

TASMANIA

**LIVING MARINE RESOURCES MANAGEMENT
AMENDMENT BILL 2005**

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**LIVING MARINE RESOURCES MANAGEMENT
AMENDMENT BILL 2005**

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

P. R. ALCOCK, *Clerk of the House*
12 April 2005

*(Brought in by the Minister for Primary Industries and Water,
the Honourable Steven Kons)*

A BILL FOR

An Act to amend the *Living Marine Resources Management Act 1995*

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

1. Short title

This Act may be cited as the *Living Marine Resources Management Amendment Act 2005*.

2. Commencement

This Act commences on the day on which this Act receives the Royal Assent.

3. Principal Act

In this Act, the *Living Marine Resources Management Act 1995** is referred to as the Principal Act.

4. Section 78 amended (Grant of licence)

Section 78 of the Principal Act is amended by inserting after subsection (2) the following subsection:

- (2A) The Minister must not grant a licence under this section if the application is for a licence to replace a licence that has been surrendered or cancelled or has ceased to be in force under section 247.

5. Sections 99A and 99B inserted

After section 99 of the Principal Act, the following sections are inserted in Division 7:

99A. Exclusion of rule against perpetuities

The rule of law commonly known as the rule against perpetuities does not apply, and is taken to have never applied, to an interest created by a deed of agreement.

99B. Right of certain persons holding abalone quotas to transfer to new deed of agreement

- (1) A person who is entitled to an abalone quota unit, under an abalone deed of

*No. 25 of 1995

agreement in force immediately before the commencement of the *Living Marine Resources Management Amendment Act 2005*, may, by notice in writing given to the Secretary on or before 1 November 2005, elect that the deed of agreement set out in Schedule 3 is to apply to him or her in respect of that abalone quota unit.

- (2) On an election under this section, the following provisions apply in respect of the relevant abalone quota unit:
 - (a) the person making the election is taken for all legal purposes to have entered into the deed of agreement set out in Schedule 3 and to have been granted a licence under this Act to take abalone in accordance with the provisions of the deed;
 - (b) the licensee has all the rights and obligations arising from that deed of agreement;
 - (c) those rights and obligations continue with modifications the rights and obligations that the licensee had under any previous deed of agreement and the latter rights and obligations cease to have effect.
- (3) Nothing in this section affects –
 - (a) any civil liability of a licensee that was not discharged before

the election under subsection (1);
or

- (b) any criminal liability of a licensee arising from any failure to comply with any previous deed of agreement or any requirement of this Act.

- (4) On an election under subsection (1), the licensee is liable with effect from 1 January 2005 to pay –

- (a) the access charge provided by clause 5.1 of the deed of agreement set out in Schedule 3; and
- (b) any fees payable under clause 5.2 of that deed.

6. Schedule 3 inserted

After Schedule 2 to the Principal Act, the following Schedule is inserted:

SCHEDULE 3 – ABALONE DEED OF AGREEMENT

Section 99B(1) and (4)

**PURSUANT TO SECTION 99 OF THE *LIVING
MARINE RESOURCES MANAGEMENT ACT 1995*
IN RELATION TO A RIGHT TO TAKE ABALONE IN
STATE WATERS****THIS DEED OF AGREEMENT** made this _____ day of _____
200**BETWEEN** Kim Ronald Evans being and as the Secretary of the
Department of Primary Industries, Water and Environment (“the Secretary”)**AND****OF** _____ (“the Licensee”)**RECITALS**

- A. The *Living Marine Resources Management Act 1995* (“the Act”) provides that the Minister for Primary Industries, Water and Environment may enter into a deed of agreement for the right to take and acquire commercially protected fish in State waters.
- B. The Act and Regulations made under it abrogate the common law right to take and acquire Abalone for commercial purposes in State Fishing Waters.
- C. The Licensee is the holder of a Licence and authority under a Deed of Agreement dated _____ (“the Deed of Agreement”) which licenses him to enter and take abalone in State waters to the extent of the number of abalone quota units specified in that Licence.
- D. The Minister for Primary Industries, Water and Environment has pursuant to section 20 of the Act delegated to the Secretary the power to enter into this Deed of Agreement (“this Deed”).
- E. This Deed continues and renews the rights and obligations conferred by the Deed of Agreement as if the Deed of Agreement for which it is substituted were limited to taking and acquiring abalone under one abalone quota unit but subject always to the terms and conditions of this Deed.

