

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No. A18 of 2012

BETWEEN:

OWEN JOHN KARPANY
First Applicant

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DANIEL THOMAS KARPANY
Second Applicant

and

PETER JOHN DIETMAN
Respondent

APPLICANTS'
~~APPELLANTS'~~ **AMENDED SUBMISSIONS**

20 **Part I:**

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. There are two substantive issues namely:
 - (a) whether the native title rights and interests to fish of the Narrunga People, including the applicants, has been extinguished by virtue of s 29 of the *Fisheries Act 1971 (SA) (1971 Act)*.
 - (b) whether s 72(2)(c) of the *Fisheries Management Act 2007 (SA) (FMA)* is not operative by virtue of s 211 of the *Native Title Act 1993 (NTA)*.
3. The applicants acknowledge that they need to succeed in this Appeal on both issues if the decision of the Full Court of the Supreme Court of South Australia is to be set aside.

Part III:

4. A notice has been given in compliance with section 78B of the *Judiciary Act 1903*. The 78B Notice articulates two potential constitutional matters, namely:

- (a) by operation of s 109 of the *Commonwealth of Australia Constitution Act* (**Constitution**) s 41 of the *Fisheries Act 1982* (SA) (**1982 Act**), did not extinguish the applicants' native title rights and interests to fish to the extent of any inconsistent with s10(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**);
- (b) by reason of the operation of s 109 of the *Constitution*, s72(2)(c) FMA was made inoperative by virtue of s 211 of the NTA.

Part IV:

- 10 5. *Dietman v Karpany & Another* [2012] SASCFC 53

Part V:

- 6. The applicants were convicted of possession of an aquatic resource of a prescribed class contrary to s 72(2)(c) FMA.
- 7. It was an agreed fact that the applicants were at all relevant times, in the waters of South Australia, in possession of 32 Greenlip abalone, 24 of which measured less than 13 centimetres: R [4], [40].¹ The value of the catch was \$169.94: M [5].²
- 8. It was accepted by the applicants that if s 72(2)(c) FMA was operative, then the offence charged (**Count 2**) under that section and r 8(1)(a) of the *Fisheries Management (General) Regulations 2007* was proved: R [4], [40].³ Count 1 was dismissed for want of prosecution.
- 9. It was accepted by the Crown that both applicants were members of an Aboriginal Group, namely the Narrunga People with a connection to the Point Pearce area (near Cape Elizabeth) and a familial lineage on Owen Karpny's mother's side demonstrating a continuous unbroken traditional fishing practice: M [13].⁴ Daniel Karpny is the son of Owen Karpny. This evidence was received without objection before the Stipendiary Magistrate.

¹ Special Leave Application Book (**SLAB**) p.30, hereafter, SLAB/19, 30.

² SLAB/9

³ SLAB/19, 30. No argument was made that the 2007 Regulations did not apply to the applicants conduct at all. Accordingly, this argument is not pursued in this application or appeal.

⁴ SLAB/10.

10. The Crown accepted that the applicants, as members of the Narrunga People, had the customary native title rights to take Greenlip abalone and that the 32 abalone were taken in a traditional manner and consistent with the requirements of the NTA, in particular to feed the applicants' family: M [13], [14] and [26].⁵
11. It is a corollary of the agreed facts, and all the parties accepted at trial, that if s 211 NTA applied, then s 72(2)(c) FMA was inoperative (R [6]) and that Count 2 was not proved.

10 **Part VI:**

Ground 1: Extinguishment

12. The majority of the Full Court (Gray and Kelly JJ) was delivered by Gray J.
13. Gray J accepts that the customary right to fish (by inference, the right exercised by the applicants in the customary manner) continued to exist at common law without constraint until the enactment of the 1971 Act: R [24].⁶
14. Native title rights and interests are recognised by the common law for the purpose of protecting the continuing connection of native title claim groups to land. Such connections occur within a complex web of knowledge and relationships that informs the actions of the claim group or a member of the 20 claim group. Such a connection existed in this case: *Yanner v Eaton*.⁷
15. The act of fishing for an indigenous person is not a narrow, contained or limited act which occurs at a point in time solely for the purpose of getting fish. The act of fishing is undertaken within a cultural context that is informed by laws and customs established by the creation ancestors and thus fishing invokes their presence and the web of laws and customs they establish. It is known through stories handed down from generation to generation. The act of fishing is part of the transmission of knowledge to future generations and the inscription of Aboriginal traditions and laws into the landscape. It reinforces the laws and customs of the claim group and maintains their connection to country. The act of fishing by the applicants 30 maintains their connection to country. The act of fishing by the applicants was undertaken in this cultural context.

⁵ SLAB/10, 12.

⁶ SLAB/26.

⁷ (1999) 201 CLR 351, 383 [73].

16. The common law and the NTA (s 223) recognize that the incident of the native title rights and interests manifest in the act of fishing should not be disjoined from the laws and customs of the native title holders and severed from its cultural context: *Yanner v Eaton*.⁸
17. The 1971 Act does not expressly extinguish the applicants' native title rights or interest to fish or to fish for abalone. Gray J recognised this because he identified and purported to apply the "*incidents of title test*"⁹ in an attempt to identify if the existing native title right and interest was impliedly extinguished: R [33].¹⁰ Blue J noted that the Crown did not expressly contend that the 1971 Act manifested an intention to extinguish native title: R [91].¹¹
18. Gray J identified that an objective inquiry must be undertaken to identify and compare two sets of rights. By this he must have meant the native title rights and interests on the one hand and the "*right conferred by statute*" on the other hand: R [33]-[34].¹²
19. Gray J states that the right is "*to fish and take fish not for sale, subject to limitations contained in the Act, including limitations as to size*": R [35].¹³
20. Gray J identifies the native title right and interest as "*a right to access and take fish*" (R [34])¹⁴ but does not characterise the right by reference to the operation of the legislation, including the effect of its operations in terms of limitations as to size.
21. In the premises, Gray J did not identify the incidents of the competing rights and, logically, he could make no comparison of them to determine if they were inconsistent. This is the error in the reasoning of the majority. It means that the incident of titles test was not applied at all.
22. To the extent that facts are available to apply the *incidents of title* test, the majority should have found that the conservation of marine resources is consistent with native title rights and interests. To exercise native title rights and interests marine resources need to be conserved. The 1971 Act

⁸ (1999) 201 CLR 351, 371 [32]-[33].

⁹ *Wik Peoples v State of Queensland* (1996) 187 CLR 1, 84-85 per Brennan CJ.

¹⁰ SLAB/10.

¹¹ SLAB/42.

¹² SLAB/28, 29.

¹³ SLAB/29.

¹⁴ SLAB/29.

merely regulates the conservation of marine resources and controls commercial fishing activities.

23. In lieu of the incidents of title test Gray J accepted the submissions of the respondent: R [35].¹⁵ The applicants contend that this approach led to at least two layers of conflation that are not justified or justifiable on present authority and relies on the interpretation of the 1971 Act.
24. First, Gray J accepted that the 1971 Act had the “*substantive effect of ... plac[ing] all persons, including Aboriginal persons, under the regime of the statute and to treat all persons as subject to the rights and obligations set out in the statute*”. Gray J said that this had the consequence that “*the native title right to fish was extinguished and was replaced by a statutory right available to all persons in the State*”.¹⁶ The applicants submit that this conflated the test for the abrogation of a public right with the test for the implied extinguishment of native title rights and interests.¹⁷
25. Secondly, Gray J conflated the incidents of title test with the prohibitory/regulatory distinction relevant to the s 211 NTA issue. He did this by concentrating on what the 1971 Act prohibited instead of the rights it conferred. In one sense these are different points along a single spectrum, but without correct characterisation the 1971 Act one can never be satisfied that the correct question is being addressed. For extinguishment, the identification of a prohibition is not enough. One has to consider how the prohibition compares to the native title rights and interests in issue. For s 211 NTA purposes, identification of a prohibitory code may be enough. The vice of Gray J’s analysis, with respect, is that he confused the former with the latter.

¹⁵ SLAB/29.

¹⁶ R [35]: SLAB/29.

¹⁷ Gray J also fails to fully consider the statutory history of the Fisheries legislation, although he recognised this history as a necessary consideration: (R [23]). In *Western Australia v Ward* (2002) 213 CLR 1, [] the majority of the Honorable Court said:

‘It is essential to identify and compare the two sets of rights: one deriving from traditional law and custom, the other deriving from the exercise of the new sovereign authority that came with settlement.’

In South Australia settlement occurred in the unique context of the *Letters Patents 1836*. They provide Aboriginal People (and their descendants) with the protection of their rights. This argument has not been developed in this appeal because it was not argued in the Full Court and it only arises otherwise if the historical source of the right is put in issue by the respondent.

