, processing fish, delivering and transporting fish etc.

Section 154(2) provides that trafficking in fish also includes a person controlling, directing or supervising the dealing with fish as described in subsection (1), or allowing facilities to be used for the dealing, or financing the dealing, or agreeing to deal in fish, or knowingly being concerned with the dealing in fish.

Section 155 – **Unauthorised trafficking in fish** - creates the offence of trafficking in fish and provides substantial penalties for the unauthorised trafficking in fish.

Section 155(1) provides that a person must not traffic in commercial quantities of priority fish unless the person is authorised to do so by the Act. “Commercial quantity” is defined in section 153 as a quantity of fish that exceeds the quantity of fish prescribed in the regulations, or fish of a value that exceeds the value prescribed in the regulations.

Section 155(2) provides that a person who contravenes section 155(1) commits a crime and provides for substantial penalties including, for an individual for a first offence, a fine of 400,000 and imprisonment for four years and ten years imprisonment for a second or subsequent offence. The penalty for a body corporate is \$800,000.

If the matter is dealt with summarily in a magistrate’s court, the penalty for an individual for a first offence is \$200,000 and imprisonment for two years and four years imprisonment for a second or subsequent offence. The penalty for a body corporate is \$400,000.

Section 156 – **Regulations relating to the trafficking in fish** – provides that the regulations may specify methods for determining commercial quantities of priority fish or the exemption of persons from the application of section 155.

#### **Clause 55 Section 172 amended**

Clause 55 amends section 172 – **Unlawful interference with fishing gear**.

The amendment recasts the existing provision to remove the ambiguity in its wording so that it is clear that it is unlawful to remove fish from any fishing or aquaculture gear or interfere with any fishing or aquaculture gear unless the person is the owner of the gear, or is acting with the authority of the owner. The heading to section 172 will also be changed when the Act is reprinted to read “Unlawful interference with fish or gear”

#### **Clause 56 Part 16A inserted**

Clause 56 inserts after section 176 a new **Part 16A – Emergency powers to deal with biological threats**. This Part gives the CEO of Fisheries emergency powers to respond to biological threats to fish or the aquatic environment, despite the provisions of the *Biosecurity and Agriculture Management Act 2007*, These powers are needed to allow the Department to act quickly if harmful organisms are discovered in the aquatic environment, which has occurred from time to time in recent years.

Section 177A – **Application** provides that this Part applies despite the *Biosecurity and Agriculture Management Act 2007*.

Section 177B – **Terms used** – defines the terms used in this Part.

Section 177C – **Dealing with biological threats** – empowers the CEO of Fisheries to deal with biological threats to fish or other aquatic resources or to aquatic environment.

Section 177C(1) applies this section if the CEO considers that it is necessary to exercise the powers because of a biological threat to fish or other aquatic resources or their habitats.

Section 177C(2) provides that the CEO may take action (through the Department), or direct another person who the CEO considers is responsible for the biological threat, to take action that the CEO considers is appropriate to prevent an organism from entering an area of WA waters, or to control the spread of the organism in an area of WA waters or eradicate an organism from an area of WA waters.

Section 177C(3) provides that if a person contravenes a direction in relation preventing , controlling or eradicating an organism, the CEO may take the steps specified in the direction and recover the reasonable costs of such action as a debt to the State.

#### **Clause 57 Section 182 amended**

Section 182 – **Routine Inspection** – specifies the routine powers of fisheries officers to enter and inspect land or premises used in connection with the fishing industry. Clause 57 amends section 182 by deleting paragraph (c) in section 182 and replacing it with a new paragraph (c). The amendment is necessary only because “aquaculture gear” is now defined by this Amendment Act and is now used in this paragraph replacing the words “equipment used for aquaculture”.

The word “or” is inserted after paragraphs (a) and (b).