- F. The Secretary enters into this Deed to allow the Licensee to take and acquire abalone in State waters in accordance with the terms and conditions contained in this Deed.

WHEREBY IT IS AGREED as follows:

1. INTERPRETATION

In this Deed unless the contrary intention appears:

- 1.1 a reference to this Deed is a reference to this agreement as varied from time to time or any renewal of it;
- 1.2 a reference to the Act is a reference to the *Living Marine Resources Management Act 1995* and to any other Act for the time being regulating living marine resources in State waters;
- 1.3 a reference to the Regulations is a reference to the *Fisheries (General and Fees) Regulations 1996* or to any other regulations or rules for the time being regulating living marine resources in State waters;
- 1.4 words bear the same meaning as in the Act and the Regulations;
- 1.5 the masculine gender shall include each other gender;
- 1.6 the singular shall include the plural;
- 1.7 “abalone” means fish of the genus *Haliotis*;
- 1.8 “abalone industry” means any person or group who satisfies the Secretary that it represents more than 50% of persons holding Licences to take and acquire abalone in State waters;
- 1.9 “Department” means the Department for the time being responsible for the administration of living marine resources legislation in Tasmania;
- 1.10 “fee” is the fee referred to in clause 5.2;

- 1.11 “Licence” means and refers to all and any of the rights, benefits and entitlements conferred by the Secretary upon the Licensee by this Deed to take and acquire abalone in State waters;
- 1.12 “Licensee” includes the personal representatives, successors and assigns of the Licensee;
- 1.13 “registered interest” means an interest recorded on the Register established in accordance with the provisions of the *Fishing (Licence Ownership and Interest) Registration) Act 2001*;
- 1.14 “Secretary” means the Secretary of the Department.

2. THE LICENCE

- 2.1 Subject to the provisions of this Deed the Secretary hereby confers upon the Licensee a Licence and full authority to enter State waters and to take and acquire therein one abalone quota unit per annum, such abalone being of a size not less than that specified in the Regulations.
- 2.2 The Secretary acknowledges that any decision made to alter the total allowable catch of abalone will take account of the best biological advice available from the Department on the conservation of abalone in State waters (with the intent that the maximum sustainable yield of the resource will be realised within these conservation restraints) and that a reasonable level of consultation with the abalone industry will occur prior to making that decision.
- 2.3 The right to physically take abalone is exercisable only by the holder of a fishing licence (abalone dive) and therefore for the purposes of this Deed any abalone taken by any such licence holder under the quota unit the subject of the Licence are taken and acquired on behalf of the Licensee.
- 2.4 The Licence is property which amongst other things the Licensee may with the prior written approval of the Secretary (which shall not be unreasonably withheld) assign in whole provided always that a person having a legal interest in the Licence may assign that interest, subject to the provisions of this clause, to the extent that the assignment does not cause the Licence to be split and does not create any right or authority in

the assignee to take or acquire abalone otherwise than under this Deed and further provided that in the case of any assignment the Secretary is first satisfied that any assignee is a fit and proper person to be a licensee and, if the assignment is made to a company, that the officers of it are fit and proper to be responsible for the management of it as a licensee and further provided that the Secretary will not be obliged to consent to an assignment of a Licence where the Licensee is at the time of the proposed assignment in default of a payment hereby required to be made to the Secretary.

