

# The risks and benefits of a Deed of Agreement for the Tasmanian Rock Lobster Fishery

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## EXECUTIVE SUMMARY

Rock lobster and abalone are Tasmania's largest wild fisheries and have had extraordinarily high levels of profitability relative to most businesses in the economy over the last few decades, although the recent block of export of rock lobsters into China has severely affected the rock lobster fishery. Prior to this trade blockage, around 2/3 of the gross revenue from both abalone and rock lobster was economic rent (colloquially termed "super profits") paid from the fishery to holders of quota shares. This rent was additional to the normal business profits retained by the fishing firms. These unusually high levels of economic rent existed because of government regulations designed to reduce cost of labour and associated costs like vessel services while also preventing competition from new entrants with limits on licences and quota shares.

This situation of unusually high economic rents going to private shareholders from a public resource is unusual because governments usually capture most or all the rent from public resources as a return to the community. For example, a community return from forestry occurs through tendering access to public reserves, royalties are charged on mining, and public land is sold at market rate. Some of the economic rent from the Tasmanian abalone fishery was historically collected as a royalty although this ceased in 2015 when all three Tasmanian political parties supported reducing government income from the fishery to below the government costs of managing the fishery.

The situation in Tasmania of large private economic rents being generated from public wild fishery resources with no royalty payment is unusual overseas but common across all Australian jurisdictions. This situation is important in the context of a deed because it's fundamental to the use of the deed for abalone and why it's being investigated for rock lobster.

In 2019, the Western Australian State Government attempted to capture a share of the economic rent from their lobster fishery for the benefit of the community, not by applying a royalty but by issuing new quota shares. This economic solution is used commonly in management of other scarce resources with public interest (e.g. taxi licences) but created a backlash from western lobster quota shareholders who were able to have the proposal defeated.

This event in Western Australia led to concern amongst commercial fishing industries elsewhere in Australia that other jurisdictional governments may also explore obtaining a return to the community from fishery resources. The national body Seafood Industry Australia investigated the issue and found that the deed arrangement between quota shareholders in the Tasmanian Abalone Fishery and the Tasmanian Government had been especially beneficial for shareholders and would have blocked actions such as those proposed with Western Rock Lobster. Consequently, the Tasmanian Rock Lobster Fishermen's Association (TRLFA) requested that the Tasmanian Government consider entering into a Deed of Agreement, although with possible modifications. The change was also expected to improve access to finance using quota units as security, which would stimulate demand and therefore create capital growth in the value of quota shares.

For the most part, Tasmanian Rock Lobster Fishery (TRLF) fishing firms and quota owners are different entities. Quota owners are increasingly located outside Tasmania or Australia and have lease or rent arrangements in place with local fishing firms. This means that the proposed deed discussed in this report is primarily relevant to quota owners. Changes from the current management arrangements to a deed would have little/no effect on firms that provide services (fishing, freight, processing) unless they are also holders of quota shares.

A Deed of Agreement is used in the Tasmanian Abalone Fishery to give quota holders greater investment certainty by placing limits on changes the Government can make in the fishery. This certainty encourages business lending, increases demand for units and the price of quota units, and consequently lowers the yield on units. The increase in the sale price of TRLF quota units that would occur with increased liquidity and demand can be expected to accelerate the separation between parties holding quota units and those undertaking fishing operations.

The balance between retaining management flexibility and achieving a high degree of security for quota holders is at the heart of any assessment of the risks and benefits of adopting a Deed of Agreement for the TRLF. Increased certainty for quota unit holders is achieved by reducing regulatory flexibility around issues such as stock management, whether to trade-off employment and income to the fishing firms versus economic rents to quota holders, and how economic rents are distributed between quota unit holders versus the broader community.

Prior to Chinese trade blockage and with no royalty or other payment in place for access to the fishery resources, rock lobster quota shareholders received 100% of the resource rent (~\$47 million per annum). The licence fee revenue (~\$3.4 million) covers most Tasmanian Government costs of management, compliance and research required for the commercial fishery but does not provide any payment to the community. This payment is analogous to council rate payments on rental property which are a fee for service, as distinct from land tax which is contribution to the community.

The Government's ability to meet the management objectives of the *Living Marine Resource Management Act 1995* is diminished without flexibility in management rules, as has been seen with aspects of the abalone deed. A deed could limit the Government's ability to shift the fishery to cost recovery or introduce a royalty or payment to the community. A deed could also constrain flexibility in management of harvesting, which is increasingly important for adapting to the changing climate, markets, or community priorities for delivering benefit from a fishery. Flexibility may also be required in sharing the economic yield between quota shareholders and fishing firms – current arrangements are designed to rationalise fishing firms through competition and shift rents to shareholders but there is concern (e.g. by Tasmanian Seafood Industry Council) on whether the pendulum has swung too far in reducing income to fishers.

A deed could be used to make the Tasmanian Government liable to pay compensation for revising management policies in response to new data or altered conditions, for example, if resource sharing arrangements between different sectors were adjusted or if changes were made to deliver a return to the community from the commercial fishery. This risk of compensation costs would act as a barrier to government decision-making for these issues and more.

Table 1 summarises the factors to be considered in determining whether to enter into a Deed of Agreement for the TRLF.

## Recommendations

- 1 On balance, a Deed of Agreement is **not** recommended. The benefits of certainty to industry are outweighed by the risks to the community. A deed reduces the ability of the Tasmanian Government to implement sustainable management practices, to generate revenue to recover the cost of regulatory activities and to introduce a system so the community obtains a portion of the substantial resource rent generated each year by the TRLF.
- 2 If the Government nonetheless decides to pursue a Deed of Agreement, it should contain safeguards that: have a meaningful limit on the Deed's duration; preserve flexibility to respond to environmental change; ensure that commercial exploitation of the fishery covers the costs of management and maximises economic benefit to the Tasmanian community; and promotes transparency and industry accountability.

**TABLE 1 – FACTORS INFLUENCING WHETHER TO ENTER INTO A DEED OF AGREEMENT FOR THE TASMANIAN ROCK LOBSTER FISHERY**

Factor	Implication of entering into a Deed of Agreement
<b>Timeframe</b>	<ul style="list-style-type: none"> <li>Deeds with long duration increase security for private investors but diminish government flexibility. The Abalone Deed is effectively in perpetuity; a deed of shorter duration (e.g. 5 years) could be used for rock lobster.</li> </ul>
<b>Access to finance</b>	<ul style="list-style-type: none"> <li>The Abalone Deed increases quota shareholders' access to finance, increasing demand for tradeable quota units. The same could be expected for the rock lobster. The increased demand would be expected to accelerate the current trend in shift in ownership to non-fishing quota holders from outside Tasmania and Australia.</li> </ul>
<b>Price of units</b>	<ul style="list-style-type: none"> <li>Higher demand for quota shares increases prices and creates a windfall capital gain for existing quota holders. This process tends to price fishing firms out of the market in quota managed fisheries.</li> </ul>
<b>Certainty of access</b>	<ul style="list-style-type: none"> <li><i>The Living Marine Resources Management Act (1995)</i> currently limits the Government to issuing 10507 quota units or shares. Some additional commercial catch occurs through "research quota" (representing 1% of the TACC) that is used to generate income to offset research costs and fund industry organisation costs. Issuing more shares as per the WA government's proposal to generate community return from the resource would require a change to the Act.</li> <li>The deed suggested by the TRLF industry would prevent the Government's ability to issue of additional quota units (as per the abalone deed).</li> </ul>
<b>Management of the harvesting arrangements</b>	<ul style="list-style-type: none"> <li>A deed can limit management flexibility and prevent fishery management responding to new data or changing circumstances. In contrast, a management plan that requires Parliamentary oversight can be a more responsive management instrument.</li> <li>Lack of management flexibility can be positive or negative for industry (e.g. a deed can prevent the introduction of more restrictive harvesting plans - which some regard as disadvantageous - but the abalone industry has enjoyed less fee relief during the COVID-19 pandemic due to the inflexible nature of the governing deed).</li> </ul>
<b>Resource sharing</b>	<ul style="list-style-type: none"> <li>A deed may be used to limit changes to catch allocation between users of the resource, including quota holders, indigenous fishers, recreational fishers, or non-extractive users.</li> <li>To reduce exposure to future compensation claims, a deed for the TRLF could provide for future change by reducing the proportion of the TAC currently allocated to commercial fishing.</li> </ul>
<b>Compensation</b>	<ul style="list-style-type: none"> <li>A deed could create the risk that changes to access or harvesting arrangements require affected quota holders to be compensated. This is a disincentive to adaptive management practices and undermines sustainable management of a public resource.</li> </ul>
<b>Management costs</b>	<ul style="list-style-type: none"> <li>A deed can provide greater long-term certainty regarding fee obligations.</li> <li>Certainty of costs should be balanced against the whether the commercial fishery should continue to benefit from public subsidy or whether government expenses should be recovered. To achieve full cost recovery for the TRLF fishery, fees set out in a deed would need to be set above present rates and should be reviewed periodically.</li> </ul>
<b>Return to the community</b>	<ul style="list-style-type: none"> <li>Direct public benefit is achieved when payments received from the commercial fishery exceed management costs.</li> <li>While a deed purports to provide certainty, experience with the Abalone Deed shows that royalties can be adjusted or abolished while a deed is in place, removing any direct financial benefit to the public from the use of the resource.</li> <li>A deed for the TRLF could involve introducing a fee on commercial users that provides a return to the community.</li> </ul>
<b>Transparency</b>	<ul style="list-style-type: none"> <li>A deed for the TRLF should provide for regular public reporting of harvest rates, royalties and other fees paid, as well as management and research costs paid by government.</li> </ul>

# 1. INTRODUCTION

The Tasmanian Rock Lobster Fisherman's Association has requested that the Tasmanian Government consider entering into a Deed of Agreement with quota unit owners, similar to the arrangements in place for holders of abalone quota units. The Tasmanian Rock Lobster Fishermen's Association points to the investment certainty that the Deed of Agreement has provided to holders of abalone quota units (distinct from abalone diving licences).