#### **Clause 58 Section 191 amended**

Section 191 specifies other powers of fisheries officers. The amendments to section 191 are mainly necessary a result of the new definition of “aquaculture gear”. The amendment to section 191(1)(u) also extends the application of the section to fishing tours, so that a fisheries officer may now, by notice in writing, require the master of any boat or person in control of any vehicle to deliver any fish, or fishing gear used for fishing tours (charter fishing), to a specified place, in the same way as the section currently applies to the commercial and recreational fishing sectors, and the aquaculture and aquatic eco-tour (no-take) sectors.

### **Clause 59 Section 191A amended**

This amendment is necessary as result of the passage of the *Fish Resources Management Amendment (Fees) Act (No.2) 2011*, wherein a new subsection (2) was inserted in section 258 causing the existing section to be renumbered as section 258(1).

### **Clause 60 Section 193 amended**

Section 193 – **Seizure** - describes the powers of fisheries officers in relation to seizing things under the Act. Clause 60 amends section 193(1) by:

- inserting a new section 193(1)(ga) to enable a fisheries officer to seize exotic fish and any medium containing them, in compliance with a direction from the CEO under 103A(3) to minimise the risk of the accidental introduction of exotic fish into WA waters; and
- deleting “totally protected fish” in section 193(1)(h) and replacing it with a reference to protected fish, so that the section will now apply to all categories of protected fish – being totally protected fish, commercially protected fish and recreationally protected fish.

### **Clause 61 Section 202B inserted**

Part 17 of the Act deals with legal proceedings for offences against the Act.

Division 2 of Part 17 provides that certain persons may be liable for prosecution along with the principal offender in certain circumstances. For instance, section 202 – **Liability of master** – provides that where a crew member of a vessel (the principal offender) commits an offence, then the master of the vessel is also taken to have committed the same offence. Defences are provided for the master. Similarly section 202A provides that a person in charge of a fishing tour is taken to have committed the same offence as a participant in the fishing tour. Again defences are provided. The same applies to section 202 – **Liability of authorisation holder** – where if a person acting for or on behalf of an authorisation holder commits an offence, then the authorisation holder is taken to have committed the same offence, with defences specified. These types of provisions are necessary for the make it clear to masters, charter operators and authorisation holders that it is their responsibility to ensure that that the provisions of this Act observed by employees, paying customers or persons operating an authorisation on behalf of the authorisation holder. Without such provisions the sustainable management of the State’s commercial and recreational fisheries will be placed at risk.

Clause 61 inserts after section 202A new section **202B – Liability of authorisation holder for offences by other holders.**

New section 202B(1) provides that if an authorisation is held by more than one person, and any of those persons commits an offence under the Act, then each of the authorisation holders is taken to have committed the same offence.

New section 202B(2) provides a defence where a person charged can prove that the offence was done without the consent or connivance of the person and that the person took all reasonable measures to prevent the act or omission being made.

New section 202B(3) provides that a person (authorisation holder) may be charged and convicted of an offence against the Act whether or not another person has been charged and convicted of the same offence.

#### **Clause 62 Section 212 amended**

Section 212 of the Act is an evidentiary provision that provides that in any proceedings for an offence against the Act, proof is not required as to the facts contained in any certificate regarding licensing matters purporting to be signed by the Registrar. Clause 62 amends section 212 to include a reference to temporary aquaculture permits in addition to authorisations, aquaculture leases and exemptions.

#### **Clause 63 Section 215 amended**

Section 215 of the Act is an evidentiary provision that provides that in any proceedings for an offence against the Act, proof is not required as to the accuracy of specified equipment used by fisheries officers. This section is amended to cover modern equipment used by fisheries officers such as electronic equipment used as part of the Department's vessel monitoring system.

#### **Clause 64 Section 216 amended**

Section 216 provides that, for the purposes of the Act, reference to determine a line or point on the Earth's surface is to be determined in accordance with the prescribed Australian datum. Clause 64 amends sections 216(a) and (b) so that the prescribed datum may be used to determine the position of temporary aquaculture permits on the Earth's surface, in additions to authorisations, exclusive licences and aquaculture leases.

#### **Clause 65 Section 220 amended**

Section 220 provides that certain fish are forfeited to the Crown upon seizure as well as any receptacle or container that the fish may be in.