- 2.5 The Licence may devolve to another person upon the death of the Licensee or may be sold by a person having a registered interest in the Licence or otherwise entitled to sell property of the Licensee subject always to the right of the Secretary not to give effect to a transfer under this clause to any person whom the Secretary is satisfied is not a fit and proper person to be a Licensee.
- 2.6 This Deed continues and renews the rights and obligations conferred by the Deed of Agreement as if the Deed of Agreement for which it is substituted were limited to taking and acquiring abalone under abalone quota unit No. only, but subject always to the terms and conditions of this Deed.
- 2.7 The Secretary covenants with the Licensee that during the term of this Deed and any subsequent terms the abalone quota unit shall remain 1/3500th of the total allowable catch of abalone in any year.
- 2.8 The Licensee acknowledges that the weight comprised in the quota unit may not remain constant throughout the term of this Deed.

3. TERM OF THE DEED

- 3.1 This Deed will be deemed to have commenced on 1 January 2005 and will expire on 31 December 2033 unless sooner terminated.
- 3.2 If this Deed is renewed as provided in clause 4, each term of this Deed as so renewed will be for a period of twenty (20) years.

4. OPTION TO RENEW

- 4.1 The Licensee will have a continuing option exercisable in writing not more than nine (9) months nor less than three (3) months prior to the expiration of this Deed to renew this Deed for a further term on the same terms and conditions other than the fee when the fee is due for revision under clause 4.4.
- 4.2 The Secretary agrees, on his own behalf and on behalf of the Crown in right of the State of Tasmania, that neither he nor the Crown will challenge the validity of this option on the basis that it does not fix with sufficient certainty the fee for further terms of this Deed.
- 4.3 The option conferred by clause 4.1 may not be exercised if this Deed has been lawfully terminated by the Secretary or if the Licensee is in default of a payment hereby required to be made to the Secretary.
- 4.4 The Secretary will undertake a reasonable level of consultation with the abalone industry during the first six (6) months of the 27th year of the first term of this Deed and thereafter during the first six months of the 18th year of each further term of this Deed for the purposes of reaching agreement in that year on the fee to be paid by the Licensee during the next term of this Deed. Upon agreement being reached between the Secretary and the abalone industry the Secretary shall announce the fee within twenty one (21) days of such agreement and, if the Licensee renews this Deed, the Licensee will pay to the Secretary that fee during the next term.
- 4.5 If the Secretary and the abalone industry are unable to agree during the period stipulated in clause 4.4 upon the fee to be paid during the next term of this Deed, the fee will be the fee fixed by or determined in accordance with the Regulations in the second half of the 27th year of the first term of this Deed and thereafter during the second half of the 18th year of each further term of this Deed.

5. PAYMENT OF CHARGE AND FEE

- 5.1 The Licensee will pay to the Secretary in the first month of each calendar year of the operation of this Deed, an annual access charge which is subject to the provisions of the *Fee Units Act*

and calculated as if it were in the year 2004 a fee set by an enactment and expressed as 45 fee units.

5.2 The Licensee will also pay to the Secretary a fee to take and acquire abalone under the Licence during a billing period.

5.3 The fee will be payable in respect of the following billing periods:

- 1 January - 31 March - (Billing period 1)
- 1 April - 30 June - (Billing period 2)
- 1 July - 30 September - (Billing period 3)
- 1 October - 31 December - (Billing period 4)

5.4 The fee payable in respect of each billing period will be due and payable as follows:

Billing period 1	30 April
Billing period 2	31 July
Billing period 3	31 October
Billing period 4	31 January

5.5 The fee payable in respect of billing periods 1, 2 and 3 respectively is the product of the number of kilograms of abalone taken and acquired by the Licensee under this Deed in that billing period and 8.125% of the beach price.

5.6 The fee payable in respect of billing period 4 is the product of the number of kilograms of the abalone quota unit for which no fee has been paid for the relevant calendar year and 8.125% of the beach price.

5.7 The definition of "beach price" contained in the Regulations will not be changed without a reasonable level of prior consultation with the abalone industry in relation to the proposed change and then only in the event that the Secretary has reasonable grounds for believing that the price as defined does not reflect the true return to licensees, who may include the Licensee from the disposal of abalone. In the event that the Secretary proposes to change the beach price he will first publish in writing the reasons for his belief that the existing beach price does not reflect the true return to licensees and the reasons for determining the new beach price.

