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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

FISHERIES LEGISLATION AMENDMENT BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Resources and Energy,
Senator the Hon Warwick Parer)

FISHERIES LEGISLATION AMENDMENT BILL 1996

GENERAL OUTLINE

1. The Fisheries Administration Act 1991 and the Fisheries Management Act 1991 came into effect in February 1992 and the proposed amendments seek to correct minor anomalies in them that have been identified over the last 4 years, streamline their administration and generally improve the efficiency of fisheries management. As a major component of the amendments, this Bill seeks to implement Government policy by enhancing the security of long-term access rights to fisheries. A minor consequential amendment is also made to the Remuneration Tribunal Act 1973.

2. The Torres Strait Fisheries Act 1984, being of earlier origin, lacks some of the features included in the Fisheries Administration and Management Acts. It is proposed to amend the Torres Strait Fisheries Act to give the Torres Strait Protected Zone Joint Authority one of the powers considered central to modern fisheries management, namely the power to make management plans.

FINANCIAL IMPACT STATEMENT

3. The amendments in the Bill have low financial significance for the Commonwealth Budget. With a view to improving compliance and enforcement, the Bill contains provisions for raising the level of penalties for breaches of the Fisheries Management Act. While these amendments are not intended as a revenue-raising measure, they should ensure that any financial impact flowing from the Bill will be positive.

NOTES ON INDIVIDUAL CLAUSES

Clause 1: Short title

4. This clause provides for the Act to be called the Fisheries Legislation Amendment Act 1996.

Clause 2: Commencement

5. This clause provides for the Act to commence on the day on which it receives Royal Assent.

Clause 3: Schedules

6. This clause provides for the amendments to each of the 4 Acts being amended to appear in a separate Schedule.

Schedule 1 - Amendment of the Fisheries Administration Act 1991

Clause 1: After paragraph 7(d)

7. This clause inserts a new paragraph after paragraph (d) of section 7 of the Act, specifying that the Australian Fisheries Management Authority (AFMA) is not only to devise but also to manage and carry out adjustment, restructuring, exploratory and feasibility fishing programs.

Clause 2: Paragraph 7(g)

8. This clause substitutes a new paragraph, which extends AFMA's consultation and information exchange function to encompass State, Territory and overseas bodies having functions similar to AFMA's functions.

Clause 3: Subsection 12(2)

9. This clause changes the maximum period for which a person may serve consecutive terms as Chairperson or nominated director of AFMA from 3 terms to 9 years. The maximum length of a term is 3 years.

Clause 4: After subsection 58(1)

10. This clause inserts two subsections which specify, without limiting the generality of AFMA's powers, that a management advisory committee may establish and abolish sub-committees as it sees fit and determine their membership and procedures.

Clause 5: Subsection 67(4)

11. This clause relates to travelling allowance payable to members of management advisory committees and sub-committees. Currently, there is provision only for management advisory committee members and these allowances need to be prescribed by regulations under the Act. This clause extends the provision to sub-committee members and provides that the level of allowances is to be determined by the Remuneration Tribunal.

Clause 6: At the end of subsection 67(5)

12. This clause adds to section 67 a mention of members of a sub-committee established as set out above, meaning that such a membership is not a public office within the meaning of the Remuneration Tribunal Act 1973.

Clauses 7 and 8: Subsection 80(1A) (paragraph (a) of the definition of *Deductible component*)

13. These clauses clarify the definition of the "Deductible component" of a levy amount. This component is dedicated to funding the Fisheries Research and Development Corporation.

Clause 9: At the end of section 91

14. Section 91 of the Act gives the Minister power to give directions to AFMA in exceptional circumstances. This clause adds a subsection by which, if a fishery is managed under Commonwealth law under a Joint Authority arrangement, then the Joint Authority Ministers, ie the Commonwealth and State and/or Northern Territory Ministers, will jointly have the power to give such directions instead of the Commonwealth Minister alone.

Clause 10: Transitional

15. This clause refers to clause 4 and makes it clear that the establishment, operation and funding of all sub-committees that a management advisory committee had purported to establish are to be deemed valid under the Act. Any such sub-committee that a management advisory committee had not purported to abolish prior to the commencement of clause 4 remains valid.