The amendment to section 220 updates the section to provide that fish are forfeited to the crown where the fish are in excess of a bag limit or possession limit seized (new section 220(ba)), are fish exceeding prescribed commercial quantities for the purposes

of fish trafficking offences (new section 220(bb)), exotic fish (new section 220(bc)), and any receptacle or container etc that contains such fish (new section 220(d)).

#### **Clause 66 Section 222 amended**

Section 222 provides that a court must impose additional penalties based on ten times the prescribed value of the fish the subject of the offence, if a person is convicted for certain offences under the Act. Section 222(1) specifies the offence provisions to which section 222 applies. These include offences against provisions relating to orders prohibiting fishing (s.43), totally protected fish (s.54), commercially protected fish (s.47), bag limits (s.50), possession limits (s.51), management plans (s.74), managed fishery licence conditions (s.77), fish processing licence requirements (s.82), fish processing at a place other than that specified in the licence (s.86), regulations relating to fish processing (s.88), and the purchase and possession of fish dealt with unlawfully under the Act (s.173).

Clause 66(1) amends section 222(1) by including offences against sections 48A (recreationally protected fish) and section 155(2) (unauthorised trafficking in fish) as offences to which the additional penalty provisions of section 222 apply.

Such penalties provide a strong deterrent to potential offenders against the Act and are still required for this reason. However, it is the experience of the Department that the imposition of these mandatory penalties may, in some cases, cause undue hardship upon those receiving the penalty, or that, in some cases, the penalty may exceed the severity of the offence. In recognition of this, section 222 is being further amended to provide some flexibility in the imposition of the additional penalty. This has been achieved in clause 66(2) by deleting the existing section 222(2) and inserting new sections 222(2) and 222(3A).

As section 222(2) currently stands, on convicting a person of any of the offences listed in section 222(1), the court must also impose an additional penalty equal to 10 times the prescribed value of the fish the subject of the offence.

Clause 66(2) deletes section 222(2) and inserts two new subsections 222(2) and 222(3A) which combine to provide the court with the flexibility to impose an additional penalty in a range **equal to the value of the fish up to less than** 10 times the prescribed value of the fish the subject of the offence, if the CEO (or a person acting on the CEO's behalf) makes application to the court, and the court is satisfied that an additional penalty equal to 10 times the prescribed value of the fish would be harsh, oppressive or not otherwise in the interests of justice.

Clause 66(3) amends section 222(5) to delete the reference to section 222(2) and replace it with a reference to sections 222(2)(a) or (b) as a result of the amendments to this section previously outlined above. The effect of the amendment is to provide that

the additional penalty of either ten times the prescribed value of the fish (222(2)(a)) or the lesser amount 222(2)(b) as determined by the court is irreducible.

#### **Clause 67 Section 225 amended**

Section 225(1) currently provides that if a court convicts a person of an offence against the Act, the court may, in addition to any other penalty the court imposes, prohibit the person from being on fishing boats or engaging in fishing, aquaculture or fish processing. These are potentially serious limitations on a person's ability to engage in fishing and related activities. However, the Act provides that the court may only impose a prohibition order if the prosecutor applies for the order and the court is satisfied that the offence is of a serious nature and the offender is likely to re-offend against the Act if such an order is not made.

The amendments to section 225 extend the range of matters about which the court may make an order and update the penalty provisions for contravening an order of the court or knowingly allowing or permitting a person to do so. In addition to the ability to prohibit persons from being on fishing boats or engaging in fishing, aquaculture or fish processing, section 225(1) has been amended to enable the court to prohibit persons from being at places where fish are sold (section 225(1)(b)(i)), being employed in or managing operating or holding an interest in a fishing, aquaculture or fish processing business **and** being in control or possession of fish or fishing or aquaculture gear (section 225(1)(c)), being in possession of any fish or fishing or aquaculture gear, or any specified fish or fishing or aquaculture gear or class of such fish or gear (section 225(1)(d)) or being on or near specified waters (section 225(1)(e)).

