

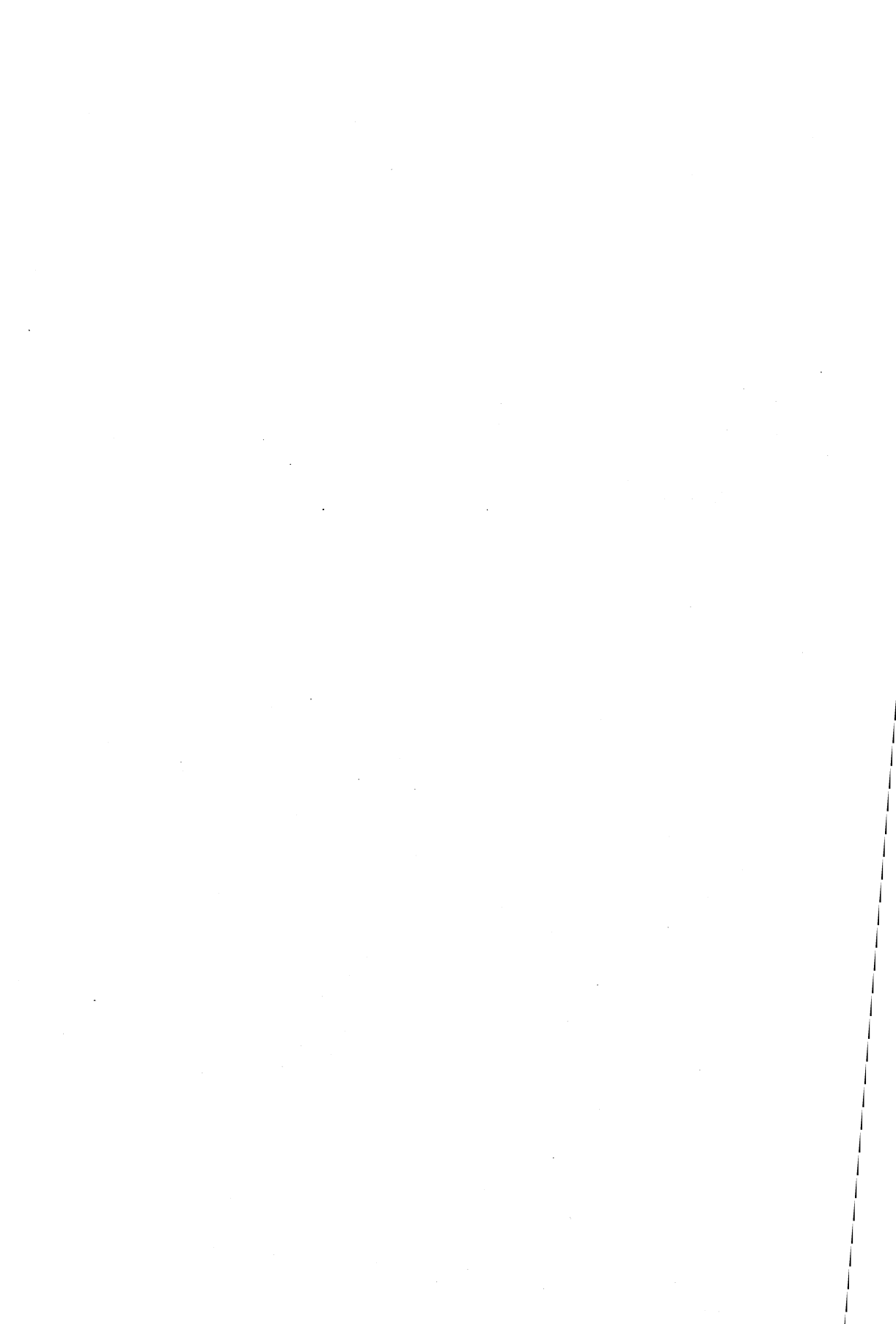


FISHERIES AMENDMENT (CONTRACTS) ACT 1994

No. 33 of 1994

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**FISHERIES AMENDMENT (CONTRACTS) ACT 1994**

No. 33 of 1994

AN ACT to amend the *Fisheries Act 1959***[Royal Assent 26 May 1994]**

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:—

Short title

1—This Act may be cited as the *Fisheries Amendment (Contracts) Act 1994*.

Commencement

2—This Act commences on the day on which it receives the Royal Assent.

Principal Act

3—In this Act, the *Fisheries Act 1959** is referred to as the Principal Act.