26. In any event, the 1971 Act is properly to be characterised as a regulatory scheme. Its purpose was to enact "*provisions relating to the management and conservation of fisheries and the regulation of fishing ...*".¹⁸ It did not disclose "*a clear and plain intention to extinguish native title*".¹⁹ It may have regulated some aspects of the way aboriginal persons were able to exercise their customary rights, and it might have done so without those rights and interests being extinguished.
27. The fact that legislation is expressed to apply to *all* persons does not necessarily imply the extinguishment of *all* native title rights and interests.
- 10 There is no reference in the predecessor Acts to a *customary right to fish*. The 1971 Act cannot have *expressly* excluded a customary right which had hitherto not been referred to by Parliament. The argument advanced to Gray J and accepted by him in R [25]²⁰ and R [35]²¹ is logically incorrect. The references in the predecessor Acts are references to aboriginal persons by dint of *race* not by dint of *rights*. In this respect, the approach of Blue J to the issue of extinguishment is to be preferred and is consistent with authority: R [91].²²
28. Thirdly, the second of the two previous conclusions (in paragraph 27 above) is predicated on the characterisation of s 29 of the 1971 Act that is not justified by its language or its intent. This incorrect characterisation of s 29 of the 1971 Act is not remedied by the opening words of s 29, namely, "*Except as is provided in this Act...*" (R [27], [35]).²³ These words alone or in conjunction with the remainder of s 29 do not affect an extinguishment of native title.
- 20 29. To the extent that the majority's conclusion is predicated on the conjunction of s 29, s 47(2) and the proclamation of 30 November 1971, that too does not assist the respondent. As can be seen from R [27],²⁴ the relevant proclamation was subject to exemption. The fact that no exemption was obtained by the Narrunga people does not change the proper

¹⁸ Taken from the Long Title of the 1971 Act.

¹⁹ *Mabo v Queensland (no.2)* (1992) 175 CLR 1, 64.

²⁰ SLAB/8.

²¹ SLAB/29.

²² SLAB/42.

²³ SLAB/27, 29.

²⁴ SLAB/27.

characterisation of the 1971 Act and it does not mean that each and every incident of the native title right and interest was extinguished by these provisions.²⁵

30. Contrary to Gray J's conclusion,²⁶ this is a case like *Yanner v Eaton*.²⁷ On his Honour's own analysis,²⁸ the 1971 Act created a prohibition subject to exemption. Again, the applicants submit that on the issue of extinguishment, the approach of Blue J (particularly at R [79], [85] and [90])²⁹ is correct.
31. The applicants accept that s 5(3) FMA does not alter the characterisation of s 29 or the 1971 Act. However, the express acknowledgment in s 5 (3) FMA of native title rights and interests which the majority held to have been extinguished by the legislature (namely the right to fish and take fish) would seem to point to a different legislative intent than the one ascribed by the majority to the Parliament of the State of South Australia 36 years earlier.

Notice of Contention

32. The respondent has sought leave to file a Notice of Contention by summons dated 25 September 2012. The relevant contention is that s 41 of the 1982 Act and the associated regulations extinguished the applicants' native title rights and interests.
33. The contention arises if the applicants succeed on the extinguishment issue as it relates to s 29 of the 1971 Act.
34. The applicants oppose the filing of the Notice of Contention. The relevant contention was not considered by the Full Court: R [36] per Gray J³⁰ or by Blue J, at all. This Court is being asked to consider this further issue without the benefit of the Full Court's consideration of the issue and when consideration of the Contention will require a consideration of complex issues, including the operation of the Past Acts provisions upon the operation of the 1982 Act, its repeal and the effect of the FMA.

²⁵ Of the 30 abalone shells recovered by the prosecution, 6 were 130mm or larger, 11 others were 120mm or larger. Two (being those without shell) were not charged under Count 2. Under the 1971 regulation 19 of the 32 would not have been protected in any event.

²⁶ R [35]: SLAB/29.

²⁷ (1999) 201 CLR 351.

²⁸ R [27]: SLAB/27.

²⁹ SLAB/40, 41, 42.

³⁰ SLAB/29.

35. To the extent the matter is to be considered by this Court, the applicants acknowledge that the 1982 Act is a Category D past act,³¹ validated by s 19 NTA and s 32 of the *Native Title (South Australia) Act 1994*. As such, the 1982 Act is subject to the *non-extinguishment principle*.³² By operation of s 238(2) NTA the native title rights were not extinguished. Section 5(3) FMA expressly acknowledges the native title rights and interests of aboriginal people, including the Narrunga People.
36. In any event, by reason of the operation of s 109 of the *Constitution*, s 41 of the 1982 Act and associated regulations, do not extinguish the applicants' native title rights and interests to fish as such a reading of s 41 would be inconsistent with s 10(1) of the RDA because:³³
- 10 (a) native title is not to be treated differently from other forms of title simply because native title has different characteristics from those other forms of title or because it derives from a different source;
- (b) the relevant section or regulations of the 1982 Act effected the enjoyment of native title rights by denying the Narrunga People only, including the applicants, the human right to freedom from arbitrary deprivation of property, namely their native title right and interest to fish; and
- 20 (c) the deprivation occurred without compensation.

Conclusion – Ground 1

37. The majority adopts a novel approach to the extinguishment of native title. If the majority is correct, then there is no need to apply the *incidents of title* test in any case where a public right is abrogated in favour of a statutory right. On the reasoning of the majority, any legislation creating a statutory regime in place of an existing public right necessarily extinguishes all relevant native title rights and interests. This is inconsistent with the current law and will result in native title rights and interests being extinguished when there is no express extinguishment and no relevant inconsistency between the incidents of the native title and the legislation.
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³¹ NTA, s232.

³² *Native Title (South Australia) Act 1994 (SA)*, s36.

³³ *Western Australia v Ward* (2002) 213 CLR1, 105-106 at [118]-[122].

38. The applicants submit that in this case a correct application of the *incidents of title* test results in the opposite outcome, namely that the applicants' native title rights and interests were not extinguished by s 29 of the 1971 Act.

Ground 2 - Section 211 NTA

39. The State Law for the purpose of operation of s 211 NTA is s 72(2)(c) FMA (**State Law**).

40. The Full Court unanimously accepted that s 211 NTA does not apply to render the State Law inoperative. The Courts reasons are set out in the judgment of Blue J. Gray J agreed with those reasons (R [14]),³⁴ as, by inference, did Kelly J.

41. The Full Court accepted that s 71 and s 72(2)(c) FMA are subject to the power of the Minister to grant an exemption under s 115 FMA.³⁵

42. Blue J found that:

- (a) the State Law is prohibitory, not regulatory;
- (b) the State Law can be contrasted with the licensing regime set out in Part 6 FMA which is regulatory, and unless the regulatory exemption set out in s 115 FMA gives the State Law a different character, the State Law is prohibitory;
- (c) the exemption under s 115 FMA is a "reserve power" and does not convert a "prohibition regime into a mere licensing regime".³⁶

43. Blue J reached this conclusion as to the character of s115 FMA in the following manner:

- (a) Section 115 FMA is in Part 10 FMA and this is to be contrasted with Part 6 FMA. A permit or licence under the latter can be sought by application, and a document is issued upon acceptance of the application. This brings it within the language of s 211(1)(b) which requires a "licence, permit or other instrument". This was to be contrasted with s 115 FMA where, his Honour assumed, an application was not required, nor would any document be granted or

³⁴ SLAB/22.

³⁵ R [63]: SLAB/35.

³⁶ R [65]: SLAB/35.

issued if an exemption was allowed under s 115 FMA. These assumptions are incorrect:

- 10 (i) exemption³⁷ is sought by an application in a pro forma document to be completed by the applicant for exemption;³⁸
- (ii) the grant of an exemption is notified by record in the Government Gazette³⁹ and a Register is to be maintained of all granted exemptions pursuant to s 116(1)(b) FMA. A fisheries officer appointed under the FMA can demand production and to examine documents including, it is submitted, proof of exemption;
- (iii) the *Gazette* of the exemption under s 115 FMA is an “instrument” pursuant to s 4 of the *Acts Interpretation Act 1915* (SA).

- 20 (b) Part 6 FMA applies to commercial fishing and does not apply to fishing for personal or domestic purposes. Part 10 FMA applies irrespective of whether the fishing activity is commercial or for personal or domestic use. This is correct. However, it emphasizes rather than detracts from the proposition that the regulation of non-commercial fishing is as amenable to Ministerial exemption as the regulation of commercial fishing under Part 6. It does not imply that the Minister’s consent is limited to commercial fishing activities.
- (c) Part 6 FMA is regulatory of commercial fishing and s 211 NTA does not operate so as to require the holder of native title rights to take fish for commercial purposes. Again, this is correct but this simply means that Part 6 FMA has no relevant operation requiring reliance upon s 211 NTA to fish for domestic or personal purposes.
- (d) Fishing in contravention of the State Law (which is in Part 7) is not permitted because the taking of, *inter alia*, undersized abalone is absolutely prohibited because it is ‘inherently undesirable’.⁴⁰ It is not

³⁷ Defined by the FMA to mean an exemption granted under the FMA, not limited to any Part of the FMA: see s 3(1).