Schedule 2 - Amendment of the Fisheries Management Act 1991

Clauses 1 to 9: Subsection 4(1)

16. These clauses add to the definitions already set out in subsection 4(1) of the Act. The new definitions cover the terms "conveyance", "evidential material", "executing officer (in relation to a warrant)", "magistrate", "premises", "receive (in relation to fish)", "take", "warrant", and "warrant premises".

Clause 10 : Subsections 13(1), (2) and (4)

17. This clause expresses the \$50,000 penalty in respect of certain offences relating to driftnet fishing as 500 penalty units, each currently equivalent to \$100.

Clause 11 : Subsection 13(3)

18. This clause expresses the \$250,000 penalty applicable to a body corporate incorporated in Australia, or mainly carrying on activities in Australia, that engages in driftnet fishing outside the Australian fishing zone as 2,500 penalty units, each currently equivalent to \$100.

Clause 12: Subsections 15(1) and (2)

19. This clause raises the penalty for taking black cod or a prescribed fish in the Australian fishing zone, and for a person on an Australian boat taking a prescribed fish outside the Australian fishing zone, from \$5,000 to \$12,500 and expresses it as 125 penalty units, each currently equivalent to \$100.

Clause 13 : Subsection 26(2)

20. Subsection 26(2) sets out the conditions under which an applicant for a fishing right is to be registered as an eligible person. This clause provides that the conditions are to be subject to the new section 31K, the contents of which are described under clause 14.

Clause 14 : After Division 4 of Part 3

21. This clause inserts Division 4A, consisting of new subsections 31A to 31L which relate to providing that long term fishery access rights are recognised so that holders of access rights under a management plan continue to have rights under a new plan that replaces it.

22. Subsection 31A provides for statutory fishing right options to be held by each former holder of fishing rights if a management plan for a fishery is revoked. This does not apply where the revocation is immediately followed by the determination of a new management plan that is in all substantial respects identical to the earlier one and gives all holders of statutory fishing rights under the old plan equivalent rights under the new plan.

23. In the case where a management plan is not immediately remade after revocation, subsection 31B specifies in what circumstances the new plan of management is deemed the same or substantially the same as the former plan and, if this applies, gives the formula in accordance with which the number of statutory fishing rights to be held by a holder of options under the new plan is to be calculated.

24. Subsection 31C specifies in what circumstances the new plan of management is deemed to have some features in common with the former plan of management, but not to be the same or substantially the same as that former plan, and sets out the manner in which fishing rights are then to be allocated to option holders. Essentially, the number of rights then allocated is to be as determined fair and equitable by AFMA, having particular regard to the points set out in this section.

25. Subsection 31D sets out how a statutory fishing rights option is to be exercised by a person and states that failure to exercise an option within the period specified by AFMA will lead to the option lapsing.

26. Subsection 31E provides for AFMA to keep a Register of Statutory Fishing Rights Options, how it is to be kept and the particulars about options that are to be recorded.

27. Subsection 31F provides for dealing in interests in statutory fishing rights options, the instruments that may be presented to AFMA as evidence of dealing, the conditions under which registration of dealing may be refused and the documents that AFMA is to make available for inspection.

28. Subsection 31G sets out the conditions under which AFMA is required to register a claim of interests in statutory fishing rights options, the circumstances under which the registration is to be cancelled and the procedure for the registration of further dealings in the options.

29. Subsection 31H provides that trusts are not registrable on the Register.

30. Subsection 31J provides the holder of a statutory fishing rights option with the power to deal with the option as absolute owner subject only to any rights appearing in the Register to be vested in another person. This subsection protects the purchaser only if the purchaser deals with the holder in good faith for value and without notice of any fraud on the part of the holder.

31. Subsection 31K sets out the obligations of AFMA in respect of granting statutory fishing rights under a new plan of management. AFMA is required to give written notice to every person holding a statutory fishing rights option in relation to the plan. The notice is to ask the person to tell AFMA in writing within 30 days after a specified date whether the person wishes to exercise the option and the number of statutory fishing rights in respect of which the option is to be exercised. AFMA must ensure that those exercising options are granted statutory fishing rights and may remove options from the Register only after all options have been exercised or have lapsed.