Part II, Division 1 substituted

4—Division 1 of Part II of the Principal Act is repealed and the following Division is substituted:—

Division 1—Abalone agreements**Interpretation of Division 1**

6—In this Division—

“**abalone quota unit**” means an abalone quota unit as defined in regulation 2 (1) of the *Sea Fisheries Regulations 1962*;

“**adjustment abalone quota unit**” means an adjustment abalone quota unit as defined in regulation 2 (1) of the *Sea Fisheries Regulations 1962*;

“**Commissioner**” means the Commissioner for Corporate Affairs;

“**Court**” means the Supreme Court;

“**deed of agreement**” means a deed of agreement referred to in section 7 (1);

“**interested person**” means a person with a registered interest in a deed of agreement;

“**licensee**” means the person who entered into a deed of agreement.

* No. 16 of 1959. For this Act, as amended to 1 February 1987, see the continuing Reprint of Statutes. Subsequently amended by Nos. 10, 19 and 58 of 1988, Nos. 38 and 52 of 1989, No. 5 of 1990, Nos. 7 and 46 of 1991, No. 34 of 1992, Nos. 12, 24 and 62 of 1993 and No. 12 of 1994.

Deed of agreement

7—(1) The Minister or Director may enter into a deed of agreement in respect of the right to take and acquire abalone for commercial purposes in State fishing waters during a period specified in the deed.

(2) A deed of agreement is to include the provisions agreed by the Director and the abalone industry as defined in the deed, a copy of which initial provisions is set out in Schedule 3.

(3) A deed of agreement is not unenforceable only because it does not fix with sufficient certainty the fee payable for future terms of the deed or in the circumstances provided for in Clause 5.6.3 of the deed.

(4) The common law rule against perpetuities and the *Perpetuities and Accumulations Act 1992* do not apply to a deed of agreement.

Registration of interest

7A—(1) A person may apply for registration of an interest in or over a deed of agreement by lodging—

- (a) the original, or true copy as certified by a statutory declaration, of a deed of agreement; and
- (b) a statutory declaration stating—
 - (i) the date on which and time at which the deed was executed; and
 - (ii) the place of business or residence of the parties and the attesting witnesses; and
 - (iii) details of any interest that person has in or over that deed.

(2) On receipt of the documents referred to in subsection (1), the Commissioner is to—

- (a) register the interest of a person in or over a deed of agreement in the register of interests kept under section 7C; and
- (b) give notice in writing to the licensee of—
 - (i) the registration; and
 - (ii) the right of the licensee to object to the registration under section 7B.

- (3) A registration of an interest is provisional—
- (a) if an objection is not made under section 7B for a period of 15 days after the date on which a notice under section 7A is given, after which it becomes absolute; or
 - (b) if an objection is made under that section until—
 - (i) the objection is heard and determined; or
 - (ii) the objection is withdrawn.

Objections to registrations

7B—(1) A licensee may object to the registration of an interest under section 7A.

- (2) An objection is to be—
- (a) made within 15 days after the date on which a notice under section 7A is given; and
 - (b) lodged with the Commissioner.
- (3) On receipt of an objection, the Commissioner is to send a copy of the objection to any interested person.
- (4) An interested person may summon the licensee before the Court to show cause why the objection should not be removed.
- (5) A licensee may summon an interested person before the Court to show cause why the provisional registration of that person should not be cancelled.
- (6) Upon the return of a summons under this section, the Court may order—
- (a) that the objection be removed; or
 - (b) that the provisional registration be cancelled.
- (7) The Court may make any order it considers appropriate—
- (a) as to costs; and

- (b) in respect of compensation payable to an interested person by a licensee who—
 - (i) lodges an objection without reasonable cause; or
 - (ii) unreasonably refuses to withdraw the objection.

(8) A licensee who has lodged an objection may withdraw an objection at any time.

Register of interests

7C—(1) The Commissioner is to establish and maintain a register of interests containing—

- (a) the names and addresses of persons who have an interest registered under this Division; and
- (b) the details of any such interest.

(2) The Commissioner is to—

- (a) number every entry in the register consecutively according to the date and time of lodging; and
- (b) mark the original or copy of the deed of agreement with the corresponding number.

(3) A person, on payment of any prescribed fees, may—

- (a) inspect the register; and
- (b) request and be given a copy of an extract from an entry in the register.