Investors in any asset desire certainty, so it is unsurprising that industry is seeking measures to improve security of access. Higher security would be expected to provide an immediate capital gain to existing holders of quota units as it increases demand, especially through greater access to finance.

However, benefits accruing from a Deed of Agreement may be asymmetrical if it results in a loss of regulatory flexibility that stifles adaptive management approaches. These include those needed to respond to changing climatic conditions (e.g. adjusting catch or spatial management arrangements), community expectations and other external factors. Depending on its structure, a Deed may reduce or remove the Tasmanian Government's ability to implement changes in the distribution of benefits from the Tasmanian Rock Lobster Fishery (TRLF), including changing the proportion of the catch available to other user groups (e.g. for Aboriginal or recreational harvesting).

This report explains the rationale for implementing the abalone Deed and the practical experience of managing resources subject to a Deed of Agreement. The report looks at the benefits and risks of a deed, including potential risks to sustainable management, and proposes criteria that should be considered when determining whether a Deed of Agreement for the rock lobster fishery is desirable.

Part 2 sets out the background to the proposed deed and Part 3 explains how the TRLF is currently managed. Part 4 outlines the experience of regulating for the public benefit under the abalone fishery Deed of Agreement.

In Part 5, the Report identifies the following risks and benefits of a Deed of Agreement for the TRLF:

- There is a tension between retaining flexibility to adapt fishery management in light of new knowledge and providing a high degree of security to quota owners to encourage business lending, increase investor demand for units, and promote capital gains in quota units. Based on objectives of the *Living Marine Resources Management Act 1995*<sup>1</sup>, the Tasmanian Government's priority is to maintain the sustainability of living marine resources, having regard to the community interest in the TRLF. The Government's ability to meet these objectives is diminished without flexibility in managing rules and flow of benefit to different sectors.
- The community's interests may not be enhanced by increasing security for quota holders in a way that reduces the ability of the Government to implement that system to provide a return to the community from the commercial lobster fishery. Prior to the China trade barrier, the TRLF generated ~\$50 million per annum in resource rents which was allowed to be fully private with no direct capture of any of this rent for the Tasmanian community (via the Government).<sup>2</sup> Likelihood that this rent was to the benefit of the Tasmanian community was further diminished where shareholders are based outside Tasmania. An increasing proportion of shares are held by entities outside the jurisdiction and ownership is unmanaged.
- A deed introduces the risk that governments are penalised and exposed to compensation claims for revising government policy in response to altered conditions or new information if it reduces quota unit value. Any disincentive for management action undermines responsiveness and sustainable management of the resource.

On balance, the report concludes that the benefits of certainty to industry from a Deed of Agreement are outweighed by the risks of locking in poor practices, declining revenue to cover regulatory activities, stifling adaptive management and blocking the introduction of systems to provide a share of benefit to the Tasmanian community from commercial harvesting.

1 Section 7, *Living Marine Resources Management Act 1995*.

2 Ogier et al. (2018) *Economic and Social Assessment of Tasmanian Fisheries 2016/17*, IMAS.

## Royalties vs resource rent

The terms “resource rent” and “royalty” are often used together, despite describing different concepts.

In lobster fisheries “rent” or “economic rent” is the profit from the sale of lobsters, after all costs have been paid, including operating expenses, return to capital (such as vessels), and opportunity cost, such as unpaid labour.

“Resource rent” is the surplus value after all costs and normal returns have been accounted for.

In Tasmania, the resource rent from the TRLF is collected by private organisations or individuals through payments made by fishing operators to holders of quota units (e.g. lease fees).

“Royalty” is the portion of the rent that is collected by the Government and therefore of *direct benefit to the community*.

In the TRLF, no royalty is paid to the Tasmanian Government, despite large resource rents collected by quota owners most years<sup>3</sup>. In contrast, communities in other jurisdictions expect profitable fishing industries to pay for access to public resources, so many fisheries have a royalty system that achieves this return. This is also the case in other Tasmanian industries in which scarce natural resources are exploited for profit, such as mining, forestry and use of crown land.

## Recommendations

### RECOMMENDATIONS ON DEED

Therefore, a Deed of Agreement is **not** recommended.

### RECOMMENDATIONS ON INCLUSIONS AND PROCESS FOR DEVELOPING A DEED IF PREFERRED APPROACH

If the Government does decide to enter into a Deed, it should minimise the identified risks by:

- Undertaking a comprehensive audit of regulatory costs to set fees on a cost-recovery basis, to be updated following review;
- Implementing a system to maximise the return to the Tasmanian community from the commercial harvesting of the resource, as is done for the exploitation of other community assets. The system would need to redress the current situation in which all rents are private and significant resource rents may be exported;
- Providing for flexibility by limiting the duration of the Deed to say five years. This would enable changes to be made in response to performance indicators, including: equitable distribution of access between recreational, Aboriginal and commercial users; stock status and reference points; efficient / cost effective management; research contribution; and compliance;
- Providing for flexibility by ensuring the deed duration is not de-facto perpetual, such as ensuring that there are no provisions that guarantee renewal of the deed after each term;
- Ensuring the industry makes an adequate investment in research and sustainability initiatives *in addition* to regulatory costs, royalties, and any activities currently funded by the Tasmanian or Commonwealth Governments;
- Including compensation restrictions equivalent to those contained in the *Living Marine Resources Management Act 1995* for abalone, including in cases where the quantum of catch is changed, or the areas within a fishery that catch can be taken from, or the seasons are changed;
- Increasing the transparency of rate-setting processes and minimising industry influence on rate-setting; and
- Increasing the overall transparency of industry performance through better public reporting including of the size of the resource rent, the proportion that is provided to the government, and the net income to the government after accounting for all costs associated with managing the fishery.

3 This was \$47 million in 2016: Ogier et al. (2018), above n2.

## 2. BACKGROUND TO THE DEED PROPOSAL

Following a member resolution in early 2020, the Tasmanian Rock Lobster Fishermen's Association (TRLFA) wrote to the Minister for Primary Industries and Water requesting an investigation into the potential for a Rock Lobster Deed of Agreement.

The request was prompted by a recent situation in Western Australia, where the State Government announced plans for a system to provide community return from commercial harvesting of the Western Australian rock lobster resource. The history of the Western Australian lobster fishery is similar to Tasmania's, with management by an "individual transferable quota (ITQ)" or "catch share" system. In both cases the units were initially given away to firms for free and could be transferred or consolidated with the objective of increasing "allocative efficiency" by reducing employment and the number of vessels operating in the fishery. This reduction in costs for capital and labour successfully led to an increase in the resource rents from the fishery. The rents were fully private and flowed wholly to quota unit holders. The commercial industry was charged licence fees, but these were wholly a contribution towards management costs, rather than a royalty return to the community, as is applied in other resource industries.

### Western Australian proposal to deliver community benefit from lobster fishery

As employment was reduced and private economic rent rose, the Western Australian Government recognised that the Western Australian lobster fishery was not delivering a direct return to the community despite high profitability. Most produce from the fishery was exported which reduced local consumption benefit, the opportunity for recreational fishing was diminished by commercial harvesting, and there were reduced employment opportunities as a result of the ITQ management system. There was no royalty payment to compensate for the reduced employment, recreational opportunity, and local seafood supply. In contrast to Tasmania, the Western Australian Department of Fisheries also estimated that the lobster fishery was under-harvested, with catches falling well short of that which would deliver maximum economic yield.

The Western Australian Department determined that catches should be increased as this increased economic yield with no risk of over-fishing. Rather than allocating this catch to existing quota holders, the Government proposed to issue 1,700 tonnes of new quota, while keeping the catch of existing quota holders steady. The additional quota was to be leased by the Government with a condition that the product was to be sold locally. The proposal was designed to generate

government income from lease fees that could fund community services, boost employment in the fishery, and secure local access to seafood at lower prices. The increase in supply of quota would have assisted new entrants and lease-dependent fishers.

The proposal provoked a targeted campaign by commercial quota holders who were able to gain support from recreational rock lobster sectors in opposing the issuing of extra quota units. The Western Australian Fishing Industry Council Chair, Dr Ron Edwards, said, in relation to the Government's decision to seek a return to the community from commercial harvesting of Western Rock Lobsters, that there was *"interest around the world on this serious attack on access rights, and the fallout it may generate."*

The proposal did not get Parliamentary support and was subsequently abandoned by the Western Australian Government.

### Request from the Tasmanian Rock Lobster Fishery Association

As part of its response to the Western Australian proposal, the national Seafood Industry Association established a National Resource Security Taskforce and identified the Tasmanian Abalone Deed of Agreement as a 'best practice approach' to limiting the ability of Government to change management arrangements to provide a community return from commercial fisheries.

This has prompted the TRLFA to seek a similar arrangement for the rock lobster fishery. In proposing a Rock Lobster Deed of Agreement for Tasmania, the TRLFA proposed the following benefits:

- Reducing "sovereign risk" would encourage more capital investment in the Rock Lobster fishery, including in sustainability initiatives and secondary tourism ventures;
- More certainty regarding royalty revenue;
- Greater resource security, minimising future conflict; and
- Protecting jobs in a key export industry.

The TRLFA claimed that a Deed of Agreement that dealt with resource security and fee certainty quota holders would increase investment demand for quota units by providing secure collateral for business loans and giving investors greater confidence of financial return.

To assist the Tasmanian Government to determine whether a Rock Lobster Deed of Agreement will be beneficial for Tasmania, this report examines these claims and whether the risks of such a Deed of Agreement for the TRLFA outweigh the proposed benefits.

## 3. MANAGEMENT OF THE ROCK LOBSTER FISHERY

### 3.1 Overview of the fishery

Southern rock lobsters have long been an important natural resource for Tasmanian communities, representing a traditional food source for the local Aboriginal population and supporting major recreational and commercial fisheries. The commercial catch is just over 1,000 tonnes per annum and had gross revenue at point-of-first-sale of about \$90 million in recent years, although this has fallen substantially in 2020/21 due to blockage of imports by China. Recreational lobster fishing is an important activity for many Tasmanians. In 2019/20 an estimated 54.3 tonnes was caught by over 12,000 active recreational fishers. Until 2020/21, the commercial fishery relied on export markets for sale of product, especially the Chinese market. Domestic markets have dominated sales over the last year.