#### **Clause 68 Section 228 amended**

Section 228 currently provides that authorised persons may issue infringement notices for suspected breached of the Act with 21 days of the offence being committed. The amendment to section 228 extends the period of time for issuing an infringement notice to 45 days after the alleged offence is believed to have been committed.

This is necessary because fisheries officers often discover fisheries offences when they are on extended patrol in remote locations and require the additional time to write up infringements, thereby the fisheries officer additional time to issue the infringement notice, and the alleged offender with an opportunity to pay the modified penalty instead of having the matter dealt with by a court, despite the offence being detected in a remote location.

#### **Clause 69 Section 238 amended**

Section 238 specifies the funds that may be credited to the Fisheries Research and Development Account and the purposes for which the Account may be applied by the Minister.

Clause 69(1) amends section 238(4)(a)(i) to provide that the Account may be credited with fees for temporary aquaculture permits, in addition to fees for commercial authorisations and exemptions.

Clause 69(2) amends section 238(5) to:

- enable the Minister to apply monies in the Account to defray the costs of the administration and management of customary fishing (clause 69(2))(a),
- for the purchase of fishing or aquaculture gear from the benefit of industry, in addition to authorisations, boats or entitlement (clause 69(2)(b)),
- to maintain the marking and lighting of areas subject to aquaculture licences, temporary aquaculture permits and aquaculture leases (new section 238(5)(kaa),
- to clean up and rehabilitate aquaculture sites that are no longer used, where necessary (section 238(5)(kab)), and
- to repay any amount paid under section 97(7A) as a bond by the leaseholder, but not required or expended to clean-up an aquaculture lease area because the CEO did not need to issue a direction to clean up the site, or the former lease holder has complied with such a direction, or because the costs incurred by the CEO in cleaning up the site were less than the bond paid by the former leaseholder.

#### **Clause 70 Sections 241 and 242 deleted**

Clause 70 deletes sections 241 and 242 because the AFMA Account is no longer required.

#### **Clause 71 Section 246 amended**

Section 246 currently enables the Minister to issue of policy guidelines for the assistance of the CEO and the information of the fishing industry and the public about matters the Minister considers important in respect to the performance of a function under the relevant Act by the CEO. As the Act currently stands there is no capacity for the Minister to issue policy guidelines that relate to the administration of the fisheries portfolio generally, as opposed to the performance of a relatively small number of CEO functions under the relevant Act. The Act provides that policy guidelines may be amended or revoked by the Minister and that they must be published in the Gazette. The amendments do not change these requirements.

Clause 71 amends section 246 so that any future policy guidelines issued by the Minister do not have to be limited to the CEO and the performance of the CEO's functions under the relevant Act. So in future the Minister could issue guidelines for the information of the industry or the community about matters the Minister considers of importance in the administration of the Fisheries portfolio, including functions of the Minister, or future directions for the management of a particular fishery.

Clause 71(1) deletes and replaces the existing section 246(1). The new section 246(1) provides that the Minister may issue policy guidelines for the assistance of Department of Fisheries personnel (not just the CEO) and for the information of the fishing industry and the community about the administration and enforcement of the Act or any other Act that is administered by the Minister for Fisheries, these being the *Pearling Act 1990*, the *Fisheries Adjustment Schemes Act 1987*, the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* and the *Fishing Industry Promotion Training and Management Levy Act 1994*.

Clause 71(2) deletes and replaces the existing section 246(4). The existing section 246(4) requires the CEO to take into account any policy guideline issued by the Minister in performing any function under the Act. The new section 246(4) requires Department of Fisheries personnel to take into account any policy guidelines that are relevant to the performance of any function under any of the Acts referred to above.

Clause 71(3) deletes and replaces the existing section 246(5)(a). The existing section 246(5)(a) provides that in taking account a policy guideline when performing a function under the relevant Act, nothing derogates from the CEO's duty to exercise discretion in a particular case. The new section 246(5)(a) provides that in taking account a policy guideline when performing a function under the relevant Act, nothing derogates from the duty or **fisheries personnel** to exercise discretion in a particular case.