³⁸ Exhibit SGB10 of the Affidavit of Shaun Gerard Berg dated 6 July 2012, SLAB/337, and /340-343.

³⁹ Exhibit SGB10 of the Affidavit of Shaun Gerard Berg dated 6 July 2012, SLAB/361-362. R [64(2)]: SLAB/35.

clear from contrasting Part 6 and Part 7 that activities which are made offenses under Part 7 are inherently one thing or another. In truth, the recognition that Part 6 regulates commercial fishing only would suggest that any absolute prohibition worked upon commercial fishers operating without or in excess of their licence or permit. The regulation of non-commercial fishing is left to the general management regimes in the FMA and the regulations.⁴¹ The power to make regulations is in Part 10.

- (e) The absolute prohibition evidenced by Part 7 is not made “regulatory” in character because of the mere existence of s 115 FMA. It is not clear, but this conclusion appears to rest on the characterisation of the Minister’s power as an executive power.⁴² While it is correct to say that the power is to be exercised by the Minister,⁴³ but it remains a statutory power. It is plainly not a “reserve power”.⁴⁴ The existence of the statutory power together with its administrative resemblance to its practical use for similar purposes to a licence or a permit was a critical feature of the contrary conclusion reached by the Supreme Court of Western Australia in *Wilkes v Johnsen*.⁴⁵ Blue J considered *Wilkes* was distinguishable because the Western Australian provisions were very different to the FMA.⁴⁶ However, it is evident that both the FMA and the WA Act⁴⁷ have a similar purpose, and endeavour to achieve that purpose, by similar means. This is as true of the permit/licence – exemption systems as it is of the Acts generally. In fact, the WA Act expressly prohibits certain “recreational” fishing activities. If anything, the regime the WA Court was concerned with was less regulatory and more prohibitory than the FMA. The scheme and provisions of the WA Act are not

⁴¹ FMA, s 128(1) and (2)(d), (f) and (4).

42 R [65]: SLAB/35.

⁴³ Albeit that the power is delegable: see s 10 FMA.

⁴⁴ To the extent that Blue J inferred from this characterisation that the power would be infrequently exercised, this inference is incorrect. It is evident that the power is regularly exercised as part of the regulatory scheme contained in the FMA: see Affidavit of Shaun Gerard Berg dated 6 July 2012, "SGB15": SLAB/345-359.

45 (1999) 21 WAR 269.

⁴⁶ [R 66]-[67]: SLAB/35, 36.

⁴⁷ Compare *Fish Resources Management Act 1994 (WA)*, s 3 and FMA s 7.

supportive of Blue J's conclusion. If *Wilkes* is correct as to the characterisation of the power to exempt, then it supports the applicants' contention that the FMA is regulatory, not prohibitory.

44. If the State Law is regulatory as contended by the applicants, then s 211(2) NTA applies,⁴⁸ s 72(2)(c) FMA does not operate to prohibit or restrict the Narrunga Peoples, including the applicants, from carrying on fishing for abalone for the purpose of satisfying their personal, domestic or non-commercial communal needs and in exercise or enjoyment of their native title rights and interests.
- 10 45. Provided that there is no absolute prohibition, an aboriginal person is not limited from undertaking the prescribed class of activities identified in s 211 (3) NTA. To this end, Blue J correctly identifies the purpose of s 211 NTA in R [51].⁴⁹
46. Pursuant to s 115 FMA the Minister can permit a person to take prescribed fish or fish of a prescribed size. The applicants contend that s 115, or s 115 together with other provisions of the FMA, gives the State Law a regulatory character within a regulatory regime.
47. The FMA is characterised as a regulatory scheme by virtue of (amongst other things) sections 5(3), 10, 60, and 72(6) for the conservation and management of marine resources. Further s 5(3) FMA states that native title and native title rights and interests are not affected by the operation of the FMA, except to the extent authorised under the NTA. That includes the statutory rights contained in s 211 NTA to *fish or as a cultural or spiritual activity*.
- 20 48. Aboriginal People do not need to apply for an exemption to undertake certain acts because they can use the regime in s 211 NTA. This is consistent with the purpose of the section identified by Blue J in [R 51].⁵⁰
49. Section 115 FMA contemplates that the Minister will grant exemptions. An exemption under s 115 would not sit apart from the regulatory scheme but would exist as *part of* the regulatory scheme. Accordingly, any limitation on
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⁴⁸ The threshold requirements of s 211(1) NTA are each satisfied if the Court accepts that the exemption is an "*other instrument*" within the meaning of s 211(1)(b) NTA.

⁴⁹ SLAB/32.

⁵⁰ SLAB/32.

the statutory power set out in s 115(4) does not prevent the Minister from granting exemptions to persons taking abalone.⁵¹

50. The Minister has granted exemptions under s 115 FMA on numerous occasions. The process to apply for an exemption is similar to the process of application for a licence or permit. An application for an exemption can be downloaded from the regulatory authority website, it must be completed and submitted to the authority, a fee is payable for the exemption, a physical notice is issued to the person exempted, and a notice is gazetted. Typically the notice is required to be carried at all times by the holder under the terms of the exemption.⁵²

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Conclusion – Ground 2

51. The Full Court characterised the State Law as prohibitory by interpreting s 115 FMA as a reserve power. This incorrect characterisation has led it into error. The correct character of the State Law is as part of a regulatory scheme. This means that the State Law is inoperative by virtue of s 211(2) NTA and s 109 of the *Constitution*.

52. If this Court accepts the above characterisation, then, by reason of the agreed position of the parties at trial, the applicants should be acquitted of all charges.

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Reasons why special leave should be granted

Ground 1

53. The decision of the Full Court (by majority) involves a question of law that is of public importance both because of its general application and otherwise.

In particular the decision:

- (a) is not limited to the acts of native title holders within the State of South Australia, but has general application throughout Australia;
- (b) is not limited to the exercise of the right to fish or to exercise a customary or spiritual right;

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⁵¹ See Exhibits SGB15 annexed to the Affidavit of Shaun Gerard Berg dated 6 July 2012: SLAB/345-359.

⁵² See Exhibits SGB10 - 16 annexed to the Affidavit of Shaun Gerard Berg dated 6 July 2012: SLAB/317-362.

- (c) in the alternative, even if limited to the right to fish, it effects the fisheries and fishing activities of native title holders in all States and territories;
- (d) is not consistent with the tests for extinguishment applied by other Courts in Australia; and
- (e) might purport to extend the test when considering the abrogation of public rights to the extinguishment of native title rights and interests.

Ground 2

54. The decision of the Full Court involves a question of law that is of general public importance and the interest of the administration of justice requires consideration by this Court of the judgment. In particular, the decision:

- (a) is relevant to the correct interpretation and application of s 211 NTA throughout Australia;
- (b) is applicable, and can be applied by all Courts of Australia when they apply s 211 NTA; and
- (c) is important for the administration of the criminal justice system in Australia to the extent that s 211 NTA provides an answer to offences within a regulatory scheme.

55. The Full Court has characterized the State Law as apart from the regulatory scheme when it is part of the regulatory scheme. The interests of justice in the case require that the applicants (and the Narrunga People) have access to the regulatory rights provided under s 211 NTA to fishing or cultural or spiritual activity.

Part VII:

56. See Annexure.

Part VIII:

57. The applicants seek the following relief:

- (a) an order granting special leave to appeal;
- (b) that the orders of the Full Court of the Supreme Court of South Australia be set aside.

- (c) a declaration that the *Fisheries Act 1971* did not extinguish the native title rights and interests of the Narrunga People which manifest in the act of fishing or the taking of marine resources;
 - (d) a declaration that s 211 of the *Native Title Act 1993* has the effect of making inoperative s 72(2)(c) of the *Fisheries Management Act 2007*.
 - (e) costs.

Part IX:

58. The applicants' estimate they will require 2½ hours for the presentation of
10 their oral argument (putting to one side a substantive hearing of the Notice
of Contention).

