



**ACWA SUBMISSION**

**MINISTERIAL WORKING GROUP ON WATER LEASE FEES – TERM OF REFERENCE No. 1**

**12 August 2010**

## INTRODUCTION

Aquaculture is a high technology, high risk industry. Firms that enter aquaculture must be prepared to make significant investments<sup>1</sup> not only in physical infrastructure, but also in technology development and fish inventories.

Government policy and regulation significantly affect the environment in which aquaculture investments are made. Given that the FRMA 2010 amendments have not been gazetted, government and industry needs to be mindful that it is incumbent on them to provide a statutory lease fees that recognise the limited value in the current tenure arrangements, including that leasehold arrangements are not securable assets.

ACWA's submission is presented without prejudice, with the overriding objective to facilitate a world class aquaculture industry in Western Australia.

## COMMENTS

The perfect proprietary right has the following characteristics:

1. Exclusivity
2. Security
3. Permanence
4. Transferability

An analysis of section 97 aquaculture leases (see Table 1) indicates that its proprietary right is imperfect.

Table 1: Summary comparison of Section 97 Lease to the perfect proprietary right.

<b>Proprietary right Characteristic</b>	<b>Provision under the FRMA</b>	<b>Comment against the proprietary right Characteristic</b>
Exclusivity	<p>Exclusivity is not provided for under the Act, as is the case under South Australian Aquaculture Act.</p> <p>The effect of the Section 97 is that other users may have access to, and undertake lawful activities in the leased area, provided always that such other use does not interfere with those rights of the lessee.</p>	<p>Aquaculture leases are non-exclusive.</p> <p>No penalties for trespass or interference with gear by a third party.</p>
Security	<ul style="list-style-type: none"> <li>• Section 99 (2) &amp; (3) if either an aquaculture licence or section 97 Lease is cancelled, the other is automatically extinguished.</li> <li>• At renewal holder the approval is subject to the test under the section 92(1)</li> <li>• Renewal of the section 97 lease is not an absolute right.</li> <li>• No register of interests that is protected under an Act of Parliament.</li> </ul>	Limited.

<sup>1</sup> Typically, a total of \$10 - 15 million dollars is s, prior to a business breaking even.

Permanence	<ul style="list-style-type: none"> <li>• Section 97 leases must meet initial performance criteria to commence and continue.</li> <li>• The performance review should take into account matters such as: <ul style="list-style-type: none"> <li>• Level of infrastructure development on the site;</li> <li>• Level of production (value and/or quantity) as evidenced on production returns;</li> <li>• Compliance with any development plan submitted to the Department;</li> <li>• Results of any trial or research work on the site;</li> <li>• Compliance with any agreed individual or industry performance standards; and</li> <li>• Compliance with licence conditions</li> </ul> </li> <li>• There is no on specific policy paper on performance to provide certainty for leaseholders.</li> <li>• The Minister will not grant an aquaculture lease unless an aquaculture licence is held by the same entity.</li> <li>• Section 97 Leases are for a maximum term of 21 years.</li> </ul>	Limited – no perpetuity
Transferability	The must transfer all or part of the aquaculture lease, as requested, by the holder provided the new holder meets the test under the section 92(1)	Limited by discretion of the CEO of the Department of Fisheries.

Given the imperfect nature in the propriety rights of Section 97 leases and lack of parity of with equivalent leasehold arrangements, such as pastoral leases; there have been no applications for Section 97 leases by the aquaculture industry<sup>2</sup>. On this basis, there is limited or no lease trading history to enable a market value to be determined.

In addition to the propriety rights test, any method used to set flat lease fees needs to make relevant adjustments for the following:

1. Proximity to infrastructure and service provision provided by the State Government
2. the intensity of the aquaculture method;
3. State government aquaculture policy;
4. inter-sector equity; and

<sup>2</sup> It is noteworthy, that the Department of Fisheries, in recognition of the significant deficiencies, has not enforced Section 99 of the FRMA.

5. the Water leases working group's best practice framework and principles.

**Conclusion**

It is on the above basis the current Section 97 lease fees need to be reduced. Given that the propriety rights are equivalent to pearling leases, the aquaculture lease base rate should be set at \$151/nm<sup>2</sup>.