The amendments to sections 246(5)(b) and (c) replace the reference to "CEO" with a reference to "fisheries personnel".

## **Clause 72 Section 250 amended**

Section 250 of the Act provides for the confidentiality of information required to be kept or submitted to the Department under the Act by persons operating in the fishing industry. The rationale for section 250 is that the department wants fishers to report their catches accurately, and be able to use information provided to the Department within its research modelling with a high degree of confidence as to the accuracy of catch and effort data being used in the modelling.

While section 250 has worked well in this regard, experience has identified the need for section 250 to be amended to provide for some otherwise confidential information to be able to be released in certain circumstances, without compromising the original intent of the section as explained below.

Existing section 250(1) defines **confidential information** for the purposes of the Act. Clause 72(1) deletes and replaces the existing section 250(1). The substantive effect of the replacement section is to include within the definition of **confidential information** a MEMP (i.e. a Management and Environmental Monitoring Plan) that has been lodged in accordance the aquaculture provisions of the Act. This provision will ensure the

protection of any intellectual property of an aquaculture licensee as contained within a MEMP.

Section 250(2) provides that a person who divulges confidential information obtained in the Administration of the Act - either directly or indirectly – commits an offence. Clause 72(2) amends section 250(2), but the amendment is one of style only, and not substance.

Section 250(3) outlines the circumstances in which it is not an offence for a person to divulge information. Section 250(3)(d) provides information may be divulged with the consent of the person, or each of the persons to whom the information relates. Clause 72(3) deletes and replaces 250(3) to improve the wording, while maintaining the original intent of the replaced section.

Clause 72(4) inserts a number of new subsections within section 250 outlining additional circumstance in which it will not be an offence to divulge information. These are:

- divulging information in aggregated form relating to fishing carried out in a fishery, even though it may be possible to identify a participant in the fishery because of the small number of licenses in the fishery (new section 250(4B)). This is necessary to enable the Department to be able to report on the sustainability of all fisheries managed by the Department in a transparent manner.
- New section 250(4B)(a) provides that information relating to fishing carried out under an authorisation may be divulged to the holder of an authorisation for the period which the current holder has held the authorisation. This provision enables the holder of an authorisation to determine how much quota or entitlement is left to be fished say in any one year, say in circumstances where the skipper who has fished the licence on behalf of the authorisation holder has moved on and not provided the information to the authorisation holder
- New section 250(4B)(b) provides that information relating to fishing carried out under an authorisation may be divulged in respect to any prior period with the consent of the person who held the authorisation in that period, or that person's personal representative, if the person has died. This provision enables owners to gain information, with the consent of previous owners, to inform prospective buyers of authorisations about the fishing history of an authorisation that is to be sold, for instance.
- New section 250(4C) provides that information relating to fishing carried out under an authorisation may be divulged to the master of a boat who is acting on behalf of the authorisation holder. This section will enable the master of boat to find out from the Department how much quota or entitlement remains to be taken in any licensing period, for instance.
- New section 250(4D) provides that information may be divulged to for law enforcement purposes to a department or other agency of the State with the approval of the Minister.

- New section 250(4E) provides that information may be divulged to for law enforcement purposes to a department or other agency of the Commonwealth or another State or Territory in accordance with an agreement between the Minister and the Commonwealth or another State or Territory, and in accordance with any requirements contained in the regulations.

Clause 72(5) inserts an “or” after each of section 250(3)(a) and (b) in accordance with modern legislative drafting practice.

### **Clause 73 Section 257 amended**

Section 257 provides that regulations may be made for the licensing of persons, activities or things relating to fishing aquaculture and other matters administered through the Act.

