Institute of Marine and Environmental Law

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A CRITICAL EXAMINATION OF THE PROVISIONS OF THE LEGISLATION DEALING WITH MARINE LIVING RESOURCES FROM AN ENFORCEMENT AND PROSECUTORIAL PERSPECTIVE AND RECOMMENDATIONS TO ENSURE MORE EFFECTIVE ENFORCEMENT AND PROSECUTION

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I hereby declare that I have read and understood the regulations governing the submission of a Master of Laws dissertation including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed: Signed by candidate

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My experience as prosecutor and state advocate, as well as that of legal adviser to the Directorate of Monitoring, Control and Surveillance of Marine and Coastal Management (MCM), a branch of the Department of Environmental Affairs and Tourism, has clearly demonstrated to me how crucial the quality and contents of legislation are in effective enforcement and prosecution. Between 2002 and 2006, while acting as legal adviser to MCM, I was involved in streamlining investigations and prosecutions of marine related offences, provided training and assistance to fishery control officers and prosecutors and also proposed amendments to legislation where necessary to ensure more effective enforcement and prosecution. I also acted as prosecutor in the Environmental Court in Hermanus on delegation of the Director of Public Prosecutions, where the majority of prosecutions were for marine related offences. I also acted as national legal adviser to the Southern African Development Community Monitoring, Control and Surveillance of Fishing Activities Programme sponsored by the European Union (SADC EU MCS Programme). One of the reports for this program included proposals for amendments to marine legislation to ensure more effective enforcement and prosecution[1].

This minor dissertation is an effort to critically examine the provisions of the legislation dealing with living marine resources based on the practical experience of the last few years. While it draws on numerous reports made in the scope of my career, it is an effort to provide a comprehensive critique of the provisions from an enforcement and prosecutorial perspective, as well as to propose possible solutions. Where such previous proposals made in the course of my employment have been incorporated, they have been reconsidered and substantially reworked and supplemented.

[1] P.J. Snijman: Report 2: Proposed Amendments to the Marine Living Resources Act 18 of 1998 and the Regulations. March 2006. Unpublished.

It is therefore also an attempt to marry theory and practice by proposing theoretical solutions to practical problems. The contents are mostly original and rarely touch on issues covered by academic writers. References to other works are therefore few.

While I can confidently declare this to be my own, original work and take full responsibility for the contents, I wish to acknowledge the role of various other people who contributed to the contents through asking questions, providing assistance and discussing possible solutions. These include various members of the management and inspectorate at the Directorate of Monitoring, Control and Surveillance at MCM, as well as the personnel of Ezemvelo-KZN, who are tasked with enforcement of the MLRA in that province; Advocate Mongezi Nqoro, my former colleague and also Legal Adviser to MCM; Teresa Amador of Ecosphere Consultants (Lisbon, Portugal) and Regional Legal Coordinator for the SADC EU MCS Programme; Advocate Chris Naudé, former regional magistrate at the Hermanus Environmental Court and Mr. Victor Bok, my Namibian counterpart in the SADC-EU MCS Programme. My sincerest gratitude to the abovementioned persons for their assistance. Where any of them have played a direct role in the contents, it is acknowledged in the text or footnotes.

My biggest thank you is to my supervisor, Professor John Gibson, for his extremely helpful guidance throughout.

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It is clear from the above acknowledgements that while the contents are my own creation, it is largely due to my experience at Marine and Coastal Management that I am in a position to identify the weaknesses in the legislation. I therefore believe it would be unprofessional and unethical to publicise the contents, as it would expose such weaknesses which may be exploited by the unscrupulous.

LIST OF ACRONYMS

(the) Act: Marine Living Resources Act, Act 18 of 1998

CITES: Convention on the International Trade in Endangered Species of Fauna and Flora

CPA: Criminal Procedure Act, Act 51 of 1977

DEAT: Department of Environmental Affairs and Tourism

EMI: Environmental Management Inspector

FCO: Fishery Control Officer

MCM: Marine and Coastal Management

Minister: Minister of Environmental Affairs and Tourism

MLRA: Marine Living Resources Act, Act 18 of 1998

MPA: Marine Protected Area

NEMA: National Environmental Management Act, Act 107 of 1998

(the) Regulations: Regulations as promulgated under Government Notice R.1111, and published in Government Gazette 19205 of 2 September 1998, as amended

TAC: Total Allowable Catch

TAE: Total Applied Effort

PART 1
GENERAL INTRODUCTION

1.1 Introduction

Effective enforcement of legislation firstly and foremost depends on the quality of such legislation. The purpose of this dissertation is not only to critically examine the legislation dealing with marine living resources from the viewpoint of criminal enforcement, but also to contribute to effective enforcement by proposing possible solutions.

Recent history has shown both what the almost disastrous effects of poorly drafted legislation can be, but also how relatively simple amendments can make a huge difference in drastically improving the success of enforcement and prosecution[2]. Convictions in abalone related offences shot up from an extremely low, but unfortunately unknown, figure to as high as eighty five per cent after the amendments of 2003[3] to the regulations regarding abalone.[4] The success can also be partly attributed to a more efficient system for the handling and identification of seized abalone, as well as a dedicated court to hear such matters, but the role of the amendments to the legislation was crucial to the outcome.[5] It is unfortunate that when regulations 21 and 22 of the Regulations as promulgated under Government Notice R.1111, and published in Government Gazette 19205 of 2 September 1998 (the Regulations) were amended in 2005[6]

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[2] This is discussed in more detail in Part 3.3 below.
[3] GN R 1455 of GG 25558 of 8 October 2003.
[4] The prior conviction rate was estimated, *inter alia* on the basis of SAPS statistics, to have been less than 10 per cent. The annual conviction rate at the Environmental Court in Hermanus was between seventy five and eighty five per cent over the period from 2002 to 2006. Statistics by P.J. Snijman, previously prosecutor at the Environmental Court..
[5] It is of course difficult, if not impossible to measure the contribution of the various steps that were taken to ensure more effective prosecutions in abalone related offences, but the author was involved in all of these processes and was therefore in a position to have gained a fair impression of the effect these various measures had.
[6] GN 329 of GG 27453 of 6 April 2005.

to provide for a new dispensation on line fishing, many of these mistakes were once again imported into the Regulations[7].

Enforcement officials, in this particular case the Fishery Control Officers, only have the powers granted to them in terms of the legislation; a prosecutor can only prosecute for offences clearly and unambiguously created by the legislation, and a court can only make such orders as are allowed by the legislation. While this seems to be a rather obvious remark, the implications of that will become clear throughout this discussion.

The discussion is limited to legislation dealing with "fish", as defined in the Marine Living Resources Act, Act 18 of 1998 ("the Act" or the MLRA"), and therefore does not deal with sea birds and seals. The two significant pieces of legislation in this regard are the MLRA and the regulations as promulgated under Government Notice R.1111 and published in Government Gazette 19205 of 2 September 1998 (the Regulations), which are dealt with in Part 2 and 3 respectively. There are some other relevant notices, such as the declarations of Marine Protected Areas (MPA's), and although some rather serious flaws also exist in some of these notices, the scope of this dissertation does not allow for a full discussion of them. [8]

1.2 Methodology

Various issues are examined, firstly those contained in the MLRA, followed by those in the Regulations. They are presented with reference to specific subjects, and as far as is practical, in the sequence of the relevant provisions in the legislation. The factual and legal rationale for the critique will firstly be provided, followed by a proposed solution in the form of an amendment, where appropriate. The format therefore does not lend itself to any overall conclusion with regard to all of the material, and, in most cases, the particular issue is fully dealt with in that specific part of the chapter.

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[7] This is discussed in detail in Part 3.2.

[8] Recreational activities within MPA's are however discussed in Part 2.6 below.

It must however also be added that the discussion of different issues under separate headings does not mean that these matters can always be seen in isolation. This is especially true in relation to some of the proposals on the provisions of the Act. Should such proposals be accepted and incorporated, it will have a direct effect on some of the issues discussed under the Regulations. Such cases are noted in the text.

In an effort to contain the text within the set limit of 25 000 words, all the relevant provisions of the Act and Regulations are not duplicated in the text. It is therefore of utmost importance that the legislation must be consulted throughout. An electronic copy of the relevant legislation, as well as copies of the case law referred to, is therefore provided with the text.

The Regulations are fraught with mistakes. To limit the scope of this dissertation only substantial issues requiring attention in the Regulations are discussed, while some general comments on the quality of the drafting, especially in relation to the Regulations, follow immediately below.

Where specific amendments are proposed, the following accepted method has been used to highlight the proposals:

[deletions] Words in bold type in square brackets indicate proposed omissions from existing enactments

insertions Words underlined with a solid line indicate proposed insertions in existing enactments

1.3 Drafting Errors

The MLRA is a fairly well drafted piece of legislation. The same cannot be said of the Regulations. The Regulations not only cause uncertainty through confusing provisions, as will be discussed below in Part 3, but there are also numerous errors that can only be attributed to sloppy drafting. In quite a few of the regulations reference is still being made to "Sea Fisheries", whereas it should

refer to "Marine and Coastal Management"[9]; species are wrongly cited[10] and in some cases the English and Afrikaans versions differ[11].

It is fully appreciated that it is much easier to criticize poorly drafted provisions than it is to write good ones. In many cases an effort was made to propose amendments or alternative or additional provisions. This often proved to be extremely difficult and the proposed solutions are meant to be no more than proposals that should be properly evaluated before they can be implemented.

A general comment regarding the expression of prohibitions:

Both the Act and the Regulations generally use the term "no person shall" to express a prohibition. This should rather be substituted for the more correct "no person may".

"The only proper way to express a prohibition to act is to say 'may not' in connection with the action prohibited: *A person may not murder....*To attempt to substitute these words for the more common phrase 'shall not' is wrong: *A person shall not murder....*Literally, this means that a person does not have a duty to engage in the action of murder. Think of it as follows: the word 'shall' imposes a duty on someone to do something. A duty is a commission. What commission does the sentence command the actor to do? Nothing- the actor must refrain from doing something- an omission! "[12]

One can also argue that "shall" is mandatory, whereas "may" is discretionary and in the context of the creation of a certain power or authority, "shall" will indeed indicate a peremptory or mandatory action, whereas the use of "may" will be directory or permissive, allowing for discretion.[13] Where however a prohibition is expressed, "may not" implies prohibited conduct and "shall not" a duty or command. Modern legislation also tends to use the term "may not", as for

[9] See regulations 2(7), 2(1), 4(2), 8(1), 79, 80, 82 and 85.
[10] See regulations 32 and 33, which alternately refer to "chokka squid" and "squid", which carry different meanings as set out in regulation 1.
[11] See regulations 41(a) and 75.
[12] Burger, Andrew J: A Guide to Legislative Drafting in South Africa, Juta, Cape Town, 2002: 75.
[13] Also see Du Plessis, Lourens M: The Interpretation of Statutes, Butterworths, Durban, 1986: 143,144, as well as the discussion below in Chapter 3.3.

example the offence created by section 24F of the National Environmental Management Act, Act 107 of 1998: "...no person may commence an activity .....".[14]

The use of the term "shall" reminds one of the Ten Commandments, in which God commands certain actions from his followers. It is interesting to note that in some modern translations of the Bible[15] the terminology "Thou shalt not..." is replaced by "You must not..."[16] or "Do not ...." [17]. It is respectfully submitted that this is indeed a modern version of "shall not" and not appropriate in the context of prohibiting certain actions in the context of legislation. "No person shall..." means "no person must". "No person may ....." means "No person is allowed to...", and if followed by a provision that a contravention of that prohibition would constitute a punishable offence, is indeed the only proper way to create an offence.

[14] The same applies to the terminology used in the specific environmental management Acts. Another example is the National Water Act, Act 36 of 1998, which also uses "no person may" in section 151(1).
[15] See http://www.biblegateway.com
[16] See the New Living Translation and the New Century Version of the Bible.
[17] See the Contemporary English Version and the New International Reader's Version.

PART 2

A CRITICAL EXAMINATION OF THE PROVISIONS OF THE MARINE LIVING RESOURCES ACT FROM AN ENFORCEMENT AND PROSECUTORIAL PERSPECTIVE AND RECOMMENDATIONS TO ENSURE MORE EFFECTIVE ENFORCEMENT AND PROSECUTION

2.1 The Application of the Act

Section 3(3), as part of the provisions on the scope and application of the Act, determines as follows:

"This Act shall not apply in respect of fish found in water which does not at any time form part of the sea"

Jan Glazewski[18] makes the following remark on the interpretation of section 3(3): "...the Act also specifies that it does not apply to fish found in waters which do not form part of the sea. Significantly this subsection uses the word 'sea' and not 'South African waters'. The latter includes the seashore while the term 'sea' clearly does not. The implication is that marine organisms found on the seashore are not included under the Act. This appears to be a lacuna as 'fish' is extremely widely defined in section 1 and the intention must have been to include marine resources and organisms found on or under the seashore. Favouring the latter interpretation is the fact that the MLRA applies to the seashore, secondly, the Act applies to internal waters which includes the seashore in terms of the Maritime Zones Act 15 of 1994"

Should Glazewski be correct, the implications for enforcement will be far reaching, as all marine life found on the sea-shore will be excluded from the application of the Act. In agreement with Glazewski it is clear that the intention of the legislature was to include all marine species, including those on the sea shore, as is clear from the abundance of shore living species included in the

[18] Environmental Law in South Africa, Butterworths, Durban, First Edition, 2000: 493

Regulations. Furthermore, the definition of *fish* in section 1 of the Act refers to "the marine living resources of the sea and the seashore" [emphasis added].

The following must however be noted:

- It is clear from section 3(1)(a) and (b) that the Act applies to all fishing activities in South African waters. South African waters are defined in section 1 to *inter alia* include the seashore[19], as well as tidal lagoons and tidal rivers in which a rise and fall of the water level takes place as a result of the tides.
- The Act also has extraterritorial application in terms of section 3(2) and also applies to South African registered fishing vessels on the high seas as is further set out in sections 40 to 42 of the Act.
- The "sea" is not defined in the Act. The definition of the "sea" in the Sea-shore Act 21 of 1935 includes the "water and bed of the sea below the low-water mark and within the territorial waters of the Republic......"[emphasis added]. Should that definition be followed, section 3(3) would, as it currently reads, also exclude extraterritorial application. The definition of "sea" in the Sea-shore Act 21 of 1935 is however not incorporated into the MLRA. As "sea" is not defined in the Act, it then carries its ordinary dictionary meaning and includes the whole sea and not just our territorial waters (probably the reason why the definition from the Sea-shore Act was not incorporated).

It is respectfully submitted that section 3(3) does not exclude the application of the Act to species found on the seashore. Section 3(3) provides that "this Act shall not apply in respect of fish found in water which does not at any time form part of the sea" [emphasis added]. Surely one can argue the proviso "which does not at any time form part of the sea" only qualifies "water" and that fish found in or on the seashore is not "fish found in water which does not at any time form

[19] The seashore, although it has a corresponding meaning to the sea-shore in the Sea-shore Act, Act 21 of 1935, is hyphenated in the Sea-shore Act, but spelled as one word in the MLRA. This has no consequence with regard to the interpretation.

part of the sea", as such organisms are either found in or on sand, attached to rocks or when found in water, in shallow pools that do at times form part of the sea. The intention of the legislator that fresh water fish are not included, but marine fish found in tidal rivers and lagoons are, would indeed be clear and no amendment would be necessary.

Glazewski seems to favour the substitution of "sea" with "South African waters" but this can lead to an unwanted exclusion, as the Act also has extraterritorial application as pointed out above. Such a substitution will have the effect of excluding fish in the high seas, which in the case of fishing activities by South African registered vessels, should be included. The amendment proposed by Glazewski would then have the effect of creating an exclusion, namely that of extraterritorial waters, which will be contradictory of the clear intention of section 3(1) and 3(2).

The above remarks are made with the utmost respect for the views of the learned author and academic. It is interesting to note that this opinion was not repeated in the 2005 edition of the same book, although one must immediately add that the 2005 edition was apparently purposefully shortened.[20] Should Glazewski however be correct in his interpretation, it can indeed have serious consequences for the enforcement of legislation dealing with such species found on the seashore. As far as could be ascertained this point has not been argued or decided in court yet, but it might be wise in the circumstances to clarify this matter as to avoid any confusion. This can be done by amending section 3(3) in line with what must be seen to be the intention of the legislator, which was clearly to exclude the application of the Act to fresh water fish, but to clearly include all marine species occurring, or spending part of their lifecycle, in tidal rivers and lagoons.[21]

[20] The 2005 edition is approximately 160 pages shorter than the 2000 edition.
[21] This is also clear from the definition of "South African waters", which include tidal lagoons and tidal rivers.

Fresh water fish are controlled via provincial legislation of which the Cape Nature and Environmental Conservation Ordinance 19 of 1974 (as was amended by the Western Cape Nature Conservation Laws Amendment Act, Act 3 of 2000) is an example. This ordinance limits the scope of its application by reference to fish in "inland waters"[22]. "Inland waters" are defined as "all waters which do not permanently or at any time of the year form part of the sea and includes any tidal river ...". "Waters" are defined to include *inter alia* rivers and lagoons, "whether the water therein is fresh or saline" and "tidal waters" means "that part of any inland waters which, owing to the influence of the sea, becomes saline at any time or the level of which rises at any time owing to the influence of the sea" [23]. Without any detailed discussion of the above provisions, which are also open to criticism, it is clear that the intention is that fresh water fish found in tidal rivers would be included in the application of the ordinance.

It is therefore within this transitional zone of tidal rivers and lagoons or estuaries where the application of the two pieces of legislation overlap and which requires the exclusion that is so difficult to define. One can turn to biologists for a scientific definition, but such definitions are often intricate and therefore difficult to apply.