32. Subsection 31L makes the Register of Statutory Fishing Rights Options subject to the same provisions as the Register of Statutory Fishing Rights, already in the Act. These provisions relate to the inspection of the Register and documents, evidentiary provisions, orders for rectification of the Register, correction of clerical errors in the Register, the circumstances in which AFMA is not liable to an action, suit or proceeding connected with exercising powers related to keeping the Register, and the penalty for wilfully causing a false entry to be made in the Register or producing false documents. The penalty in the latter case is 2 years imprisonment.

Clause 15 : At the end of section 38

33. This clause adds a note about the powers of a court under section 98 to suspend a fishing concession.

Clause 16 : At the end of section 39

34. This clause adds a note about the powers of a court under section 98 to cancel a fishing concession.

Clause 17 : After subsection 46(3)

35. This clause inserts a new subsection (3A) which refers to documents that are required by AFMA for the registration of fishing rights and provides the option of a party to a dealing lodging with AFMA a summary of the instrument evidencing the dealing.

Clause 18 : Subsection 46(4)

36. Subsection 46(4) requires AFMA to register a dealing when the documents specified in subsection 46(3) are lodged. This clause subjects subsection 46(4) to the provisions set out in subsection (4C) (inserted under clause 19) and provides that the summary referred to in clause 17 may be lodged in lieu of the instrument evidencing the dealing.

Clause 19 : Subsection 46(5)

37. This clause repeals the existing subsection and substitutes subsections (4A), (4B), (4C), (5) and (6). These set out in what circumstances AFMA must register a claim to an interest in a fishing right, or cancel such a claim. The new subsections also set out the procedure by which AFMA is to give notice to the person currently registered as the holder of the fishing rights that an application for registration of a dealing has been received. The new subsection (5) provides that the summary referred to in clause 17 may be produced by AFMA for public inspection instead of the copy of the instrument evidencing the dealing. The purpose of this provision is to protect the privacy of the parties involved in the dealing where one or more of the parties considers that the instrument contains information that is inappropriate for public access. In certain circumstances, subsection (6) enables a party to avoid lodging with AFMA the original of the instrument evidencing the dealing if that instrument has been lodged with the Australian Securities Commission. In this case, the requirements of the Act are deemed to have been met if 2 copies of each instrument lodged with the Commission are lodged with AFMA.

Clauses 20 and 21: Subsection 49(1) and subsection 49(2)

38. These clauses refer to fisheries Joint Authorities, consisting of Commonwealth and State or Territory Ministers responsible for fisheries. Joint Authorities provide one type of arrangement for achieving co-operation between the Commonwealth, the States and the Northern Territory in the management of particular fisheries.

39. Under the current provisions of the Act, AFMA has no intrinsic powers in the management of Joint Authority fisheries. These clauses (and several following clauses) seek to amend the Act to give AFMA this power and to create the same relationship between AFMA and Joint Authorities as AFMA has with the Commonwealth Minister in respect of other Commonwealth-managed fisheries. These clauses delete mentions of the Joint Authority in section 49 dealing with the circumstances in which AFMA may refuse to transfer ownership of a fishing right.

Clause 22: Subsection 65 (1)

40. This clause amends the provision which enables a Joint Authority to delegate its powers to AFMA, a Commonwealth officer or State authorities. With the new powers being given to AFMA, the situation where powers will need to be delegated to AFMA or Commonwealth officers should no longer arise. However, there is still to be provision for delegations to be given to State officers and authorities in respect of those Joint Authority fisheries that are managed under State law. The clause provides that all powers of the Joint Authority may be so delegated except the power to delegate and the power to accept, vary or revoke management plans.

Clause 23: Saving

41. This clause saves all delegations given to officers and employees of any State government or authority and thus avoids the situation where they might have been invalid because of the repeal of the existing subsection 65(1).

Clause 24: Subsection 65(2)

42. In accordance with the change made in clause 22, this clause omits mention of AFMA and the Commonwealth Department in the wording which an instrument of delegation may take.

Clause 25 : Section 78

43. This clause substitutes a new section for the section setting out the functions of a Joint Authority. The new section provides that if the fishery is managed by a Joint Authority under Commonwealth law, then AFMA is to manage the fishery as it manages any other fishery. However, in the case of a Joint Authority fishery, AFMA must seek approval for any management plan for the fishery, and amendment or revocation of the plan, from the Joint Authority rather than from the Commonwealth Minister alone.