The fishery has undergone substantial economic changes since the introduction of the Individual Transferable Quota (ITQ) or catch share system in 1998/99. The ITQ system has two main elements:

- 1 a fixed total allowable catch (TAC) for the species in Tasmania. This element is directed to sustainability and allows managers to control stock levels and facilitate rebuilding of biomass.
- 2 splitting the total catch into individual transferable quota (ITQ) shares which were given to licence holders. This element was designed to encourage reduction in the fleet and therefore employment and capital costs. The reduction in costs in the fishery leads to the creation of rents.

These ITQ shares have market value because the holder receives rent, either by catching and selling the lobster themselves or by renting/leasing the quota to fishers. An increasing proportion of the catch in the TRLF (55% in 2017) is by fishers who lease units from quota unit holders (“investors”).<sup>4</sup> In the abalone fishery, which has had an ITQ system in place for decades, 85% of the catch in 2017 was taken by fishers who leased, rather than owned, quota units.

The shift towards a fishery where quota is held by different entities to those that take the catch is important in the context of security from a deed. More than 50% of fishers in the TRLF rely on short-term leases of quota.

These leased quota shares provide no long-term security and will be unaffected by any changes to security resulting from a deed. Any security benefits of a deed will accrue to TRLF quota holders, rather than lease-dependent fishers. In the context of claims of community benefit from trickle down of rents, it is important to note that an increased proportion of quota owners are based interstate or overseas (23% in 2017)<sup>5</sup>.

### 3.2 Economics of the Tasmanian Rock Lobster Fishery

The creation of transferrable quotas was intended to reduce the number of vessels/employees so that economic rents could be generated from the fishery. The aggregate value of these quota units increased from \$200 million in 2011 to almost \$1 billion in 2019. In 2016, the total rents provided to private quota holders was estimated at \$47 million, 51% of the total revenue from the commercial TRLF.<sup>5</sup> This is an exceptionally high ratio of rent to revenue compared with other fisheries and other resource industries. Most primary industries in the economy operate with zero economic rent.

Despite this exceptional profitability, government has not attempted to directly capture any of the rent to the benefit to the Tasmanian community. Instead, regulations are strongly directed to maintaining high private rents with limited entry rules to restrict competition, long open seasons and consolidated quotas to reduce local employment, public subsidy of government costs, and no collection of royalty payments to fund public services. For contrast, the abalone fishery delivered an estimated \$61 million in rent to private quota holders in 2016, with the Deed originally designed to deliver some of the resource rent for public benefit. The fee rate was set at 8.125% of the beach price in 2005 and at that time, the fee covered management costs *and* provided a return to the community of several million dollars per year.

4 Ogier et al. (2018), above n2.

5 Ogier et al. (2018), above n2.

In 2015, the Parliament of Tasmania approved a fee reduction for the abalone fishery from 8.125% to 7% (see section 5.3.1). Since 2018, government expenditure in the abalone fishery has increased by \$1.02 million per annum, through the creation of the Abalone Industry Reinvestment Fund (AIRF – see section 5.2). The combination of reduction in fees and increase in government costs has meant that the community now receives no direct benefit from commercial abalone harvesting. In 2019, fees received by the Tasmanian Government were \$795,000 less than management costs. This represents a public subsidy despite the presence of substantial resource rents provided to quota holders.

Government revenue from rock lobster fees was ~\$1 million less than abalone in 2019 while the costs to government of managing the fishery were ~\$1.3 million less. The management of the TRLF required public subsidy of approximately \$473,000 (Table 2) in 2019.

The size of this subsidy is not known for the most recent year but undoubtedly increased because fees were reduced and government support increased including through subsidy of freight costs for export.

Without careful consideration and drafting, a deed could potentially prevent the government from addressing this public subsidisation of the TRLF and achieving cost recovery through higher fees. From the perspective of Government, the deed negotiations should introduce fees to cover public costs of the commercial fishery plus introduction of a royalty that delivers a public return from the fishery. These changes could occur in the absence of a deed although the public subsidy of the TRLF has persisted for many years despite high profitability. The history of the abalone fishery likewise shows that the introduction of a royalty as part of a deed does not secure an ongoing share of the economic rent to the benefit of the public.

**TABLE 2— SUMMARY OF INCOME AND EXPENDITURE IN THE TASMANIAN ROCK LOBSTER FISHERY AND TASMANIAN ABALONE FISHERY (\$'000)**

	Tasmanian rock lobster	Tasmanian abalone
Gross revenue (2016)	87,120	78,390
Fishing operations cost (2016; capital, labour, operating, fishing profits)	40,120	17,390
Private resource rents received by quota unit holders (2016)	43,500	57,000
<b>Income (Tas Public Sector, 2019)</b>		
Fees and levies	3,119	4,053
<b>Expenditure (Tas Public Sector, 2019)</b>		
Management, Compliance, Licensing	579	637
Research (IMAS, others)*	1,975	3,092
Industry Organisations (TSIC, others)	18	217
Tasmanian Police	1,020	902
Tas Total	3,592	4,849
<b>Net direct public benefit (Tas, 2019)</b>	<b>-473</b>	<b>-795</b>
<b>Expenditure (Cwth Gov, 2019)</b>		
Research	936	778
Cwth Government Total	936	778
<b>Net direct public benefit (Tas + Cwth Government, 2019)</b>	<b>-1,409</b>	<b>-1,573</b>

Resource rent provided to quota holders is estimated from 2016 (Ogier et al., 2018) with ~\$43.5 million and ~\$57 million to each, respectively. Public income and expenditure were estimated from 2019 with a public subsidy for each fishery of ~ \$1.5 million (Data provided by DPIPW and compiled by IMAS. This does not include additional revenue to the Commonwealth Government through company taxation. It does not include several additional Commonwealth Government costs such as export freight subsidy and research other than Fisheries Research and Development Corporation (e.g. Cooperative Research Centres, Australian Research Council) or University of Tasmania contributions to commercial abalone and rock lobster research, which were \$990K and \$1221K respectively in 2019).

### 3.3 Current approaches to management and resource allocation

The rock lobster resource is a public asset of significant social, ecological, and economic value to the Tasmanian community. TRLF harvesting is managed by the Department of Primary Industry, Parks, Water and Environment (DPIPWE), allowing access by users including recreational harvesting, Indigenous and cultural harvesting, commercial harvesting, and non-extractive users (e.g. recreational divers).

Allocation between commercial and recreational users received attention from 2010 to 2013 in the development of a strategy for replenishing stocks along Tasmania's east coast. Boundaries were defined for an east coast zone and a harvest strategy was introduced to rebuild east coast stocks to an interim target of 20% of unfished biomass by 2023. Achieving this target requires the total rock lobster catch from the east coast zone to be limited. In 2015 a "notional" east coast resource sharing policy framework was implemented. Under this framework the total catch level is shared notionally between the recreational sector (21%) and the commercial sector (79%).

The share in catch between these sectors has been the subject of debate with the recreational sector lobbying for a higher share so that bag limits could be increased. This is an example of the type of flexibility that the Government would typically want to retain, to enable decisions to be made that provide greatest public benefit from the resource. A deed could restrict the ability to adjust the shares either through explicitly fixing the shares or indirectly through other constraints on government decisions.

### 3.5 Governance priorities for the rock lobster fishery

The stated management objective of the *Living Marine Resources Management Act 1995* (LMRM Act) is to "achieve sustainable development of living marine resources", having regard to ecosystem integrity and the community's needs and interests in marine resources.<sup>6</sup> Achieving this objective for the TRLF requires a number of governance and management issues to be addressed, many of which require that the Government retain flexibility.

Management priorities for the TRLF include:

- Developing statewide objectives for the fishery and associated performance indicators and reference points, including revising the objective of maximising economic yield in the commercial fishery and a revised recreational target.
- Developing an east coast harvest strategy for the period beyond 2023 and after the biomass reaches 20% of unfished levels.<sup>7</sup>
- Regional management in areas (other than the east coast).
- Revised resource sharing arrangements as stocks rebuild, including allocations between commercial and recreational fishers, Indigenous fishers and non-extractive public uses (e.g. marine parks for recreational diving or research).

As outlined in Section 5, a Deed of Agreement would decrease rather than increase flexibility in the scope of options the Government can exercise when making these management decisions.

6 *Living Marine Resources Management Act 1995* (Tas), Section 7.

7 Biomass of 20% is regarded as the threshold at which a fishery should be opened or closed due to stock depletion in most fisheries.

## 4. THE EXPERIENCE OF THE ABALONE DEED OF AGREEMENT

The TRLFA seeks a Deed of Agreement modelled on the one in place for abalone quota holders. The TRLFA, the Tasmanian Abalone Council and the Seafood Industry Council's National Resource Security Taskforce all regard the abalone New Deed as “gold standard resource access security”<sup>8</sup> that “sets the precedent for other key Tasmanian Fisheries regarding security of access.”<sup>9</sup> This section outlines the features of that Deed that have promoted such high levels of support from industry.

The Tasmanian abalone fishery has been the world's largest sustainable wild abalone resource, providing a substantial portion of the annual global harvest. Most abalone harvested in Tasmania is exported live to Asian markets, including China, Hong Kong, Taiwan, Japan and Singapore.

There are currently around 600 entities that hold Tasmanian abalone quota units. Most quota holders are based in Tasmania but with no restrictions on ownership by interstate or foreign entities, a significant and growing proportion are based outside the jurisdiction (29% in 2017). This reduces any potential for trickle down of private resource rents to the benefit of the Tasmanian economy. The Deed only covers quota unit holders - the catching and processing components of the industry are not covered by the Deed and are governed by various other regulations.

There are about 120 active licensed abalone divers, supplying 24 abalone processing businesses. Overall, the industry estimates that it employs more than 800 Tasmanians, many in regional Tasmania.

There is some potential for employment to be affected by a deed because the objective for fishery management can be defined. The abalone deed states that the fishery should be managed toward maximum sustainable yield (MSY). If the objective of maximum economic yield (MEY) was selected, then this would limit the use of government regulations that promote

employment (because employment is a cost and regulations that promote employment in ITQ fisheries are considered inefficient).