Dated: Tuesday, 9 October 2012

 Ian C. Robertson

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**APPELLANT'S ANNEXURE OF CONSTITUTIONAL AND
STATUTORY PROVISIONS**

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Relevant provisions of the Constitution

SECTION 109

Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

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Relevant statutory provisions

RACIAL DISCRIMINATION ACT 1975 - SECT 10

Rights to equality before the law

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
- (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

- (3) Where a law contains a provision that:
- (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
 - (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;
- not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.
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NATIVE TITLE ACT 1993 - SECTION 7

Racial Discrimination Act

- (1) This Act is intended to be read and construed subject to the provisions of the *Racial Discrimination Act 1975*.
 - (2) Subsection (1) means only that:
 - (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
 - (b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.
 - (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.
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NATIVE TITLE ACT 1993 -SECTION 11(1)

Extinguishment of native title

- (1) Native title is not able to be extinguished contrary to this Act.

NATIVE TITLE ACT 1993 -SECTION 19

State/Territory acts may be validated

- (1) If a law of a State or Territory contains provisions to the same effect as sections 15 and 16, the law of the State or Territory may provide that past acts attributable to the State or Territory are valid, and are taken always to have been valid.

Effect of validation of law

- (2) To avoid any doubt, if a past act validated by subsection (1) is the making, amendment or repeal of legislation, subsection (1) does not validate:
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- (a) the grant or issue of any lease, licence, permit or authority; or
 - (b) the creation of any interest in relation to land or waters;
- under any legislation concerned, unless the grant, issue or creation is itself a past act attributable to the State or Territory.

NATIVE TITLE ACT 1993 -SECTION 20

Entitlement to compensation

Compensation where validation

- 10 (1) If a law of a State or Territory validates a past act attributable to the State or Territory in accordance with section 19, the native title holders are entitled to compensation if they would be so entitled under subsection 17(1) or (2) on the assumption that section 17 applied to acts attributable to the State or Territory.

Compensation where no validation

- (2) Native title holders are entitled to compensation for the past act attributable to a State or Territory that, at the time when the claim for compensation is determined, has not been validated by the State or Territory in accordance with section 19.

Recovery of compensation

- 20 (3) The native title holders may recover the compensation from the State or Territory.

States or Territories may create compensation entitlement

- (4) This section does not prevent a law of a State or Territory from creating an entitlement to compensation for a past act or for the validation of a past act.

NATIVE TITLE ACT 1993 -SECTION 45

RDA compensation to be determined under this Act

- 30 (1) If the *Racial Discrimination Act 1975* has the effect that compensation is payable to native title holders in respect of an act that validly affects native title to any extent, the compensation, in so far as it relates to the effect on native title, is to be determined in accordance with section 50 as if the entitlement arose under this Act.

Recovery of compensation

- (2) If the act took place before 1 January 1994 and is attributable to the Commonwealth, a State or a Territory, the native title holders may recover the compensation from the Commonwealth, the State or the Territory, as the case requires.

NATIVE TITLE ACT 1993 -SECTION 50

Bodies that may determine compensation

Division exhaustive

- (1) A determination of the compensation may only be made in accordance with this Division.

Applications to Federal Court

- (2) An application may be made to the Federal Court under Part 3 for a determination of the compensation.

Jurisdiction to hear appeals, to review etc. not affected

- 10 (3) Nothing in this Division affects:
- (a) any jurisdiction of a court, person or body to hear appeals against, to review or otherwise to affect, a determination of compensation made in accordance with this Division; or
 - (b) the jurisdiction of the High Court.

NATIVE TITLE ACT 1993 -SECTION 51

Criteria for determining compensation

Just compensation

- 20 (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests.

Acquisition under compulsory acquisition law

- 30 (2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place.

Compensation where similar compensable interest test satisfied

- (3) If:
- (a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and
 - (b) the similar compensable interest test is satisfied in relation to the act;
- the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms)

set out in the law mentioned in section 240 (which defines *similar compensable interest test*).

Compensation not covered by subsection (2) or (3)

- (4) If:
- (a) neither subsection (2) nor (3) applies; and
 - (b) there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth) or for the State or Territory to which the act is attributable;

10 the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria set out in that law for determining compensation.

Monetary compensation

- (5) Subject to subsection (6), the compensation may only consist of the payment of money.

Requests for non-monetary compensation

- 20 (6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:
- (a) must consider the request; and
 - (b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a specified period, transfer property or provide goods or services in accordance with the recommendation.

Where recommendation not complied with

- 30 (7) If the person does not transfer the property or provide the goods or services in accordance with the recommendation, the person claiming to be entitled to the compensation may request the court, person or body to determine instead that the whole or the part of the compensation concerned is to consist of the payment of money.

Where recommendation complied with

- (8) If the person does transfer the property or provide the goods or services in accordance with the recommendation, the transfer of the property or provision of the goods or services constitutes full compensation for the act, and the entitlement to it is taken to have been determined in accordance with this Division.

NATIVE TITLE ACT 1993 -SECTION 51A

Limit on compensation

Compensation limited by reference to freehold estate

- (1) The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.

This section is subject to section 53

- 10 (2) This section has effect subject to section 53 (which deals with the requirement to provide "just terms" compensation).

NATIVE TITLE ACT 1993 -SECTION 53

Just terms compensation

Entitlement to just terms compensation

- (1) Where, apart from this section:
- (a) the doing of any future act; or
 - (b) the application of any of the provisions of this Act in any particular case;
- 20 would result in a paragraph 51(xxi) acquisition of property of a person other than on paragraph 51(xxi) just terms, the person is entitled to such compensation, or compensation in addition to any otherwise provided by this Act, from:
- (c) if the compensation is in respect of a future act attributable to a State or a Territory—the State or Territory; or
 - (d) in any other case—the Commonwealth;
- as is necessary to ensure that the acquisition is made on paragraph 51(xxi) just terms.

Federal Court's jurisdiction

- 30 (2) The Federal Court has jurisdiction with respect to matters arising under subsection (1) and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.

NATIVE TITLE ACT 1993 -SECTION 211

Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

- (1) Subsection (2) applies if:

- 10 (a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and
- (b) law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and
- (ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and
- (c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

- 20 (2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
- (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
- (b) in exercise or enjoyment of their native title rights and interests.

Note: In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application.

Definition of class of activity

- 30 (3) Each of the following is a separate *class of activity*:
- (a) hunting;
- (b) fishing;
- (c) gathering;
- (d) a cultural or spiritual activity;
- (e) any other kind of activity prescribed for the purpose of this paragraph.

NATIVE TITLE ACT 1993 -SECTION 232

Category D past act

A *category D past act* is any past act that is not a category A past act, a category B past act or a category C past act.

NATIVE TITLE ACT 1993 -SECTION 238

Non-extinguishment principle

Effect of references

- (1) This section sets out the effect of a reference to the non-extinguishment principle applying to an act.

Native title not extinguished

- (2) If the act affects any native title in relation to the land or waters concerned, the native title is nevertheless not extinguished, either wholly or partly.

10 *Rights and interests wholly ineffective*

- (3) In such a case, if the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the rights and interests have no effect in relation to the act.

Rights and interests partly ineffective

- (4) If the act is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency.

20 *Who the native title holders are*

- (5) Despite the fact that the native title rights and interests have no effect (as mentioned in subsection (3)) or have only limited effect (as mentioned in subsection (4)) in relation to the act, the persons who are entitled in accordance with the traditional laws and customs, as applying from time to time, to possess those rights and interests continue to be the native title holders, subject to Division 6 of Part 2 (which deals with the holding of native title on trust).

Complete removal of act or its effects

30 (6) If the act or its effects are later wholly removed or otherwise wholly cease to operate, the native title rights and interests again have full effect.

Partial removal of act or its effects

- (7) If the act or its effects are later removed only to an extent, or otherwise cease to operate only to an extent, the native title rights and interests again have effect to that extent.

Example of operation of section

10

(8) An example of the operation of this section is its application to a category C past act consisting of the grant of a mining lease that confers exclusive possession over an area of land or waters in relation to which native title exists. In such a case the native title rights and interests will continue to exist but will have no effect in relation to the lease while it is in force. However, after the lease concerned expires (or after any extension, renewal or re-grant of it to which subsection 228(3), (4) or (9) applies expires), the rights and interests again have full effect.

NATIVE TITLE ACT 1993 -SECTION 239

Act attributable to the Commonwealth, a State or a Territory

An act is *attributable* to the Commonwealth, a State or a Territory if the act is done by:

20

- (a) the Crown in right of the Commonwealth, the State or the Territory; or
- (b) the Parliament or Legislative Assembly of the Commonwealth, the State or the Territory; or
- (c) any person under a law of the Commonwealth, the State or the Territory.

NATIVE TITLE ACT 1993 -SECTION 253 – Definition of valid

valid includes having full force and effect.