(4) An entry in the register of interests stating that a specified person has a specified interest in or over a deed of agreement is conclusive evidence that that person has that interest.

(5) The Commissioner may amend an entry in the register of interests if satisfied that the entry was incorrect due to any accidental or inadvertent error, omission or misstatement.

(6) The Commissioner is to remove an entry in the register of interests—

- (a) on the lodgement of a certificate of satisfaction; or
- (b) by order of a court of competent jurisdiction.

Fees and charges recoverable

7D—Any fees, charges or other money payable under this Division or under regulations made in respect of this Division is a debt due to the Crown and may be recovered in a court of competent jurisdiction.

Waiver of certain payments and fees

7E—(1) The Director may waive the requirement for a person to pay the second payment for any adjustment abalone quota unit under the regulations if—

- (a) no fish have been taken or acquired under that unit before 1 July 1994; and
- (b) the person enters into a deed of agreement before 30 July 1994 under which the person agrees to pay the fee for that unit.

(2) The Director may waive the requirement for a person to pay a part of a fee for an abalone quota unit or an adjustment abalone quota unit under a deed of agreement if that person has paid the fee prescribed for that part of that unit before 1 July 1994.

Section 9 amended (Regulations)

5—Section 9 (1) of the Principal Act is amended as follows:—

- (a) by inserting the following paragraphs after paragraph (nf):—
 - (ng) providing for the Director, in accordance with the provisions of deeds of agreements, to determine and publish fees payable;
 - (nh) providing for the Director to define, determine and publish the beach price of abalone;
- (b) by inserting in paragraph (pa) “or total weight” after “number”.

Schedule 3 inserted

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

SCHEDULE 3

Section 7 (2)

PROVISIONS OF DEED OF AGREEMENT

WHEREBY IT IS AGREED as follows:

1. INTERPRETATION

In the Deed unless the contrary intention appears:

- (a) a reference to the Deed is a reference to this agreement as amended from time to time or any renewal of it;
- (b) a reference to the Act is a reference to the *Fisheries Act 1959* and to any other Act for the time being regulating sea fisheries in State fishing waters;
- (c) a reference to the Regulations is a reference to the *Sea Fisheries Regulations 1962* or to any other regulations for the time being regulating sea fisheries in State fishing waters;
- (d) words bear the same meaning as in the Act and the Regulations;
- (e) the masculine gender shall include each other gender;
- (f) the singular shall include the plural;
- (g) “the abalone industry” means any person or group who satisfies the Director that it represents more than 50% of persons holding licences to take and acquire abalone from State fishing waters;
- (h) “the Director” includes his successors in office;
- (i) “fee” is the fee referred to in Clause 5.2;

- (j) “the Licence” means and refers to all and any of the rights, benefits and entitlements conferred by the Director upon the Licensee by the Deed to take and acquire abalone in State fishing waters;
- (k) “the Licensee” includes the personal representatives, successors and assigns of the Licensee;
- (l) “the Minister” means the Minister for the time being administering the Act;
- (m) “registered interest” means an interest recorded on the Register established in accordance with the provisions of Section 7C of the Act.

2. THE LICENCE

- 2.1 Subject to the provisions of the Deed the Director hereby confers upon the Licensee full licence and authority to enter State fishing waters and to take and acquire there from abalone quota units per annum for commercial purposes such abalone being of a size not less than that specified in the Regulations.
- 2.2 The Licensee acknowledges that the Director does not guarantee that, other than in 1994, an abalone quota unit will comprise 600 kilograms.
- 2.3 The Director acknowledges that any decision made to alter the total allowable catch of abalone will take account of the best biological advice available from the Tasmanian Department of Primary Industry and Fisheries (or its successor) on the conservation of abalone in State fishing 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.
- 2.4 The Director covenants with the Licensee that during the term of the Deed and any subsequent term an abalone quota unit shall remain 1/3500th of the total allowable catch of abalone in any year.

- 2.5 The right to physically take abalone is exercisable only by the holder of a commercial abalone diver's licence. For the purposes of the Deed any abalone taken by a commercial abalone diver in respect of an abalone quota unit the subject of the Licence are taken and acquired on behalf of the Licensee.
- 2.6 The Licence is property which amongst other things the Licensee may with the prior written approval of the Director (which shall not be unreasonably withheld) assign in whole or in part provided always that the Director 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 Director 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 Director.
- 2.7 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 the property of the Licensee subject always to the right of the Director not to give effect to a transfer under this clause to any person whom the Director is satisfied is not a fit and proper person to be a Licensee.
- 2.8 The Deed continues, renews and revises the rights and obligations conferred by the abalone quota licence referred to in Recital D.