### 4.1 Old and New Deeds of Agreement

In 1994, a Deed of Agreement was negotiated (the “Old Deed”) to give long-term certainty to the abalone quota holders (who are distinct from abalone dive licence holders or processing licence holders). The Old Deed was developed under the under the *Fisheries Act 1959* and given effect on signing by the parties. The introduction of the Deed in 1994 represented a major change in the management of the abalone fishery. It set out quota entitlements and a fee structure based on a sliding percentage of the beach price for abalone. Existing quota owners were given the choice of continuing with their annual abalone licences or entering into an agreement under the Old Deed that would apply for 10 years with a perpetual right of renewal.<sup>10</sup> Unsurprisingly, 90% of quota owners chose an Agreement under the Old Deed.<sup>11</sup>

In 2005, a new Deed of Agreement was negotiated under the LMRM Act (the “New Deed”). The vast majority of operational abalone quota units in Tasmania are now held under the New Deed, although some quota units persist under the Old Deed.<sup>12</sup> Licences issued under the New Deed grant full authority over one abalone quota, being 1/3500th of the total allowable catch.<sup>13</sup> The New Deed will continue to 2033, but provides for 20 year rolling renewals beyond that time.<sup>14</sup> This effectively provides abalone quota holders with secure access to the abalone fishery *in perpetuity*. The number of shares issued is fixed by the deed. Any attempt to terminate the commercial access granted under the Deed could expose the Government to a costly compensation liability.

8 Tasmanian Abalone Council (2019), *TAC CEO Report*, April 2019: <https://tasabalone.com.au/wp-content/uploads/2019/04/TAC-CEO-Report-April-2019.pdf>

9 TRLFA (2020) *TRLFA Briefing to Minister*, March 2020.

10 Section 14 of the *Marine Resources (Savings and Transitional) Act 1995* (Tas) also confirmed the rule against perpetuities would not apply to an Old Deed agreement.

11 Pecl et al. (2014) *Preparing fisheries for climate change: identifying adaptation options for four key fisheries in South Eastern Australia*, FRDC Project No 2011/039, p.197.

12 Section 99B(1) of the *Living Marine Resources Management Act 1995* (Tas) provides that a person entitled to an abalone quota unit under a former deed can elect to transfer their entitlement to the Deed. In 2016, approximately 82% of quotas were held under the Deed.

13 *Abalone Deed of Agreement*, clause 2.7, contained in *Living Marine Resources Management Act 1995* (Tas), Sch 3.

14 *Abalone Deed of Agreement*, clauses 3.1 and 3.2.

## MANAGEMENT OF CATCH

The New Deed does not specify the total allowable catch (TAC) for the abalone fishery, and licensees acknowledge that the weight of the quota may not remain constant throughout the term of the New Deed.<sup>15</sup> Any decision to alter the TAC must take account of biological advice and the objective of maximising sustainable yield within conservation constraints, and the decision may only be taken only after reasonable consultation with industry.

Historically, the Deed has not directly affected the TAC setting process, but the lack of flexibility created by the Deed has constrained other processes, such as fee setting (including reductions or waivers), quota carry-overs, or determining management objectives other than maximising yield.

## FEES

Under the New Deed, an annual access fee of \$100 is payable for a fisheries licence (abalone quota).<sup>16</sup> This was an historical fee designed to contribute towards government costs such as management and applies to the head licence, rather than the quota units. There were 125 licences originally issued, each with 28 quota units, so the revenue raised by this fee for management costs is \$12,500 per annum across all licence holders. The Government is required to consult with industry by 2031, and in the 18th year of any renewal, “for the purposes of reaching agreement ... on the fee to be paid by the Licensee during the next term of [the] Deed.”<sup>17</sup> If no agreement is reached with industry, the fee can be set by Regulation.

The Old Deed introduced an additional fee that returned some of the resource rent from the fishery to the Government with the intent that this would be used to fund public services rather than the abalone industry. This additional quarterly fee (“royalty”) was set in the Old Deed based upon a non-linear increase in the proportion of the beach price for abalone: at \$6/kg, no fees were payable; at \$35/kg fees were 10%; and at \$200/kg, fees were 33% of the beach price. These fees have since been revised, and current fees for quotas held under the Old Deed are set out under Schedule 3 of the *Fisheries (General and Fees) Regulation 2016*.

“Beach price” for both Deeds is defined in r.9 of the *Fisheries (General and Fees) Regulations 2016* as: *the average price per kilogram of abalone paid by abalone purchasers to the holders of fishing licences (abalone quota), holders of fishing licences (abalone) or holders of fishing licences (abalone dive).*

The revenue collected by fees from the abalone industry has been in decline over the last decade. The fee for quotas under the New Deed was originally based on 8.125% of the average beach price in 2005 but has since been reduced to 7%.<sup>19</sup> It was only \$4M in 2016.<sup>20</sup> Internal financial reporting at DPIPWE recorded approximately \$6M from various sources in 2019.

Reduced fees paid by the industry, coupled with increasing government support, has meant that revenue is now only \$699,000 higher than government costs of managing the fishery. As a result, fees in the abalone fishery have evolved to primarily represent cost recovery, rather than a royalty.

## TERMINATION

If a licensee believes that the total allowable catch reduces the weight that can be taken under the quota “to an amount which is unacceptable”, the licensee can terminate the licence with 10 days’ notice to the Secretary.<sup>21</sup> The Secretary can terminate a licence if the licensee has not paid relevant fees, has accrued unreasonable fines, or has entered into a contract that is in breach of the Deed. Written notice of the intention to terminate must be given to the licensee and any person with a registered interest in the licence. If a licence is terminated, neither the Secretary nor the licensee has a claim against the other in respect of rights or liabilities which accrued prior to termination.

The licensee or the Secretary may sell the licence after termination, but the Secretary may not offer the licence to another party on more favourable terms.<sup>22</sup> After covering any debts payable, at least 80% of the sale price is to be paid to the licensee with the balance of proceeds transferred to Consolidated Revenue.<sup>23</sup>

15 *Abalone Deed of Agreement*, clause 2.8.

16 Fees are also payable for the registration of a fishing vessel endorsed for taking abalone, and for dive licences (see Schedule 1, *Fisheries (General and Fees) Regulation 2016*). These fees are not discussed in this report.

17 *Abalone Deed of Agreement*, clause 4.4.

18 For the purposes of the definition, an ‘abalone purchaser’ means a person who has purchased more than 80 tonnes of abalone in the preceding 12 months. The price per kilogram must be the “true value”, having regard to recorded payments and other rights, privileges or benefits paid for the abalone. Pursuant to the Deed, the definition of ‘beach price’ cannot be changed without “a reasonable prior level of consultation with the abalone industry”, and only if the Secretary reasonably believes that the definition does not reflect the true return to licensees.

19 See discussion in 5.3.1: *What are fees used for?*

20 Ogier et al. (2018), above n2.

21 *Abalone Deed of Agreement*, clause 6.8.

22 *Abalone Deed of Agreement*, clause 6.9.

23 *Abalone Deed of Agreement*, clause 6.11, 6.6.

## 4.2 Management Plan

The New Deed provides the administrative and commercial security for the abalone fishery, but most operational issues are determined by a suite of other documents, including the management plan, Fisheries Regulations and a harvest strategy.

Section 94 of the LMRM Act authorises the Minister to set the total allowable catch for the abalone fishery (in consultation with the Tasmanian Abalone Council and the Tasmanian Association for Recreational Fishing, TARFish) and determine the amount of abalone to be taken pursuant to an abalone quota unit from each part of the fishery. Significantly, the Minister can exercise this power “even if it results in any inconsistency with any provision of a deed of agreement”. No compensation is payable if a person suffers loss as a result of a decision in relation to TAC or allocations for parts of a fishery.<sup>24</sup> Despite these provisions:

the Act, Abalone Management Plan, and Abalone Management Policy document provide neither decision rules and supporting frameworks nor guidance as to how to estimate Maximum Sustainable Yield and measure its achievement.<sup>25</sup>

The Deed specifies that the goal of the TAC-setting process is maximum sustainable yield (MSY). This removes flexibility to target different objectives. MSY is used as a target in fisheries where benefit is maximised by volume of product – typically fisheries that are important sources of food. Because abalone is a luxury export product providing negligible food benefit to Australians, MSY is not the optimal objective to guide TAC setting.<sup>26</sup>

The *Fisheries (Abalone) Rules 2017* establish a 10-year management plan framework for licensees to operate in the Abalone Fishery, including commercial operators under the Old Deed and New Deed, and recreational and Aboriginal fishers. Importantly, the Rules prescribe the areas in which fishing for abalone can occur, seasons, and limitations on taking and possession of abalone and the apparatus used in the fishery. Any changes require consultation with industry, but it is noteworthy that the prescription of fishing locations is not part of the Deed of Agreement.

An abalone quota holder can authorise a diver to take a specified weight of abalone within their quota from a specified part of the fishery. Penalties apply for taking in excess of an authorised weight.<sup>27</sup>

## 4.3 Industry levies

Section 279 of the *LMRM Act* allows the Minister to impose a levy on any person undertaking activities in a fishery, to be applied to research or service provision within the fishery.<sup>28</sup> However, levies may only be applied at the request of the relevant fishing body and only if the Minister is satisfied that the majority of people who would be asked to pay the levy would be in favour of doing so. Examples of levies used by fishing industries to promote their interests include support of representative organisations, Fisheries Research and Development Corporation contributions and marketing levies.

24 *Living Marine Resources Management Act 1995* (Tas), Section 94(6).

25 Mayfield et al. (2012) ‘Fifty Years of Sustained Production from the Australian Abalone Fisheries’, *Reviews in Fisheries Science*, 20:4, 220-250. <http://dx.doi.org/10.1080/10641262.2012.725434>

26 Lack of flexibility in the setting of TAC is discussed at 5.4.2.

27 *Fisheries (Abalone) Rules 2017* (Tas), Rules 56 – 58. Rule 18 sets limits for recreational divers.