Clause 73(1) amends section 257 to provides heads of power to enable regulations to be made to cover the following additional things:

- Aboriginal bodies corporate engaged in commercial fishing, but the Act provides that a licence or a permit granted or renewed under this section cannot be transferred despite any other provision of the Act (new section 257(1)(ba)). Incorporated aboriginal bodies have operated in the mud crab and trochus fisheries under exemptions granted under the Act for about the last 15 years, with no right of renewal. This provision will provide these entities with an annual right of renewal and provide certainty to the community in terms of their ongoing rights to a licence. With regard to requirement that these licences not be transferable, it is the policy intent of the government that mud crab, trochus and beche de mer licences granted to incorporated Aboriginal bodies always remain the property of the incorporated body. The non-transferability requirement will only relate to these fisheries because of the long standing cultural and historical association that some Aboriginal communities in the Kimberley have with these fisheries. This provision will not preclude any incorporated Aboriginal body from purchasing a licence in any other commercial fishery such as rock lobster or abalone with full rights of transferability.
- Masters of boats used for purposes relating to commercial fishing (new section 257(1)(bb)). Management arrangements for many of the States commercial fisheries impose certain obligations of the masters of vessels, but currently there is no distinction between the licence that is required to be held by the master of a vessel and its crew.
- Persons engaged in diving for purposes related to commercial fishing aquaculture and aquatic eco-tourism (new section 257(1)(bc).
- Persons collecting fish, including totally protected fish, for broodstock for aquaculture purposes (new section 257(1)(bd).

- Individuals engaged in recreational fishing. The wording has been changed from the old section 257(1)(b) to reflect the fact that only individuals can hold a recreational fishing licence and not companies (new section 257(1)(b)).
- Boats, including foreign boats, used for recreational fishing (new section 257(1)(ca)). There has been interest expressed by the operators of passenger liners to enable their guests to engage in recreational fishing as part of their voyage in places such as the Kimberley, whereby some passengers may go fishing from the ship's boat for a day trip. This provision will allow the Department to licence such activities based on the merits of any application received.
- Persons engaged in specified activities in a fish habitat protection area (new section 257(1)(cb)). This may include the licensing of pontoons and seaplanes to operate in a fish habitat protection area.
- Charter boats (new section 257(1)(f)). The Act previously referred to charter boats used for recreational fishing, but this has been expanded to charter boats generally to accommodate charter boats used for non extractive eco tours
- Persons engaged in the possession, unloading, transport, consignment, handling, labelling, delivery, receipt, storage, packaging, purchase or sale of fish

The effect of the amendments to sections 257(1)(d) and (e) is to insert a semi colon after each of these paragraphs.

The substantive effect of the amendment to section 257(2) as made by clause 73(2) is to enable the regulations to prohibit a person who has been convicted of a prescribed offence from being in any boat or prescribed class of boats for a prescribed period of time unless the person is the holder of the proper authorisation and the authority conferred by the authorisation is in effect. This means that the regulations may provide for persons convicted of serious offences under the Act, and as a result have had their licence suspended by the CEO under section 143, be banned from being on commercial fishing boats while their licence is suspended. At the moment a person can be banned, say, from commercial fishing in such circumstances, but this cannot be effectively policed by the Department when the vessel is not visible from the shore. The most effective and efficient means of ensuring such persons do not engage in commercial fishing during the period of suspension is to make it an offence to be on a commercial fishing vessel during that period.

#### **Clause 74 Section 258 amended**

Section 258 provides for the making of other amendments under the Act. The effect of the amendments is to provide new heads of power to make regulations regarding any of the following:

- Prohibiting or regulating the possession of fish in addition to the other matters already referred to in section 258(1)(a);
- Customary fishing by Aboriginal persons 258(1)(ba);
- Measures to determine who will receive authorisations in situations where the number of people seeking authorisations outnumbers the number of

authorisations available including public auction, tender, ballot or lottery (section 258(1)(ea)). An example of where this could apply in the future may be in the metropolitan abalone fishery where it may be preferable to cap the number of licences granted rather than further reducing the available fishing hours in the fishery. For the 2011/12 fishing season, abalone fishing will be restricted to just 8 hours in total, comprising one and a half hours fishing time on each of the last Sundays of the month for five months commencing on the last Sunday in November 2011. This time period may be further reduced during the 2011/12 season depending on how much abalone is taken during the first 3 fishing days.