3. TERM OF THE DEED

- 3.1 The Deed will commence on 1 July 1994 and will expire on 31 December 2003 unless sooner terminated.
- 3.2 If the Deed is renewed as provided in Clause 4, each term of the Deed as so renewed will be for a period of 10 years.

4. OPTION TO RENEW

- 4.1 The Licensee will have a continuing option exercisable in writing not more than 9 months nor less than 3 months prior to the expiration of the Deed to renew the 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 This option will not be invalid by reason only that it does not fix with sufficient certainty the fee for further terms of the Deed or in the circumstances provided for in Clause 5.6.3.
- 4.3 The option conferred by Clause 4.1 may not be exercised if the Deed has been lawfully terminated by the Director or if the Licensee is in default of a payment hereby required to be made to the Director.
- 4.4 The Director will undertake a reasonable level of consultation with the abalone industry during the first six months of the eighth year of each alternate term of the Deed for the purposes of reaching agreement in that year on the fee to be paid by the Licensee during the next two terms of the Deed. Upon agreement being reached between the Director and the abalone industry the Director shall announce the fee within 21 days of such agreement and, if the Licensee renews the Deed, the Licensee will pay to the Director that fee during the next two terms.
- 4.5 If the Director 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 two terms of the Deed, the fee will be the fee fixed by or determined in accordance with the Regulations in the second half of the eighth year of each alternate term of the Deed.

5. PAYMENT OF CHARGE AND FEE

- 5.1 The Licensee will pay to the Director for the Licence, upon the execution of the Deed and thereafter in the first month of each calendar year of the operation of the Deed, an annual access charge of \$100.

- 5.2 The Licensee will also pay to the Director 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 For the purpose of this Clause abalone will be deemed to have been taken and acquired under one abalone quota unit at a time until it is all used up.
- 5.6.1 The fee payable in respect of billing periods 1, 2 and 3 respectively is the product of the kilogram value of the number of abalone quota units taken and acquired by the Licensee in that billing period and the fee per kilogram for that billing period.
- 5.6.2 The fee payable in respect of billing period 4 is the product of the kilogram value of the number of units conferred by Clause 2.1 on the Licensee and for which no fee has been paid in that calendar year and the fee per kilogram for that billing period.
- “kilogram value” means the number of kilograms of abalone that comprise an abalone quota unit as specified in the Regulations.
- “fee per kilogram for that billing period” is the fee in the Schedule to the Deed which corresponds to the beach price, for that billing period.
- 5.6.3 In the event that the beach price at any time exceeds the maximum figure in the Schedule hereto:—
- (a) The fee per kilogram will be calculated at the percentage applicable to that maximum figure until the Schedule is extended as hereinafter provided;

- (b) The Director will forthwith undertake a reasonable level of consultation with the abalone industry for the purpose of reaching agreement within 28 days of the commencement of consultation upon the fee per kilogram to be applicable to beach price in excess of the maximum figure hereinbefore referred to;
- (c) Upon agreement being reached in accordance with Clause 5.6.3 (b), the Director shall forthwith announce the fee which shall thereupon become part of the Schedule;
- (d) If agreement is not reached in accordance with Clause 5.6.3 (b), the fee applicable to beach price in excess of the maximum figure hereinbefore referred to will be the fee fixed by or determined in accordance with the Regulations.

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 Director 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 Director proposes to change the beach price he will first publish in writing the basis for his belief that the existing beach price does not reflect the true return to licensees and the basis for determining the new beach price.

6. TERMINATION

6.1 The Deed may be terminated or suspended by the Director 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 100 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 the operation of the abalone quota system administered by the Department of Primary Industry and Fisheries (or the successor) where by reason of the conduct constituting such offences the Licensee has in the opinion of the Director (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 14.

6.2 Before terminating or suspending the Deed in reliance upon the ground specified in paragraph 1 (a) of this clause, the Director 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 paid within 14 days of delivery of the notice of demand the Director 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 21 days of the service of such notice.

6.3 Before terminating or suspending the Deed in reliance upon the ground specified in paragraph 1 (b) of this clause, the Director will serve upon the Licensee 21 days' notice in writing of his intention to do so.