Clause 26 : Sections 79 and 80

44. This clause repeals these sections dealing with the powers of a Joint Authority and the application of provisions relating to offences. These are superfluous under the amended arrangements.

Clause 27 : Section 82

45. This clause repeals the section dealing with reconsideration of decisions by the Joint Authority and the right to review by the Administrative Appeals Tribunal (AAT). Under the amended arrangements, the provisions of this section are superseded by section 165, which provides for AFMA's decisions to be internally reconsidered and reviewed by the AAT.

Clause 28 : Paragraphs 84(1)(h) and (i)

46. This clause seeks to correct an anomaly and an error in the conditions under which an officer may enter and search the premises of the holder of a fish receiver permit. Currently, an officer may enter such premises only with the consent of the holder of the fish receiver permit or under a warrant. This clause amends the Act to enable officers to enter premises subject to a fish receiver permit at any time without the requirement for either consent or a warrant, to conduct a search, make copies of documents and secure anything providing evidence of a contravention of the Act. However, seizure of the item(s) in question will still require the person's consent or a warrant.

Clause 29 : Paragraph 84(7)(a)

47. Subsection 84(7) lists a number of offences under the *Crimes Act 1914*. Specifically, these are being an accessory after the fact, attempting to commit an offence, urging or inciting the commission of an offence and conspiracy to commit an offence. The subsection makes these actions offences also under the Fisheries Management Act. In addition, section 5 of the Crimes Act, dealing with aiding and abetting, is listed. However, citing this section is technically superfluous. It is not necessary to refer in this Act to the Crimes Act to ensure that an action of aiding and abetting in the commission of an offence against the Fisheries Management Act is equivalent to committing that offence. Therefore, this clause deletes the mention of section 5 of the Crimes Act.

Clause 30 : Sections 85 and 86

48. This clause substitutes new sections 85, 85A, 85B, 85C, 85D, 85E, 85F, 85G, 85H, 85J, 85K and 86 dealing with search warrants. These sections set out when search warrants can be issued, the things that are authorised by a search warrant, the availability of assistance and use of force in executing a warrant, the requirement to give copies to the occupier of the premises, specific powers available to the officer executing the warrant, the use of equipment to examine or process things, the use of electronic equipment at the premises, compensation for damage to electronic equipment, the requirement for copies of

seized documents to be provided, the occupier's right to be present during the search, the receipts to be provided for things seized and the provision for warrants to be obtained by telephone or electronic means. In all these provisions, this clause closely follows the provisions of sections 3E to 3R of the *Crimes Act 1914*.

Clause 31: After section 88(1)

49. This clause adds to the powers of AFMA to require security for the release of seized property. The Act currently enables AFMA to require security equal to the value of the property (to cover the possibility that the court orders its forfeiture) and any fine that may be imposed. The amendment will enable security to also be required to cover the costs of prosecution to cover the possibility that an order is made by the court for the convicted party to pay those costs.

Clause 32 : Subsection 89(4)

50. This clause raises the penalty for an ex-officer under the Act failing to return his or her identity card from \$100 to \$200 and expresses it as two penalty units, currently equivalent to \$100 per unit.

Clause 33 : After subsection 95(1)

51. Section 95 deals with offences in relation to fishing. To enable the implementation of certain management and by-catch arrangements, this clause inserts a mechanism whereby no offence is committed if actions which would otherwise be offences under this section are authorised under a management plan or regulations under the Act. Examples of such arrangements would include providing that overcatching in one year may be counterbalanced by undercatching in the following year and that by-catch in excess of a trip limit may be surrendered.

Clause 34 : Subsection 95(2)

52. This clause expresses the \$50,000 maximum fine for illegal fishing involving a foreign boat as 500 penalty units, currently equivalent to \$100 per unit.

Clause 35 : Subsection 95(4)

53. This clause raises the maximum fine for illegal fishing involving a foreign boat from \$10,000 to \$25,000 if the offence is dealt with by a court of summary jurisdiction and expresses it as 250 penalty units, currently equivalent to \$100 per unit.

Clause 36: Subsection 95(5)

54. This clause raises the maximum fine for illegal fishing not involving a foreign boat from \$10,000 to \$25,000 and expresses it as 250 penalty units, currently equivalent to \$100 per unit.