LETTERS PATENT ESTABLISHING THE PROVINCE OF SOUTH AUSTRALIA DATED 19 FEBRUARY 1836

30

William the Fourth by the Grace of God of the United Kingdom of Great Britain and Ireland King Defender of the Faith To all to Whom these Presents shall come Greeting Whereas by an Act of Parliament passed in the fifth year of our Reign entitled "An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonization and Government thereof" After writing that, that part of Australia which lies between the Meridians of the one hundred and thirty second and one hundred and forty first Degrees of East Longitude and between the Southern Ocean and twenty six Degrees of South Latitude together with the Islands adjacent thereto consists of Waste and unoccupied Lands which are supposed to be fit for the purposes of Colonization And that divers of our Subjects possessing amongst them considerable Property are desirous to embark for the said part of Australia And that it is highly expedient that our said Subjects should be enabled to carry their said laudable purpose into effect It is Enacted that it shall and may be lawful for Us with the advice of our Privy Council to erect within that part of Australia which lies between the Meridians of the one

40

hundred and thirty second and one hundred and forty first Degrees of East
 Longitude and between the Southern Ocean and the twenty-six Degrees of
 South Latitude together with all and every the Islands adjacent thereto and the
 Bays and Gulfs thereof with the advice of our Privy Council to Establish one or
 more Provinces and to fix the respective Boundaries of such Provinces Now
 Know Ye that with the advice of Our Privy Council and in pursuance and
 exercise of the powers in Us in that behalf vested by the said recited Act of
 Parliament We do hereby Erect and Establish one Province to be called the
 Province of South Australia—And we do hereby fix the Boundaries of the said
 Province in manner following (that is to say) On the North the twenty sixth
 Degree of South Latitude On the South the Southern Ocean—On the West the
 one hundred and thirty second Degree of East Longitude— And on the East
 the one hundred and forty first Degree of East Longitude including therein all
 and every the Bays and Gulfs thereof together with the Island called Kangaroo
 Island and all and every the Islands adjacent to the said last mentioned Island
 or to that part of the main Land of the said Province Provided Always that
 nothing in those our Letters Patent contained shall affect or be construed to
 affect the rights of any Aboriginal Natives of the said Province to the actual
 occupation or enjoyment in their own Persons or in the Persons of their
 Descendants of any Lands therein now actually occupied or enjoyed by such
 Natives In Witness whereof We have caused these our Letters to be made
 Patent Witness Ourselves at Westminster the Nineteenth day of February in the
 sixth year of our Reign.

By Writ o f P r i v y S e a l
 Edmunds

FISHERIES ACT 1878 (SA) - SECTION 14

30 Nothing in this Act shall apply to any person using a landing net to secure fish
 caught with rod and line, nor to any fixed engine used solely for catching
 eels, nor to any person using a hand shrimp net, nor to any aboriginal native
 taking fish for his own use, nor to any person taking fish in water of which he
 is the owner, nor to any person authorised by such owner to take fish in such
 water, nor to any person with the written permission of the Commissioner
 catching fish for the *bona fide* purpose of removing them to stock other waters,
 or otherwise in the discretion of the Commissioner, nor to any nets, engines,
 or boats used or fish taken by such person, nor to any person who, having
 unintentionally taken any fish contrary to the provisions of this Act, shall
 40 immediately return the same with as little injury as possible to the water.

FISHERIES ACT 1904 (SA) - SECTION 22

Nothing in this Act shall apply to any person using a rod and line, or hand-line,
 or a landing-net to secure fish taken with a rod and line or hand-line or a hand
 crab-net, nor to any device used solely for catching eels or congolly, nor to
 any person using a hand shrimp-net, nor to any aboriginal native taking fish for
 his own use, nor to any person taking fish solely for bait, nor to any person
 taking fish in water of which he is the owner, nor to any person authorised by

such owner to take fish in such water, nor to any person with the written permission of the Minister catching fish for the *bona fide* purpose of removing them to stock other water, or otherwise in the discretion of the Minister, nor to any device or boat used or fish taken by such last-mentioned person for the purpose aforesaid : Provided that fish caught by any method mentioned in this section (crab-nets excepted) shall not be sold or bartered.

10 ACTS INTERPRETATION ACT 1915 - SECT 4

Interpretation

- (1) In this Act and in every other Act or statutory instrument, unless the contrary intention appears—

...

"statutory instrument" means—

- (a) a regulation, rule, by-law or statute made under an Act; or
- (ab) a proclamation, notice, order or other instrument made by the Governor or a Minister under an Act and published in the Gazette; or
- (b) a code or standard made, approved or adopted under an Act; or
- (c) any other instrument of a legislative character made or in force under an Act;

FISHERIES ACT 1917 (SA) - SECTION 48

Nothing in this Act shall apply to –

- (a) any full-blooded aboriginal inhabitant of this State taking fish for his household consumption: provided that no explosive or noxious matter is used in the taking of such fish; nor
- (b) ...

FISHERIES ACT 1971 (SA) - SECTION 29

- (1) Except as is provided in this Act, a person shall not take fish unless he hold a fishing licence.

40 Penalty: Two hundred dollars for a first offence and five hundred dollars for a second or subsequent offence.

- (2) A person may without holding a licence, but subject to the other sections of this Act-

- (a) take fish otherwise than for the purpose of sale by means of a rod and line, hand line, hand fish spear or declared device;
- (b) take crabs otherwise than for the purpose of sale, by a hoop net; or
- (c) take garfish, otherwise than for the purpose of sale, by a dab net.

FISHERIES ACT 1971 (SA) - SECTION 47

- 10 (1) The Governor may by proclamation declare that fish of any specified species which do not comply with any minimum dimension or weight specified for fish of that species (whether such dimension or weight is a dimension or weight of the whole fish or any part of the fish) shall be undersize fish within the meaning of this Act.
- (2) A person shall not-
 - (a) except as allowed by proclamation under subsection (4) of this section take any undersize fish;
 - (b) drag or draw a net into a boat or onto the shore or to such a distance from the water as to prevent undersize fish from escaping alive into the water; or
 - (c) sell any undersize fish.
 Penalty:
 For a first offence-One hundred dollars.
 For a subsequent offence-Two hundred dollars.
 In either case-Additional penalty as provided in section 60 of this Act.
- 20 (3) If a person takes any undersize fish and returns them to the water forthwith unencumbered in any way and with as little injury as possible he shall not be deemed to have taken those fish in contravention of a proclamation under this section.
- (4) The Governor may by proclamation declare that it shall be lawful for any person or any person of a specified class of persons to take undersize fish in accordance with such limitations or conditions as are set out in the proclamation and such limitations or conditions may relate to the waters or place where undersize fish may be taken, the devices which may be used to take such fish, or the number of such fish which may be taken by any person during any period.
- 30
- 40 PROCLAMATIONS AND REGULATIONS UNDER THE FISHERIES ACT 1971 (SA)

Proclamations under the Fisheries Act 1971 dated 30 November 1971

Proclamation 4(2)

Minimum Length and Wrights of Abalone

An abalone of the species listed in column 1 of schedule 2 of this paragraph shall be an undersized fish if the abalone is of such a size that it when in the shell in any way pass through a circular ring the internal diameter of which is

the diameter length listed in column 2 of the schedule or if the abalone when shucked according to normally accepted commercial procedures and at any time thereafter until processing at a registered factory weights less than the weight listed in column 3 of the schedule. The dimensions and weights respectively prescribed for the several species of abalone shall apply only in those areas of water appearing opposite the species respectively in column 4 of the schedule.

SCHEDULE 2

10

Species Column 1	Minimum Measurements Dimensions Column 2	Weight Column 3	Parts of South Australia Column 4
All species of Abalone	Length 10.2 cm	Weight 113g	All South Australian waters

Proclamation 5

PROCLAIMED SPECIES INVOLVING ADDITIONAL PENALTIES

Those species of fish set out in the schedule to this paragraph shall be proclaimed species pursuant to Section 60(1) of the Act.

SCHEDULE

20

Abalone of all species

....

Regulations under the Fisheries Act 1971 dated 30 November 1971 titled Managed Fisheries Regulations, 1971

Regulation 2

In these regulations, unless the context otherwise requires:-

30

“undersized abalone” means any abalone weighting less than the prescribed minimum weight for abalone.

Regulation 7

(1) No person, being the holder of a fishing licence shall: -

- (a)
- (c) take abalone;

40

unless he has obtained a permit from the Director of Fisheries.

Regulation 14

A permit shall have effect, subject to the following conditions:-

- (a) that in the case for a permit to take abalone the holder of the permit may take abalone in the zone or zones specified in the permit and shall not take abalone in any other zone; and
- (b) ...

10

Regulation 32

- (1) Any person may take up to five abalone in any one day, provided however, that where a person is operating from a boat, or a boat is used for the taking of abalone, the total number of abalone taken by all persons operating from or using the said boat shall not exceed ten.