28 If a levy is payable in respect of a particular fishing body, money received is to be deposited in a dedicated Fishery Levy Fund and applied for the benefit of that fishing body (in consultation with them): *Living Marine Resources Management Act 1995* (Tas)s.279(7)-(8)

## 5. RISKS AND BENEFITS OF A DEED OF AGREEMENT

This section provides a brief analysis of the benefits that the TRLFA claims would flow from a Deed of Agreement, in light of the practical experience of the Abalone Deeds. The benefits proposed by the TRLFA are:

- *“Reducing sovereign risk;*
- *Encouraging more capital investment in the Rock Lobster fishery, including in sustainability initiatives and secondary tourism ventures;*
- *Greater certainty regarding royalty revenue; and*
- *Resource security and minimising future conflict.”*

### 5.1 Reducing sovereign risk

#### 5.1.1 ADVANTAGES TO INDUSTRY OF REDUCING ‘SOVEREIGN RISK’

The term “sovereign risk” usually means the risk of government being unable to pay and therefore defaulting on government debt. However, in the context of the Deed proposal, the TRLFA uses the term to mean the risk of government making policy changes or allocation decisions that adversely affect quota unit holders, especially where the decisions weaken any perceived exclusive right to harvest the resource ‘owned’ by the quota holder. As was the case in the campaign against the Western Australian proposal to expand rock lobster catch levels and broaden flow of benefits, the TRLFA has identified the “property rights” of quota unit holders as a key issue that could be addressed by a Deed of Agreement. Submissions to Productivity Commission and Senate Inquiries show that industry hold a perception that risk from government decisions is a barrier to investment:

Despite having strong access rights systems in place in many Australian fisheries, sovereign risk reportedly remains high in the minds of industry and those who provide access to capital for fisheries investment.<sup>29</sup>

The South East Trawler Fishery Association submission to the Productivity Commission inquiry into fisheries and aquaculture<sup>30</sup> discussed the supertrawler ban and the ban on commercial net fishing in Port Phillip Bay as “*examples of political flip-flopping in well run fisheries [that] have a significant negative effect on the appetite of investors who may be considering investment ...*”. This view was echoed by the Commonwealth Department of Agriculture and Water Resources in its submission to the Senate Inquiry into large trawlers:

This risk was highlighted as that in which countries are perceived, without reasonable cause, to change or to be at risk of changing their framework of economic and environmental regulation may either not attract further foreign investment or do so only if higher rates of return over shorter periods are present. Like considerations can govern the decisions of Australian based investors as to whether further to invest in this country or instead to place investments abroad.<sup>31</sup>

These comments may be valid in respect of the small pelagic fishery to which they referred because that fishery generates no economic yield to quota holders or government, because the marginal cost of catching approximates the marginal revenue. The TAC is substantially under-caught each year, so the fishery is underutilised. Capital investment in lower cost harvesting or value-added processing is required for the fishery to exist and grow to its potential.

In contrast, the TRLF and the abalone fishery have extraordinarily high economic yield and there is no need to attract capital investment to ensure the TAC is taken. Whereas capital investment in the small pelagic fishery is required to create harvesting capacity (for example, by purchasing vessels and processing equipment), the proposal for a rock lobster Deed of Agreement secures the exclusive allocation to holders of quota units, which would not influence investment in vessels or processing equipment.<sup>32</sup>

29 AFMA (2016), ‘Submission to the Inquiry into the Regulation of Australian Marine Fisheries and Aquaculture Sectors’, [https://www.pc.gov.au/\\_data/assets/pdf\\_file/0003/198462/sub050-fisheries-aquaculture.pdf](https://www.pc.gov.au/_data/assets/pdf_file/0003/198462/sub050-fisheries-aquaculture.pdf)

30 South East Trawler Fishery Association (2016), ‘Submission to the Productivity Commission Inquiry into Regulation of Australian Marine Fisheries and Aquaculture Sectors’, [https://www.pc.gov.au/\\_data/assets/pdf\\_file/0003/198651/sub053-fisheries-aquaculture.pdf](https://www.pc.gov.au/_data/assets/pdf_file/0003/198651/sub053-fisheries-aquaculture.pdf)

31 Department of Agriculture and Water Resources (2015), ‘Inquiry into the environmental, social and economic impacts of large-capacity fishing vessels commonly known as ‘supertrawlers’ operating in Australia’s marine jurisdiction: Submission from the Australian Government Department of Agriculture and Water Resources’, <https://www.awe.gov.au/sites/default/files/2020-01/dawr-submission-senate-inquiry-large-trawlers.pdf>

32 See discussion in 5.2.1 regarding capital investment in the TRLF.

Government control reduces certainty of rent flows for quota unit holders, but reducing government control can be problematic if policy needs to be changed during the term of the Deed. The costs to the public of giving industry greater resource ownership is explored below, drawing on experience in forestry and water resource sectors.

#### FORESTRY

In Tasmania, the *Forestry Act 1920* (now replaced by the *Forest Management Act 2013*) provided for a guaranteed minimum sawlog quota to be available to industry and facilitated entry into contractual wood supply agreements between Forestry Tasmania and forestry operators. The consequence of this resource security was that when negotiating the Tasmanian Forest Agreement, the Tasmanian Government was required to make costly compensation payouts. It entered a Deed of Release with Gunns Limited in relation to two Wood Supply Agreements entered into under the former *Forestry Act 1920* and the Triabunna Wharf lease, at a cost to the Government of \$25.3M.<sup>33</sup> A further \$230M was set aside to buy out sawlog quotas, downsize regional sawmills, and assist harvest, haulage and processing workers to transition out of the industry.

In Victoria, the *Forests (Wood Pulp Agreement) Act 1996* (Vic) commits the Victorian Government to provide fixed volumes of pulp logs to Nippon Paper Industries Co Ltd pulp and paper processing mills in Gippsland until 2030.<sup>34</sup> When a Parliamentary Budget Office costing was released in April 2020 showing that early termination of the Agreement could save the Government \$192M, the costing was criticised for disregarding the significant “cost to the state of paying out supply contracts to sawmills, harvest and haul businesses and Australian Paper”.<sup>35</sup>

#### WATER ENTITLEMENTS

Water entitlements provide another instructive example of how arrangements that assign the risk of policy shifts to government constrain management changes, even where they are required in light of fresh scientific evidence. The National Water Initiative framework, largely adopted at the federal level and in New South Wales and Queensland,<sup>36</sup> provides for a division of risks between governments and entitlement holders.

Governments bear the risk of changes in government policy and most of the changes that result from improvements in our understanding of water systems’ capacity to sustain particular extraction levels (known as ‘new knowledge risks’).<sup>37</sup> Entitlement holders bear the risks associated with seasonal or long-term climate changes and natural disasters, and any portion of ‘new knowledge’ risks assigned to them. In general, this arrangement has meant that compensation is not payable for reduced allocations, but is payable for any other changes made under water plans.

The effect of this risk assignment framework is to:

increase the reliability of individual entitlements, at least in the short term, because governments will be reluctant to amend water plans in a way that triggers compensation requirements. But the flipside is a loss of collective flexibility because governments will be more reluctant to act in the light of new knowledge, or where it becomes clear that previous government policy was misconceived.<sup>38</sup>

A Deed of Agreement that reduces a sovereign risk can impose a significant cost for implementing any change of policy. This can effectively stifle efforts by government to respond to new social, economic or environmental information regarding the management of the resource subject to the deed.

33 Crown Solicitor of Tasmania (2011), *Deed of release between the Crown and Gunns Limited*, <https://www.treasury.tas.gov.au/Documents/Deed-Gunns.pdf>

34 Parliamentary Budget Office Victoria (2020), ‘End Native Forest Logging in Victoria: Costing by the Parliamentary Budget Office (Victoria) requested by Dr Samantha Ratnam.’ <https://sway.office.com/cQXoiKWO0HHNL6mI>

35 Morton (2020), ‘Ending logging in Victoria now would save taxpayers \$192m, budget office estimates’, *The Guardian*, <https://www.theguardian.com/environment/2020/apr/13/ending-logging-in-victoria-now-would-save-taxpayers-192m-budget-office-estimates>

36 *Water Act 2007* (Cth) s77; *Water Management Act 2000* (NSW) s87AA; *Water Act 2000* (Qld) Chapter 8, Pt 3.

37 The National Water Initiative provided a formula for sharing ‘new knowledge’ risks between the Commonwealth and State/Territory governments. In contrast, the *Intergovernmental Agreement on Murray-Darling Basin Reform* provided that the entitlement holder would bear the first 3% of ‘new knowledge’ risks and the balance of risk would fall to the Commonwealth (cl 10.1.3).

38 Bennett (2015) ‘Adjusting collective limits on the use of natural resources: Approaches in Australian Fisheries and Water Law’ 34:1 UTLR 1. See also Quiggin, ‘Uncertainty, Risk and Water Management in Australia’ in L Crase (ed) (2008) *Water Policy in Australia: The Impact of Change and Uncertainty* (Resources for the Future).

### 5.1.2 THE RISKS OF ESTABLISHING COMPENSABLE ENTITLEMENTS

The effect of conferring property-style rights on industry is that the acquisition of those rights may attract a right to compensation, imposing a cost on the public purse. In some circumstances a statutory right to access natural resources (such as rights granted under the LMRM Act) will be considered property.<sup>39</sup> For example, the Federal Court has previously held that transferable units of fishing capacity granted under the Fisheries Act 1952 (Cth) and the Northern Prawn Fishery Plan were property.<sup>40</sup> A legal right to compensation typically only arises if the property right has been 'acquired' and it is difficult to show that property has been 'acquired' in cases where that property is inherently variable, so a reduction in the volume of catch is not an acquisition if it results solely from changes to the overall volume of the resource that can be taken.