- 6.4 Before terminating or suspending the Deed in reliance upon the ground specified in paragraph 1 (c) of this clause, the Director will serve upon the Licensee notice in which he furnishes particulars of the matters which the Director relies upon as constituting that ground and will afford to the Licensee a period of 21 days from the date of service within which to provide to the Director written submissions. Upon receiving the written submissions, the Director will consider them and, after doing so, may resolve to either terminate or suspend the Deed or withdraw the notice and shall so advise the Licensee in writing. If the Licensee does not make any written submissions the Director may proceed to terminate or suspend the Deed if he so wishes.
- 6.5 Notwithstanding that the Director has served a notice under Clause 6.2, 6.3 or 6.4 the Director 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 Director serving notice to terminate or suspend as provided in Clause 6.6.
- 6.6 If the Director resolves to terminate the Deed he will serve upon the Licensee and any person having a registered interest notice of termination and if he resolves to suspend the Deed, he will serve upon the Licensee notice of suspension.
- 6.7 Upon termination or suspension of the Deed by the Director, 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 Director may proceed to dispose of the Licence by selling it.

- 6.8 Notwithstanding service upon the Licensee as hereinbefore provided of notice of termination of the Deed, a person holding a registered interest ("the holder") may within 14 days of service upon him of notice of termination pursuant to Clause 6.6 elect by written notice to the Director to exercise any power of sale conferred upon the holder by the instrument which gives rise to the registered interest. For 3 months after service of the last-mentioned notice the right of the Director 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 Director. In the event that the balance exceeds 20% of the total sale price, the Director will pay the amount by which the balance exceeds 20% of that paid to the Licensee.
- 6.9 The Deed may be terminated by the Licensee on one month's notice to the Director in writing.
- 6.10 Notwithstanding Clause 6.9 the Deed may be terminated by the Licensee on 10 day's notice to the Director in writing if the weight of abalone the Licensee may take under an abalone quota unit has been reduced to a number which is unacceptable to him.
- 6.11 In the event of the Licensee terminating the Deed under Clause 6.10, the Director will not offer the Licence to another person on terms and conditions more favourable than those in the Deed without first offering the Licence to the Licensee on those terms and conditions.

- 6.12 Subject to Clause 6.11 upon termination of the 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.
- 6.13 Notwithstanding Clause 6.7 and subject to Clause 6.8, following a lawful termination of the Deed the Director will pay no less than 80% the proceeds of sale of the Licence to the Licensee and the remainder (if any) into the Consolidated Fund.

7. COMPLIANCE WITH THE ACT AND REGULATIONS

The Director and the Licensee will comply with the provisions of the Act and the Regulations.

8. NOTICES

- 8.1 Any notice to be given under the 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 the Deed at the last address of that party known to the other party.
- 8.2 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.

8.3 Notwithstanding the provisions of Clause 8.1 any notice under Clause 6.2, 6.3, 6.4 and 6.6 must be personally served on the Licensee or upon any person notified by the Licensee in writing to the Director 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.

9. FORCE MAJEURE

If by reason of any fact, circumstance, matter or thing beyond the reasonable control of the Director 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.

10. POWERS OF MINISTER

The Minister may exercise any power of the Director specified in the Deed.

11. VARIATION OF THE DEED

The parties may vary the 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.

12. OBLIGATIONS JOINT AND SEVERAL

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

13. 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.

14. DIVERS NOT TO PAY ACCESS CHARGE OR FEE

The Licensee agrees and undertakes not to enter into any contract or arrangement with a Commercial Abalone Diver whereby the Commercial Abalone Diver 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.

15. 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.

16. 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.

17. TRANSITIONAL PROVISIONS

17.1 This Licensee agrees that all licence fees payable for abalone taken by the Licensee under the abalone quota licence described in Recital D will be paid within 30 days of the commencement of the Deed or within such other period as the Director shall authorise in writing.

17.2 In the 1994 calendar year the abalone quota units conferred on the Licensee by Clause 2.1 shall include all quantities of abalone quota units issued to the Licensee in 1994 under the abalone quota licence referred to in Recital D.

SIGNED SEALED AND DELIVERED
by STEVEN LESLIE BALCOMBE being
and as the Director of Sea Fisheries
appointed under the *Fisheries Act 1959*
in the presence of:

SIGNED SEALED AND DELIVERED
by
in the presence of:

*[Second reading presentation speech made in:—
House of Assembly on 30 November 1993
Legislative Council on 9 December 1993]*