- (2)

20 FISHERIES ACT 1982 (SA) - SECTION 41

Offence of engaging in certain fishing activities

A person must not engage in a fishing activity of a prescribed class.

Penalty:

- For a first offence—division 7 fine;
- for a second offence—division 6 fine;
- for a subsequent offence—division 5 fine.

Expiation fee: A fee determined in accordance with the regulations.

FISHERIES ACT 1982 (SA) - SECTION 46

30 Regulations relating to fisheries and fishing

The Governor may make regulations for the conservation, enhancement and management of the living resources of the waters to which this Act applies, the regulation of fishing and the protection of certain fish, and, without limiting the generality of the foregoing, may by such regulations—

- (a) declare that any prescribed class of fishing activities constitutes a fishery;

....

40 REGULATIONS UNDER THE FISHERIES ACT 1982 (SA) DATED 28 JUNE 1984
TITLED FISHERIES (GENERAL) REGULATIONS 1984

Regulation 4(3)

Where the expression 'licensed person' is used in these regulations in the definition of a fishing activity such expression shall be construed to mean a

person who is for the purpose of trade or business engaged in a fishing activity of a class which constitutes the fishery in respect of which he holds a licence and a person who is acting as the agent of a holder of such a licence.

Regulation 4(4)

Where the expression 'unlicensed person' is used in these regulations in the definition of a fishing activity such expression shall be construed to mean any person who is not a licensed person as that expression is to be construed according to sub regulation (3) of this regulation.

10

Regulation 5

Pursuant to Section 41 of the Act each class of fishing activity described in Schedule 1 is a fishing activity of a prescribed class.

Regulation 21

20

For the purpose of paragraph 62 of Schedule 1 undersize fish shall mean fish which are undersized as determined in accordance with this Part but shall not include any fish taken from any jetty, pier, wharf or breakwater abutting land.

Regulation 23

30

(1) Abalone (*Haliotis spp.*) of all species (except Greenlip *Haliotis laevigata*) shall be undersize if:

(a) it is less than 13 centimetres in length; or

(b) the meat, having been removed from the shell, weighs less than 113 grams.

(2) Abalone, greenlip (*Haliotis laevigata*), shall be undersize:

(a) If taken in all waters of the State except the western zone:

(i) it is less than 13 centimetres in length; or

(ii) the meat, having been removed from the shell, weighs less than 113 grams;
or

(b) if taken in the waters of the western zone:

(i) it is less than 14.5 centimetres in length; or

(ii) the meat, having been removed from the shell, weighs less than 140 grams.

40
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Regulation 31

(1) In this Part:

'abalone' means abalone of all species (*Haliotis spp.*);

'licensed person' has the meaning ascribed to it in regulation 4(3) of these regulations;

10 'unlicensed person' has the meaning ascribed to it in regulation 4(4) of these regulations.

(2) Any unlicensed person who takes abalone in the waters of the State shall bring such abalone to a position above high water mark before such abalone is removed from its shell.

Schedule 1

20 62. The taking of undersize fish by any person in the waters of the State.

69. The taking in any one day by an unlicensed person of more than 5 abalone of all species (*Haliotis spp.*) in the waters of the State.

70. (1) The taking in any one day in the waters of the State by an unlicensed person by using a boat when such boat:

30 (a) has previously been used on that day by an unlicensed person or persons for the purpose of taking abalone in the waters of the State; and

(b) 10 abalone have been taken on the day by that person or persons by using that boat. of all species (*Haliotis spp.*).

(2) In this paragraph 'abalone' means abalone of all species (*Haliotis spp.*).

40 REGULATIONS UNDER THE FISHERIES ACT 1982 (SA) DATED 28 JUNE 1984 TITLED FISHERIES (GENERAL) REGULATIONS 1984, amended by the addition of Regulation 23(5): inserted by 146, 1985, reg. 23 and Regulation 23A: inserted by 146, 1985, reg. 24

Regulation 23(5)

(5) This regulation shall apply to abalone taken by a licensed person only.

Regulation 23A

- 10 (1) Abalone (*Haliotis* spp.) of all species (except greenlip (*Haliotis laevigata*)) shall be undersize:
- (a) if it is less than 13 centimetres in length; or
 - (b) if the meat, having been removed from the shell, weighs less than 113 grams.
- (2) Abalone, greenlip (*Haliotis laevigata*) shall be undersize:
- (a) if taken in the waters of the State other than the waters of the western zone:
 - (i) it is less than 13 centimetres in length; or
 - (ii) the meat, having been removed from the shell, weighs less than 113 grams; or
 - (b) if taken in the waters of the western zone:
 - (i) it is less than 14.5 centimetres in length; or
 - (ii) the meat, having been removed from the shell, weighs less than 140 grams.
- 20 (3) For the purposes of this regulation:
- (a) the length shall be measured at its greatest width as shown by diagram 1 set out in Schedule 7;
 - (b) the "meat" shall mean all the muscular foot from which the viscera have been detached by the usual shucking method;
 - (c) the "western zone" means all coastal waters west of the meridian of longitude 136° 30' 00" east.
- (4) This regulation shall apply to abalone taken by an unlicensed person only.

NATIVE TITLE (SOUTH AUSTRALIA) ACT 1994 (SA) – SECTION 32

30 Validation of past acts attributable to the State

Every past act attributable to the State is valid and is taken always to have been valid.

NATIVE TITLE (SOUTH AUSTRALIA) ACT 1994 (SA) – SECTION 36

Effect of validation—category C and D past acts

The non-extinguishment principle applies to all category C and D past acts.

FISHERIES MANAGEMENT ACT 2007 (SA) - SECTION 5(3)

40 (3) Native title and native title rights and interests are not affected by the operation of this Act except to the extent authorised under the *Native Title Act 1993* of the Commonwealth.

FISHERIES MANAGEMENT ACT 2007 (SA) - SECTION 7**Objects of Act**

- (1) An object of this Act is to protect, manage, use and develop the aquatic resources of the State in a manner that is consistent with ecologically sustainable development and, to that end, the following principles apply:
- (a) proper conservation and management measures are to be implemented to protect the aquatic resources of the State from over-exploitation and ensure that those resources are not endangered;
 - (b) access to the aquatic resources of the State is to be allocated between users of the resources in a manner that achieves optimum utilisation and equitable distribution of those resources to the benefit of the community;
 - (c) aquatic habitats are to be protected and conserved, and aquatic ecosystems and genetic diversity are to be maintained and enhanced;
 - (d) recreational fishing and commercial fishing activities are to be fostered for the benefit of the whole community;
 - (e) the participation of users of the aquatic resources of the State, and of the community more generally, in the management of fisheries is to be encouraged.
- (2) The principle set out in subsection (1)(a) has priority over the other principles.
- (3) A further object of this Act is that the aquatic resources of the State are to be managed in an efficient and cost effective manner and targets set for the recovery of management costs.
- (4) The Minister, the Director, the Council, the ERD Court and other persons or bodies involved in the administration of this Act, and any other person or body required to consider the operation or application of this Act (whether acting under this Act or another Act), must—
- (a) act consistently with, and seek to further the objects of, this Act; and
 - (b) insofar as this Act applies to the Adelaide Dolphin Sanctuary, seek to further the objects and objectives of the *Adelaide Dolphin Sanctuary Act 2005*; and
 - (c) insofar as this Act applies to the River Murray, seek to further the objects of the *River Murray Act 2003* and the *Objectives for a Healthy River Murray* under that Act; and
 - (d) insofar as this Act applies to areas within a marine park, seek to further the objects of the *Marine Parks Act 2007*.

- (5) For the purposes of subsection (1), *ecologically sustainable development* comprises the use, conservation, development and enhancement of the aquatic resources of the State in a way, and at a rate, that will enable people and communities to provide for their economic, social and physical well-being while—
- (a) sustaining the potential of aquatic resources of the State to meet the reasonably foreseeable needs of future generations; and
 - (b) safeguarding the life-supporting capacity of the aquatic resources of the State; and
 - (c) avoiding, remedying or mitigating adverse effects of activities on the aquatic resources of the State,
- (taking into account the principle that if there are threats of serious or irreversible damage to the aquatic resources of the State, lack of full scientific certainty should not be used as a reason for postponing measures to prevent such damage).

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 44(9) and (10)

- 20 (9) A management plan has no force or effect until adopted by the Minister.
- (10) On adopting a draft management plan, the Minister must cause notice of that fact to be published in the Gazette.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 51

Interpretation

In this Division—

authority means a licence, permit or registration;

licence means a fishery licence;

permit means a fishery permit;

registration means registration of any of the following:

- 30 (a) a boat;
- (b) the master of a boat;
- (c) a device.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 52

Obligation of commercial fishers to hold licence or permit

A person must not, for a commercial purpose, engage in a fishing activity of a class that constitutes a fishery unless—

- (a) the person holds a licence or permit in respect of the fishery; or
- (b) the person is acting as the agent of a person holding a licence or permit in respect of the fishery.