6. TERMINATION

- 6.1 This Deed may be terminated or suspended by the Secretary for any one or more of the following acts, matters or things:
- (a) non-payment of any part of the access charge when specified in clause 5.1 or fee by the date specified in clause 5.4;
 - (b) an accumulation by the Licensee of fines and special penalties totalling more than two hundred (200) penalty units in any consecutive period of three years or more than three convictions in a like period for offences arising under the Act or Regulations arising out of separate incidents involving the taking, possession, processing or offering for sale of abalone or the management, administration or operation of the quota system administered by the Department where by reason of the conduct constituting such offences the Licensee has in the opinion of the Secretary (which shall not be unreasonably held) shown himself not to be a fit and proper person to hold the Licence.
 - (c) the Licensee has entered into a contract or arrangement in breach of the covenant in clause 15.
- 6.2
- (a) Before terminating or suspending this Deed in reliance upon the ground specified in clause 6.1(a), the Secretary will send a notice of demand to the Licensee for payment of the access charge or fee (as the case may be). If payment is not made within fourteen (14) days of delivery of the notice of demand the Secretary may exercise the power to terminate or suspend providing that he has first served upon the Licensee a further notice in which he furnishes particulars of the unpaid amount and affords to the Licensee an opportunity to pay such amount within twenty one (21) days of the service of such notice.
 - (b) Before terminating or suspending this Deed in reliance upon a ground specified in clause 6.1(b) or 6.1(c), the Secretary will serve upon the Licensee notice in which he furnishes particulars of the matters upon which he relies upon as constituting that ground and will afford

- the Licensee a period of 21 days from the date of service within which to provide the Secretary with written submissions. Upon receiving the written submissions, the Secretary will consider them and, after doing so may resolve to either terminate or suspend this Deed or withdraw the notice and shall so advise the Licensee in writing. If the Licensee does not make any written submissions, the Secretary may proceed to terminate or suspend this Deed if he so wishes.
- 6.3 Notwithstanding that the Secretary has served a notice under clause 6.2 the Secretary will not terminate or suspend the Licence if the Licensee can and does remedy the situation which constitutes his misconduct or makes reparation prior to the Secretary serving notice to terminate or suspend as provided in clause 6.4.
- 6.4 If the Secretary resolves to terminate this Deed he will serve upon the Licensee and any person having a registered interest notice of termination and if he resolves to suspend this Deed, he will serve upon the Licensee notice of suspension.
- 6.5 Upon termination or suspension of this Deed by the Secretary, neither party will have any claim against the other except in respect of any rights or liabilities which accrued to either of them prior to the termination or suspension and in the case of termination the Secretary may proceed to dispose of the Licence by selling it.
- 6.6 Notwithstanding service upon the Licensee as hereinbefore provided of notice of termination of this Deed, a person holding a registered interest ("the holder") may within fourteen (14) days of service upon him of notice of termination pursuant to clause 6.4 elect by written notice to the Secretary to exercise any power of sale conferred upon the holder by the instrument which gives rise to the registered interest. For three (3) months after service of the last-mentioned notice the right of the Secretary to sell the Licence shall be postponed in favour of the exercise by the holder of his power of sale, during which time the holder will be at liberty to exercise the powers conferred by the Licence and will be subject to it as if the holder were the Licensee. From the proceeds of any sale of the Licence by the holder the holder will immediately discharge in order of their priority all debts of the Licensee which are the subject of a registered interest and

the reasonable costs incurred by him in effecting the sale, and shall forthwith thereafter pay the balance of the proceeds to the Secretary. In the event that the balance exceeds 20% of the total sale price, the Secretary will pay the amount by which the balance exceeds 20% of that paid to the Licensee.