- The reseeded of fish stocks or the release of fish to improve fish stocks (section 258(1)(eb))
- The labelling or other identification of aquacultured fish (section 258(1)(ec))
- Prohibiting or regulating any aquaculture that is likely to have an incidental impact on aquatic fauna or flora (section 258(1)(ed))
- Adopting codes of practice or standards for aquaculture (section 258(1)(ee))
- Requiring persons in specified circumstances to notify the CEO of the occurrence of any fish not endemic to the state or a part of the state, in addition to the existing head powers in relation to such fish (section 258(1)(h)(iii))
- Prescribing measures for the control, recapture or eradication of exotic fish 258(1)(ia)
- Extending the powers already contained in section 258(1)(k) to make regulations for the control of disease in fish to pearl oysters (pearl oysters are primarily managed under the *Pearling Act 1990*)
- Protecting aquatic fauna and aquatic habitats from incidental harm from fishing activities, including prohibiting or regulating specified fishing activities (section 258(1)(la))
- All the things currently involved in section 258(1)(o) and (p), but with the wording updated to take into account changed terminology as a result of this Bill e.g. aquaculture gear
- Rewording existing section 258(1)(u) and replacing it with 258(1)(u) and (v) to clarify the ability to make regulations regarding the depositing of waste or refuse in waters and of activities that might pollute waters, for instance, releasing toxic substances such as anti fouling paint into waters
- Prohibiting or regulating the possession of fish and the removal of fish from designated areas and provide for the management of fishing and related activities in those areas section 258(1)(wb). Possible use for this head power includes making regulations for the possession of fish by recreational fishers in areas designated as landing zones in the West Coast Rock Lobster Managed Fishery.
- Regulating the exchange of information with Commonwealth or State law enforcement agencies for law enforcement purposes (section 258(1)(zaa))

The amendments to sections 258(1)(za) and (zb) limit the application of section 258(1)(za) to persons who are **authorised to** engage in fishing etc, and accommodate the concept of submitting **or lodging** a return etc as discussed earlier in this document (sections 258(1)(za) and (zb)).

#### **Clause 75 Section 261 amended**

Section 261 deals with the serving of notices under the Act and provides that notices may be served on the holder of an authorisation or aquaculture lease by stamping the notice and sending it to the address contained in the Register. Clause 75 amends section 261 so that this same process will apply to serving a notice on the holder of a temporary aquaculture permit.

#### **Clause 76 Part 20 heading and Part 20 Division 1 heading inserted**

Clause 76 inserts, before section 266, the Part Heading – **Part 20 – Transitional matters** – and the Divisional Heading – **Division 1 – Transitional matters for the *Fish Resources Management Act 1994***.

#### **Clause 77 Part 20 Division 2 inserted**

Clause 77 inserts the Divisional Heading - – **Division 2 – Transitional matters for the *Fish Resources Management Amendment Act 2011*** and new sections 267, 268, 269 and 270.

Section 267 – **Term Used: amending Act** - defines amending Act as the *Fish Resources Management Amendment Act 2011* for the purposes of this Division.

Section 268 – **Exemptions under section 7** – provides that an exemption that was in force under section 7 immediately before the commencement of the amending Act is taken to have been granted under section 7 of the amending Act.

Section 269 – **Application of extended period for service of infringement notices under section 228** – provides that if an offence was alleged to have been committed before the commencement of this amending Act, then the authorised person has 21 days to issue an infringement notice, and not the 45 days that will apply to offences committed after the commencement of this amending Act.

Section 270 – **Transfer of money in accounts under repealed sections 241 and 242** – provides that any money on the AFMA Account or the Fisheries Research and Development Corporation Account immediately before the commencement of the amending Act must be paid into the Fisheries Research and Development Account.

#### **Clause 78 Schedule 3 heading amended**

Clause 78 amends the heading to Schedule 3 of the Act to make it clear that the savings and transitional provisions contained in Schedule 3 are relevant to the *Fish Resources Management Act 1994* (and not this amending Act).