40 Maximum penalty:

- (a) in the case of a body corporate—

- (i) if the offence involves the taking of fish of a priority species or a fishing activity engaged in for the purpose of taking fish of a priority species—\$500 000;
- (ii) in any other case—\$100 000;
- (b) in the case of a natural person—
- (i) if the offence involves the taking of fish of a priority species or a fishing activity engaged in for the purpose of taking fish of a priority species—\$250 000 or imprisonment for 4 years;
- (ii) in any other case—\$50 000 or imprisonment for 2 years.

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FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 53

Obligation for boats and devices used in commercial fishing to be registered

- (1) A person must not, for a commercial purpose, use a boat, or cause, suffer or permit a boat to be used, for the purpose of engaging in a fishing activity of a class that constitutes a fishery unless—
- (a) the boat—
- (i) is registered for use under a licence or permit in respect of the fishery held by him or her or a person for whom he or she is acting as an agent; or
- (ii) is being used in the place of a boat referred to in subparagraph (i) with the consent of the Minister and in accordance with the conditions (if any) of that consent; and
- (b) the boat is in the charge of a natural person who—
- (i) is registered as the master of a boat that may be used under the licence or permit; or
- (ii) is acting in the place of a person referred to in subparagraph (i) with the consent of the Minister and in accordance with the conditions (if any) of that consent.

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Maximum penalty:

- (a) in the case of a body corporate—\$250 000;
- (b) in the case of a natural person—\$50 000.

- (2) A person must not, for a commercial purpose, use a device, or cause, suffer or permit a device to be used, for the purpose of engaging in a fishing activity of a class that constitutes a fishery unless the device is registered for use under a licence or permit in respect of the fishery held by him or her or a person for whom he or she is acting as an agent.

Maximum penalty:

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- (a) in the case of a body corporate—\$250 000;
- (b) in the case of a natural person—\$50 000.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 54

Application for licence, permit or registration

- (1) An application for an authority must—
- (a) be made in a manner and form approved by the Minister; and
 - (b) be signed by the applicant and completed in accordance with the instructions contained in the form; and
 - (c) be accompanied by the fee fixed by regulation or an instalment of the fee in accordance with the regulations.
- (2) ...
- 10 (10) The Minister may refuse to grant an application for an authority in the following circumstances:
- (a) the Minister is not satisfied the applicant is a fit and proper person to hold an authority of the kind to which the application relates;
 - (b) the Minister is of the opinion that the issue of the authority would be inconsistent with—
 - (i) an inter-governmental agreement or arrangement; or
 - (ii) any instrument made under this Act;
 - 20 (c) in the case of an application to register a device—
 - (i) the applicant does not produce the device for examination after being requested by the Minister to do so; or
 - (ii) the applicant could not lawfully use the device in the fishery even if it were registered;
 - (d) prescribed grounds for the refusal exist.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 57

Transfer of licence or permit

- (1) A licence or permit is not transferable.
- 30 (2) However, if the regulations for a fishery provides that licences or permits, or a class of licence or permit, in respect of the fishery are transferable, then, with the consent of the Minister, such a transfer may occur.
- (3) An application for consent to the transfer of a licence or permit must—
- (a) be a joint application made by the holder of the licence or permit and the transferee; and
 - (b) be made in a manner and form approved by the Minister; and
 - (c) be signed by the applicants and completed in accordance with the instructions contained in the form; and

- (d) be accompanied by the fee fixed by regulation.
- (4) The Minister may only consent to the transfer of a licence or permit if—
- (a) the Minister is satisfied as to the matters prescribed by the regulations for the fishery; and
 - (b) where the register of authorities includes a notation that a specified person has an interest in the licence or permit—that person consents to the transfer.
- (5) If a licence or permit is transferable, the registration of a boat used under the licence or permit is also transferable.
- 10 (6) If—
- (a) a licence or permit is transferable; and
 - (b) the holder of the licence or permit dies,
- the licence or permit (as the case may be) vests in the personal representative of the deceased (whether the personal representative is a natural person or body corporate) as part of the estate of the deceased but cannot be transferred in the course of the administration of the estate except with the consent of the Minister.
- (7) If a deceased licence or permit holder was, immediately before his or her death, registered as the master of a boat that may be used under the licence or permit—
- (a) the boat may, while the licence or permit remains vested in the personal representative of the deceased, continue to be used for the purpose of engaging in fishing activities under the licence or permit if it is in the charge of a person who is acting with the consent of the Minister and in accordance with the conditions of that consent; and
 - (b) a person so acting will be taken to be acting under section 53(b)(ii).
- 20 (8) A licence or permit that vests in the personal representative of a deceased licence or permit holder will, if it is not transferred within 2 years after the death of the licence or permit holder or such further period as may be approved by the Minister, be suspended pending such transfer.
- (9) In this section—
- personal representative* means—
- (a) the executor of the will or administrator of the estate of the deceased licence or permit holder; or
 - (b) in relation to any period for which there is not an executor or administrator—the Public Trustee.
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FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 59

Obligation to carry authority and identification while engaging in fishing activities

(1) Subject to the regulations, the holder of a licence or permit (being a natural person) must, at all times when he or she is engaging in any fishing activity under the licence or permit, carry with him or her—

- (a) the licence or permit; and
- (b) identification in the form issued by the Minister.

Maximum penalty: \$2 500.

Expiation fee: \$210.

10 (2) Subject to the regulations, if a registered boat is being used on any waters for any purpose, the person in charge of the boat must carry with him or her—

- (a) the licence or permit under which the boat may be used for the purpose of taking aquatic resources; and
- (b) identification in the form issued by the Minister.

Maximum penalty: \$2 500.

Expiation fee: \$210.

(3) Subject to the regulations, if a registered device is being used in or on any waters for any purpose—

- (a) if the device is not being used on or from a boat, the person using the device must carry with him or her—
 - (i) the licence or permit under which the device may be used; and
 - (ii) identification in the form issued by the Minister;
- (b) in any other case, the person in charge of the boat must carry with him or her—
 - (i) the licence or permit under which the device may be used; and
 - (ii) identification in the form issued by the Minister.

20 Maximum penalty: \$2 500.

Expiation fee: \$210.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 60

Management of aboriginal traditional fishing

(1) The Minister and a native title group that is party to an indigenous land use agreement may make an aboriginal traditional fishing management plan under the agreement for the management of specified aboriginal traditional fishing activities in a specified area of waters.

- (2) An aboriginal traditional fishing management plan under an indigenous land use agreement must—
- (a) be consistent with—
 - (i) the agreement; and
 - (ii) the objects of this Act; and
 - (iii) any management plan under Part 5 that relates to the area of waters to which the plan applies; and
 - (b) include the management objectives of the plan; and
 - (c) specify the management tools and other measures to be used to achieve the management objectives; and
 - (d) identify the area of waters to which the plan applies; and
 - (e) identify any fisheries constituted in relation to those waters; and
 - (f) specify the classes of aboriginal traditional fishing activities that are authorised by the plan; and
 - (g) identify, or provide a mechanism for identifying, the classes of persons who are authorised to engage in aboriginal traditional fishing activities under the plan; and
 - (h) provide a method for determining how aboriginal traditional fishing activities may be distinguished from other kinds of fishing activities; and
 - (i) provide for any other matter relating to aboriginal traditional cultural fishing as required by the agreement.
- (3) The Minister must cause notice of an aboriginal traditional fishing management plan made under an indigenous land use agreement to be published in the Gazette fixing the date on which the plan will take effect.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 61

Availability and evidence of aboriginal traditional fishing management plans

- (1) Copies of each aboriginal traditional fishing management plan must be kept available for inspection and purchase by the public during ordinary office hours at a place or places determined by the Minister.
- (2) In legal proceedings, evidence of the contents of an aboriginal traditional fishing management plan may be given by production of a document certified by the Minister as a true copy of the plan.
- (3) An apparently genuine document purporting to be a certificate of the Minister will be accepted as such in the absence of proof to the contrary.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 67

Misuse of authorities

A person must not—

- (a) except as contemplated by this Act or without other reasonable excuse, give any other person the possession or control of an authority that is not in the name of that other person; or
- (b) except as contemplated by this Act or without other reasonable excuse, have in his or her possession or control an authority that is not in his or her name; or
- 10 (c) by words or conduct, falsely represent that he or she is the person named in an authority.

Maximum penalty: \$5 000.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 71

Taking, injuring etc aquatic mammals and protected species prohibited

(1) A person must not—

- (a) take an aquatic mammal or aquatic resource of a protected species; or
- (b) injure, damage or otherwise harm an aquatic mammal or aquatic resource of a protected species.