Clause 37 : Section 96

55. This clause raises the penalty for illegally removing a fish from a net, trap or other equipment from \$5,000 to \$12,500 and expresses it as 125 penalty units, currently equivalent to \$100 per unit.

Clause 38 : Subsection 97(1)

56. This clause raises the penalty applicable to a person not holding a fish receiver permit receiving (other than for private use) fish from a fishery to which fish receiver permits apply from \$5,000 to \$12,500 and expresses it as 125 penalty units, currently equivalent to \$100 per unit.

Clause 39: At the end of section 98

57. Where a person holding a fishing concession has committed an offence against the Act, this clause adds to the penalties that are able to be imposed by a court the power to cancel or suspend the concession.

Clause 40 : Section 99

58. This clause raises the penalty for the use of a foreign boat for recreational fishing, or for carrying or processing fish taken in the course of recreational fishing from \$5,000 to \$12,500 and expresses it as 125 penalty units, currently equivalent to \$100 per unit.

Clause 41 : Subsection 100(2)

59. This clause expresses the \$250,000 maximum fine for illegally using a foreign boat for commercial fishing as 2,500 penalty units, currently equivalent to \$100 per unit.

Clause 42 : Subsection 100(4)

60. This clause expresses the \$25,000 maximum fine for illegally using a foreign boat for commercial fishing where the offence is dealt with by a court of summary jurisdiction as 250 penalty units, currently equivalent to \$100 per unit.

Clause 43 : Subsection 101(2)

61. This clause expresses the \$250,000 maximum fine for illegally having on board a foreign boat nets, traps or other fishing equipment as 2,500 penalty units, currently equivalent to \$100 per unit.

Clause 44 : Subsection 101(4)

62. This clause expresses the \$25,000 maximum fine for illegally having on board a foreign boat nets, traps or other fishing equipment where the offence is dealt with by a court of summary jurisdiction as 250 penalty units, currently equivalent to \$100 per unit.

Clause 45 : Subsection 102(1)

63. This clause expresses the \$50,000 maximum fine for illegally bringing a foreign fishing boat into an Australian port as 500 penalty units, currently equivalent to \$100 per unit.

Clause 46 : Subsection 102(2)

64. This clause expresses the \$50,000 maximum fine applicable to the operator of a foreign fishing boat illegally overstaying in an Australian port as 500 penalty units, currently equivalent to \$100 per unit.

Clause 47 : Subsection 102(5)

65. This clause raises the maximum fine applicable to the offences set out in clauses 45 and 46 where the offence is dealt with by a court of summary jurisdiction from \$10,000 to \$25,000 and expresses it as 250 penalty units, currently equivalent to \$100 per unit.

Clause 48 : Subsection 103(1)

66. This clause expresses the \$50,000 maximum fine applicable to the operator of a foreign fishing boat illegally landing catch in an Australian port as 500 penalty units, currently equivalent to \$100 per unit.

Clause 49 : Subsection 103(3)

67. This clause raises the maximum fine applicable to the offence set out in clause 48 where the offence is dealt with by a court of summary jurisdiction from \$10,000 to \$25,000 and expresses it as 250 penalty units, currently equivalent to \$100 per unit.

Clause 50 : Subsection 104(2)

68. This clause expresses the \$50,000 maximum fine applicable to the operator of a Treaty boat contravening the conditions of a Treaty licence as 500 penalty units, currently equivalent to \$100 per unit.

Clause 51 : Subsection 104(4)

69. This clause raises the maximum fine applicable to the offence indicated in clause 50 where the offence is dealt with by a court of summary jurisdiction from \$10,000 to \$25,000 and expresses it as 250 penalty units, currently equivalent to \$100 per unit.

Clause 52 : Subsection 104(7)

70. This clause specifies the penalty applicable to a person who, upon conviction for the offence indicated in clause 50, contravenes an order imposed by a court not to be on a boat for the purpose of engaging in fishing in the Australian fishing zone. This clause raises the maximum fine for such an offence from \$2,000 to \$5,000 and expresses it as 50 penalty units, currently equivalent to \$100 per unit.