In *Minister for Primary Industry and Energy v Davey*, Black CJ and Gummow J held:

The demands of conservation and economic efficiency ... necessitate continual adjustments in the regulation of the fishery. It is necessary, therefore, for the administering authority to be able to alter the rights of unit holders.... [I]nstead of taking away something the fishermen possessed, it merely alters the statutory creatures in accordance with the statutory scheme creating and sustaining them.<sup>41</sup>

Entitlements under the Abalone Deed are given effect through the licensing regime under the LMRM Act. Arguably, this gives the entitlements the character of statutory rights, rather than property rights. This is supported by the fact that abalone quota holders explicitly acknowledge that the weight of the quota may not remain constant throughout the term of the New Deed (see clause 2.8) although the number of shares is set at 3,500. The LMRM Act provides that compensation is not payable to a party to an abalone Deed for any loss or damage suffered because of changes to the parts of a fishery from which the total allowable catch can be taken, the portion of the catch that can be taken from each part, or the amount of abalone that can be taken under an abalone quota.<sup>42</sup> However, a provision was added in 2007 prohibiting licence variations that are inconsistent with the Deed.<sup>43</sup>

This is especially problematic since the Deed essentially operates in perpetuity. It may strengthen the view held by the TRLFA that a Deed could be used to create compensable rights.

The explicit provision in the LMRM Act that compensation is not payable for changes to access may be desirable to allow areas of the fishery to be reserved for other purposes or to rebuild stocks. Were a Deed of Agreement developed for the rock lobster fishery, it should contain a similar provision to prevent compensation being payable for changes to the geographical location from which lobsters can be taken. It should also exclude measures that restrict the Government's ability to adjust catch allocation between the recreational, Aboriginal, research, commercial, and non-extractive sectors in the public interest. Fishery managers should be able to adjust catch between sectors to maximise the total benefit from the resource. For example, the exclusion of commercial net fishing from Port Phillip Bay is often cited by the fishing industry as an example of the need for security, but commercial fishing was excluded to provide greater benefit to recreational fishers.

## 5.2 Encouraging investment

### 5.2.1 ACCESS TO CAPITAL

The TRLFA contends that security of access rights allows individuals and companies to access capital more readily, allowing demand and the price of quota units to be increased. This contention relates solely to investment in quota units, rather than capital associated with the lobster supply chain, such as vessels and processing capital.

As discussed in 5.1.1, the need for capital investment in the TRLF is markedly different to the situation in the small pelagic fishery. The TRLF maintains a very high economic yield, meaning capital investment in equipment is not required to ensure the TAC within the fishery is taken. More than half of the catch taken in the TRLF is through annually leased quota units. These operators already invest their capital with no certainty of access beyond that fishing season, and there is no shortage of investors or fishers interested in the fishery as evidenced by the existence of lease fees.

39 See, for example, *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, per Hayne, Kiefel and Bell JJ.

40 *Fitti v Minister for Primary Industries and Energy* (1993) 40 FCR 286, 290-292. This aspect of the decision was not disturbed on appeal.

41 (1993) 47 FCR 151, 160. This approach has been confirmed in *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567 in relation to the Northern Prawn Fishery and further applied in relation to petroleum exploration permits. *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

42 *Living Marine Resources Management Act 1995* (Tas) s94(6).

43 *Living Marine Resources Management (Miscellaneous Amendments) Act 2007* (Tas), s.24.

TRLFA provide correspondence from an experienced financier with Rabobank stating that all major lenders loaned up to 65% of the value of abalone quota units in reliance on the New Deed and that this access to finance for quota units would not have been possible otherwise. He states that the ability to take a charge against a quota unit, knowing it could be sold in default, significantly strengthened lender confidence.<sup>44</sup> The 2019 Annual Report presentation of the CEO of the Tasmanian Abalone Council confirms this, noting that the formal Register of Interests<sup>45</sup> established to support the Deeds gained the confidence of the banking sector and has allowed significant amounts to be borrowed using the quota unit as security.<sup>46</sup>

Factors that affect lending decisions by banks against quota units were listed by the Productivity Commission Inquiry Report into Marine Fisheries and Aquaculture and are broader than the controls of a Deed. They include:

- the strength and certainty of the business's cashflow, equity, and management experience and expertise
- whether the relevant fishery is sustainable, "managed against stable total allowable catch limits and underpinned by strong, longterm statutory fishing rights"
- liquidity of the market and the difficulty of obtaining reliable valuations for quota units and anticipated selling prices.<sup>47</sup>

The Commission concluded that "*most of the benefits of perpetual rights can be achieved through the use of limited duration rights if the length and characteristics of the right are sufficient to encourage investment and satisfy lending requirements.*"<sup>48</sup>

In its submission to the Productivity Commission, the TRLFA said:

The current harvest strategy has been a very effective tool for the sustainability of the fishery. Predefined rules for monitoring and assessing stocks, combined with reference points for performance allow control measures to be implemented to ensure sustainability.

The defined rules within the harvest strategy provide industry with a level of certainty around allocation and access to the resource that results in business having the capacity to balance investment with financial risk.<sup>49</sup>

It is an open question whether the Tasmanian Government would want to increase demand and prices for quota units by facilitating easier access to finance. Higher prices for quota units clearly creates an initial period of capital gain for entities who already own units but increases the cost for future entrants. Access to finance increases the pool of potential investors in quota units and may include individuals currently associated with the fishery (e.g. lease fishers) or entities from elsewhere (e.g. increased ownership outside Tasmania, as seen in the abalone fishery). Several researchers have observed that increasing the market liquidity of quota units and access to finance makes quota units more attractive to non-local investors.<sup>50</sup> For example, Knapp found that as the average permit price went up, the share of permits held by local residents went down in 26 limited-entry Alaskan salmon fisheries.<sup>51</sup>

Critically, the price of quota units and access to finance for quota units has **no effect** on the economic aspects of fisheries that government is generally concerned with — such as economic yield, productivity, efficiency of the harvesting sector, employment or the distribution of revenue generated from commercial harvesting.

44 TRLFA (2020) *TRLFA presentation to Minister Hon Guy Barnett*, MHA, 2020.

45 For the registration of third-party interests in quota units under a Deed.

46 Tasmanian Abalone Council CEO Report, April 2019: <https://tasabalone.com.au/wp-content/uploads/2019/04/TAC-CEO-Report-April-2019.pdf>

47 Productivity Commission (2016) *Productivity Commission Inquiry Report No.81: Marine fisheries and Aquaculture*.

48 Productivity Commission (2016), above n48.

49 TRLFA (2016), 'Submission to the Australian Government Productivity Commission with respect to Australian Marine Fisheries and Aquaculture', Submission 37, p8.

50 Chambers et al. (2017) "Little kings": community, change and conflict in Icelandic fisheries', *Maritime Studies* 16:10; Copes & Charles (2004) 'Socioeconomics of individual transferable quotas and community based fisheries management', *Agricultural and Resource Economics Review* 33:171-181; Gibbs (2009) 'Individual transferable quotas and ecosystem-based fisheries management: it's all in the T' *Fish* 10:470-474; F. McCormack (2017) 'Sustainability in New Zealand's quota management system: A convenient story' *Marine Policy* 80:35-46.

51 Knapp (2011) 'Local permit ownership in Alaska salmon fisheries' *Marine Policy* 35:658-666.

If the Government wished to become involved in encouraging greater access to finance and higher demand for quota units, lender confidence in rock lobster quota units as security against loans could be improved in other ways, for example through shorter-term (for example, 5 year<sup>52</sup>) statutory rights. Such rights would involve transparent and consultative review and renewal procedures, strong and clear management practices and harvest strategies, and facilitating the trading market for units to increase liquidity and inform valuations.

The value of any additional lender confidence achieved through a Deed of Agreement would need to be weighed against the management risks discussed below.

### 5.2.2 STEWARDSHIP AND SUPPORT FOR RESEARCH PROGRAMS

In addition to lender confidence, TRLFA argues that security of access rights gives quota owners a sense of longevity that encourages them to invest time and resources into building their business. TRLFA claims that this will lead to an increased willingness to invest in long-term sustainability initiatives or collective research or infrastructure projects.<sup>53</sup> However, studies offer mixed evidence on whether fisheries with transferrable quotas promote stewardship, including whether industry is increasingly likely to maintain sustainable limits and improve stock recovery. A global review of quota fisheries found that the risk of stock collapse was reduced with ITQ-based management,<sup>54</sup> although this was related to the government's ability to constrain the TAC, not the market-based attributes of ITQs.

Setting a conservative TAC generally results in increased catch rates and cost reductions that outweigh the loss of revenue from higher TACs.<sup>55</sup> Thus, limiting catch provides an economic benefit. In ITQ fisheries, the economic benefit of conservative catch setting flows to quota holders and becomes capitalised in the traded value of quota units, so quota holders benefit from government decisions to set TACs that increase future cash flows, rather than short term revenues.

Theoretically, this incentivises resource stewardship and creates support from quota holders for government to set conservative TACs.<sup>56</sup>

This theoretical outcome of stewardship is not borne out in practice. Leon examined whether the ITQ systems used in 34 different abalone and rock lobster fisheries in Australia and New Zealand had actually led to increased stewardship and a willingness to forego short-term revenue to secure longer-term profitability.<sup>57</sup> Despite the claims of stewardship, many quota holders lobbied the government to set TACs that would lead to stock depletion and nearly 30% of the fisheries were ultimately successful in convincing the government to set TACs that led to stock depletion. Leon identified the lack of understanding or acceptance of the productivity rationale for lower TACs as a pervasive hurdle. This was particularly a problem in fisheries where owners of quota units were not directly involved in fishing operations, as has occurred increasingly in the Tasmanian rock lobster and abalone fisheries. As noted by Knapp, the separation of quota and fishing activity becomes more likely when finance to invest in quotas becomes more accessible. Sustainable management of a fishery is ultimately a factor of whether the responsible Minister is willing to implement decisions based on sound scientific data, rather than reliance on stewardship by those with financial interests in the resource. Industry support for good management can be helpful and van Putten et al. suggest that the success of the TRLF to date has been "*due in part to a strong tradition of participatory management.*"<sup>58</sup> This participation was not solely through quota unit holders but also included lease dependent fishers and processors.

The existence of a deed in the abalone fishery does not appear to have improved stewardship relative to other Tasmanian fisheries without a deed. Stock abundance has declined in all zones over the last decade, requiring TAC reduction of greater than 50% across this period.<sup>59</sup>

52 The term should be longer than an election cycle to provide some certainty against the influence of politicised decision-making.