It is therefore submitted that substituting the "sea" with another term does not seem to be a workable solution. It is rather recommended that it be made clear that the proviso "which does not at any time form part of the sea" only qualifies "water", and that the act indeed does apply to marine fish found in tidal rivers and lagoons. A possible solution could be the following:

This Act shall apply in respect of fish found in tidal rivers and tidal lagoons, but shall not apply in respect of fish found in water ***[which]*** *where such water does not at any time form part of the sea.*

Definitions for "tidal river" and "tidal lagoon" will have to be added to section 1:

"Tidal river" means that part of a river, irrespective of whether such river is permanently or periodically connected to the sea, in which a rise and fall of the

[22] See Chapter 5 of Ordinance 19 of 1974.
[23] See section 2 of Ordinance 19 of 1974.

water takes place as a result of the tides when such a river is connected to the sea.

"Tidal lagoon" means any lagoon or other body of water, irrespective of whether such lagoon or other body of water is permanently or periodically connected to the sea, in which a rise and fall of the water takes place as a result of the tides when such a lagoon or other body of water is connected to the sea.

As fish are defined as "the marine living resources of the sea and the seashore..." the "fish" referred to in the above definitions can clearly only be marine fish, and will exclude fresh water fish. One can actually argue that the exclusion that the Act does not apply to fish found in water where such water does not at any time form part of the sea, is an unnecessary exclusion as the definition of fish in the Act would already exclude any freshwater fish. The term "fish found in water that does not at any time form part of the sea" is to a large degree superfluous. It might even be best to repeal that section and rather replace it with a provision that the Act does indeed apply to fish that occurs in tidal rivers and lagoons (as proposed above, but deleting the provision that it does not apply to fish found in water that does not at any time form part of the sea), acknowledging the fact that some marine species do venture into this transitional zone. This seems to be quite adequate to make the intention of the legislator that the Act does apply to marine species occurring, or spending part of their lifecycle, in tidal rivers and lagoons, quite clear.

2.2 Ownership of Fish

In 2002 a large quantity of abalone was seized by the Swaziland Police and detained by their Commissioner of Customs and Excise in connection with contravention of customs and excise legislation in Swaziland. Although the First Import and Export Co (Pty) Ltd claimed to have obtained the abalone from a legal source in Maputo, South Africa joined the proceedings as fourth respondent after a South African expert examined the abalone and identified it as *Haliotis midae*, which is endemic to South African waters. The only logical assumption, in the

absence of any export permit from South Africa, was that this was illegally harvested abalone that was illegally imported into Swaziland, one of the established smuggling routes to the Far East markets. South Africa's claim for the return of the abalone was unsuccessful. Although the court judgment is not available, this was at least partly due to the fact that Swaziland, for quite obvious reasons, does not have legislation dealing specifically with marine living resources. The issue of whether South Africa could claim ownership of such fish was however also relevant in the case[24].

An opinion was obtained from the esteemed adv. Jeremy Gauntlett, SC in this matter. An extract reads as follows:

"22. It is apparent ...that the control of all marine living resources vests exclusively in the State, and that commercial or recreational fishing is lawful only to the extent that a right is conferred under the Marine Living Resources Act...

23. It is to be noted that neither the Constitution nor the Marine Living Resources Act vests ownership of marine resources in the State. The reason for this is that South African common law (Roman-Dutch law) regards fish as *res nullius* but once they are caught and appropriated, they become the property of the person who caught them."

Gauntlet then continues in paragraph 24 to set out the authority for the view that a person who acquires a wild animal unlawfully, does not become its owner. He refers to Voet and *Dunn v Bowyer and Another 1926 NPD 516* as motivation for this viewpoint, but immediately concedes in paragraph 25 that this judgment was not followed in *S v Frost;S v Noah 1974 (3) SA 466 (C)* where the court had to determine what effect the Sea Fisheries Act 10 of 1940 had upon the common law rule that ownership of a wild animal which is *res nullius* can be acquired by *occupatio* even though its capture may be controlled or prohibited by legislation. The court held that the answer to this question depended upon the construction of the legislation concerned and that the provisions of the Sea Fisheries Act then

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[24] Information from some available court papers in Case No 3214/2002 *First Import & Export Co(Pty) Ltd v The Commissioner of Customs and Excise in the High Court of Swaziland.* Additional information known due to personal involvement.

in force "were inconsistent with a construction that the lawgiver did not intend to exclude the ordinary consequences which flow from *occupatio* or to reserve ownership in favour of the State".

Gauntlett then applies the above principles to the current situation, and in paragraph 26 comes to the conclusion "[a]s regards S v Frost the facts in my view are distinguishable...the Sea Fisheries Act of 1940 did not contain an absolute prohibition on the landing, selling, receipt or possession of any fish taken in contravention of its provisions such as section 44(2) of the MLRA".

Gauntlett then continues to examine the effect of the Constitution on the situation and concludes in paragraph 33 that "commercial or recreational fishing of a South African marine resource is lawful only in terms of a right conferred under the Marine Living Resources Act, and that the Government of the Republic of South Africa, by virtue of the powers granted to it by the Constitution, and the exclusive control over South African marine living resources vested in it by the provisions of the Marine Living Resources Act, is entitled under South African law to claim the return of abalone poached in its waters in order to deal with it in accordance with the powers conferred on it by the MLRA".

Taking into consideration that the above opinion was written in support of the application of the South African Government and with great respect to the learned and senior colleague, the following comments are offered:

Gauntlet's remark in paragraph 22 (and repeated in paragraph 33) that "commercial or recreational fishing is lawful only to the extent that a right is conferred under the Marine Living Resources Act" is incorrect. No right is required in the case of recreational fishing, but only a permit. A proper reading of sections 13 and 18 of the Act makes this clear.

In paragraph 26(3) Gauntlet refers to section 44(2) of the MLRA as authority for the view that the MLRA contains "an absolute prohibition on the landing, selling, receipt or possession of any fish taken in contravention of its provisions". This interpretation of section 44(2) is clearly wrong. Section 44(2) reads as follows:

"No person shall land, sell, receive, or possess any fish taken by any means in contravention of this Act".

The Afrikaans version reads:

"Geen persoon mag enige vis wat op enige wyse in stryd met hierdie Wet bekom is, aan wal bring, verkoop, ontvang of besit nie".

Although the provision refers to "this Act", it falls under the heading of "Prohibited fishing methods" or "Verbode visvangmetodes" in Afrikaans (emphasis added). It then specifically refers to "fish taken by any means in contravention of this Act" or "vis wat op enige wyse in stryd met hierdie Wet bekom is" in Afrikaans (emphasis added). This is clearly not the same as "fish caught in contravention of this Act", which would warrant such an interpretation, immediately adding that it ought to be under a different heading.

Unfortunately the judgment is not available, but the South African application was unsuccessful. Whatever the reasons put forward by that particular court, the argument by Gauntlet that fish unlawfully caught in South African waters becomes the property of the State is unconvincing. Gauntlet does indeed note in paragraph 23 that it "is to be noted that neither the Constitution nor the Marine Living Resources Act vests ownership of marine resources in the State" and further on in the same paragraph that South African common law "regards fish as *res nullius* but once they are caught and appropriated, they become the property of the person who caught them". This is also the opinion of Glazewski[25], who, with reference to *S v Frost and S v Noah (1974 (3) SA 466 (CPD)* makes it clear that fish is regarded as *res nullius* and becomes the property of the person who catches such fish, even if illegally caught. Neither the Constitution nor the MLRA have changed the common law position[26], and section 2(4)(o) of NEMA determines that "the environment is held in public trust for the people", a

[25] Environmental Law in South Africa, Butterworths, Durban, Second Edition, 2005: 373, 374
[26] Section 2 of the Game Theft Act 105 of 1991 is an example of where legislation specifically changes the common law position regarding ownership of wild animals held on land sufficiently enclosed.

provision that falls short of vesting ownership of all facets of the environment in the State.

An example of such a clause vesting ownership of natural resources in the State is to be found in the Namibian Constitution. Article 100 of the Namibian Constitution, Act 1 of 1990, contains a clause reading as follows[27]:

"Article 100: Sovereign ownership of Natural Resources.

Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State, if they are not otherwise lawfully owned."

As an amendment to the Constitution would be unrealistic, it is submitted that the MLRA be amended to provide that the ownership of fish acquired in contravention of this Act, or fish unlawfully possessed, should vest in the State. There does not seem to be any motivation to make such a provision of wider application, as the example from the Namibian Constitution provides for. It is therefore submitted that a new section 4A be inserted in Chapter 1 of the Act:

4A Any fish caught or possessed in contravention of any provision of this Act shall become the property of the State.

The proposed wording does not provide for a major deviation from the common law principles, as fish will remain *res nullius.* If such fish is however caught or possessed in contravention of the Act, ownership will revert to the State. This will effectively deal with a situation as was encountered above.

Not directly relevant to the issue discussed, but highly relevant to the factual situation discussed above, is the fact that *haliotis midae* has been listed on CITES Appendix III as from May 2007[28]. As most of our neighbouring countries,

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[27] Professor Glazewski referred me to this provision. Victor Bok provided me with a copy of the Namibian Constitution.
[28] See www.environment.gov.za.

including Swaziland, are members of CITES, it will in practice hopefully effectively deal with the type of situation as was discussed above[29].

2.3 Commercial Fishing

The definition of "commercial fishing" is also problematic from a prosecution perspective. "Commercial fishing" is defined in section 1 of the Act as fishing for a species which has been determined by the Minister to be subject to a total allowable catch (TAC) or total applied effort (TAE), or a combination thereof. Such determination is not published, making it rather cumbersome to prove which species have been so designated[30], or to expect the public to have knowledge of it.

Furthermore the definition is inappropriate in its reference to species. The fishing of one rock lobster would constitute "commercial fishing" in terms of this definition, while provision is also made for recreational rock lobster fishing, to use but one example. Commercial fishing is in essence nothing other than fishing for commercial purposes, and it is proposed that "commercial fishing" should be defined to mean fishing for commercial purposes.

Such an amendment would deal effectively with the burden of proof in such cases, avoid the absurdity described above and would indeed, it is submitted, be in accordance with the intention of the legislator of managing all commercial catches. Another consequence of defining "commercial fishing" with reference to the TAC or TAE is that should no such limits be set, the particular species will no longer fall under the definition of "commercial fishing". Recent media reports indicate that the Minister plans to close the commercial abalone sector, as was done with the recreational sector a few years ago. This could have the unwanted effect that abalone would not fall under "commercial fishing", unless the correct wording is used. Setting the TAC at zero would probably maintain abalone's

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[29] See however the discussion in Part 2.15.5 below.

[30] A senior management member of MCM will have to be called to confirm this, or at least a statement in terms of section 212 of the Criminal Procedure Act 51 of 1977 will have to be obtained and submitted.

status as a commercial species which may not be fished without a permit; failure to set a TAC at all, would result in abalone not being included in the definition[31].

"Commercial fishing" can be defined simply as "fishing for commercial purposes" in section 1 and "commercial purposes" can be defined to mean "any purpose other than for personal leisure or sport, or for personal or own domestic use or consumption". Such a wide definition would include all commercial fishing activity, but would exclude small scale recreational fishing. Another option would be to borrow from our Namibian neighbours. The Namibian Marine Resources Act, Act 27 of 2000, defines "commercial purposes" as follows:

" 'commercial purposes' with respect to harvesting marine resources means -

(a) with the intention of selling, bartering, pledging or otherwise disposing of, or delivering or offering to do any of the things mentioned in this paragraph in respect of such resources;

(b) using purse seine, trawl or long line, or such other fishing or harvesting methods as may be prescribed; or

(c) exceeding the limits prescribed for the harvesting of marine resources for own use"

It is respectfully submitted that redefining the definition of "commercial purposes" would greatly assist in proving this element in criminal proceedings. It is fully appreciated that the term "commercial purposes" is also used in the Regulations[32] and that the definition would also apply to such Regulations. This proposed definition will also play a role in the amendments proposed in Part 3 below.

2.4 The Catch-All Phrase

It is respectfully submitted that the MLRA fails to require a permit for all fishing activities, and that such an inclusion is of utmost importance to ensure effective enforcement. Both of these aspects will be motivated below.

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[31] The consequence of this will be discussed under Part 2.4 below.

[32] See e g regulation 39(1)(a).

Section 18 of the MLRA deals with the granting of rights and section 13 with the issue of permits. While a person must have a permit in terms of section 13 to exercise a right in terms of section 18, you only need a permit for "any other activity in terms of the Act". Section 13(1) of the MLRA provides as follows:

"No person shall exercise any right granted in terms of section 18 or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such a person to exercise that right or perform that activity".

To conduct commercial fishing both a right in terms of section 18, as well as a permit in terms of section 13, are required. If the Act and the Regulations[33] are read together and in context, recreational fishing (meant in general terms) only requires a permit. It will however only be the specific activities described in the Act and Regulations that will fall under "any other activity in terms of this Act" and therefore require such a permit, and not fishing in general. To state the obvious: unless fishing in general is described as a prohibited activity under the Act, which is not the case, it will not be an "activity in terms of the Act".

If read in the context of section 58(1)(a)(i), the "other activity" (which is not defined in section 1) also refers to "related activities", a term that is indeed defined in section 1. Section 58(1)(a)(i) reads as follows:

"58 Offences and penalties

(1) Any person who, subject to the provisions of subsections (2) or (3)-

(a) undertakes fishing or related activities in contravention of-

(i) a provision of section 13;

(ii) ....

(iii) ....

(b) contravenes any other provision of this Act,

[33] The definition of "this Act" in section 1 of the MLRA includes any regulations made under the MLRA.

shall be guilty of an offence and liable on conviction to a fine not exceeding two million rand, or to imprisonment for a period not exceeding five years."

It is respectfully submitted that "related activities in contravention of section 13" described in section 58 can only refer to "any other activity in terms of this Act" referred to in section 13. It must however be added that there is no general definition for "related activities" and the activities mentioned in section 1 are listed as being "included" in the definition. "Related activities" is defined as follows in section 1:

"'related activities' include: [emphasis added]

(a) storing, buying, selling, transshipping, processing or transporting of fish or any fish product taken from South African waters up to the time it is first landed or in the course of high seas fishing;

(b) on-shore storing, buying, selling or processing of fish or any fish product from the time it is first landed;

(c) refuelling or supplying fishing vessels, selling or supplying fishing equipment or performing any other act in support of fishing;

(d) exporting and importing fish or any fish product; or

(e) engaging in the business of providing agency, consultancy or other similar services for and in relation to fishing or a related activity;"

It is therefore submitted that the MLRA and Regulations contain a prohibition on commercial fishing (section 18 and 13) and fishing of species specifically prohibited in the Act or Regulations, but fail to contain a general ban on fishing. Section 58(1)(a) does place a prohibition on "fishing", but then qualifies it in (i) as fishing "in contravention of section 13". Section 13 contains no prohibition on fishing in general, and whilst it would include commercial fishing through its interaction with section 18, it does not include fishing in general, but only those activities specifically described in the Act or Regulations. Much the same can be

said about the lack of a general ban on the possession of fish illegally caught, an issue discussed immediately below.

The above rather technical argument has very practical consequences. It is indeed impossible to draft a general charge sheet for an offence of fishing without a permit. Even though one can argue that it was the intention of the legislator to include such a prohibition, and that fishing (in general) would be "any other activity in terms of this Act", the principle of legality requires that a criminal offence be described in clear and unambiguous language.[34]

This of course begs the question of why such a general ban on fishing without a permit is necessary. Do the Regulations not adequately cover the situation by requiring a permit for the fishing and possession of all the species dealt with in those Regulations? The answer to the last question is unfortunately in the negative.

One only needs to be reminded of the fiasco regarding the lack of a provision clearly requiring a permit for the fishing, and more importantly, possession of abalone that existed prior to the amendments of the Regulations of 8 October 2003[35]. While that situation was rectified via the said amendments, more recent amendments to Regulations 21 and 22, dealing with linefish, recreated exactly the same problem by failing to include a prohibition on the fishing of various line fish species.

To illustrate but one example: the current, rather absurd, position is that should a person be apprehended catching species from either the permitted or even prohibited species of line fish contained in Annexure 4 of the Regulations without any permit, such a person cannot be prosecuted as regulation 21 fails to prohibit

[34] See Burchell, Jonathan and Milton, John: Principles of Criminal Law, Juta, Landsdowne, 2005: 97-99.

[35] See the discussion under Part 3.3 below. This was discussed in detail in an unpublished paper by P.J. Snijman entitled *Conservation of Marine Living Resources: Problems and Solutions relating to the Conservation of Abalone* as part of a M.Phil Degree in Environmental Management at the University of Stellenbosch. A reworked version of this opinion by P.J. Snijman and M. N. Nqoro was submitted to MCM and led to the mentioned amendments.

the catching of such species without a permit[36]. A general prohibition on fishing in the Act would have covered such a situation.

There are other motivations that also require such a general prohibition:

- Taking into consideration that the definition of "fishing" in section 1 also includes an attempt to fish, it is almost impossible for the State to prove what species was the target of the attempt, unless the gear used was species specific. Should a person therefore be apprehended while fishing e.g. with a non species specific net without a permit, but has not yet caught any fish, such a person cannot be prosecuted. The inclusion of a general prohibition on fishing would also accommodate this situation.

- Charging illegal fishing under such a general prohibition will not require the proof of species or purpose and will therefore be very effective in facilitating prosecutions in this regard. The problems experienced in practice in prosecutions of proving abalone to be of the genus *haliotis* (and prior to the 2003 amendments of the species *Haliotis midae)* have been dealt with quite effectively, but are still not completely laid to rest. Defence counsel still sometimes challenges the identification of species such as abalone in criminal matters.[37]

- The penalty provision under the Act is much higher than that under the Regulations and prosecution under the Act therefore makes sense, especially in the case of marine resources with an extremely high value, such as abalone[38].

- As was discussed in Part 2.3 above, the failure to set a TAC or TAE at all, as is a possibility with the species abalone, would result in that species not being included in the definition of "commercial fishing". That would mean that fishing of abalone without a right would not be a criminal offence in contravention of section 18, and one would have to fall back on the

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[36] This is discussed in detail in Part 3.2 below.
[37] Observation by the author based on practical experience.
[38] See the discussion on the penalty provision below in Part 2.12.

Regulations for prosecution[39]. A general prohibition on fishing will however also include abalone, irrespective of whether a TAC or TAE is set or not.

It is therefore submitted that section 13 should be amended to clearly include a prohibition on all fishing, irrespective of purpose or species, to effectively deal with the above lacuna. Section 13 should include a "catch-all" phrase (pun unintended, but appropriate) requiring a permit for fishing in general. The fact that "any other activity" also includes "related activities", as defined in section 1, should also be made clear.

It is therefore proposed that section 13 be amended to read as follows:

*13(1) No person **[shall]** <u>may</u> exercise any right granted in terms of section 18<u>,</u> <u>conduct any fishing,</u> **[or]** perform any other activity in terms of this Act <u>or perform any related activity</u> unless a permit has been issued by the Minister to such person to exercise that right<u>, conduct fishing</u> or perform that activity.*

Section 58(1)(a)(i) can be amended to read as follows:

(1) Any person who, subject to the provisions of subsections (2) or (3)-

(a) undertakes fishing<u>, performs any other activity in terms of this Act</u> or <u>performs</u> any related activities in contravention of-

(i) a provision of section 13;

(ii) ....

(iii) ....

(b) ....,

shall be guilty of an offence and liable on conviction to a fine not exceeding two million rand, or to imprisonment for a period not exceeding five years.

It is also submitted that the definition of "related activities" should be amended to include a clear requirement for the possession of fish in certain circumstances. This matter is further dealt with below.

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[39] See the discussion under Part 3.3 below on problems associated with prosecution of abalone related offences under the Regulations.

2.5 Related Activities and the Control of Commercial Activity

One of the major problems in the effective control of illegal fishing is the difficulty in determining the origin of fish available in the commercial trade. South Africa's vast coastline and huge waters make it very difficult to control illegal fishing at source. However important it is to ensure that illegal fishing is limited to a minimum, an effective system is also needed to ensure that fish entering the market is indeed from a legal source.

The Act does have control mechanisms to do so, and this is mainly addressed via the requirement for a permit to conduct "related activities". The definition of "related activities" is however problematic- on the one hand it is so wide that it includes activities not necessary, or wise, to be covered by its application, on the other hand it does not deal effectively with possession of fish for commercial purposes, or with trading in fish. These measures in the Act are supplemented by control in the Regulations, for example via a prescribed invoice system. This haphazard approach is however unsatisfactory and does not effectively deal with the problem. Firstly, it only applies to certain species. Secondly, it is not made clear whether an invoice, issued on the basis of a sale, is meant to serve as a permit although that seems to have been the intention. Thirdly, although the contents of the invoice are prescribed, no prescribed format exists and, more importantly, no real control is exercised. Any person can easily claim to have an informally written invoice containing the prescribed particulars, which of course could prove to be false. It can either contain false particulars issued by the seller, with the buyer claiming innocence regarding that circumstance, or the buyer can easily draw up his own invoice with false particulars, claiming that that is the invoice issued to him by the seller. In such cases it is often almost impossible for the State to prove the opposite. Fourthly, there is no qualification that the buyer must buy from a person authorised to sell- only an invoice is required.

It is clear that various inconsistencies and uncertainties exist within this framework. Taking into consideration the current policy at Marine and Coastal Management not to over-regulate the trade in fish, and on the other hand the

need for a strong control mechanism, the rather confusing and unsatisfactory provisions concerning the processing, trading, import and export of fish need urgent attention.

A major advantage of addressing this issue in the Act would be that the Regulations could be shortened and simplified by deleting all references to such invoices which are currently contained in respect of certain species. It will also be in line with the general division between the Act and the Regulations. The Act deals extensively with the commercial fishing sector and related activities; the Regulations deal with recreational fishing and species/area/season or gear specifications. Species specific restrictions can still be regulated via the Regulations where required.

The main provisions of the Act dealing with this aspect are contained in sections 18 and 13, and are of relevance here, specifically in relation to "fish processing establishments" and "related activities", both of which are further defined in section 1 of the Act.

Some of the issues that have arisen are the following:

(i) There is no general definition of "related activities". A broad definition, followed by the specific inclusions, would be wise.

(ii) The use of the Afrikaans word "ontskeep" as a translation for the English word "landed" in the definition of "related activities" in section 1 is not synonymous and the Afrikaans word is more restrictive in meaning than the English. The Afrikaans word means to offload from a ship; the correct translation for "landed" is "aan wal bring".

(iii) Additional to the above remark is the fact that some species of fish are not caught from vessels. Is there any need to qualify the application of (b) in the definition of "related activities to from the time it is first landed"? Till when?

(iv) Restaurants, supermarkets and fish shops clearly fall within the definition of a "fish processing establishment"[40], but for policy and practical reasons are not expected to have a right or permit to operate a fish processing establishment. The control of such establishments via the invoice system and inspections is apparently adequate. The difference between the prescriptions of the Act and policy not only creates uncertainty but also causes problems in proving *mens rea* in criminal prosecutions.

(v) Possession of fish is not dealt with in the Act, conceding that such a general control measure would be difficult. The Regulations of course deal extensively with possession, but only relating to specific species. The Act does however touch on the issue of possession in two respects. Firstly, "related activities" does include "on-shore storing" [see section 1 (xlix) (b)]. Secondly, a "fish processing establishment" also includes a vehicle, vessel or premises which is used "for the preserving of fish... <u>for sale</u>" (emphasis added). The question is whether "storing" and "preserving" would carry the same meaning as "possession". Apparently this must be answered in the negative for surely "possession" would have been included had it been intended, and possession is a term used often elsewhere in the legislation. While "storing" is not defined, "preserving" of fish is indeed qualified in the respect that the purpose of such preserving must be "for sale". What is therefore clear and also makes practical sense, is that the Act intends to control possession of fish where such possession is for commercial purposes (see the discussion above under part 4.3). While such prohibition on the possession of certain species of fish for commercial purposes therefore exists in the Regulations, it is not altogether clear whether the Act succeeds in creating such a prohibition. The main advantage of such a prohibition in the Act, except of course that it carries a higher maximum penalty, is that a

[40] See the definition of a *fish processing establishment* in section 1 of the MLRA.

general prohibition on the possession of fish for commercial purposes would make the proof of species redundant, as it refers to all fish. The other arguments advanced in favour of a general prohibition on fishing without a permit, also find application here. The practical problems experienced in courts with the proof of species identification have been and still sometimes are stumbling blocks in getting convictions. The prohibition on the operation of a fish processing establishment without a right[41], is already an example of a general prohibition, independent of the type of species. The further advantages of such a general prohibition would be that the Regulations could also be shortened and simplified by deleting all references to such invoices which are currently contained in respect of certain species.

(vi) Processing of fish is already dealt with under section 18, which requires a right to operate a fish processing establishment. Why then is it again included in section 13 under the definition of "related activities", for which no right and only a permit is required?

(vii) Why, in the definition of "related activities" in section 1, is transportation included in (a), referring to activities at sea, but not in (b), which refers to on-shore activities?

(viii) Is it the intention to require a permit for the activities described in (c) to (e) of the definition of "related activities" in section 1, where such activities do not relate to commercial activities? It seems not, and in practice people engaging in the activity of refuelling or supplying of fishing vessels, or those selling fishing equipment, have not been required to obtain a permit. Must the recreational angler importing his recreational catch from Namibia or Mozambique obtain an import permit? As it currently reads, these activities are included in "related activities" and require a permit. Surely this was not the intention.

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[41] See section 18 of the MLRA.

It is therefore proposed that the definition of "related activities" be rephrased to:

- include a broad definition
- exclude processing
- include possession of any fish for commercial purposes
- include transportation of fish on land
- clearly indicate that the activities described are limited to when conducted for commercial purposes and do not include possession, storing, transporting or importing for personal consumptive use.

The following amendments are therefore proposed:

'related activities' ***[include]****means any activity relating to fishing for commercial purposes or to trading in fish, including but not limited to-*

(a) ***[storing, buying, selling, transshipping, processing or transporting]*** *transshipping, possession, storing, transportation or buying of fish for commercial purposes, or selling, bartering or trading of fish or any fish product* ***[taken from South African waters up to the time it is first landed or in the course of high seas fishing]****;*

[(b) on-shore storing, buying, selling or processing of fish or any fish product from the time it is first landed;]

*(b)****[(c)]*** *refuelling or supplying commercial fishing vessels, selling or supplying commercial fishing equipment or performing any other act in support of commercial fishing;*

(c) ***[(d)]*** *exporting and importing fish or any fish product for commercial purposes; or*

(d) ***[(e)]*** *engaging in the business of providing agency, consultancy or other similar services for and in relation to commercial fishing or a related activity;*

The definition of "commercial purposes" proposed in part 2.3 above would also find application here.

The above proposal:

- provides a wide definition of related activies, but at the same time limits the scope of its application by limiting it to activities for commercial purposes;
- provides a wide definition of commercial purposes, but clearly excludes any recreational activities;
- in (a) includes the term "buying" in the list of activities for commercial purposes to exclude the buying of fish for personal consumption, whereas "selling, bartering and trading" are in essence commercial activities and therefore need not be qualified by purpose;
- does away with the distinction of activities as before and after landing- there is no need for such a distinction which only serves to complicate prosecutions and enforcement;
- clearly includes possession of fish for commercial purposes as a related activity, the need of which was discussed above;
- excludes the import of fish by recreational fisherman who caught such fish in neighbouring countries, the need of which was discussed above;
- excludes the processing of fish as being a related activity, as any processing of fish requires a right in terms of section 18 of the MLRA, the motivation of which was discussed above.

It is further submitted that this proposed definition of "commercial purposes" can also be used to clarify the definition of "fish processing esablishments" by replacing the qualification "for sale" with the term "for commercial purposes". This will bring an end to the speculation of in what circumstances the processing of fish indeed constitutes the operation of a fish processing establishment. It is

therefore proposed that the definition of "fish processing establishment" in section 1 should be amended as follows:

'fish processing establishment' means any vehicle, vessel, premises or place where any substance or article is produced from fish by any method, including the work of cutting up, dismembering, separating parts of, cleaning, sorting, lining and preserving of fish, or where fish are canned, packed, dried, gutted, salted, iced, chilled, frozen or otherwise processed for commercial purposes ***[sale in or outside the territory of the Republic]****;*

The qualification of "in or outside the territory of the Republic" is unnecessary and serves no purpose. The definition clearly includes all processing establishments, irrespective of where the product will be sold.

It is respectfully submitted that the above amendments will greatly assist in clarifying the highlighted problems, but would not eliminate the rather confusing and unsatisfactory provisions concerning the buying and selling of fish. While it would exclude the consumptive user, other parties such as restaurants, fish shops and supermarkets would still need to apply for and be issued with permits. As the Act currently reads these institutions are clearly required to have such permits, but are excluded from the requirement based on a policy decision. The Act and the policy, which is based on the enormous administrative burden such a requirement would cause, must be brought in line. It is appreciated that at the same time a strong control mechanism is needed to control possession of, and dealing in, fish for the simple reason that it is often the possessor of fish illegally caught who is apprehended, and not the illegal exploiter. The problems encountered with the current invoice system were discussed above.

An attempt to draft an alternative provision in this regard has proved to be extremely difficult. As all selling of, trading in, as well as possession and buying of fish for commercial purposes are included in the revised definition of "related activities", for which a permit is required, the proposed new section 13A rather attempts to provide for certain exclusions for which a permit is not required, as

well as to provide for an invoice system applicable to all species, but only required under certain circumstances:

13 A Buying, selling and trading in fish and fish products

(1) Notwithstanding the provisions of section 13 (1) the holder of a commercial fishing permit, the holder of a fish processing permit or the holder of a mariculture permit may sell fish, or part or product thereof, provided that the prescriptions in subsections 3, 4 and 7 are adhered to.

(2) Notwithstanding the provisions of section 13 (1) a person other than the holder of a commercial fishing permit, the holder of a fish processing permit or the holder of a mariculture permit, may sell fish, or part or product thereof, without a permit, provided that:

(a) such fish, or part or product thereof, has been acquired from

(i) the holder of a commercial fishing permit; or

(ii) the holder of a fish processing permit; or

(iii) the holder of a mariculture permit; or

(iv) the holder of a trading permit; or

such fish has been imported on authority of an import permit; and

(b) all invoices as contemplated in subsection (5) are retained as prescribed; and

(c) such fish, or part or product thereof, is offered for sale only to the general public for consumptive use; and

(d) such fish, or part or product thereof is packed in accordance with the prescribed South African Bureau of Standards specifications[42]; and

(e) such a person is registered with the South African Revenue Service[43].

[42] See Regulation 74(g) where a similar requirement is listed.
[43] This requirement is inserted to ensure payment of taxes.

(3) Any person, except a person as contemplated in subsection (2), who sells or delivers, or who trades or barters in, fish or part or product thereof, must issue an invoice as described in subsection (7) at the time of delivery in respect of such fish or any part or product thereof to the person acquiring it.

(4) Any person as contemplated in subsection (3), must retain a copy of the invoice issued to the person acquiring it for a period of not less than 24 months.

(5) Any person, except under the conditions as set out in subsection (6), who buys or acquires fish must retain the invoice referred to in subsection (3) for not less than 24 months or until such fish is no longer in possession of such person, whichever period is the longest.

(6) Notwithstanding the provisions of section 13 (1) a person may buy fish or part or product thereof, possess such fish bought and transport such fish without a permit provided that:

(a) such fish is bought and possessed in limited quantities for personal or domestic consumption;and

(b) such fish is bought from the holder of a commercial fishing permit, the holder of a fish processing permit, the holder of a mariculture permit, the holder of a trading permit or a person as contemplated in subsection (2).

(7) An invoice as contemplated in subsection (3) shall be in a chronologically numbered invoice book and shall contain at least the following details:

(a) full particulars, including full names, identity numbers and physical addresses of the parties to the sale;

(b) the number and date of issue of the commercial fishing permit, fish processing permit or trading permit authorising the selling of fish or part or product thereof;

(c) the date of delivery;

(d) the species of fish, and

(e) the quantity or mass of fish or part or product thereof sold[44].

(8) The Department may issue a prescribed invoice book for the purpose as contemplated in subsection (3)

(9) An invoice as referred to in subsection (3) and containing the details as prescribed in subsection (7), serves as a permit for the possession of such fish bought or acquired.

(10) An invoice as prescribed in subsection (5) is not transferable.

The above proposal provides for the following:

- The holders of commercial fishing permits, fish processing permits and mariculture permits[45] do not require an additional permit to sell fish, but must adhere to the invoice system i.e. retain copies of invoices for all fish sold;
- Any person buying and selling fish in big quantities, i.e. trading in fish as a "middleman", must have a permit to trade in fish (as is required by section 13(1) read with the definition of "related activities"), may only buy from a legal source and must adhere to the invoice system i.e. obtain and keep invoices for all fish bought, and issue invoices, and retain copies, for all fish sold.
- To make provision for supermarkets and fish shops, without requiring them to obtain a permit, they are allowed to sell fish under certain conditions, most importantly provided that the fish is obtained from a legal source, that all invoices are retained and that they may only sell to the general public for consumptive use (i.e. they are not allowed to sell for resale purposes). They do not have to obtain a trading permit nor have to issue invoices in the prescribed format.

[44] These requirements are similar to those in the Regulations. See eg regulation 36(3) and (4).

[45] The subsection specifically refers to permits, and not rights. Any rightsholder must also obtain a permit in terms of section 18.

- All persons buying or acquiring fish, but excluding persons buying fish only in limited quantities for domestic consumption and provided that it is from a legal source, have to be issued with an invoice which they must retain for 24 months. This means that an end user who buys small quantities for domestic consumption need not obtain an invoice, but any person who buys fish with the intention of resale or processing (any commercial purpose), must have an invoice (the trader or "middleman", as discussed above, and the fish processing estabishment).

This system has distinct advantages. Firstly, it will provide an effective mechanism to ensure that only legally caught fish can enter the market. Secondly, it provides for an invoice system to enable monitoring of such commercial activity. Thirdly, it provides for the selling of fish to the end user without a permit, as well as for the public to buy for consumptive use without retaining an invoice. It therefore meets the objective of not over-regulating, while still being able to monitor and control the supermarket and fish shop via the invoice system. Fourthly, such a system will simplify the Regulations as all references to invoices can be deleted because all species of fish will be governed by these prescriptions.

The proposed changes, although not necessarily a final solution to the issue, will however, it is respectfully submitted, clarify the current uncertainty. It will in all probability also be welcomed by those involved in the fishing industry and trade, as it provides for a fairly simple system without placing an unnecessary burden on industry. It will further bring the legislation and policy in line, and provide for legal certainty. It further also creates a system that is both monitorable and enforceable.

2.6 Control of Recreational Activities in Marine Protected Areas[46]

A ban on diving in certain marine protected areas has been requested repeatedly by Fishery Control Officers ("FCO's") as it would provide a tool for keeping illegal exploiters out of the water and therefore the fish in the water. This request was specifically made in the context of the illegal exploitation of abalone in marine protected areas ("MPA's") such as the Betty's Bay Marine Protected Area, where such activity is rife. The purpose of such a provision would not be to create an offence that will be seen as serious, but rather to strengthen the powers of FCO's who often have to helplessly watch divers in the water, knowing full well that they are taking out abalone but without sufficient proof to arrest. Abalone and lifters are merely abandoned in the water as soon as the officers approach. An additional measure would be to prevent vessels from entering such areas, as most of the poaching is done from vessels. By controlling the activities of diving and boating in such areas, the law can therefore play a preventive role in combating illegal fishing. The same would of course apply to other areas outside MPA's where abalone poaching is occurring on a huge scale, but, it will be submitted, the legal position differs substantially in regard to such areas. This will therefore be discussed separately below under part 2.7.

Although the Minister has wide powers to make regulations under section 77 of the MLRA, diving may also be a purely recreational activity and not necessarily linked to fishing or related activities. While clearly the Minister may therefore regulate the method of fishing, e.g. prohibit fishing of abalone with artificial diving apparatus[47], the regulation of diving or boating in itself might be attacked for being *ultra vires* as it will regulate a recreational activity unconnected with fishing or related activities.

There is however a strong argument for submitting that the Minister may regulate diving and boating in MPA's. The purpose of such areas is inter alia "allowing

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[46] I acknowledge the indirect input of Mongezi Nqoro, Marcel Kroese and Pedro Goosen from MCM through various discussions on the topic.

[47] See e g regulation 38(3)(d) which prohibits the harvesting of abalone with artificial diving apparatus.

stock recovery ... and providing pristine communities for research" [48] as well as "to diminish any conflict that may arise from competing uses in that area" [49]. Furthermore, no person is allowed to "fish or attempt to fish" [50] in a MPA (the definition of "fishing" in section 1 covers an attempt to fish and the "attempt to fish" is thus superfluous in this section). No person may "carry on any activity which may adversely impact on the ecosystem of that area" [51]. The powers of the Minister to make regulations are covered by section 77 of the MLRA and more expressly by section 77(2)(x)(i), which provides that the Minister may make regulations concerning "the management and protection of marine protected areas". It is submitted that Marine Protected Areas are indeed the national parks of the sea, and as such the area may be managed as a whole and limitations on activities other than those connected with fishing and related activities may also be regulated. The above argument, which was already advanced in 2002, is now strengthened by the fact that Chapters 1 and 2 and section 48 of the National Environmental Management: Protected Areas Act, Act 57 of 2003, also applies to MPA's.[52] Although Chapters 1 and 2 only contain some general principles, and section 48 deals with mining in such areas, it clearly places MPA's under the same umbrella as other protected areas. Surely no one will argue that access to or recreational activities within a national park may not be regulated- the same should therefore apply to a marine protected area.

It is therefore submitted that, as the Minister clearly has wide powers to regulate the management of such areas, he may regulate activities such as diving and boating in marine protected areas. Existing examples are found in regulation 3(4) of Government Notice 1429 of Government Gazette 21948 of 29 December 2000[53] which states that "[n]o person shall dive in the St Lucia and Maputaland marine protected areas with the use of artificial breathing apparatus or any submersible craft, except on the authority of a permit" and more recently when

[48] Section 43(1)(b) of the MLRA.
[49] Section 43(1)(c) of the MLRA.
[50] Section 43(2)(a) of the MLRA.
[51] Section 43(2)(e) of the MLRA.
[52] See Section 14 of Act 57 of 2003.
[53] This Notice contains the declaration of 19 Marine Protected Areas.

four new marine protected areas have been declared, such a ban on diving was included in provisions for some of these Marine Protected Areas[54]. Regulation 6(1) of the notice declaring the Bird Island Group Marine Protected Area[55] contains a prohibition on diving in that MPA, and regulation 8(1) of the notice declaring the Table Mountain National Park MPA[56] contains a prohibition on SCUBA diving in that MPA. Another example of such a limitation on recreational activities is the ban on any vessels within the Whale Sanctuary Area of the Walker Bay Whale Sanctuary MPA during the period from 1 July to 30 November, both dates inclusive[57]. It is however conceded that the last example does have a more direct link to the protection of fish, as the intention of the prohibition clearly is to ensure that visiting whales are not disturbed.

It is therefore submitted that the Minister may regulate and control both the use of vessels and the activity of diving within MPA's and should continue to do so via regulations on the different MPA's. It is however proposed that a general prohibition on diving and boating within MPA's, to be contained in the MLRA, should be considered. Such a prohibition of general application can be added as a new section 43(2)(f) and 43(2)(g):

(2) No person shall in any marine protected area, without permission in terms of subsection (3)-

- *(a)* *fish* ***[or attempt to fish]*** <u>*unless expressly allowed for by regulation;*</u>
- *(b)* *...;*
- *(c)* *...;*
- *(d)* *...;**[or]***
- *(e)* *...;*

[54] It is not known what, if any, role the opinion played in the drafting of these provisions.
[55] GN 696 in GG 26432 of 4 June 2004.
[56] GN 695 of GG 26431 of 4 June 2004.
[57] See Regulation 3(2) and 4 of GN 473 of GG 22335 of 29 May 2001. In another unfortunate omission the Notice however fails to create an offence for such a prohibition. This again created serious problems for enforcement and prosecution in the 2006 whale watching season (information based on personal involvement of author).

(f) dive, attempt to dive or be in possession of any diving gear unless expressly allowed for by regulation; or

(g) use any motorised vessel unless expressly allowed for by regulation.

The above insertion will have the effect of a general prohibition in such areas, but will still allow for exclusions via regulations. In some areas such a prohibition will be unnecessary or impractical, such as certain parts of the Table Mountain National Park Marine Protected Area which includes heavily populated urban areas where recreational diving and boating for various purposes often take place. It is however submitted that a general prohibition allowing for exceptions is a stronger mechanism than the current approach of prohibiting such conduct in certain MPA's, or in some cases, in certain parts of certain MPA's. A general prohibition sends out a clear message that such activities are not allowed unless expressly provided for and creates greater legal certainty. It also facilitates prosecution by creating one offence applicable to all MPA's, and the exception does not need to be alleged or proved by the State. Section 90 of the Criminal Procedure Act 51 of 1977 ("the CPA") provides as follows:

"In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution."

The prohibition on the use of vessels in MPA's is limited to motorised vessels, so as not to be unnecessarily restrictive by excluding sea kayaks and similar craft. The vessels used for the illegal exploitation of abalone are almost always motorised, and usually extremely fast high powered vessels. An unintended advantage of such a prohibition would be to ensure the tranquillity associated with protected areas by excluding motorised vessels.

Another amendment, not directly related to the subject, but within the same section, as is set out above in section 43(2)(a) above is also proposed. Section 43(2)(a) as it currently reads, places a blanket prohibition on all fishing in Marine Protected Areas. Almost all of the notices declaring MPA's however allows for some form of fishing inside the MPA.[58] This situation is untenable as it leads to a contradiction between the provisions in the Act and notices under the Act. It is therefore proposed that the same proviso as was proposed for the above prohibition, be inserted. It will therefore provide that no person may fish in a MPA unless expressly allowed for by regulation.

Although of no practical consequence, the superfluous "or attempt to fish", can be deleted simultaneously.

2.7 Control of Recreational Activities outside Marine Protected Areas

The motivation for such control is the same as was discussed directly above in relation to marine protected areas. Most of the distribution area of abalone falls outside of MPA's.

As diving and boating are recreational activities not necessarily linked to fishing, it is respectfully submitted that the Minister cannot make regulations controlling such activities outside of MPA's. FCO's have often remarked that if diving at night, which would very rarely occur for recreational purposes, can be prohibited, they would be in a much stronger position to keep divers out of the water, and therefore the abalone in the water, as much of the abalone poaching is indeed done at night.

One can argue that such a prohibition, at least of diving during night time, can be based on the wide powers given to the Minister in terms of section 77(1)(b) of the MLRA which determines that the Minister may make regulations regarding "generally all matters which are reasonably necessary or expedient to be

[58] See e g Regulation 3(1)(a) in Regulation 1429 of Government Gazette Number 21948 of 29 December 2000 that allows for recreational shore-angling in the Betty's Bay, Goukamma and Robberg MPA.

prescribed in order to achieve the objects of this Act", including the protection of species and ecosystems. Such a regulation against night diving would have a factual basis for protecting the resource and ecosystem, as night diving for purely recreational purposes is extremely rare. It can further be shown that almost all night diving is done for the purpose of illegally harvesting abalone, especially in relation to certain areas. It is however conceded that this is not a very convincing argument.

A possible basis for controlling recreational activities in the sea is to be found in the Sea-shore Act, Act 21 of 1935. Section 10 of that act gives powers to the Minister to make regulations concerning certain activities. Section 10(b) refers to "bathing in the sea", and although it might be argued that "bathing" does not include diving, section 10(e) refers to "the control, generally, of the sea-shore and of the sea". If read within the context of the "State President to be the owner of the sea-shore and the sea", as is stated in section 2(1) of the Sea-shore Act, it is respectfully submitted that a regulation in terms of section 10 of the Sea-shore Act 21 of 1935 would be the appropriate vehicle for such a measure. Furthermore, section 10(3)(a) provides that such a regulation may be "declared to be applicable to the whole of the sea-shore or to any defined portion thereof or to the whole of the sea or any defined portion thereof", making it possible to limit such a ban to areas where abalone poaching is rife. The "Minister" referred to in the Sea-shore Act is defined in section 1 as the "competent authority [of a particular province] to whom the administration of this Act [Sea-shore Act]....has been assigned in that province, save ...within any port or harbour.....[where] 'Minister' means the Minister of Transport." The "sea" includes the territorial sea[59] and this will adequately cover the area where abalone is found as the species only occurs along the coastline and mostly at depths of less than 10 meters.[60]

The above is however problematic. The Minister will have to convince the MEC's of the coastal provinces to all issue such regulations. One can argue that section 77 of the MLRA should be amended to explicitly provide for such a power to the

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[59] Section 1 of Act 21 of 1935

[60] Tarr in Payne et al. **Oceans of Life** (1989) 62 – 69

Minister as it can be shown that it has a factual basis of protection of marine resources. Such a provision will however also have to provide that such a measure can only be taken in consultation with the provincial authorities to ensure that no conflicting provisions are published, as well as recognise the fact that such power is not within the exclusive domain of the national Department of Environmental Affairs and Tourism. The question as to which sphere of government has the authority to legislate on this in terms of the Constitution also arises. Environment and conservation is listed in Schedule 4 of the Constitution[61] as a functional area of concurrent national and provincial legislative competence, marine living resources fall under exclusive national legislative competence and provincial recreation is listed in Schedule 5 as a functional area of exclusive provincial legislative competence.

The rather outdated Sea-shore Act will however in all probability soon be replaced by an Integrated Coastal Management Act, which will be a specific environmental management act (SEMA) under NEMA. Under the current provisions contained in the Integrated Coastal Management Bill[62] "coastal waters", which comprise the internal waters and territorial sea[63] are included in the definition of "coastal public property" [64], which in turn is included in the definition of the "coastal zone" [65]. The Integrated Coastal Zone Management Bill inter alia provides for national, provincial and municipal coastal management programmes[66] and all three spheres of government will therefore play a role in the administration of the act. This is therefore similar to the current position under the Sea-shore Act, but with two major differences. Firstly, the Minister of Environmental Affairs and Tourism maintains some control, and secondly, provision is made for various measures (such as the management programmes) to ensure co-operative governance within the spirit of the Constitution.

[61] Act 108 of 1996
[62] The July 2007 version of the Bill.
[63] See section 1 of the Bill
[64] See section 7 of Bill
[65] See section 1 of the Bill
[66] See Chapter 6 of the Bill

The Bill in its current format provides that the Minister may issue regulations under this Act to provide for inter alia "the presence and recreational use of vessels on coastal waters". [67] This therefore explicitly provides the power to the Minister to issue regulations on the use of vessels as envisaged above. It does however not provide for the Minister to make regulations regarding recreational use (in general) of coastal waters. This is the responsibility of the MEC, who may make regulations regarding "the use of coastal public property [which includes coastal waters] for recreational use".[68] Ideally, the Integrated Coastal Management Bill should also make provision for the Minister to regulate such activities on a national level, as is the case with the use of vehicles in the coastal zone.

If the relevant Bill is however passed in its current format, the position with regard to the possible control of diving and boating will therefore be similar to the current position under the Sea-shore Act, but, it must be stressed, now within a system of management programmes to ensure co-operative governance. It is therefore submitted that the control of recreational diving in certain areas where poaching is rife would be possible via a co-ordinated effort by all spheres of government.

The practical aspects of the above will however have to be clearly considered- not all areas where abalone is occurring can be closed to recreational vessels and diving. The authorities may however decide to close certain "hotspots" and this can contribute significantly to enforcement, and therefore the protection of the abalone resource.

2.8 Powers of Fishery Control Officers

A Fishery Control Officer (FCO) has wide powers in terms of section 51 of the Act. These powers largely correspond to the powers of police officers in terms of the Criminal Procedure Act 51 of 1977 ("the CPA"). In some circumstances the powers are even wider than those of police officers, e g the powers to stop,

[67] See section 81(1)(o) of the Bill.
[68] See section 82(1)(c) of the Bill.

board and inspect vessels at sea. These can be described as powers of inspection. There are, however, also notable omissions.

Firstly, section 51(1) authorises a FCO to enter and search vehicles, vessels and premises with a warrant, but does not specify if such officials can apply and obtain a warrant. In practice magistrates differ in opinion on this - some have issued search warrants to FCO's while others have refused on the basis that the MLRA does not authorize them to do so[69]. One can argue the merits of both views. On the one hand section 21(1) of the CPA does not specify that a warrant can only be issued to a police official, although section 21(2) states that such a warrant must "authorise a police official" to enter, search and seize [emphasis added]. Section 19 of the CPA specifies that these provisions do not derogate from any power conferred by any other law to enter, search and seize, but then again the MLRA does not set out any procedure for an application for a warrant. In the absence of a clear indication either way, it is submitted that the MLRA be amended to make it clear that FCO's can also apply for a warrant.

One could possibly incorporate the provisions of section 21 of the CPA *mutatis mutandis,* but section 21 contains so many references to its subsequent provisions, and therefore must be read in a very specific context, that this is not advisable. Another possibility would be to adapt the provisions of section 21 of the CPA and then incorporate it into section 51 of the MLRA. It is however submitted that a simple amendment as proposed below would be adequate:

51 (1) For the purposes of enforcing this Act any fishery control officer may apply for and be issued with a warrant from the persons and on the grounds as set out in section 21 of the Criminal Procedure Act, Act 51 of 1977, and may with a warrant enter and search any vessel, vehicle, aircraft or premises or seize any property.

The other slightly worrying aspect is that peace officers are appointed in terms of section 334 of the CPA, whereas a FCO will "in the exercise of his or her powers

[69] In such cases warrants were then obtained in terms of the CPA with the assistance of the police.

in terms of this Act, be deemed to be a peace officer as defined in section 1 of the CPA" [70]. Although FCO's have wide powers of search, seizure and arrest in terms of the Act, it is nowhere specified that they have the powers to issue notices in terms of section 56 of the CPA (the so-called admission of guilt fines, or J534, as it is commonly known by its government printer's code). Section 51(5) only grants the powers of a peace officer to FCO's in "exercising the powers referred to in this section". It does not grant them any other powers of a peace officer *per se*, and nowhere in section 51 are they bestowed with the powers to issue section 56 notices. In practice FCO's do issue J534 fines, but the fact that this point has not been taken in any court case is probably because such fines are fairly low and often paid to escape the embarrassment and expense of appearing in court and therefore rarely lead to trials.

The remedy for the above defect is either to appoint FCO's as peace officers in terms of section 334 of the CPA, or alternatively bestow on them such powers in terms of the MLRA. The latter would be the logical choice as it avoids the administrative burden of appointing all FCO's as peace officers and can be implemented by a fairly simple amendment. It is therefore submitted that the power to issue admission of guilt fines be inserted in the MLRA.

Ezemvelo-KZN[71] has pointed out that while section 51(2) provides for wide powers of inspection, it does not specifically authorise the searching of vessels. Whilst one can argue the semantics of the difference between "inspect" and "search", it will be better to clarify the situation by specifically authorising the search of such vessels[72]. Section 51(2) of the MLRA only authorizes a FCO to take specific actions in the case of an inspection and it would therefore be wise to insert the specific authority to search.

(2) For the purposes of enforcing this Act any fishery control officer may without a warrant-

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[70] Section 51(5) of the MLRA

[71] Ezemvelo-KZN administers the MLRA in the Kwa-Zulu Natal province and forwarded this proposal.

[72] NEMA also contains different provisions on inspection and search. The main difference is that an inspection is a routine activity, whereas a search is triggered by suspected non-compliance.

(h) *conduct a search or make any examination or enquiry which he or she may consider necessary to ascertain whether any provision of this Act has been contravened;*

Lastly, and very importantly, it seems that FCO's lack powers of routine inspection, except in the case of vessels at sea in terms of section 51(2)(a) to (k) and fish processing establishments in terms of section 51(2)(l). Read out of context, section 51(2)(h) authorises FCO's to make "any examination or enquiry which he or she may consider necessary to ascertain whether any provision of this Act has been contravened". In context however, this refers to the situation where vessels at sea are inspected[73]. It also does not explicitly confer the power to search, as was pointed out above.

The situation regarding inspections of catches and permits of commercial permit holders have not created problems in practice, and that situation can be adequately addressed by permit conditions as well. The situation that is not addressed is the routine inspections to monitor recreational fishing along the coast. FCO's often stop and search vehicles and vessels (usually towed behind a vehicle) in routine checks along the coastline. It is such an obvious part of their duties that private individuals generally tend not to question it. No general authority to carry out routine inspections of individuals who have, or might have, fish in their possession is however specified anywhere in the Act. FCO's are authorised to stop and search vessels (referring here also to vessels not at sea) and vehicles, but only those "which he or she reasonably suspects is being used in the commission of an offence"[74]. On what legal basis can a FCO search a vehicle which has clearly been involved in fishing (towing a boat; having fishing gear on or in the vehicle)? Section 250(2) of the CPA does authorise any peace officer, which in this case will include a FCO deemed to be a peace officer in terms of section 51(5) of the MLRA, to require a person to produce a permit if they are engaging in fishing activity. That will indeed cover the situation where a person is busy fishing, but will not necessarily authorise a FCO to stop a vehicle

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[73] See section 51(2) of the Act.
[74] Section 51(3)(b).

to do such an enquiry, and definitely not to search such a vehicle. A FCO cannot claim that he or she suspected the commission of an offence unless he first ascertains whether there are fish in the car and that the person does not have a permit. How can the FCO know whether there are fish in the car unless it is visible without a search or the person volunteers the information? The only way in which this can be done is to authorise FCO's to search vehicles and towed vessels in certain circumstances to ascertain whether there are any fish in or on the vehicle and vessel.

The predecessor to the current act, the Sea Fishery Act, Act 12 of 1988, inter alia authorised FCO's to "board any fishing boat or vessel ....and enter any vehicle used for the transport .... of fish....and perform any such acts as may be necessary to ascertain whether the provisions of the Act were or are being complied with". Note that this power is not limited to boats at sea, neither to the suspicion of an offence, but is a general power to inspect. Furthermore, section 53(4) specified that in respect of vessels, these powers may "be exercised outside the fishing zone". This provision was however also too limited to include random searches as it refers to "vehicles used for the transport of fish" (unless it is a marked vehicle from a fishing company, how can the FCO know whether the vehicle is used for the transport of fish?). Under the current Act, such a vehicle from a fishing company will fall under the definition of a "fish processing establishment" and can therefore also be inspected without a warrant. The provision in the Sea Fishery Act was however wider that the current provision in the MLRA and it is not clear why such a provision was not repeated in the MLRA, except if the perception was that it would be contrary to the right to privacy in the Bill of Rights.

The Namibian legislation clearly confers such rights to their inspectorate[75]. Section 5 of the Namibian Marine Resources Act of 2000, Act 27 of 2000, determines as follows:

"**5.** (1) A fisheries inspector may, at any time and without a warrant -

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[75] Thank you to Victor Bok for referring me to this section and providing me with a copy of the Act.

(a) board any vessel and inspect such vessel, its fishing gear, cargo and stores, any marine resources aboard and any document or other item required to be kept under this Act and may, for the purposes of that inspection, stop that vessel;

(b) enter any premises, other than a dwelling house, or any vehicle, in which marine resources or any fishing gear are kept or are being transported, as the case may be, and inspect the premises, or vehicle, and may, for the purpose of inspecting a vehicle in which marine resources are being transported, stop that vehicle;

(c) stop any vehicle for the purpose of carrying out a routine check for marine resources;

(d) examine any fishing gear or object which he or she has reasonable grounds to suspect is being used or intended for use in the harvesting, handling or processing of marine resources;

(e) question any person who, in his or her opinion, may be capable of furnishing any information which he or she may require; and

(f) require any person employed on a vessel to assist him or her in the examination of any container, fishing gear, marine resources or document on or in such vessel in order to ascertain whether this Act has been complied with."

Note especially the powers conferred by section 5(1)(b) and (c). Section 5(1)(c) provides authority both to stop a vehicle as well as to carry out a routine check.

It is therefore strongly recommended that such general powers of inspection and search be conferred on FCO's. FCO's must have the explicit power to stop and inspect vehicles and vessels (out of the water) to determine whether there are any fish in or on such a vehicle or vessel.

Such a power must be reasonable and justifiable in the circumstances to ensure that it complies with section 36(1) of the Constitution dealing with the limitation of rights. It should therefore only be allowed where the necessity to effectively

enforce the provisions of the Act demands it and it should infringe as little as possible on the right to privacy. Limiting such a right to the coastal area is problematic in more than one regard. It would be very difficult decide on the demarcation of such an area, as well as then having to prove that such action did indeed take place within the area. It might also be too limiting as it would exclude the possibility of an inspection away from the coast (people often travel vast distances to fish). It is therefore proposed that such powers be limited to circumstances where there is an indication, or then a reasonable suspicion, that there might be fish in or on such vessel or vehicle. In contrast to the powers currently contained in the Act, these powers will depend on a reasonable possibility of possession of fish, and not on a reasonable suspicion of an offence having been committed. This will cover the situation of routine inspections of vessels and vehicles, especially along the coast, in circumstances where there is a possibility that fishing might have taken place.

It is therefore proposed that a new section 51(3) (a) should be inserted (and that the consequent subsections be renumbered). This would ensure that should fish be found in or on such a vessel or vehicle, and no permit can be shown, seizure and arrest can be done in terms of section 51(3)(c) and (d) respectively.

51(3)(a) A fishery control officer may without a warrant stop, inspect and search any person, vehicle or vessel for the purpose of carrying out a routine check for fish or compliance with any provision of this Act, if he or she has reason to believe that such person has been involved in fishing or related activities, or that such a person might have fish in his or her possession, or that that there might be fish in or on such a vessel or vehicle; and

The power to request the production of a permit is contained in section 250(2) of the CPA, as was pointed out above and need not be repeated here.

2.9 Criminalising Non-Compliance with Permit Conditions

Section 58 fails to criminalise non compliance with permit conditions attached to related activities, as well as any other permits issued. This effectively means that a person cannot be prosecuted for non-compliance with conditions attached to a permit issued for related activities or any other activity under the Act. This is clearly an unintended, and rather serious, oversight.

Section 58(1)(a)(i) creates an offence for undertaking "fishing or related activities in contravention of a provision of section 13", and section 58(1)(a)(ii) for undertaking "fishing or related activities in contravention of the conditions of any right of access, other right, licence or permit granted or issued in terms of Part 1, 2 or 3 of Chapter 3" (emphasis added). Although section 58(1)(a)(i) therefore creates an offence for undertaking related activities and (in some cases), fishing or exercising a right without a permit, and section 58(1)(a)(ii) does refer to undertaking "related activities in contravention of the conditions" of a permit, it limits this to rights and permits issued under Part 1, 2 and 3 of Chapter 3. Permits for related activities are however not dealt with under Part 1, 2 and 3 of Chapter 3, but only in section 13. Section 13 falls under Chapter 2.

Conditions attached to rights issued for commercial fishing, subsistence fishing, mariculture and the operation of a fish processing establishment are covered as section 18 is contained in Part 2 of Chapter 3. Chapter 3 does however not deal with the issue of permits for any of the related activities, which is only dealt with in section 13, which is part of Chapter 2. Although sections 19 and 20, which are contained in Part 2 of Chapter 3, dealing respectively with subsistence fishing and recreational fishing, do refer to permits, they do not deal with the issuing of such permits. There is a good argument to be made for stating that all permits issued in terms of the MLRA are permits issued in terms of section 13 and are therefore not covered by section 58(1)(a)(ii). Nowhere in Part 1, 2 and 3 is the issue of permits authorised- all permits are issued in terms of section 13. This would effectively means that the contravention of the conditions of any permit issued in terms of the MLRA is not a criminal offence. Section 58(1)(b), making it

an offence to contravene "any other provision of this Act", is also not of assistance, as section 13(2)(b) only empowers the Minister to make the permit subject to conditions, and does not make it an offence not to comply with these conditions.

This oversight has in practice caused practical problems for prosecutors trying to formulate charge sheets on the non-compliance of permit conditions. One such case involved the export of abalone where the accused blatantly contravened the permit conditions. As such export is a related activity, the permit was issued in terms of section 13 and such non-compliance is therefore not a criminal offence. Although persons have been successfully prosecuted for non-adherence to permit conditions for recreational and commercial fishing, it is submitted, based on the discussion above, that such permits are also issued in terms of section 13, or more importantly, not issued in terms of Part 1, 2 or 3 of Chapter 3. This means that such a contravention of permit conditions is not a prosecutable offence.

It is therefore submitted that section 58 must be amended urgently to cover this huge lacuna in the Act. Any person doubting the correctness of the above argument should try to draft a charge sheet for a contravention of permit conditions: it simply cannot be done. Part 1, 2 and 3 of Chapter 3 deals with the issue of rights; section 13 deals with the issue of permits.

The only remedy for non-compliance with permit conditions is the administrative procedure for the cancellation and suspension of permits provided for in section 28 of the Act.

The wording of the proposed amendment is included in the discussion immediately below.

2.10 Criminalising Non-Compliance with Exemption Conditions

Section 58 also fails to criminalise non compliance with conditions attached to exemptions granted in terms of section 81 of the Act.

Exemptions are often used in practice and create serious problems for compliance personnel. It is doubtful whether the purpose of exemptions was to serve as an alternative to the issue of permits, as is currently often the case, and the practice in this regard is questionable. However, it is still being used and therefore needs to be dealt with.

Exemptions can also be issued "subject to conditions" in terms of section 81(1). If those conditions are however contravened, the only option seems to be the cancellation of the exemption in terms of section 81(2). It must immediately be added that, although section 81(2) does not prescribe any procedure in this regard as is the case in section 28 dealing with cancellation of permits, it would be wise to follow the rules of administrative justice in cases where exemptions are used as a substitute for permits. The contravention of these conditions does not, however, constitute a criminal offence. As in the case of permit conditions discussed above, neither section 58(1)(a)(ii) nor section 58(1)(a)(iii), nor section 58(2), deals with these conditions. Nor does section 81 create a criminal offence for non-compliance with the conditions. It can possibly be argued that such conditions are suspensive and that non-compliance with the conditions therefore has the effect that the exemption is void. I do not however believe that such an *argum*ent is sound as there is no indication in the wording of the provision that such an interpretation is valid.

It is therefore strongly recommended that section 58 be amended to make non-compliance with these conditions an offence.

The proposed wording of section 58 which will incorporate both this aspect, as well as cover the position in regard to permit conditions discussed above, is as follows:

58 Offences and penalties

(1) Any person who, subject to the provisions of subsections (2) or (3)-

(a) undertakes fishing or related activities in contravention of-

(i) ...;

(ii) the conditions of any right of access, other right, licence or permit granted or issued in terms of section 13 or of Part 1, 2 or 3 of Chapter 3 or of any exemption granted in terms of section 81 for such activities; or

(iii) an authorisation to undertake fishing or related activities in terms of Part 6 or 7 of Chapter 3, but excluding section 39 (5), or of any exemption granted in terms of section 81 for such activities; or

(b) contravenes any other provision of this Act,

shall be guilty of an offence and liable on conviction to a fine not exceeding two million rand, or to imprisonment for a period not exceeding five years.

2.11 The Penalty Provision

The penalty provision needs urgent amendment. The relevant sentence provisions are contained in section 58 of the MLRA and regulation 96 of the Regulations. Generally, the scope of sentences is mainly determined by two factors: the one being the penalty provisions in the act itself, and the other the jurisdiction of the court.

Unless an act makes specific provision for higher jurisdiction, a district court is limited to a fine of R60 000, 00 or imprisonment of three years, and a regional court to a fine of R300 000, 00 or imprisonment of fifteen years[76]. It is to be noted that these limitations limit sentences per count, and not the total sentence. The MLRA does however specifically provide for a higher jurisdiction in section 70(3):

"Notwithstanding anything to the contrary in any other Act, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act."

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[76] These limits are determined by the Minister in terms of section 92(1) of the Magistrates Court Act 32 of 1944. The latest specification of fines was published in GN R239 in GG24393 of 14 February 1998.

This means that both district and regional courts can hand down the prescribed sentences in the MLRA which include fines ranging from two million to five million rand and imprisonment of up to five years. Unfortunately the other transgressions relating to many serious offences, e g the possession of abalone, the catching and possession of great white sharks and the killing of a whale, are all contained in the Regulations and are not covered by the MLRA. Section 58 (4) provides that a regulation made under the MLRA may provide for a sentence of "a fine or imprisonment for a period not exceeding two years". Before the amendments to the Regulations of 8 October 2003[77] the same provision was contained in regulation 96 of the Regulations. Although the provisions of section 70(3) also apply to penalties under the Regulations, no fine was specified in the Regulations and the maximum of two years imprisonment fell within both the district and regional court jurisdictions. As no maximum fine was specified in regulation 96, the Adjustment of Fines Act, Act 101 of 1991, applied. This provides that the maximum fine as an alternative to which a period of imprisonment may be imposed shall be in the same ratio with regard to the period of imprisonment. This effectively meant that as no maximum fine was specified in the Regulations, the maximum fine a district court could impose was 2 (the maximum period of imprisonment specified in the Regulations) / 3 (the jurisdiction of a district court as to years of imprisonment) x R60 000,00 = R40 000,00. The maximum fine a regional court could impose was 2 (the maximum period of imprisonment specified in the Regulations) /15 (the jurisdiction of a regional court as to years of imprisonment) x R300 000,00 (the jurisdiction of a regional court to impose a fine) =R40 000,00. Such sentences were clearly inadequate in some instances such as abalone related offences, to note but one example. Although sentences of direct imprisonment (without the option of a fine) were appropriate in the case of some of these offences, it would have been a fallacious argument to try to convince a court that a sentence of imprisonment must follow because the legislature failed to make provision for an adequate fine.

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[77] GN R 1455 of GG 25558 of 8 October 2003.

The above limitation was partly overcome by amending regulation 96 of the Regulations by inserting a higher maximum fine, because section 1(2) of Act 101 of 1991 "shall not apply if the maximum amount of the fine prescribed in the law or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1)(a)". The 2003 amendments introduced a maximum fine of R800 000. There was however some concern that section 58(4) of the MLRA does not refer to any specified maximum fine, and therefore some reservation as to whether the Minister may specify such a maximum fine[78]. The specified maximum fine has not been challenged in court, but it might be wise to rather make provision for a maximum fine in the enabling provisions of section 58(4). The proposed wording for such an amendment follows below.

It must immediately be added that the current penalty provision for imprisonment in the Regulations seems inadequate. In the recent appeal court judgement in Packereysammy v The State[79] a sentence of 18 months imprisonment without the option of a fine on a conviction on one count (under the Regulations) of possession of 6140 abalone, was confirmed. The accused was a first offender. In the more recent appeal of Louis van Dyk v. The State[80], also heard in the Supreme Court of Appeal, a sentence of 18 months imprisonment in terms of section 276(1)(i) of Act 51 of 1977 for unlawful possession of 378 abalone, was confirmed. In such a context a sentence of 2 years imprisonment for a repeat offender in similar circumstances would surely not be suitable. Setting higher maximum sentences would also confirm the seriousness with which the legislature views such crimes.

The setting of minimum fines for certain offences is an option, but there is a general resistance from the judiciary against the setting of minimum fines. The above sentences show that sentences of direct imprisonment in appropriate circumstances have the blessing of our highest court of appeal and the courts

[78] The recommendation for the increased fine was done by P.J. Snijman and M.N. Nqoro, legal advisers to MCM. They also noted the reservation.
[79] Case no. 048/2003 delivered on 28 November 2003, now reported 2004(2)SALR 167.
[80] Case no. 042/2004, delivered on 29 September 2004, unreported.

have therefore given a clear indication that direct imprisonment can be a suitable sentence, even for relatively small amounts of abalone.

In further motivation of increasing the maximum penalty, the following extract from an opinion expressed by a former regional magistrate of the Environmental Court in Hermanus, Advocate Chris Naudé[81]:

"...the current amount of R800 000,00 is completely out of proportion compared to a maximum of two years imprisonment. The legislation with regard to a maximum of two years imprisonment is outdated as regards abalone matters. This type of offence is very often committed by organized syndicates and is highly lucrative. Three (3) abalone are about 1 kg in weight and the price of 1kg on the black market is between R800,00 and R1 000,00.

When a syndicate leader is convicted of the possession of 100 000 abalone for commercial purposes, a term of imprisonment is limited to two years, even for a third or fourth conviction on a similar charge. The legislature therefore did not consider the severe nature of some of these offences and has not empowered the courts to impose an appropriate sentence when dealing with a perpetual offender, or when the facts indicate that the offence was committed on an organised basis."

There seems to be no reason why sentences for offences in terms of the Regulations cannot correspond with those in the Act. Using abusive language towards a FCO theoretically can be punished with a fine of two million rand or five years imprisonment[82], while possession of thousands of abalone is only punishable with a fine of R800 000 or two years imprisonment. It is therefore recommended that the enabling penalty provision with regard to the maximum fine for regulations in terms of the Act, and of course also the penalty provision in the Regulations, be amended to at least correspond with the maximum fine of R2 million prescribed in section 58(1) of the Act. It is further recommended that the

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[81] From a presentation delivered at the first national training course for prosecutors *Prosecuting Environmental Crimes* Helderfontein Estate, Midrand, July 2005, a joint project by the DEAT, the NPA, Justice College, the US Department of Justice and the US Environmental Protection Agency.

[82] Section 56(5)(c) read with section 58(1)(b) of the MLRA.

maximum term of imprisonment prescribed in terms of section 58(4), as well as the penalty provision in regulation 96, be increased to at least 5 years.

Section 58 furthermore refers throughout to a fine "or" imprisonment. This should read a fine "and/or" imprisonment, the phrase used in almost all other legislation. By using "or" the court is given a discretion to impose either the fine or imprisonment. While a sentence such as "R40 000 or 2 years imprisonment, of which half is suspended for 4 years" is competent, a sentence of "R20 000 or 1 year imprisonment, as well as a further 1 year imprisonment (without the option of a fine) suspended for 4 years" is not a competent sentence because it contains a fine and imprisonment.[83] This severely limits the court's ability to be creative in sentencing. If there is only one count against an accused and the court wishes to fine a perpetrator but also suspend direct imprisonment without the option of a fine, it is not possible in terms of the current penalty clause. There seems to be no reason for this limitation other than oversight on the part of the original drafters.

In view of the above the following amendments are proposed:

58 Offences and penalties

(1) Any person who, subject to the provisions of subsections (2) or (3)-

(a) .....

(i) ...;

(ii) ...; or

(iii) ...; or

(b) ...,

shall be guilty of an offence and liable on conviction to a fine not exceeding two million rand, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

(2) ...

[83] See **Du Toit et al, Commentary on the Criminal Procedure Act, Juta, Kenwyn, 2003: 28-20**

(3) ...

*(4) A regulation made under this Act may provide that a person who contravenes or fails to comply with a provision thereof, shall be guilty of an offence and liable on conviction to a fine not exceeding two million rand or to imprisonment for a period not exceeding **[two]** five years or to both such fine and such imprisonment.*

2.12 Security for the Release of Vessels, Vehicles or Aircraft

Section 62 provides for "the court which will hear the matter" to, while a criminal case is pending, release seized vessels, vehicles or aircraft. While the rationale for this is clear, it is not clear whether section 62(2) was meant to be compulsory, leaving no discretion to the court whether a vessel or vehicle must be returned to an accused. As it currently reads the court has no choice but to return a vessel or vehicle on the payment of security. Section 62(2) states that "[on] hearing the application the court shall (a) determine the amount of security...(iii) and order the release ....." While this section is open to interpretation, it seems to favour the interpretation that the court does not have any discretion. There are cases where the court must be able to refuse such a request e g where the vessel or vehicle is still needed for purposes of investigation or as an exhibit for court purposes.

In comparison, section 31 of the CPA, which also deals with the disposal of articles before the conclusion of a case, provides that such an article be returned to the person from whom it was seized, provided "that such article is not required at the trial for purposes of evidence or for purposes of an order of court". As section 62 of the MLRA effectively deals with the purposes of an order of court[84], but not with the situation where the vessel, vehicle or aircraft may be required at the trial for purposes of evidence, such an insertion would be advisable.

[84] See section 68(3) of the MLRA.

It is also interesting to note that the similar (almost identical) provision in section 34F(2) of NEMA clearly leaves a discretion to the court in such circumstances by providing that "[a] court may order the release of the vehicle, vessel or aircraft" (emphasis added).

Two further provisions in section 62 create problems in practice. Firstly, section 62(2)(b) makes provision for the release on a lesser than prescribed amount of security in cases where there are "special and exceptional circumstances". It does not allow for the release without any security, though. In practice it is often the case that a confiscated vehicle is still the property of a financing institution which then cancels their agreement with the accused (usually due to non-payment). In such cases no need for the payment of any security exists (there is no reasonable expectation that the vehicle will be forfeited, and therefore no need for setting security), but as the provision currently reads, the release without paying any security is not possible[85]. It would be appropriate to allow for the release without payment of security in such instances.

Secondly, section 62(3) determines that the setting of security shall be subject to conditions that the court may determine. It is submitted that it will be expedient to make the release of any vessel, vehicle or aircraft automatically subject to the condition that it must be retained, and not altered or modified either, until the criminal case is finalised. Such items might prove to be necessary for court purposes later, and although the court might set such a condition in terms of section 62(3), it often fails to do so (and prosecutors often fail to request it). It has happened in practice that such items are alienated or altered and should an inspection by the court become necessary during the trial, it is not available any more, or has been substantially modified. Adding this as a standard condition, but allowing for the court to be able to give permission for alienation will effectively deal with this problem as it will force the court to apply its mind before such permission is granted.

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[85] In practice a nominal amount is usually set in such circumstances.

It is therefore submitted that section 62(2) should be amended to provide for the above. A possible amendment can read as follows:

62 Security for release of vessel, vehicle or aircraft

(1) If a fishing vessel, vehicle or aircraft is taken, seized or detained in terms of this Act and judicial proceedings are instituted in respect of an offence for which the vessel, vehicle or aircraft has been detained, the master, owner, charterer or agent of the owner or the charterer of the vessel, vehicle or aircraft may at any time apply to the court which will hear the matter, for the release of the vessel, vehicle or aircraft on the provision of security in terms of this section.

(2) On hearing the application the court shall-

(a) determine whether such vehicle, vessel or aircraft may be required for purposes of further investigation or for purposes of evidence at the trial and may refuse or postpone such an application on such grounds; alternatively determine the amount of security to be deposited with the court by adding to the value of the vessel, vehicle or aircraft-

(i) the maximum fine for the offence or offences alleged; and

(ii) costs and expenses incurred or reasonably foreseen to be incurred by the State, and recoverable in terms of this Act,

and may order the release of the vessel subject to the lodging of a guarantee or depositing of the security as determined; or

(b) where it is satisfied that there are special and exceptional circumstances to justify it doing so, may order the release of the vessel, vehicle or aircraft subject to the payment of security which is less than the amount contemplated in paragraph (a) ,and may also order the release without the payment of any security.

(3) The furnishing of security, or an order to release without the payment of any security, shall, subject to subsection (4), be subject to the conditions that the court determine; provided that, unless the court determines otherwise, it shall

be subject to the condition that such vessel, vehicle or aircraft not be alienated or substantially altered or modified until such time as the criminal proceedings have been finalised.

(4)....

2.13 Disposal of Perishables

Section 63 of the Act empowers the Minister to sell confiscated fish prior to the finalization of the criminal proceedings. The proceeds of such a sale must however be paid into a suspense account pending an order of the court in respect of the forfeiture of the proceeds. This provision has caused problems in instances where criminal cases have been withdrawn and the accused then claims either the fish that was confiscated, or the proceeds of such fish that was sold in terms of section 63(1) (b).

The problem arises where the accused does not have a permit or invoice for the possession of such fish. In some instances no criminal proceedings are instituted or cases are withdrawn because of "technical reasons" (e g a key witness that died or where the search warrant was defective). An accused would be rather short-sighted if he/she claimed back the fish itself in such circumstances (the moment such fish is handed back to the accused, he/she is again in possession without a permit/invoice, and the fish can be confiscated and the accused charged again – unlawfully possessed fish cannot be "laundered" via confiscation). The situation that has however caused problems is where the fish has already been sold in terms of section 63(1)(b). Often the person from whom such fish has been confiscated and against whom no court proceedings have been instituted (or the case has been withdrawn), demands the return of such proceeds. There can be no objection against such a person receiving such proceeds. The person would indeed have succeeded in "laundering" the unlawfully possessed fish, and that through confiscation by the State! It can be argued that the Minister has a discretion whether to return the proceeds or not, but this is not clear. Section 63(1)(b) determines that "... the Minister

may....cause the sale of the fish.....[and] if no proceedings are instituted, release the proceeds to the person from whom the fish or other thing was seized..." (emphasis added).

In contrast the similar provision in the procedure prescribed in section 31 of the CPA, allows that such an article may be returned to the person from whom it was seized "if such person may lawfully possess such article".

It is therefore important that section 63 be amended as to only allow the return of proceeds from the sale of confiscated fish in circumstances where the initial possession was lawful.

63 Disposal of perishables

(1) If any fish or other thing of a perishable nature is seized in terms of section 51 the Minister may, notwithstanding any other provision of this Act-

(a) ...; or

(b) cause the sale of the fish or other thing at a price which is reasonable in the circumstances and, if court proceedings are instituted, pay the proceeds of the sale into a suspense account of the Department pending a court order in respect of the forfeiture of the proceeds or, if no proceedings are instituted, release the proceeds to the person from whom the fish or other thing was seized provided that at the time of the seizure such a person was in lawful possession of such fish; provided further that, if, after making all reasonable efforts, the Minister is unable to sell the fish or other thing, or where such fish or other things are unfit for sale, he or she may dispose thereof in such other manner as he or she deems fit, including by destruction.

(2) ...

The proposed amendment discussed in part 2.2 above on the ownership of unlawfully obtained fish will further strengthen the position in this regard.

2.14 Forfeiture Orders by Court

Section 68(1), dealing with forfeiture orders by the court, does not mention gear other than in the context of a *fishing vessel, together with its gear* whereas the purpose logically must have been to include it as an item to be forfeited irrespective of whether it was on board a vessel or not. Section 69(1), dealing with the disposal of forfeited things, reads correctly in this respect by referring to any "vessel, including its gear, cargo, stores and fuel, and any vehicle or aircraft, gear, net or other equipment..." (emphasis added).

Section 68(1) is therefore defective in this respect and needs to be amended to clearly show that all gear and equipment, irrespective of it being on a vessel or not, can be forfeited to the State. As the section currently reads the court cannot order forfeiture in terms of this section[86] of e g diving gear where such gear was used in the commission of an offence unless it was used from a vessel. The phrase "together with its gear" following on "fishing vessel" is also superfluous as the definition of "fishing vessel" in section 1 includes its gear and equipment. It is however submitted that it is unnecessarily restrictive to refer to a "fishing" vessel, except insofar as it would by definition include the gear and equipment aboard such a vessel. Section 69(1) further refers to a "vessel" and not to a "fishing vessel".

Of more practical importance than the above is however the unnecessary restriction in section 68(1) that forfeiture is limited to instances where a person is convicted. A person may be acquitted on particular grounds, e g as so often happens, because the State could not prove that the accused was indeed in possession of the fish that was illegally harvested. Does that now mean that the court cannot order the forfeiture of that fish? In practice the situation has also occurred where an accused denies ownership e g of a vehicle in which abalone was transported illegally, and no person claims ownership of that vehicle. Why is the court not empowered to order the forfeiture of such fish or vehicle? In this regard section 34 (1) of the CPA determines that the court can "at the conclusion

[86] It is submitted that the provisions on forfeiture in the CPA can be utilised in such cases.

of such proceedings....make an order that any article.....(a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or.........(c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State". Although section 35 of the CPA also deals with forfeiture where an accused is convicted, section 34 covers any situation, irrespective of a conviction or not. Our courts have fallen back on these provisions in the CPA in the absence of any similar provisions in the MLRA, but as the MLRA clearly intends to regulate forfeiture, it is strongly recommended that section 68 be amended in this respect as well.

Another problem with the wording of section 68(1) recently came to the fore[87]. Section 68(1) makes provision for the forfeiture of "fish caught unlawfully" (emphasis added). It is not known why such a restrictive qualification was used. What about fish possessed unlawfully? Or fish unlawfully imported? Or fish unlawfully processed? The interpretation of this section is currently the subject of an appeal lodged in a case heard in Durban Magistrate's Court, the State v Hanam CC[88]. The matter concerns the illegal import of almost 54 tons of fish into South Africa in contravention of regulation 27(1)(e) of the Regulations[89]. The accused pleaded guilty and received a sentence of R20 000, 00, of which half was suspended. The sentence seems to be very light, but was probably motivated by the fact that all the imported fish, which has been confiscated, was forfeited to the State by the court in terms of section 68(1) of the MLRA. The accused has now taken the confiscation order on appeal on the basis that section 68(1) does not allow the forfeiture of illegally imported fish, but only the forfeiture of fish "caught unlawfully". It would be interesting to see what the

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[87] Robert Mortassagne, regional prosecutor in Durban, highlighted this problem in a conversation with the author.

[88] Case no. 23/15397/2006, heard on 14/9/2006. The author was involved in the investigation of case; the prosecutor in the case, who also supplied the additional information, was Robert Mortassagne.

[89] A prosecution under section 13 of the MLRA would also have been appropriate, as import is a related activity listed in section 1 of the Act.

decision of the High Court will be on this[90], but it would seem that such the forfeiture order could not have been granted on the basis of section 68(1). This case again highlights how important legislation is in effective enforcement and prosecution, and how big the negative effect of poorly drafted provisions is. The value of the fish in this particular case is R655 000, 00.

Section 68 (2) does make provision for the return of articles not forfeited, but does not empower the court to make such an order. It is therefore left in the hands of the SAPS or MCM to interpret this provision. Moreover it suffers from the same defect as does section 63(1) discussed above. Should a court therefore fail to make an order for the forfeiture of e g the fish, or the proceeds of the sale of such fish (and this has happened in practice), an accused, even if convicted, can claim such proceeds (this has also happened in practice). Section 68(2) should therefore be amended to rather let the court make such a decision, as well as to cover the situation similar to that discussed in relation to section 63(1) discussed above.

A proposed alternative follows below:

68 Forfeiture orders by court

(1)(a) If any person is convicted of an offence in terms of this Act, the court may, in addition to any other penalty, order that

- *i)* *any fishing vessel or vessel, including its gear, equipment, cargo, provisions and fuel;*
- *ii)* *any vehicle or aircraft;*
- *iii)* *any gear, equipment, net, explosive or fire-arm; or*
- *iv)* *any other thing*

used or involved in the commission of that offence be forfeited to the State.

[90] A copy of the judgment was received just prior to the finalisation of this minor dissertation. The finding of the Natal Provincial Division was that section 68(1) indeed only makes provision for the forfeiture of fish "caught unlawfully" and that the court *a qua* was therefore not legally competent to make an order for the confiscation of fish illegally imported. Case No. A198/07 in the High Court of South Africa (Natal Provincial Division), judgment delivered on 16 July 2007. Judgment by Msimang J, with Ngubane, J concurring.

(b) At the conclusion of criminal proceedings the court may order that any fish or perishables caught, possessed or otherwise involved in the contravention of any provision of this Act, or the proceeds of the sale of such fish or perishables, be forfeited to the State.

(c) At the conclusion of criminal proceedings the court may order that any article, including any fishing vessel or vessel, any vehicle or aircraft, any gear, equipment, net, explosive or fire-arm, be forfeited to the State if no person is entitled to the article, or if no person may lawfully possess the article without a permit, or if the person who might be entitled to it cannot be traced or is unknown.

(2)(a) If any vessel, vehicle, aircraft, equipment, fish or any other thing seized in terms of this Act, or any security or net proceeds of sale in respect thereof, is not forfeited, the court can order such articles or proceeds to be returned to the person from whom it was seized, or to the owner of such an article.

(b) If any vessel, vehicle, aircraft, equipment, fish or any other thing seized in terms of this Act, or any security or net proceeds of sale in respect thereof, is not forfeited or ordered to be returned by the court in terms of subsection (2)(a) or applied in the discharge of any fine, order for costs or penalty imposed in terms of this Act, it shall be made available to the person from whom it was seized, or the owner, provided that such a person may lawfully possess such an article, or, in the case of the proceeds of sale of fish, provided that such person may lawfully have possessed such fish.

(3) ...

(4) ...

2.15 Miscellaneous Matters

2.15.1 Observers

Section 50 of the MLRA deals with the subject of observers. It does not contain any detailed provisions on the role and task of observers. Section 50(4) simply states that "an observer shall exercise the scientific, compliance, monitoring and other functions determined by the Minister".

The task of the observer is often made more difficult by the fact that he or she is seen as a type of watchdog by the fishing industry. "Once it becomes clear ...that the observer is there primarily to collect information for the good management and sustainability of the resources being exploited, then the observers task becomes considerably easier.....[T]he presence of an observer on a vessel may alter the behaviour of the fisher such that there is an element of compliance in his role[91]", but the observers do not play any direct role in law enforcement.

The fact that observers do not play a role in law enforcement, and must not be seen as to fulfil that role, has recently come to the fore very strongly. This issue was highlighted in various discussions within the SADC-EU Monitoring Control and Surveillance Programme, and the exclusion of any law enforcement role is also in line with international policy. Section 50 of the MLRA however falls under Chapter 6 under the heading of "Law Enforcement". The placing of this section dealing with observers under a separate heading, or more to the point, not under the heading of "Law Enforcement", was strongly advised by both Southern African and European partners in the SADC-EU Monitoring Control and Surveillance Programme[92].

It is therefore submitted that a separate Chapter 6 with the heading of "Observers" be inserted and that section 50 will fall under that chapter. A new

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[91] Dave Japp in a presentation on Observer Programmes in South Africa delivered at the SADC EU Regional MCS Symposium in Cape Town, February 2005.

[92] It was however Teresa Amador, regional legal advisor to the Programme, who initially remarked that section 50 should not fall under the heading of "Law Enforcement".

Chapter 7 titled "Law Enforcement" should then contain sections 51 to 57. Subsequent chapters will need to be renumbered accordingly.

2.15.2 Destruction of evidence

The qualification in section 60 that no items may be destroyed or thrown overboard "to avoid seizure thereof or the detection of any contravention of this Act" is unnecessarily restrictive and might be very difficult to prove in some cases. Such conduct will in any regard amount to the common law offence of defeating or obstructing the ends of justice. The contravention of section 60 should ideally be an alternative to the common law crime where the purpose of the action cannot be proved. It is therefore recommended that the qualification be deleted.

It is submitted that section 60 should be amended to read as follows:

60(1) No person who, being on board any vessel being pursued, about to be boarded or notified that it will be boarded by a fishery control officer shall throw overboard or destroy any fish, fish product, gear, explosive, fire-arm, poison, noxious substance, chart, log book, document or any other thing ***[to avoid the seizure thereof or the detection of any contravention of this Act]****.*

2.15.3 Admission of Guilt Fines

One cannot criticise the MLRA for not making provision for a uniform process of fixing admission of guilt fines as this is a fairly new concept in South African legislation. Such a provision will however have numerous advantages.

The setting of admission of guilt fines is regulated by the CPA. The maximum amount determined for admission of guilt fines in terms of section 56 of the CPA has been increased in 2003 from R1500 to R2500 in terms of Government Notice R.239 published in Government Gazette No.24393 of 14 February 2003 (the maximum amount that prosecutors can determine in terms of section 57 of the CPA has been increased to R5000). The allowed maximum is therefore

determined in terms of the powers in the CPA and applies to all peace officers and not only FCO's. Furthermore, section 57(5) of the CPA prescribes that the magistrate of a particular district must determine amounts for specific transgressions. In practice this is done in consultation with the prosecutors and the result is the so-called admission of guilt fines list according to which all peace officers, including all FCO's, must determine fines in particular cases. These fines therefore may, and often do, differ in different districts. In practice it means that a FCO must apply a different fine for the same offence, depending on in what district the offence was committed. Uniform fines throughout the different court districts would of course be preferable, but all the magistrates will have to be convinced to set such fines. Such a process is a quite daunting task given the number of court districts involved, although it has been attempted with some success[93].

The ideal position would be to enable MCM to set admission of guilt fines that would apply uniformly. This will only be possible if such powers are provided for in the Act. A precedent in this regard is provisions contained in section 34G of the National Environmental Management Act 107 of 1998 (NEMA), which provides for regulations in terms of that act to set admission of guilt fines[94]. It is therefore recommended that such an enabling provision be inserted in Chapter 7 (Judicial Matters) or Chapter 8 (General Provisions) of the MLRA. The wording of section 34G in NEMA, with the necessary adaptations, can be "borrowed".

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[93] The author compiled such an AG Fine List after perusing various lists from various districts, and consultation with management and inspectors. Prosecutors were then requested to submit this list to magistrates, and at least in the Western Cape region this was fairly successful.

[94] Although there were discussions about the possibility of the MLRA being included in the SEMA's, the current position is that this would probably not be done, and definitely not in the near future. DEAT is currently in the process of drafting such proposed lists (information from Melissa Fourie, Director: Enforcement, Environmental Quality and Protection Branch, DEAT). An example of such an AG fine set in terms of NEMA is to be found in regulation 14 of GN R1399 of GG22960 of 21/12/01(as amended), setting a fine of R2000, 00 for the unauthorized use of a vehicle in the coastal zone.

2.15.4 Sea Shells on the Seashore

Almost the whole of the predecessor to the MLRA, the Sea Fishery Act 12 of 1988 was repealed by the MLRA, but the provisions on shells were retained. Section 38(1) of the Sea Fishery Act reads as follows:

"...no person shall collect and remove or cause to be collected or removed any aquatic plants or shells from the sea or sea- shore, except for his own use and in the prescribed quantities, without being the holder of a permit issued by the Minister and otherwise in accordance with the conditions contained in the permit".

A "shell" is defined as the empty shell of a shellfish in section 1 of the Act. Regulation 50 of the regulations in terms of the Sea Fishery Act (GNR 2934/14353/1 of 23 October 1992) prescribes the following quantities:

"... no person shall on any one day collect for his own use or remove from the sea-shore more than 1 kg shells, 50 kg shellgrit or more than 10 kg aquatic plants, unless he is the holder of a permit..."

It is not quite clear why provisions on shells were not included in the MLRA or Regulations. Although the Act deals with living marine resources, shells still have their origin in live organisms. The MLRA further deals with fish products as well, and regulation 56(7) of the Regulations does indeed deal with pansy shells. There seems to be no rationale for this exclusion, which, judging from the amount of enquiries received from the public, and also from FCO's, only lead to confusion.

It is therefore proposed that shells be expressly included in the definition of *fish*, that a definition for shells be inserted in the Act and that the collection of shells further be dealt with in the Regulations. Section 38(1) of the Sea Fisheries Act and other references thereto will have to be repealed if this proposal is implemented.

2.15.5 The Listing of Abalone on CITES Appendix III

The recent listing by South Africa of abalone (*Haliotis midae*) in Appendix III of the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) on 3 May 2007 should assist in combating the illegal export of the species from South Africa, as was pointed out in Part 2.2 above. Whereas listing a species in Appendices I and II requires a decision by the member countries, a species can be unilaterally placed in Appendix III. The listing of a species in Appendix III means that export permit and a certificate of origin are required. The advantage of this measure is that the country of import, if a member of CITES, must ensure that such an export permit has been issued in the country of origin, providing an effective control for preventing the import of illegally harvested abalone to other CITES member countries.

There is evidence of Mozambique, Namibia, Tanzania, Swaziland and Zimbabwe having been used as points of exit to the overseas market in abalone which is concentrated in Hong Kong and China[95]. All of these countries, as well as China, are however members of CITES. Parties may indeed enter a reservation with regard to a listing in Appendix III, but as CITES has been listed as one of the international conventions in which parties to the Southern African Development Community Protocol on Fisheries shall, in terms of Article 6, endeavor to undertake co-ordinated and complimentary actions, it is unlikely that these neighbouring countries will enter such a reservation. The listing therefore has the potential of being effective in that such member countries are obliged to only allow imports of abalone into their countries if they are accompanied by the necessary export permit issued by South Africa.

The lacuna that currently exists in this regard is that the export of abalone without an export permit in contravention of the provisions of CITES is not a criminal offence under South African law. Until very recently the only incorporation of the CITES provisions into our domestic law was to be found in provincial legislation. An example of this is to be found in Western Cape Nature and Environmental

[95] Information based on personal experience by the author.

Conservation Ordinance 19 of 1974 (as amended in 2000) which incorporates Appendix I and II into certain provisions, but does not incorporate Appendix III. Additional to this is the fact that marine resources fall under exclusive national legislative competence, and therefore cannot be controlled via provincial legislation.

The current position is that the National Environmental Management: Biodiversity Act, Act 10 of 2004, a specific environmental management Act under NEMA, although it does not mention CITES by name, clearly intends via the provisions of Chapter 4: Part 3, dealing with trade in threatened or protected species, to *inter alia* give effect to the provisions of CITES on a national level. Section 51 (c) determines that the purpose of Chapter 4 is to "give effect to the Republic's obligations under international agreements regulating international trade in specimens of endangered species". Section 56 makes provision for the Minister to publish a list of "critically endangered species", "endangered species", "vulnerable species" and "protected species" by notice in the Government Gazette. Section 57 (1) determines that no "restricted activity" involving a specimen of a listed threatened or protected species may be carried out without a permit. Import of, export of, and trading in, listed threatened or protected species is included in the definition of restricted activities in section 1. (The term "listed threatened or protected species" includes all species listed in terms of section 56(1)). Section 60 to 62 further deals with the establishment, functions and non-detriment findings of a "Scientific Authority" dealing with international trade – again a clear reference to the provisions of CITES.

None of these lists of species have however been published, and although much publicity was given to the listing of abalone on CITES Appendix III, the export of abalone from South Africa without a CITES export permit is not currently a criminal offence. This is not only a serious oversight, but also means that South Africa is not fulfilling its international obligations in terms of CITES.

PART 3

A CRITICAL EXAMINATION OF THE PROVISIONS OF THE REGULATIONS FROM AN ENFORCEMENT AND PROSECUTORIAL PERSPECTIVE AND RECOMMENDATIONS TO ENSURE MORE EFFECTIVE ENFORCEMENT AND PROSECUTION

As was noted in the introduction the Regulations are frought with unnecessary mistakes which can only be attributed to poor drafting. Only the most important issues are highlighted below.

3.1 Closed Seasons

The contents of the annexure to regulation 9, determining closed seasons for various species, are problematic. Although there are currently no recreational permits issued for abalone, both in regard to the species abalone and west coast rock lobster, no offence is created for the catching or possession of either of the species by the illegal exploiter in the closed season.

Different closed seasons are prescribed for the different permit holders, thereby making the prescribed seasons only applicable to permit holders. A non-permit holder can therefore not be prosecuted for fishing of these species out of season. Although accused have been convicted under this provision, the parties clearly have not applied their minds to the issue. It is recommended that the seasons be specified to apply to all persons, including recreational permit holders, but excluding commercial permit holders. A separate season for commercial permit holders can then be specified.

3.2 The New Linefishing Regulations

Regulations 21 and 22 have been replaced in totality on 6 April 2005[96]. From a compliance point of view these amendments can only be described as disastrous and any attempt to insert the text into the Regulations leads to absurdities.

In the preamble to the new linefishing regulations the following amendments to the Regulations R. 1111 as published in Government Gazette No.19205 of 2 September 1998 are set out:

- New definitions are added to the definitions contained in Regulation 1.
- Part 5 of Chapter 4, containing regulations 21 and 22, is deleted.
- New regulations 21 and 22 are inserted.
- Annexures 4, 5, 6, 7, 8 and 9 to Regulations R. 1111 are deleted.
- New Annexures 4, 5, 6, 7, 8 and 9 are added.

It is appreciated that these new provisions were an effort to regulate linefishing more effectively. Unfortunately it was done out of context with the rest of the Regulations, and without any consideration to the application of compliance measures.

3.2.1 The Deletion of Part 5 of Chapter 4

While it is appreciated that the deletion of Part 5 of Chapter 4 must be evaluated in the context of the insertion of the new regulations 21 and 22, a few preliminary remarks are necessary to place the discussion below in context.

The deletion of the "old" regulation 22(1)(a) is used as an example. The removal of this provision effectively removes the prohibition on the catching of specially protected species. Unfortunately the new regulations contain no such ban (now called "prohibited species"), except for the holders of

[96] GN 329 of GG 27453.

recreational permits. This means that the catching of "prohibited species" is not an offence for a non-permit holder. This situation is quite absurd.

3.2.2 The Insertion of New Regulations 21 and 22

There seems to be a typing error in regulation 21(1): "hake *handling* fishing" must read "hake *handline* fishing".

Regulation 21(3)(a) places a prohibition on the attachment of more than ten hooks to a fishing line, but limits the prohibition to the holders of linefishing permits. This leads to the position that a person who catches linefish without a permit, is in a better position because such a person cannot be prosecuted for using more than ten hooks on a line. In this regard the "old" regulation 21(1) read correctly: "No person shall .... engage in fishing by means of gear to which more than ten fishing hooks are attached" (emphasis added).

Regulation 21(3)(c) prohibits fishing in an *estuary* by linefishing permit holders. The term is however not defined anywhere in the MLRA or regulations. Furthermore, the provision is superfluous because regulation 10(a) determines that no person may fish in a tidal river or tidal lagoon, both of which are defined in regulation 1 and clearly include an estuary (in its scientific meaning). Should there be a need for such a prohibition, it should not be limited to permit holders, for the reasons explained above. The same argument applies to regulation 22(14) dealing with spearfishing in estuaries.

Regulation 22(1) can only be described as disastrous - not because of what it determines, but because of what it fails to determine. As was the case with the provisions on abalone before the amendments of 8 October 2003, it fails to prohibit the catching of linefish without a permit. Regulation 22(1) is an empowering provision (...permits may be obtained from an office authorised by the Minister...) and contains no prohibition. The argument that the MLRA fails to prohibit fishing in general, was advanced under part 2.4 above. If that is correct, it means that the current position is therefore that there is no

prohibition on the catching of linefish without a permit, and that no person can be prosecuted for doing so.

The provision in regulation 22(2) is superfluous in the light of the prohibition contained in section 20(1) of the MLRA: "No person shall sell, barter or trade any fish caught through recreational fishing". Neither is it formulated in such wide terms as the prohibition in the Act.

Regulation 22(5) contains a prohibition on on the catching of species on the protected list by recreational permit holders. It is incomprehensible why this ban is limited to recreational permit holders. It should logically include every person, especially those that catch without any permits. Even if the lack of a ban on linefishing as described under regulation 22(1) is rectified, the catching of species on the protected list addresses a different mischief and must be addressed separately. As it currently reads the illegal exploiter is in a better position than the permit holder.

Regulation 22(6) also fails to prohibit the catching of the species on the permitted species list without a permit. It should simply read: "No person may engage in the fishing of .... without a permit, ...", followed by the provision as it currently reads.

Regulation 22(7) determines (a) size limits, (b) closed seasons, and (c) to (f) bag limits. Again the illegal exploiter is excluded from these provisions and cannot be prosecuted for catching undersize, out of season or exceeding the bag limits. This obviously leads to an unwanted result.

Closed seasons are controlled by regulation 9, which incorporates Annexure 2. Annexure 2 has not been amended and contains both elf (shad) and galjoen, which have now been included in Annexure 7. To make matters worse, the season for elf (shad) differs between the two annexures- according to Annexure 2 the closed season starts on 1 September and according to Annexure 7 it starts on 1 October.

The closed season for chokka (squid) is from 25 October to 22 November according to Annexure 2. Chokka (squid) is now included in the new Annexures 4, 5, 6 and 7. In Annexures 4, 5 and 6, the season is as is specified above. Annexure 7, dealing with recreational fishing, however specifies no closed season. This is a contradiction that has to be rectified.

There have been enquiries about the meaning of "engage in fishing for, or be in possession of .... [to use but one example] (c) more fish than the bag limit listed in respect of each species in the Permitted Species List of Annexure 7 on any one day (emphasis added). The literal interpretation would be that no accumulation is allowed at all. It is not clear whether this was the intention or not. It does appear to be quite harsh to not allow a recreational fisherman some kind of accumulation, especially if the bag limit of the particular species is one or two. On the other hand, such accumulation can be used to accumulate and sell illegally. It is therefore important that, should accumulation be allowed, limits are set. An example of that is to be found in regulation 38(3)(b) which limited accumulation of abalone to 15.

Regulation 22(15) to (17) deals with recreational cast-netting. The possession and use of cast nets ("gooinette" in Afrikaans) is also controlled by regulation 19. Although the English version of the Regulations omits a cast net in regulation 19(a), the Afrikaans version, as well as regulation 19(d), do include a cast net. It is not advisable to duplicate or fragment regulations on the same subject. Section 19(a) prohibits even the mere possession of a cast net- is such possession now admissible if a person has a cast-netting permit? It would seem so. The prohibition on the use of a cast net at night is also covered by regulation 19(d).

Regulation 22(18) and (19) deals with marine aquarium fishing. It is not clear whether the new regulation 22(18) and (19) are meant to substitute the current regulation 24 (Part 7 of Chapter 4) which also deals with the subject, or supplement it. As regulation 24 has not been repealed, the two regulations must be read together.

According to regulation 24(1)(a) no person may fish or collect marine aquarium fish, or keep any fish in an aquarium, without a permit (keep in mind that "aquarium fish" is defined in regulation 1 as "fish that are caught or collected for display purposes in fish tanks or aquariums" and that the new definition that has been added defines "marine aquarium fishing" as "recreational fishing for the purpose of obtaining fish for display"). According to regulation 24, you may not keep any fish in an aquarium without a permit whereas, according to the new regulation 22(18), you may possess certain species if you are the holder of an aquarium fishing permit. Does this mean that you must still have a permit to keep any fish in an aquarium, or is the permit referred to in the new regulation 22(18) sufficient? There is a difference between a permit to possess certain species [regulation 22(18)], and a permit to keep fish in an aquarium [regulation 24(1)(a)].

The deletion of regulation 24(1)(a) as a possible solution is not an option as regulation 22(18) and (19) does not contain any ban on the catching or possession of marine aquarium fish (irrespective of the definition used), but only regulates permit holders and does not prohibit the catching of such fish at all.

The above provisions, if read together, as they must be, are not only confusing but also unsatisfactory because of the fragmentation of provisions on the subject. One would expect that all provisions regarding aquarium fish would be dealt with under the first heading of regulation 22(18) and (19), and not suddenly reappear under regulation 24 in Part 7 of Chapter 4.

There is a further direct contradiction between the new regulations and regulation 24. According to regulation 22(4), the holder of a recreational permit shall not use any artificial respiratory equipment other than a snorkel "except in the case of marine aquarium fishing", clearly allowing such use in the case of marine aquarium fishing. Regulation 24(2), however, provides that "no person shall gather any marine aquarium fish with the aid of artificial respiratory apparatus, except a snorkel".

3.2.3 The Deletion of Annexures 4 to 9

The deletion of these annexures in the context of the replacement of regulations 21 and 22 has been discussed above. There are, however, further complications in this regard.

Regulation 27(1)(a) prohibits the selling of fish listed in Annexure 4, which contained the non-saleable recreational list. The new Annexure 4 contains a prohibited as well as a permitted species list, which apply to traditional commercial linefish. This replacement makes nonsense of regulation 27(1)(a). Furthermore, regulation 27(1)(a) was worded correctly to apply to all persons and not only to permit holders ("No person shall..."). This means that non-permit holders are now not prohibited from selling these and cannot be prosecuted for doing so (except possibly under section 13(1) or 20(1) of the MLRA, although both of these provisions are problematic).

Regulation 30 (3)(c) prohibits the selling of any sharks on "the recreational list contained in Annexure 4". The same argument therefore applies here and again the effect is that non-permit holders are not prohibited from doing so.

Regulation 31(1) and (2) deals with bag limits for sharks listed in Annexure 8 for recreational and subsistence permit holders respectively. The new Annexure 8 deals with permitted cast net species and again the result is to make nonsense of this regulation. As recreational bag limits are set for sharks in the new regulations, the practical effect of regulation 31(1) effectively falling away is of no consequence. Unfortunately the effect on regulation 31(2) is to make it nonsensical, although the intention of the new regulations seem to be that such permits will no longer be issued.

Regulation 33(1)(a) sets a bag limit of 20 for chokka (squid). Fortunately this is the same as the bag limits set in the new Annexures 4, 5, 6 and 7. The survival of this regulation also means that non-permit holders can still be prosecuted for fishing or possession of more than 20 chokka (squid).

Regulation 35(1) and (2) deal with bag limits for tuna in Annexure 8 for recreational and subsistence permit holders respectively. The new Annexure 8 deals with permitted cast net species and again the result is to make nonsense of this regulation. As recreational bag limits are set for tuna in the new regulations, the practical effect of regulation 35(1) effectively falling away, is of no consequence. Unfortunately the effect on regulation 35(2) is to make it useless, although the intention of the new regulations seem to be that such permits will no longer be issued

The deletion of the old Annexure 9 has no practical effect. The Engish version of Annexure 9 refers back to regulation 22, and the Afrikaans version refers back to regulation 21, but none of these had any provisions dealing with Annexure 9.

3.2.4 The Insertion of New Annexures 4 to 9

The insertion of these annexures in the context of the replacement of regulations 21 and 22 has been discussed above. There are, however, further complications in this regard.

Regulation 25, which has not been repealed, sets size and mass limits for species in accordance with Annexure 10 (which has also not been repealed). Three of these species, all tuna species, are also contained in the new Annexure 5, with corresponding size limits. There is no size limit for Seventy-four (Polysteganus praeorbitalis) in the new annexures, but it is contained under the prohibited species in both annexure 4 and 7.

The rest of the species listed in Annexure 10 all appear in the permitted species list of Annexure 7. In quite a few cases the size limits differ between the two lists, leading to confusion and contradictions.

A list of the species where the size limits differ is as follows:

Species	Annexure 7	Annexure 10
Dageraad	40 cm	30 cm
Glassy	none	2,5 cm
Kob- Argyrosomus spp.	40/50/60, depending on area	40cm
Kob- Argyrosomus thorpei	?	35cm
(the latter species only occurs on the East Coast)		
Red (copper) steenbras	60cm	40cm
Scotsman	40 cm	30cm
Carpenter (silverfish)	35cm	25cm
Catface rock cod	50cm	40cm
West coast steenbras	60cm	40cm
Yellow belly rock cod	60cm	40cm

While it is appreciated that the intention was to increase the size limits of these species, the contradiction remains. It is not advised that regulation 25(a) be repealed as this regulation reads correctly ("No person shall.....") and is therefore also applicable to non-permit holders. The size limits in the new regulations have only been made applicable to permit holders.

The listing of Kob according to the area where it was caught in the permitted species list is understandable, given the history of identification problems between the different species. It is, however, very strange that the one description reads "Kob caught in estuaries & from the shore [East of Cape Agulhas only] . It has already been pointed out that *estuaries* is not defined in the MLRA or Regulations, but the much more serious cause for concern is the fact that fishing in estuaries (in the scientific meaning of the word) is forbidden in terms of Regulations 10, as was pointed out above.

The above discussion clearly shows the serious problems caused by an ill-judged amendment.[97] It is respectfully submitted that the only proper solution would be a total reevaluation and redraft of the provisions dealing with linefishing. As an emergency measure it is submitted that the following amendments will at least be helpful in the interim:

- Regulation 21(1)(a) must be amended to prohibit the activities of traditional linefishing, tuna pole fishing and hake handline fishing without a permit.
- Regulation 21(3)(c), 22(14) and the description relating to kob in the permitted species list of Annexure 7 must be amended to refer to tidal rivers and lagoons, as this seems to have been the intention. The alternative would be to insert a definition for estuaries in regulation 1.
- The invoice system contained in Regulation 21(4) and (5), although referring to fish, must be amended to clearly only apply to linefish. If the general invoice system as proposed in the discussion under part 2.5 is however accepted, these two subsections can be deleted.
- Regulation 22(1)(a) must be amended to prohibit the activities of angling, spearfishing, cast netting and marine aquarium fishing without a permit.
- The closed seasons only applicable to permit holders must be made applicable to all by inserting Annexure 7 in Regulation 9 on closed seasons.
- A new regulation must be inserted to generally prohibit fishing with more than 10 hooks on a line.
- Part 7 and Regulation 24 on marine aquarium fish must be deleted as this subject is now covered by Regulation 22.

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[97] Kevin Pretorius, attorney at law in Durban, acting on behalf of Ezemvelo-KZN, in a separate and independent opinion, also identified some of the problems identified above. KZN has a large recreational linefishing sector and have experienced serious problems with the application of these regulations.

- The reference to Annexure 10 in Regulation 25(a) must be replaced with Annexure 7 to make the size limits applicable to non permit holders as well. Annexure 10 serves no further purpose and can therefore be deleted in total.
- The reference to Annexure 4 in Regulation 27(1)(a) must be replaced with a reference to the prohibited species lists in Annexures 4 and 7 as Annexure 4 has been replaced, and to make the ban on selling of these species applicable to non permit holders as well.
- The reference to Annexure 4 in Regulation 30(3)(c) must be replaced with a reference to the prohibited species list in Annexure 7 as sharks are now contained in that annexure. This prohibits selling of certain species and is a duplication of Regulation 27(1)(a) above, but as it specifically deals with sharks, it is wise to rather duplicate.
- The reference to Annexure 4 in Regulations 30(3)(d) must be replaced with a reference to the permitted species list in Annexure 7 as sharks are now contained in that annexure. This prohibits the fishing or possession of more than 10 species of any shark, and also a reference to the bag limits. This is partly a duplication, but as it specifically deals with sharks, it is wise to rather duplicate.
- Regulation 31 must be deleted as the bag limits for sharks applicable to permit holders are now dealt with under Regulation 22(7).
- Regulation 35 must be deleted as the bag limits for tuna applicable to permit holders are now dealt with under Regulation 22(7).
- A new regulation must be inserted to prohibit the fishing of species in the permitted species list of Annexures 7 and 8, and the prohibited species in Annexures 7 and 9 without a permit. Where the amended Regulation 21(1)(a) and 22(1)(a) prohibit the activity without a permit, such a new regulation would prohibit the fishing of the species without a permit.

3.3 The Regulations Dealing with Abalone Revisited

The regulations dealing specifically with abalone are found in regulations 36 to 40 (or Part 6) of the Regulations. Prior to the amendments of 2003 a serious lacuna existed in so far as the Regulations failed to effectively prohibit the fishing and possession of abalone without a permit. An opinion on this was submitted to MCM and ultimately led to the said amendments[98].

The main thrust of the opinion was that although the fishing of abalone is indeed "commercial fishing" as defined in the MLRA, and fishing of abalone without a right can be prosecuted under section 18 of the Act, section 18 requires proof of abalone being a species as contemplated in section 14 of the Act[99], but more importantly, fails to cover possession of abalone without a permit. It was submitted that the Regulations also failed to effectively cover possession of abalone without a permit and that they should be urgently amended. This created serious problems in prosecutions as it was often the middleman who was arrested for the possession of abalone, and in the apparent absence of a provision criminalizing such possession, often was acquitted[100]. Prosecutors generally used regulations 38(1) or 38(3)(b) to prosecute both the fishing and illegal possession of abalone. Both of these, it was submitted, were problematic.

Regulation 38(1), providing that a person over the age of 12 years may obtain a permit to fish a maximum of three abalone a day, does not create an offence. It is only an empowering stipulation giving the Minister the power to issue recreational permits. Prosecutors argued that the inverse of this provision implied the requirement of a permit, but it is clear that it is an empowering and not a peremptory clause. Regulation 38(3), which prohibits any person from being in possession of more than 15 abalone at any one time, was even more commonly

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[98] The problems relating to the regulations dealing with abalone were originally discussed in an unpublished paper by P.J. Snijman entitled *Conservation of Marine Living Resources: Problems and Solutions relating to the Conservation of Abalone* as part of a M.Phil Degree in Environmental Management at the University of Stellenbosch. A reworked version of this opinion by P.J. Snijman and M. N. Nqoro was submitted to MCM and led to the amendments to the regulations in GN R 1455 of GG 25558 of 8 October 2003.

[99] See the discussion under Part 2.3 above.

[100] The opinion expressed here and further on in this part is based on practical experience and personal involvement in the prosecution of abalone related offences.

used. It was however submitted that although regulation 38(3) states "No person shall .....," it falls under the heading of "Recreational or subsistence" and that it only applies to the holders of recreational or subsistence permits. One can argue this to be incorrect as regulation 39(3) states "No person shall", but the number of 15 set seems to imply that this is indeed a limitation for the above permit holders, who may then fish a maximum of three abalone per day, but are not allowed to accumulate more than 15 at any given time. As the intention of the legislation is clearly to prohibit the possession of abalone without a permit or invoice (although, it is respectfully submitted, fails to do that), it would be quite absurd to state that the inverse of regulation 38(3)(b) is then true, meaning that any person may possess 15 abalone without a permit. Regulation 39(1)(a) was however successfully used at the Environmental Court in Hermanus to overcome the apparent lacuna in the regulations[101] when dealing with abalone related offences prior to the 2003 amendments. Regulation 39(1)(a) prohibits the fishing of abalone for "commercial purposes", and although it falls under the heading "commercial", clearly applies to all (otherwise it would have had no effect – prohibiting fishing for commercial purposes for the holders of commercial permits is non sensical). Unfortunately "commercial purposes" is not defined as "commercial fishing" referred to above, and must therefore be proved. Evidence was led as to the amount and value of the abalone fished, and the court was requested to draw an inference from this that it was indeed possessed for commercial purposes. In cases where big quantities of abalone were involved, the court usually came to such a conclusion and convicted on that basis. The use of regulation 39(1)(a) however had two drawbacks. Firstly, the extra element of commercial purposes had to be proved, requiring testimony in each and every prosecution of the value of abalone. This placed an unnecessary burden on the State. Secondly, the possession of a small number of abalone, where commercial purposes could not be proved, could not be prosecuted. Why a simple prohibition on the possession of abalone was not originally included in the

[101] The author acted as prosecutor at this court and utilized this provision.

Regulations is beyond comprehension. In the case of most of the other species of fish dealt with in the Regulations, such a provision is indeed included.[102]

The 2003 amendments effectively dealt with this by inserting a new regulation 36(1)(a) simply providing that no abalone may be fished or possessed without a permit.[103] The issue of the interpretation of regulation 38(3)(b) was however the subject of a Cape High Court decision which was delivered on 3 September 2004 in the currently unreported appeal of Jannie Dalton Chan Hong v The State[104]. The High Court found, not unsuspectedly, that regulation 38(3)(b) is only applicable to recreational and subsistence permit holders, confirming the opinion expressed above. The effect of the court's decision however goes wider than just regulation 38(3)(b). On a proper reading of the verdict it becomes clear that the rest of the provisions of regulation 38(3) must meet the same fate as regulation 38(3)(b). The High Court also found that there was indeed a "casus omissus" in the provisions, therefore clearly implying that regulation 38(1) does not create an offence. The court did not discuss regulation 39(1)(a) in any detail, but did remark that it is of general application. Although the Supreme Court of Appeal only later in that same month confirmed a sentence on a contravention of regulation 38(3)(b), as well as regulation 9, in the appeal of Louis van Dyk v The State[105], the interpretation of the regulations was not an issue that was put before court or decided on.

This decision means that the other provisions of regulation 38(3), which include a prohibition on the fishing of abalone at night[106] and the use of artificial diving apparatus for the fishing of abalone[107], only apply to the holders of recreational or subsistence permit holders.[108] This is extremely unfortunate as night diving with

[102] See e g regulation 44(1)(a) which simply prohibits the catching and possession of rock lobster.
[103] Other provisions were also amended simultaneously in an effort to streamline prosecutions in abalone related offences, but are not of relevance in the context of this discussion.
[104] Case number unknown (does not appear on written judgment). Judgment delivered by Hiemstra AJ with Louw J concurring, on 3 September 2004. Although this was subsequent to the amendments, the offence in question was committed in 2000.
[105] Unreported case no 042/2004. Judgment delivered on 29 September 2004.
[106] Regulation 38(3)(c)
[107] Regulation 38(3)(d)
[108] Currently no such permits are issued.

artificial diving apparatus is the common method used by the illegal exploiters of abalone. As the Regulations currently read, no such non-permit holders can be prosecuted for these offences. It is therefore submitted that these regulations must be amended to include a general ban on such conduct, irrespective of whether the offender is a permit holder or not. The effect of the judgment goes even wider: it also affects the other similarly worded provisions concerning the other species specific provisions. One such example is regulation 51(4), dealing with west coast rock lobster, which is similarly worded as regulation 38(3). The prohibition on fishing for west coast rock lobster at night[109] would therefore also only apply to the holders of recreational or subsistence permits, and not to illegal exploiters who are not permit holders.

As was previously mentioned, most of the provisions on the other species dealt with in the Regulations do contain a general ban on the fishing or possession of such species without a permit. Part 7 of the Regulations, dealing with oysters, however contains the same lacuna as was the case with abalone prior to the 2003 amendments and fails to simply prohibit the fishing or possession of oysters without a permit. Regulation 41(c) is insufficient as it provides that you may not collect or possess oysters "for cultivation or re-establisment purposes", an element which will have to be proved by the State in a criminal prosecution, and regulation 42(1)(a) is similar to regulation 39(1)(a) in that it prohibits the fishing or possession of oysters "for commercial purposes". Here, other than with the regulations dealing with abalone, the rules of general application are quite correctly set out under the heading of "General", but they fail to prohibit the fishing or possession of small amounts of oysters where they were not possessed either "for cultivation or re-establisment purposes" or for "for commercial purposes".

[109] Regulation 51(4)(b).

3.4 Possess and Measure

In the unreported case of Ian Cameron v The State[110], a judgment by the Supreme Court of Appeal delivered on 11 May 2005, the meaning of the term "possession" came under the spotlight. The accused was convicted for the possession of four undersized east coast rock lobsters in contravention of Regulation 52(a). The accused was apprehended by a FCO at a spot approximately 70 paces from the shoreline and found to be in possession of four undersized rock lobster. The accused claimed that he still intended to measure the rock lobster and would have returned them to the sea if undersized. He was convicted in the Durban Magistrate's Court, which conviction was upheld on appeal to the Natal High Court. The Supreme Court of Appeal however set aside the conviction.

The appeal was successful, mainly based on the factual issues. The court found that there was indeed a possibility that the accused intended to still measure the rock lobster, and that this excluded the mental element, or animus, of possession of undersized rock lobster on the part of the accused. What is of importance here is the view of the Supreme Court of Appeal on the meaning of "possession", a term also widely used in the rest of the Regulations.The Supreme Court differed in opinion from the court *a quo* which attached an "overly literal construction"[111] to the regulation. The court *a quo* found that the offence consists "solely of being in possession of an undersized lobster" and that " the regulation says nothing whatsoever about a fisherman being given the opportunity to measure his catch". The Natal High Court also stated that "the offence will be complete once the diver takes or retains possession recognising the catch to be undersized, or assuming the risk in the actual realisation that it might well be undersized"[112]. The Supreme Court of Appeal however pointed out that such an interpretation is incorrect: "Taken to its logical conclusion such an interpretation would mean that any person who merely engages in fishing or merely collects ...undersized rock

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[110] Case No. 199/2004. Judgment by Zulman,JA and Cloete JA, with Maya AJA concurring.
[111] Par 8 of the judgment.
[112] Par 7 of judgment.

lobster, would commit an offence"[113]. The court continued by referring to Regulation 53(1)(b) which allows for the fishing of east coast rock lobster with a trap. On a literal interpretation by the court a quo, such a person would be guilty of contravening regulation 52(a), as he or she must foresee the possibility of collecting undersized rock lobsters, and therefore has the necessary *dolus eventualis*. "The regulation requires a sensible and realistic interpretation so as to remove such a manifest absurdity..."[114]. The Supreme Court of Appeal further remarked that "possession" is not defined in the Regulations and that based on the particular facts, the State failed to prove the mental element of control, especially the fact that such control must be for personal gain or benefit.[115]

It is respectfully submitted that no fault can be found with the legal interpretation of the Supreme Court of Appeal. What this case however highlights is a practical problem often encountered by FCO's in such situations[116], namely at what stage is a person required to measure his or her catch for compliance to size limits. It is indeed impractical, and often impossible[117], to measure most of the species prior to it being caught. It is therefore submitted that the Regulations should clearly state at which stage such a measurement should be done. This might also need to differ according to species- in the case of linefish it should probably be done immediately after being caught; in the case of species such as rock lobster a provision that it must be measured below the high water mark would probably be more realistic.

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[113] Par 8 of the judgment.
[114] Par 8 of the judgment.
[115] Par 9 and 10 of the judgment.
[116] The author was often asked by FCO's at which stage a person is required to measure his or her catch for compliance to size limits. One such example concerned undersized west coast rock lobster on a vessel at sea. The fishermen would often also have more than the bag limit, claiming that they are trying to find the biggest specimens possible, and would have returned the rest to the sea.
[117] To state the rather obvious, it would be impossible to measure linefish prior to it being caught.

PART 4

IN CONCLUSION

As was stated in the introduction, the discussion above was presented with reference to specific subjects, and each subject was dealt with comprehensively in that specific section. The format therefore does not lend itself to any overall conclusion with regard to all of the issues discussed. What can be confidently stated is that both the Act and the Regulations need to be reconsidered, and a re-evaluation of the provisions discussed above is of utmost importance to ensure effective enforcement and prosecution in terms of the legislation.

All of the problems highlighted are based on real situations experienced in practice, and in two cases the critique has been proved to be a correct interpretation based on subsequent High Court decisions[118]. The Act and Regulations have been in operation for the past nine years, and the Act has undergone no amendments in this period, while the Regulations have been amended quite frequently, but as was the case with the linefish regulations, sometimes creating problems rather than solutions.

The only general conclusion can therefore be that in an effort to ensure effective enforcement in, and prosecution of, marine related offences, the MLRA and Regulations need to be critically examined and amended where necessary. As it was stated in the introduction, effective enforcement of legislation firstly and foremostly depends on the quality of such legislation. Some provisions in this legislation need to be seriously reconsidered.

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[118] The interpretation of regulation 38(3)(b), as was confirmed by the Hong decision, and the interpretation of section 68(1), as was confirmed by the Hanam decision.

TABLE OF CASES

Reported

- Dunn v Bowyer and Another 1926 NPD 516.
- Packereysammy v The State 2004(2) SACR 169(SCA).
- S v Frost; S v Noah 1974 (3) SA 466 (C).

Unreported

- Hanam CC v The State. Case No. AR 198/07, in the High Court of South Africa (Natal Provincial Division), judgment delivered on 16 July 2007.
- Ian Cameron v The State. Case No. 199/2004 in the Supreme Court of Appeal, judgment delivered on 11 May 2005.
- Jannie Dalton Chan Hong v The State. Case No. unknown, in the High Court of SA (Cape of Good Hope Provincial Division), judgment delivered on 3 September 2004.
- Louis van Dyk v The State. Case No. 042/2004 in the Supreme Court of Appeal, judgment delivered on 29 September 2004.

TABLE OF RELEVANT LEGISLATION

- Adjustment of Fines Act, Act 101 of 1991
- Cape Nature and Environmental Conservation Ordinance 19 of 1974
- Criminal Procedure Act, Act 51 of 1977
- Government Notice R 1111, as published in Government Gazette 19205 of 2 September 1998
- Government Notice R 1429, as published in Government Gazette 21948 of 29 December 2000
- Government Notice 473, as published in Government Gazette 22335 of 29 May 2001
- Government Notice R 239, as published in Government Gazette 24393 of 14 February 2003.
- Government Notice R 1455, as published in Government Gazette 25558 of 8 October 2003
- Government Notice 695, as published in Government Gazette 26431 of 4 June 2004.
- Government Notice 696, as published in Government Gazette 26432 of 4 June 2004.
- Government Notice 329, as published in Government Gazette 27453 of 6 April 2005
- Magistrates Court Act, Act 32 of 1944
- Marine Living Resources Act, Act 51 of 1977
- Marine Resources Act, Act 27 of 2000 (Namibia)
- National Environmental Management Act, Act 107 of 1998
- National Environmental Management: Biodiversity Act, Act 10 of 2004

- National Environmental Management: Protected Areas Act, Act 57 of 2003
- Sea- shore Act, Act 21 of 1935
- Sea Fishery Act, Act 12 of 1988
- Western Cape Nature Conservation Laws Amendment Act, Act 3 of 2000

BIBLIOGRAPHY

Burchell, Jonathan and Milton, John: **Principles of Criminal Law**, Juta, Landsdowne, 2005

Burger, Andrew J: **A Guide to Legislative Drafting in South Africa**, Juta, Cape Town, 2002

Du Toit et al: **Commentary on the Criminal Procedure Act**, Juta, Kenwyn, 2003

Glazewski, Jan: **Environmental Law in South Africa**, Butterworths, Durban, First Edition, 2000

Glazewski, Jan: **Environmental Law in South Africa**, Butterworths, Durban, Second Edition, 2005

Payne, I.L.P. et al (eds) : **Oceans of Life**, Vlaeberg Publishers, Cape Town, 1989