Clause 53 : Subsection 106(1)

71. This clause extends the circumstances in which a court may order the forfeiture of a boat, net, equipment, catch or proceeds of the sale of catch upon conviction. In addition to the offences in respect of which this power already exists, this clause adds driftnet fishing (prohibited in section 13) as an offence that can attract the aforementioned penalties.

Clause 54 : Subsections 153(1) and (2)

72. This clause converts the \$3,000 penalty applicable to the offence of refusing to take an oath, make an affirmation, answer questions or produce documents as asked or required under summons by the Statutory Fishing Rights Allocation Review Panel to 30 penalty units, currently equivalent to \$100 per unit.

Clause 55 : Section 156

73. This clause expresses the \$3,000 penalty for the offence of failing, without reasonable excuse, to appear before the Statutory Fishing Rights Allocation Review Panel as required by summons as 30 penalty units, currently equivalent to \$100 per unit.

Clause 56 : Paragraph 164(9)(b)

74. This clause deletes a mention of section 5 of the Crimes Act for the same reason as it is deleted in clause 29.

Clause 57 : Subsection 165(1) (definition of *relevant decision*)

75. This clause relates to decisions by AFMA that are subject to reconsideration by AFMA and review by the Administrative Appeals Tribunal. This clause adds to the decisions that are so reviewable three types of decisions by AFMA that relate to the new statutory fishing rights option provisions set out in clause 14. The first is AFMA's right under section 31B to determine whether the fishery to which a new plan of management applies is the same, or substantially the same, as the fishery to which the former plan applied. The second is AFMA's right under section 31C to determine the number of statutory fishing rights that an option holder may receive if the new plan is not the same or substantially the same as the former plan. The third is AFMA's right under section 31F(7) to refuse to register a dealing in statutory fishing rights.

Clause 58 : Subsection 166(4)

76. This clause follows on from the amendments set out in clauses 20 to 26. This clause repeals subsection 166(4) which, in the case of Joint Authority fisheries, made the Minister (instead of AFMA) the issuing authority of certain classes of evidentiary certificates. With the abovementioned amendments, AFMA is to be the issuing authority of these certificates, as it is in respect of other fisheries.

Clause 59 : Subsection 166(5)

77. Subsection 166(5) currently refers to subsection 166(4), which is to be repealed as set out above. Subsection 166(5) enables the Minister to give a certificate on any matter relating to decisions of a Joint Authority or instruments executed by a Joint Authority. While this provision will remain, this clause deletes the incidental reference to subsection 166(4).

Clause 60 : Paragraph 168(2)(a)

78. This clause converts the \$1,000 maximum penalty that may be prescribed in regulations made by the Governor-General to 10 penalty units, currently equivalent to \$100 per unit.

Schedule 3 - Amendment of the Torres Strait Fisheries Act 1984

Clause 1 : Before section 16

79. This clause adds a new section 15A providing for the Minister to determine management plans for Torres Strait Protected Zone (TSPZ) fisheries. This clause provides for the making of management plans for Torres Strait fisheries based on units of fishing capacity which could take the form of input or output controls.

80. Section 15A gives the Minister power to determine management plans and sets out what is to be, and may be, included in a management plan. Foremost among provisions that may be included in a plan are the determination of the fishing capacity permitted for the fishery and of the division of this determination into units of fishing capacity. Provision is made for the allocation of these units to persons and their assignment to boats. Provision is made for all administrative procedures relating to units: their duration, variation, re-assignment, transfer, surrender, replacement, renewal, suspension and cancellation. Provision is also made for recording procedures, the reconsideration of decisions and the payment of fees. The terms of a management plan are stipulated to be binding on the Minister and AFMA. The manner in which a fishery may be identified is defined and there is provision for disallowance of determinations and review of decisions by the Administrative Appeals Tribunal.

Schedule 4 - Amendment of the Remuneration Tribunal Act 1973

Clause 1: After subsection 7(4)

81. This clause adds a new subsection to the Remuneration Tribunal Act to enable the Tribunal to determine travelling allowances for members of fisheries management advisory committees and sub-committees as set out in Schedule 1 clause 5. The reason for this new subsection is that the abovementioned members are not remunerated beyond their eligibility for travelling allowance. Without this amendment, it would not be possible for the Tribunal to determine travelling allowances for the members concerned without taking the additional step of determining a level of remuneration for them.





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