53 TRLFA (2020), above n45.

54 Costello, Gaines & Lynham (2008) 'Can catch share prevent fisheries collapse?' *Science* 321:1678-1680; Costello et al. (2010) 'Economic incentives and global fisheries sustainability' *Annual Review of Resource Economics* 2:299-318.

55 Breen et al. (2009) 'A voluntary reduction in the commercial catch of rock lobster (*Jasus edwardsii*) in a New Zealand fishery' *New Zealand Journal of Marine and Freshwater Research* 43:511-523.

56 Grafton, Squires & Fox (2000) 'Private property and economic efficiency: a study of a common-pool resource' *The Journal of Law and Economics* 43:679-713; Yandle (2008) 'Rock lobster management in New Zealand: The development of devolved governance' in *Case studies in fisheries self-governance*. Vol. FAO Fisheries Technical Paper. No. 504 (eds R. Townsend, R. Shotton & H. Uchida), Rome, pp. 291-306

57 Leon (2015) *The effect of catch shares strength on management of marine resources*, UTAS PhD Thesis.

58 van Putten et al. (2013) 'Building blocks of economic resilience to climate change: A south east Australian fisheries example' *13 Regional Environmental Change* 1313-1323.

59 Mundy & McAllister (2020) *Tasmanian Abalone Fishery Assessment*, IMAS, [https://www.imas.utas.edu.au/\\_data/assets/pdf\\_file/0017/1342061/AbAssessFY2019\\_Web.pdf](https://www.imas.utas.edu.au/_data/assets/pdf_file/0017/1342061/AbAssessFY2019_Web.pdf)

These TAC changes have not been pre-emptive or a sign of stewardship, but rather a post-hoc reaction to declining stock and catch rates. Some of the historical decisions on TACs that the industry lobbied for are not consistent with industry stewardship, for example, the increases in Eastern Zone TAC that came before rapid stock collapse in that zone.

The benefits of a deed for investment in research are also unclear. The TRLF currently supports research through a range of programs, including hosting observers aboard vessels to measure catch, participating in tagging programs, and a “research pot” program where fishers measure a portion of the catch. Participation in these programs is mainly by fishers rather than quota owners and there is nothing to suggest that the lack of security of lease is a barrier to their enthusiasm to assist research and work towards future healthy stocks.

At present, a portion of the research funds for the rock lobster fishery is generated by leasing out 1% of the total allowable catch, with a return of approximately \$350,000 annually.<sup>60</sup> Additional fees are charged under the LMRM Act for research, management and compliance services relating to the fishery. However, the income received by the Government is less than government costs (as with abalone) so commercial quota holders benefit from a public subsidy.

Recent experience with the abalone industry also undermines arguments about the research benefits of a deed. A recent initiative in support of the abalone industry has been the establishment in 2018 of the Abalone Industry Reinvestment Fund (AIRF), to “support projects to increase the productivity of the abalone resource on the east coast. It also supports projects to reduce the long spined sea urchin population on the east coast.”<sup>61</sup> The Tasmanian Government committed \$5.1 million over five years towards the AIRF, yet industry contributed no extra funding. The Commonwealth Government also contributes funding to both fisheries, including through the Fisheries Research and Development Corporation and freight subsidies.

The evidence on stewardship and research show that strong guarantees of additionality from industry would be needed for the purported sustainability benefits of a deed to be achieved.

Specifically, the deed would need to require industry to significantly increase its contribution to research and stewardship initiatives, to replace or complement the investment currently made by the Tasmanian and Commonwealth Governments.

### 5.3 Certainty of government payments and royalty revenue

One of the arguments made by the TRLF in favour of a deed is the certainty it provides to quota holders regarding royalty obligations, and the certainty it provides to government regarding royalty revenue. As outlined above, despite being extraordinarily profitable, the Tasmanian rock lobster industry does not currently pay royalties. The nearly \$50 million annual economic yield goes in full to quota unit holders with no return to the community from their exploitation of the public resource. Fees levied against industry are only a partial payment towards management costs, with the balance of \$1.4 million filled by Tasmanian Government subsidy that could otherwise be used for delivery of public services. There is no amount paid to the government in excess of management costs that could be considered a royalty.

#### 5.3.1 WHAT ARE FEES USED FOR?

The Productivity Commission has urged governments to implement best practice cost recovery practices for the commercial fisheries sector. This includes linking charges as closely as possible to the efficiently-incurred costs of essential regulatory services, and reviewing charges at least every five years.<sup>62</sup> Revenues generated from fees are directed towards managing the fishery and research initiatives, including “monitoring and compliance, leasing, licensing and other business services provided [by govt] to manage and ensure the sustainability of the State’s resources.”<sup>63</sup> In Tasmania, government costs include management costs, support for research delivered by the Institute for Marine and Antarctic Studies, monitoring and compliance, and the Crown Prosecutor’s involvement in enforcement activities.

The Tasmanian Department of Treasury and Finance guidelines for Fees and Charges also provide that fees and charges should initially be costed on a full cost recovery basis (or market price, if higher).<sup>64</sup>

60 IMAS (2016) *IMAS response to draft Productivity Commission report into Marine Fisheries and Aquaculture*, University of Tasmania.

61 [www.airf.com.au](http://www.airf.com.au)

62 Productivity Commission (2016), above n48, Recommendation 10.4.

63 KPMG (2018) *PIRSA Fisheries and Aquaculture cost Recovery Policy Review*, p7 [https://www.pir.sa.gov.au/data/assets/pdf\\_file/0010/338698/KPMG\\_Report\\_PIRSA\\_Fisheries\\_and\\_aquaculture\\_cost\\_recovery\\_policy\\_review.pdf](https://www.pir.sa.gov.au/data/assets/pdf_file/0010/338698/KPMG_Report_PIRSA_Fisheries_and_aquaculture_cost_recovery_policy_review.pdf)

64 Department of Treasury and Finance, Government of Tasmania (2006) *Costing Fees and Charges: Guidelines for Use by Agencies*. <https://www.treasury.tas.gov.au/Documents/Costing-Fees-and-Charges-Guidelines-2006.pdf>

Where the full costs are not recovered, and are therefore subsidised by government, the relevant portfolio Minister is encouraged to determine the appropriateness of the subsidy having regard to current regulatory costs, competitive neutrality and departmental budgets.

Resource royalties provide government income beyond mere cost recovery to reflect the use for private profit of a public resource. The kelp wrack industry on King Island is the only commercial fishery in Tasmania that appears to consistently contribute more in fees than management costs incurred by government. Given the scale of resource rents provided to private quota holders in the abalone and rock lobster fisheries (collectively around \$110 million in 2016; Table 2),<sup>65</sup> there is clearly capacity for a system of royalty payments.

### 5.3.2 COST RECOVERY UNDER THE ABALONE DEED

The Abalone Deed has provided certainty to abalone quota holders regarding maximum payments, but has not provided the community, represented by the Government, with certainty about royalty revenue. Fees in the abalone fishery were originally set at a level where government income exceeded management costs, allowing the community to derive a small direct benefit from the fishery. In its 2011 review of the fishery, the Fisheries Research and Development Corporation found that Tasmania's Abalone Deed established a fee structure that probably included both management costs and return to the community. In 2010, the government received gross revenue of approximately \$7.2M, which was likely higher than government costs for management, research and compliance.<sup>66</sup>

However, this benefit has been eroded over time because the royalty rate was lowered under the New Deed (from 8.125% to 7% of the average beach price in 2015<sup>67</sup>), government management costs have increased, and the Government has committed further industry funding through the AIRF. The fee reduction took \$800K p.a. income from government and provided it to abalone quota unit holders.<sup>68</sup> The then-Minister for Primary Industries justified the transfer of income on the basis of “difficulties being experienced by the industry at present in the form of decline in both total allowable catch and beach price”. Although the transfer of income was justified on the basis of a temporary decline in beach price, the change was permanent and not linked to market prices. He noted that “[r]eduction of the fee would also bring it closer to amounts commonly paid by old deed holders.”<sup>69</sup> This decision was taken despite the quota holders receiving \$63 million in resource rents that year, 77% of the total revenue from the fishery,<sup>70</sup> an extraordinarily high level of private rent from any public resource.

The Tasmanian Abalone Council has said it has secured commitments from the Government (and the opposition)<sup>71</sup> for further fee reductions and increased public funding of the industry<sup>72</sup> to:

- Redirect ~2% of the current 7% fee income to the Government towards a fund to support the Abalone Industry until 2022; and
- Permanently reduce the fee payment to 5% by 2022.<sup>73</sup>

65 Ogier et al. (2018), above n2.

66 Pecl et al. (2016), above n12, p202-3.

67 *Living Marine Resources Management Act 1995* (as amended by the *Living Marine Resources Amendment Act 2015*), s99C.

68 J. Rockliff (2015) *Living Marine Resources Amendment Act 2015 Second reading speech*, Parliament of Tasmania.

69 Fees payable under the 1994 Deed are staggered, as per Schedule 3 of the *Fisheries (General and Fees) Regulation 2016*. No fees are payable where the beach price is below \$7, 4% of the beach price between \$7 and \$70, and 12% where the beach price exceeds \$70.

70 Ogier et al. (2018), above n2.

71 The CEO of the Tasmanian Abalone Council has said that he “received letters of support from Will Hodgman (Liberal) and Rebecca White (Labor) both supporting the above request.” D. Lisson (2018) *Maintaining healthy abalone reef systems on Tasmania's East coast: Report for the Tasmanian Abalone Council Ltd.* <https://tasabalone.com.au/wp-content/uploads/2020/05/2017-1-Accelerated-Centro-Harvest-Plan-Draft-Report-May-2018.pdf>

72 Resolution:

*I move that the TACL executive approach the major political parties to institute an effective royalty reduction from 7% to 5% commencing January 2019, with the 2% difference that is currently collected by the state government instead to be directed to an Abalone Industry Reinvestment Fund (AIRF) on an ongoing basis. (Old Deed units would have the same amount per unit directed from the royalties collected.) After 5 years the quota holders may call a vote to revert to a straight royalty reduction (to 5% or in line with similar industries in the state) otherwise the 2% of the royalty collected would continue to fund the AIRF.*

73 TAC CEO Report, above n9.

With these fee reductions, the Tasmanian Government costs for managing commercial access to the abalone resource exceeds fee income by around \$0.8 million. That is, quota holders pay no royalty and are the recipient of public subsidy.