- 6.7 This Deed may be terminated by the Licensee on one (1) month's notice to the Secretary in writing.
- 6.8 Notwithstanding clause 6.7 this Deed may be terminated by the Licensee on ten (10) days notice to the Secretary in writing if the weight of abalone the Licensee may take under the quota unit has been reduced to an amount which is unacceptable to him.
- 6.9 In the event of the Licensee terminating this Deed under clause 6.8, the Secretary will not offer the Licence to another person on terms and conditions more favourable than those in this Deed without first offering the Licence to the Licensee on those terms and conditions.
- 6.10 Subject to clause 6.9 upon termination of this Deed by the Licensee neither party will have any claim against the other except in respect of any rights or liabilities which accrued to either of them prior to the date of termination.
- 6.11 Notwithstanding clause 6.5 and subject to clause 6.6, following a lawful termination of this Deed the Secretary will pay no less than 80% of the proceeds of sale of the Licence to the Licensee and the remainder (if any) into the Consolidated Fund.

7. NOTICES

- 7.1 Any notice to be given under this Deed shall be in writing and shall be duly given when hand delivered or sent by prepaid post or by facsimile transmission to the party to which such a notice is to be given under this Deed at the last address of that party known to the other party.
- 7.2 Any notice shall have been received:
- (a) in the case of hand delivery when delivered;

- (b) if sent by prepaid post on the third day after the date of posting;
- (c) if sent by facsimile transmission (provided that the sending facsimile machine produces a print out of the time, date and uninterrupted transmission record of the sending of the notice) at 9.00 am on the next following ordinary business day in such place.

7.3 Notwithstanding the provisions of clause 8.1 any notice under clauses 6.2 and 6.4 must be personally served on the Licensee or upon any person notified by the Licensee in writing to the Secretary as his agent for the purpose of receiving notices or if that is not reasonably practicable be served by substituted service by delivering it to the Licensee's last known address and by advertising it in a newspaper circulating generally in Tasmania.

8. FORCE MAJEURE

If by reason of any fact, circumstances, matter of thing beyond the reasonable control of the Secretary or the Licensee either party is unable to perform in whole or in part any obligation under this Deed such party shall be relieved of that obligation to the extent and for the period that he is so unable to perform it and shall not be liable to the other party in respect of such liability provided that the party asserting the existence of a force majeure:

- (a) gives the other party prompt notice of that force majeure with reasonably full particulars thereof and, insofar as is known, the probable extent to which he will be unable to perform or be delayed in performing that obligation; and
- (b) uses reasonable diligence to remove the force majeure as quickly as practicable.

9. VARIATION OF THIS DEED

The parties may vary this Deed provided such variation does not conflict with or breach any provisions of the Act or Regulations and that such variation is in writing signed by each of them.

10. OBLIGATIONS JOINT AND SEVERAL

If there is more than one Licensee, the covenants and agreements of the Licensee under this Deed shall bind them jointly and each of them severally.

11. ASSURANCES

The parties shall execute and deliver all such documents, instruments and writings and shall do and procure to be done all such acts and things as are necessary or desirable to give effect to the Deed.

12. SEVERABILITY

In the event of any part of the Deed other than a part relating to the payment of the fee being or becoming void or unenforceable or being illegal then that part shall be severed from the Deed to the intent and so as to leave intact all parts that shall not be or become void or unenforceable or illegal and those parts shall remain in full force and effect and be unaffected by such severance.

13. APPLICABLE LAW

The Deed shall be governed by the law for the time being in force in the State of Tasmania and the parties submit to the jurisdiction of the Courts of the State of Tasmania.

14. TRANSITIONAL PROVISIONS

The Licensee agrees and covenants that all fees payable for abalone taken by the Licensee under the Deed of Agreement will be paid as if the Deed of Agreement were still in force.

15. DIVERS NOT TO PAY ACCESS CHARGE OR FEE

The Licensee agrees and undertakes not to enter into any contract or arrangements with the holder of a fishing licence (abalone dive) whereby the holder of the fishing licence (abalone dive) is required directly or indirectly to pay all or any part of the access charge or fee as

provided in clause 5. This clause does not apply to contracts or arrangements entered into prior to the Deed.

EXECUTED as a Deed.

By Kim Ronald Evans being and as the
Secretary of the Department of Primary
Industries, Water and Environment in the
presence of:

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Signature of witness:
Occupation:
Address:

By
in the presence of:

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Signature of witness:
Occupation:
Address: