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## MEMO

### RE: CONFISCATION IN TERMS OF THE MARINE LIVING RESOURCES ACT

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We have been asked to assess the following issues related to the confiscation of fish and fish products:

1. Whether or not it is legal for the State to confiscate and to sell a person's fish or fish products without a prior opportunity to defend the matter in court?
2. An assessment of the threshold for determining when an offence in terms of the MLRA should warrant the issuance of a fine as opposed to the total seizure of a vessel or product.
3. The issue of seizure as it relates to fresh fish.
4. The issue of confiscations and their susceptibility to corruption. Is there a legal basis for submitting that sales following confiscations should be open to public tender and that the tender price and details of the tenderer should be disclosed?

The first three issues can be dealt with by reference to the Marine Living Resources Act, 18 of 1998 (MLRA).

In respect of the first issue, the MLRA specifically grants an open discretion to a fishery control officer to, without a warrant, "*seize any fish or fish product which he or she has reasonable grounds to suspect to have been taken or produced in the commission of such offence or which are possessed in contravention of this Act.*"<sup>1</sup> At this stage of the process, the justification that would be posited by the State for not attaching property through the ordinary judicial process would be that confiscation is clearly distinguishable from forfeiture. The MLRA is clear in its treatment of the seized goods as confiscated property which is held in suspense (whether as the physical property or the proceeds from the sale of such property) pending a court order. Only once a court has found the owner of such goods to have been guilty of an offence in terms of the MLRA will the goods or the proceeds of the goods be forfeited to the State. Forfeiture cannot therefore occur outside of the judicial process. A fishery control officer's power to confiscate and sell fish or fish products without

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<sup>1</sup> Section 51(3)(c)(iii), MLRA.

first ventilating the matter in court is legitimate under the MLRA. However, there are still some issues that are up for discussion and these will be raised below.

In respect of the second issue, there can be no quantification of such a threshold. The MLRA grants an open discretion to fishery control officers. This open discretion to either seize or to fine is justifiable given that the factual circumstances of each case will differ to such a large degree. The same offence can be committed under a range of factual circumstances and the granting of discretion to the state officer is therefore not a unique feature to the MLRA. That being said, this discretion is of course open to abuse.

In respect of the third issue, fresh fish is dealt with in terms of section 63 of the MLRA. In terms of section 63, *“if any fish or other thing of a perishable nature is seized...the Minister may...cause the sale of such 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.”* This means that fresh fish would of course have to be sold soon after seizure. There is unfortunately no definition for “perishable” in the MLRA. Without a clear definition, fish or fish products which are frozen could still be seen as perishable, even though they would not perish for months. Section 63 of the MLRA does also provide a mechanism to have the product returned to the person from whom it was seized *“on receiving adequate security to the value of the fish or thing.”*<sup>2</sup>

In respect of the fourth issue, the MLRA does not provide guidance in respect of the procedure for sale. Research was therefore undertaken to assess the applicability of state tendering legislation and administrative law to the sale of such confiscated goods. The result of such research is dealt with separately below.

## **SALE OF CONFISCATED PRODUCT –**

### **STATE TENDER BOARD ACT, 86 OF 1968**

The State Tender Board Act 86 of 1968 establishes the State Tender Board and the procedure for the procurement of government supplies and services and for the disposal,

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<sup>2</sup> Section 63(1)(a), MLRA.

letting or hiring of State property. The sale of confiscated fish or fish products is clearly not an instance of procurement, procurement being the purchasing of goods or services to carry out government functions. The sale of confiscated fish or fish products is also not the disposal of State property. Although State property is not defined in the State Tender Board Act, it is clear from the context that what is envisaged is property specifically owned by the State. Confiscated product only becomes State property if it is forfeited by court order to the State. Before forfeiture, the sale of confiscated product for the purposes of holding the proceeds in a suspense account pending a court order is therefore not the sale of State property but rather the sale of the owner's property from whom the goods were confiscated. Public tendering for such a sale is therefore not required.

### **ADMINISTRATIVE LAW**

The Constitution of South Africa provides that:

*“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”<sup>3</sup>*

Pursuant to this, the Promotion of Administrative Justice Act 2 of 2000 (PAJA) was enacted. In terms of PAJA, *“administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”<sup>4</sup>*

If the act of selling confiscated fish were to be seen as administrative action which materially and adversely affected the rights of the owner, then the state body selling the fish would be obliged to ensure procedural fairness in the sale of such fish or fish product. In terms of PAJA, procedural fairness requires:

- (i) *adequate notice of the nature and purpose of the proposed administrative action;*
- (ii) *a reasonable opportunity to make representations;*
- (iii) *a clear statement of the administrative action;*

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<sup>3</sup> Section 33, Constitution of the Republic of South Africa, 1996.

<sup>4</sup> Section 3, Promotion of Administrative Justice Act 2 of 2000.

- (iv) *adequate notice of any right of review or internal appeal, where applicable* [this would be in circumstances where the primary piece of legislation provided a review or appeal mechanism for the particular administrative act. This would not apply in this instance as the MLRA does not provide a review or appeal mechanism for the sale of confiscated fish or fish product]; *and*
- (v) *adequate notice of the right to request reasons in terms of section 5.*<sup>5</sup>

In this regard, if the act of selling confiscated fish were to be seen as administrative action, the official arranging the sale of the fish would have to give notice to the owner of the proposed sale and specify the purpose of the sale. The official would also have to give the owner a reasonable opportunity to make representations and advise the owner of its right to request reasons for the proposed sale. In consulting commentary on procedural fairness, the right to adequate notice is described as a right to be given information about the proposed action and particulars in respect of the nature and purpose of the proposed action.<sup>6</sup> The opportunity to make representations does not necessarily mean that an oral hearing will be permitted, for in many circumstances an opportunity to make written representations will suffice. The time frame provided in which to make representations depends on the circumstances of the matter and urgency will shorten any time periods provided. In this regard, the sale of live fish would justify a very short representations period.

In order for the above requirements to apply, the sale of confiscated fish would need to fit within the definition of administrative action under PAJA.

Administrative action is defined in PAJA as “*any decision taken, or any failure to take a decision, by an organ of state, when...exercising a public power or performing a public function in terms of any legislation...which adversely affects the rights of any person and which has a direct, external legal effect...*” It is clear that the decision to sell confiscated fish is a decision taken by an organ of state exercising a public power in terms of legislation. It needs to therefore be shown that the sale adversely affects the rights of a person and that the sale has a direct legal effect.

The commentary on “adversely affecting rights” is voluminous. In short though, it is accepted that a deprivation of a right (as opposed to a complete revocation or destruction) will suffice as an “adverse effect.” “Rights are ‘affected’ whenever action is taken which establishes,

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<sup>5</sup> Section 3(2)(b), PAJA.

<sup>6</sup> Cora Hoexter, *Administrative Law in South Africa*, page 370.

withdraws, changes or determines a right.”<sup>7</sup> The capacity of a decision to affect a legal right adversely is also included in certain instances. A person has a right to sell his product at a market related price. The decision to sell confiscated fish most definitely has the capacity to affect a person’s right to a market related price. Furthermore, although the proceeds are kept in a suspense account, the owner loses ownership of his product and there is therefore a definite adverse effect. Finally, the decision to sell frozen fish in instances where a sale is not necessary for the purposes of carrying out the functions in the MLRA is also a decision that will adversely affect the rights of an owner.

The next issue, being that of a “direct legal effect”, is also an area which has attracted a lot of commentary. In this regard, it has been suggested that instead of allowing challenges to a series of preliminary or intermediate decisions, it may make more sense to allow a challenge only once the final decision has been reached. This would mean that because the decision to sell confiscated product is a preliminary step to obtain security for future court action, such a decision would not constitute administrative action at this stage and would not therefore be subject to procedural fairness. However, Hoexter, the leading commentator on South African administrative law, has explained that “direct effect” cannot be interpreted as making preliminary decisions unreviewable. Our courts have recognised that preliminary or intermediate decisions can have significant and devastating effects on individuals and Hoexter therefore concludes that such decisions are included in the ambit of PAJA.<sup>8</sup>

On the above, it is clear that the sale of confiscated fish or fish products can fit within the ambits of administrative action under PAJA. As such, the procedural fairness requirements set out in PAJA must apply to such a sale. Significantly, this means that the owner should be given information about the proposed sale and an opportunity to submit representations in respect thereof. Furthermore, an owner is entitled to request reasons in respect of the action taken. In this regard, we have devised a template letter that can be used to lobby for information when owners are concerned about the sale of confiscated product (see attached).

Finally, although PAJA has been explained above in reference to the sale of the confiscated product, the confiscation itself can similarly be fitted within the definition of administrative action under PAJA. Although the owner retains ownership until a sale, the owner loses possession and freedom of ownership, and in this way his rights of ownership are most certainly deprived. Furthermore, although the confiscation is a preliminary step towards

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<sup>7</sup> Cora Hoxter, *Administrative Law in South Africa*, page 228.

<sup>8</sup> Cora Hoxter, *Administrative Law in South Africa*, page 229.

instituting proceedings in terms of the MLRA, the confiscation has a direct and significant effect on the owner.

In conclusion, although the confiscation and subsequent sale of the fish or fish products is legal and can occur without an opportunity to defend the matter in court, the fisheries control officer must still ensure that the process whereby the fish is confiscated and sold is procedurally fair. Notice of the decision to confiscate and sell should therefore be given before confiscation and sale and an opportunity to make representations should be provided. Owners are also entitled to request reasons for the confiscation and for the sale.