Without a mechanism (or willingness) to ensure the full costs of regulation can be recovered from industry, the Government may struggle to keep up with regulatory demands or to introduce new technologies or invest in more innovative practices. Minutes from recent meetings of the Abalone Fishery Advisory Committee reveal a number of discussions in which the Government presents the costs of monitoring and compliance as a barrier to action. For example, applying demerit points to infringement notices to deter unlawful diving activities<sup>74</sup> and alteration of the boundary of block 31 were dismissed due to the cost to government of undertaking those activities.<sup>75</sup> Likewise, improvements in database systems to enable more efficient handling of quota transfers and logbook data were delayed due to lack of funding.

There are other non-financial costs from the commercial fishery such as reduced stock availability for recreational and cultural fishing. The downward re-negotiation of fees under the New Deed and increased public cost to operate the commercial abalone fishery undermines the TRLFA's claims that a rock lobster Deed of Agreement would provide secure royalty income to government.

The history of diminishing public benefit and rising public subsidy of the abalone industry shows that stronger safeguards to protect the public interest should be put in place with any deed, such as: mechanisms to increase the transparency of rate-setting and to limit the ability of the industry to influence royalty rate-setting, requirements for public notice and comment on the renegotiation of any deed, and the clear separation of royalty and management cost recovery payments.

Finally, it is also worth noting that there may be circumstances in which industry is disadvantaged by the inflexibility in fees set by a deed. For example, the structure of the current abalone Deed has presented a hurdle to fee relief being offered to the industry during the COVID-19 pandemic.

## 5.4 Resource security and minimising resource conflict

### 5.4.1 THE BENEFITS TO INDUSTRY OF REDUCED CONFLICT THROUGH IMPROVED ACCESS

The TRLFA proposes that a Deed of Agreement would reduce resource conflicts that arise when government seeks to restrict access in response to new scientific evidence or new public policy. The TRLFA would like a Deed of Agreement to identify available geographical areas within the TRLF that would trigger a right to compensation if access to those areas was removed or restricted (e.g. for marine parks or recreational fishing areas), or if access were expanded to other sectors/resource users.<sup>76</sup> This proposal offers significant and asymmetrical benefit to quota unit holders, especially if a Deed is designed to be effective in perpetuity or for a long time. The risk of compensation reduces the ability of the Government to change access, and the entitlement to compensation removes the economic risks to industry associated with any change in usage or allocation. Thus, such an approach achieves the stated "benefit" of reducing conflict by shifting all costs to the community to pay for adjustments in usage of a public resource. In the absence of a deed these changes could be accepted as routine reallocation and made at no cost to the public.

74 Minutes of AbFAC meeting, July 2019

<https://dpiwwe.tas.gov.au/Documents/AbFAC%2092%20Meeting%20Minutes%2026%20July%202019.pdf>

75 Minutes of AbFAC meeting, 9 September 2019

<https://dpiwwe.tas.gov.au/Documents/AbFAC%2093%20Meeting%20Minutes%209%20September%202019.pdf>

76 TRLFA (2020), above n45.

#### 5.4.2 THE RISKS OF LIMITING FLEXIBLE MANAGEMENT

The prospect of having to pay compensation can make government reluctant to implement policy changes. Bennett warns that:

some compensation requirements, and particularly those that penalise governments for taking into account new information or revising government policy, reduce flexibility to adjust collective resource use and may undermine sustainable management of the resource.<sup>77</sup>

This reluctance is a problem when policy and management flexibility are needed. Variations in abundance, spatial zoning, new access policies (including changing recreational or cultural fishing access), new management objectives, or new scientific information (such as the incursion of an invasive such as *Centrostephanus* urchins) can all give rise to the need for changes to management practices. Under climate change, the speed and unpredictability of these changes is even greater.

The Abalone Deed provides examples of undesirable restrictions. For example, the Deed requires the TAC to be determined to target maximum sustainable yield (MSY), rather than maximum economic yield (MEY) targets adopted in most modern fisheries. MEY targets result in higher biomass targets and stocks that are more resilient to changes in production and recruitment. An MEY target would have avoided some of the abalone stock decline that has occurred over the last decade but any attempt to move the abalone fishery to MEY targets is prohibited under the Deed. Stock management in the TRLF also requires catches to be set below MSY to restore the ecological role of lobsters as urchin predators. If a rock lobster deed set a TAC objective based on MSY, reducing catch below MSY for broader ecological objectives would potentially expose the Tasmanian Government to compensation obligations and act as a barrier to good decision making.

Another example of the restrictive nature of the Abalone Deed is that it splits the TAC into different zones in the fishery to enable spatial control of catch. Under the current system, each single unit of quota has partial catch allocations for each of the fishing zones. Issuing separate quota units for each zone would be more efficient and allow operators to specialise in different regions, however the Deed does not allow for this level of flexibility.

Minor examples of the Deed tying the regulator to sub-optimal outcomes include the provisions stipulating billing periods as the month after each quarter and preventing notices from being given by email. Though minor technical frustrations, the difficulty in amending the Deed to update these issues demonstrates the risks of stipulating such practices in a Deed, rather than regulation. These provisions are all exacerbated by the open-ended duration of the Abalone Deed.

With growing understanding of the impacts of multiple stressors, it is important that management strategies remain adaptive. As Bennett notes:

It is by no means clear that reliability of entitlements should be favoured over collective flexibility ... Indeed, it makes no sense at all, as an ongoing principle, that governments should be penalised for taking into account the latest scientific information when revising management plans. Such an approach clearly has the potential to undermine the sustainable management of the resource.<sup>78</sup>

The best balance between flexibility and certainty is found through *"locally-relevant rules that govern periodic determinations of the available resource, combined with statutory requirements that ensure these rules are adjusted in a fair, informed and predictable fashion."*<sup>79</sup> This balance is best struck through licensing rules, harvest strategies developed in consultation with industry, and regular and transparent revision of total allowable catch.

If a deed is considered appropriate, it is essential that its duration be limited to a term short enough that management changes or changes to fees and royalties may be made when it is renegotiated.

77 Bennett (2015), above n39.

78 Ibid.

79 Ibid.

## 6. CONCLUSION AND RECOMMENDATIONS

This report has examined issues related to a deed of agreement between quota units holders in the TRLF and the Tasmanian Government, having regard to the sustainable management objectives under the *Living Marine Resources Management Act 1995*, the experience of the abalone fishery, and the potential distribution of public and private benefits.

While a deed of agreement would give quota holders in the TRLF greater investment certainty and access to capital, the majority of fishers operating within the fishery who lease their quotas would not benefit from the change. Increasing access to investment capital increases demand so would be expected to drive prices up and exclude more Tasmanians from receiving rents from the fishery through quota units.

Significantly, any benefits to quota holders from certainty are achieved at the expense of regulatory flexibility around both stock management and the distribution of benefits to the broader community. Flexibility is important to support adaptive management and ensure fisheries are resilient to changing conditions. Without this flexibility, the Tasmanian Government's ability to meet the management objectives of the *Living Marine Resource Management Act 1995* for the TRLF is diminished.

Currently, the income received by the Government from the TRLF is insufficient to meet management expenses, meaning that the public subsidises the cost of managing the resource while quota holders receive the rent. Locking in an inadequate fee income through a deed would compound this problem.

A deed increases the risk that the Tasmanian Government would be penalised and exposed to compensation if it chose to increase fees, revise management policies in response to new data, changed conditions, changing catch shares between sectors, or community expectation of a return from the exploitation of the public resource.

Some of these issues, such as articulating the community's expectations about returns from exploitation of public marine resources, could be addressed through the planned reform of the *Living Marine Resources Management Act*, announced in the 2020 state budget.

On balance, a Deed of Agreement is **not** recommended. The benefits of certainty to industry are outweighed by the risks to the community.

While the disadvantages of a deed are clear and compelling, if the Government decides to enter into a deed, it should minimise the risks presented by the loss of management flexibility by:

- Undertaking a comprehensive audit of regulatory costs to set fees on a cost recovery basis, to be updated following regular review;
- In addition to cost recovery of regulatory costs, provide a return to the Tasmanian community from commercial harvests by introducing a royalty and maximise this return;
- Structure the deed so that royalty payments are not eroded and removed through time as occurred with abalone;
- Ensuring the industry makes an adequate investment in research and sustainability initiatives *in addition to* regulatory costs, royalties, and any research efforts currently funded by the Tasmanian or Commonwealth Governments; and
- Limiting the duration of a deed and providing for five yearly reviews against performance indicators, including stock status and reference points, efficient/cost effective management, research contribution, and compliance;
- Including compensation restrictions equivalent to those contained in the *Living Marine Resources Management Act 1995* for abalone, including where there are changes in the quantum of catch, the areas that can be fished, or the authorised fishing season;
- Providing for government flexibility in allocation decisions to allow changes in access between recreational, Aboriginal, commercial, non-extractive or any other user sector without exposing the Government to compensation;
- Increasing the transparency of rate-setting processes and minimising industry influence on rate-setting; and
- Increasing the overall transparency of industry performance through better public reporting.

# GLOSSARY

<b>AIRF</b>	Abalone Industry Reinvestment Fund
<b>DPIPWE</b>	Tasmanian Government Department of Primary Industries, Parks, Water and Environment
<b>FRDC</b>	Fisheries and Resource Development Corporation
<b>IMAS</b>	Institute for Marine and Antarctic Studies
<b>ITQ</b>	Individual Transferable Quota
<b>LMRM Act</b>	<i>Living Marine Resources Management Act 1995</i>
<b>MEY</b>	Maximum Economic Yield
<b>MSY</b>	Maximum Sustainable Yield
<b>TAC</b>	Total Allowable Catch
<b>TACC</b>	Total Allowable Commercial Catch
<b>TRL</b>	Tasmanian Rock Lobster
<b>TRL Fishery</b>	Tasmanian Rock Lobster Fishery
<b>TRLFA</b>	Tasmanian Rock Lobster Fisherman's Association
<b>TSIC</b>	Tasmanian Seafood Industry Council