20 Maximum penalty:

- (a) if the offence involves an aquatic mammal—
 - (i) in the case of a body corporate—\$250 000;
 - (ii) in the case of a natural person—\$100 000 or imprisonment for 2 years;
- (b) in any other case—
 - (i) for a first offence—
 - (A) in the case of a body corporate—\$50 000;
 - (B) in the case of a natural person—\$10 000;
 - (ii) for a second or subsequent offence—
 - (A) in the case of a body corporate—\$100 000;
 - (B) in the case of a natural person—\$20 000.

Expiation fee: In the case of an offence not involving an aquatic mammal—\$500.

30 (2) A person must not—

- (a) interfere with, harass or molest an aquatic mammal or aquatic resource of a protected species; or
- (b) cause or permit interference with, harassment or molestation of, an aquatic mammal or aquatic resource of a protected species.

40 Maximum penalty:

- (a) if the offence involves an aquatic mammal—
- (i) in the case of a body corporate—\$250 000;
 - (ii) in the case of a natural person—\$100 000 or imprisonment for 2 years;
- (b) in any other case—
- (i) for a first offence—
 - (A) in the case of a body corporate—\$50 000;
 - (B) in the case of a natural person—\$10 000;
 - (ii) for a second or subsequent offence—
 - (A) in the case of a body corporate—\$100 000;
 - (B) in the case of a natural person—\$20 000.
- Expiation fee: In the case of an offence not involving an aquatic mammal—\$500.
- 10 (3) In proceedings for an offence against this section, it is a defence if the defendant proves—
- (a) that the alleged offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence; or
 - (b) that the act alleged to constitute the offence was authorised by or under some other Act or law.
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FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 72(2)

- (2) Subject to this section, if a person sells or purchases, or has possession or control of—
- (a) an aquatic resource taken in contravention of this Act or a corresponding law; or
 - (b) an aquatic resource of a protected species; or
 - (c) an aquatic resource of a prescribed class,
- 30 the person is guilty of an offence.
- Maximum penalty:
- (a) in the case of a body corporate—
 - (i) if the offence involves the sale or purchase of fish of a priority species or the possession or control of fish of a priority species for the purposes of sale—\$250 000;
 - (ii) in any other case—\$100 000;
 - (b) in the case of a natural person—
 - (i) if the offence involves the sale or purchase of fish of a priority species or the possession or control of fish of a priority species for the purposes of sale—\$50 000 or imprisonment for 4 years;
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(ii) in any other case—\$20 000.

FISHERIES MANAGEMENT ACT 2007 (SA) – SECTION 115

Exemptions

- (1) Subject to this section, the Minister may, by notice in the Gazette—
 - (a) exempt a person or class of persons, subject to such conditions as the Minister thinks fit and specifies in the notice, from specified provisions of this Act; or
 - (b) vary or revoke an exemption, or a condition of an exemption, under this section or impose a further condition.
- (2) The Minister must, before making an exemption that relates to, or is to apply in respect of, a specially protected area, consult with the relevant Minister.
- (4) The Minister may not exempt a person or class of persons from a provision of a management plan or regulations for a fishery or an aboriginal traditional fishing management plan or regulations relating to aboriginal traditional fishing.
- (5) An exemption under this section operates for a period (not exceeding 12 months) specified in the notice of exemption.
- 20 (6) A person who contravenes a condition of an exemption is guilty of an offence.
Maximum penalty: \$10 000.
Expiation fee: \$500.

REGULATIONS UNDER THE FISHERIES MANAGEMENT ACT 2007 (SA)

Regulation 3(1) *Fisheries Management (General) Regulations 2007 -*

undersize fish means fish that is undersize as determined in accordance with Schedule 2 but does not include—

- 30 (a) scalefish of the family Bothidae or Pleuronectidae taken by an unlicensed person; or
- (b) aquaculture fish taken by the holder of an aquaculture licence from an area in which aquaculture is carried on;

Regulation 4 *Fisheries Management (General) Regulations 2007*

Commercial quantity

For the purposes of the definition of *commercial quantity* in section 3(1) of the Act, a quantity specified in Schedule 3 is declared to be a commercial quantity in relation to the class of aquatic resource specified alongside that quantity.

Regulation 8(1)(a) Fisheries Management (General) Regulations 2007

Sale, purchase or possession of aquatic resources

(1) For the purposes of section 72(2)(c) of the Act, the following classes of aquatic resources are prescribed:

- (a) undersize fish;
- (b) aquatic resources of a class specified in Schedule 3.

(2) For the purposes of section 72(6) of the Act, a quantity specified in Schedule 3 alongside a class of aquatic resources is the prescribed quantity of aquatic resources of that class.

Schedule 2, clauses 5 and 6 Fisheries Management (General) Regulations 2007

5—Abalone taken by licensed person

(1) Abalone of all species (except Blacklip Abalone and Greenlip Abalone) is undersize if—

- (a) it is less than 13 cm in length; or
- (b) the meat, having been removed from the shell, weighs less than 113 gm.

(2) Blacklip Abalone is undersize—

- (a) if taken in the waters of the Southern Zone within Area S—
 - (i) it is less than 11 cm in width; or
 - (ii) the meat, having been removed from the shell, weighs less than 90 gm; or

(b) if taken in the waters of the Southern Zone outside Area S—

- (i) it is less than 12.5 cm in length; or

(ii) the meat, having been removed from the shell, weighs less than 106 gm; or

(c) if taken in the waters of the State outside the Southern Zone—

- (i) it is less than 13 cm in length; or

(ii) the meat, having been removed from the shell, weighs less than 113 gm.

(3) Greenlip Abalone is undersize—

(a) if taken in the waters of the Western Zone—

- (i) it is less than 14.5 cm in length; or

- (ii) the meat, having been removed from the shell, weighs less than 140 gm; or
- (b) if taken in any other waters of the State—
- (i) it is less than 13 cm in length; or
- (ii) the meat, having been removed from the shell, weighs less than 113 gm.

(4) Despite subclauses (1), (2) and (3), abalone of all species is not to be taken to be undersize if the meat when removed is below the minimum weight referred to in those subclauses provided that—

- (a) the abalone is brought ashore and before shucking is delivered to a registered fish processor at premises at which that fish processor is registered to carry on business as a fish processor by virtue of the Act; and
- (b) the length of the abalone is not below that required by this clause.

(5) In this clause—

Area S has the same meaning as in the *Fisheries Management (Abalone Fisheries) Regulations 2006*;

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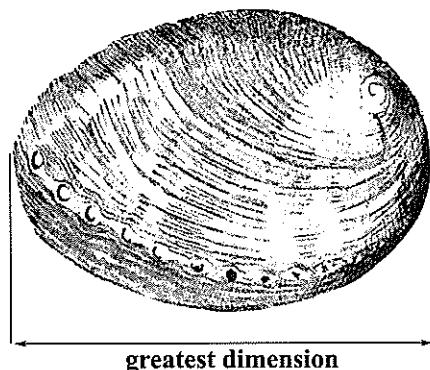
length, of an abalone, means the length of the abalone as measured at its greatest dimension as shown in diagram 5;

Southern Zone has the same meaning as in the *Fisheries Management (Abalone Fisheries) Regulations 2006*;

Western Zone has the same meaning as in the *Fisheries Management (Abalone Fisheries) Regulations 2006*.

(6) This clause applies only in relation to abalone taken by a licensed person.

Diagram 5—Abalone (*Haliotis* spp)



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6—Abalone taken by unlicensed person

(1) Abalone of all species (except Greenlip Abalone) is undersize—

- (a) if it is less than 13 cm in length; or

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(b) if the meat, having been removed from the shell, weighs less than 113 gm.

(2) Greenlip Abalone is undersize—

(a) if taken in the waters of the Western Zone—

(i) it is less than 14.5 cm in length; or

(ii) the meat, having been removed from the shell, weighs less than 140 gm; or

(b) if taken in any other waters of the State—

(i) it is less than 13 cm in length; or

(ii) the meat, having been removed from the shell, weighs less than 113 gm.

(3) In this clause—

length, of an abalone, means the length of the abalone as measured at its greatest dimension as shown in diagram 5 of clause 5;

Southern Zone means all coastal waters east of the meridian of longitude 139° East such waters not including the waters of the Coorong or any other waters above the Murray Mouth;

Western Zone means all coastal waters west of the meridian of longitude 136°30'00" East.

(4) This clause applies only in relation to abalone taken by an unlicensed person.

Schedule 3—Commercial quantities

(Regulation 4)

<u>Column 1</u> <u>Class of fish</u>	<u>Column 2</u> <u>Quantity</u>
...	
Molluscs	
Abalone (<i>Haliotis</i> spp.)	more than 25

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