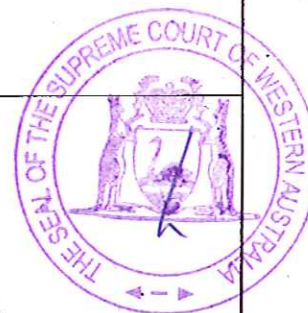


In the Supreme Court of Western Australia Perth Registry	NO.: CIV 1278 of 2014 Application for Judicial Review
Applicant/s	<p>SEA SHEPHERD AUSTRALIA LTD (ACN 123 339 499) First Applicant</p> <p>and</p> <p>SHARON ANN BURDEN Second Applicant</p>
Respondent/s	<p>STATE OF WESTERN AUSTRALIA First Respondent</p> <p>and</p> <p>PREMIER OF WESTERN AUSTRALIA Second Respondent</p> <p>and</p> <p>MINISTER FOR FISHERIES Third Respondent</p>
Other parties	N/A
Decision or conduct to be reviewed	<p><u>Dates:</u> Decisions and conduct of the Three Respondents beginning 24 December 2013 and continuing.</p> <p><u>Where made or occurring:</u> Perth WA and coastal waters of the Perth and South West Marine Management Areas described in Request No DPC 1596 and Addendum 1 to Tender DPC 1596</p> <p><u>Written law governing:</u> <i>Fish Resources Management Act 1994</i> (WA) (the FRM Act), particularly ss 4, 8 45 and 46 thereof; <i>Fish Resources Management Regulations 1995</i> (WA) (the FRM Regulations), particularly r 10, Sch 2, pt 2 and Sch 7 thereof.</p> <p><u>Description:</u> The following decisions and conduct by or of the Respondents occurring as further particularised at paragraphs 1 – 13 below and evidenced by the facts deposed to in the affidavits of the Applicants:</p> <p>(1) The tender for services set forth in Request No DPC 1596 and Addendum 1 to Tender DPC 1596.</p>



	<p>(2) The award of contract for services tendered in response to Request No DPC 1596 and Addendum 1 to Tender DPC 1596.</p> <p>(3) Any and all services or activities conducted by or on behalf of the Respondents, or any of them, under the Shark Drum Line Deployment, Management and Associated Services described in Schedule 2 of Request No DPC 1596 and Addendum 1 to Tender DPC 1596.</p>
Application	<p>The Applicants apply for judicial review of the above decisions (further or alternatively conduct) described at (1)-(3) above (“the decisions or conduct under challenge”) and seek relief by way of:</p> <ul style="list-style-type: none"> <li>(a) a writ of certiorari;</li> <li>(b) a writ of prohibition;</li> <li>(c) a declaration;</li> <li>(d) an injunction restraining the decisions and/or conduct insofar as they have been, and may continue to be, unlawful (including an interlocutory injunction to maintain the status quo until a full hearing of this application);</li> <li>(e) an order that the Respondents provide the Applicant with discovery pursuant to Orders 56 rule 5(2)(f) and 26; and</li> <li>(f) an order that the Respondents pay the Applicants’ costs of this application (including of any interim or interlocutory application).</li> </ul>
Grounds of application	<p>The grounds for this application are as follows:</p> <p><b>Material Facts</b></p> <ol style="list-style-type: none"> <li>1. On 10 December 2013, the Second Respondent and the then Acting Minister for Fisheries, Troy Buswell, announced a “shark mitigation” policy involving the setting of baited drum lines one kilometre from shore to catch large sharks in designated zones off along heavily used beaches in the metropolitan area and the south west of Perth from January to April 2014.</li> <li>2. On 24 December 2013, the Second Respondent announced a tender (Request No DPC 1596) seeking Shark Drum Line Deployment, Management and Associated Services described in Schedule 2 of DPC 1596 (Shark Drum Line Program). DPC 1596 specified the goal of the Shark Drum Line Program, and the</li> </ol>

species of sharks affected, in relevant part as to:

f) [h]umanely destroy any white shark (*Carcharodon carcharias*), tiger shark (*Galeocerdo cuvier*) or bull shark (*Carcharhinus leucas*) that is greater than 3m total length caught on the drum lines.

3. On 27 December 2013, Second and Third Respondents issued a media statement specifying the Marine Monitoring Areas (MMAs) where the Program would be carried out from January – April 2014.

4. On 30 December 2013, the Second Respondent issued Addendum 1 to DPC 1596, which, among other things specifies the beaches in the Metropolitan Coastal area and corrects some of the location information for the South West Coastal Area, where the Shark Drum Line Program is to be deployed. According to DPC 1596 and Addendum 1 thereto, the specific locations at which the Shark Drum Line Program will be carried out are as follows.

a) Deployment and maintenance of up to 36 baited drum lines 1km offshore from the following Perth metropolitan beaches (the Metropolitan MMA):

- (1) Ocean Reef/Mullaloo;
- (2) Trigg/Scarborough;
- (3) Floreat/City Beach;
- (4) Cottesloe/North Cottesloe; and
- (5) Port/Leighton.

b) Deployment and maintenance, in 2 phases – Phase 1 being from 10 January – 10 February 2014, and Phase 2 being from 11 February to 30 April 2014 – of up to 36 baited drum lines offshore from beaches in the South-West of Western Australia (the SW MMA) as follows: Phase 1 – from Quindalup Beach (33.633°S, 115.152°E) to Cape Naturaliste (33.530°S, 115.003°E); Phase 2 – from Cape Naturaliste (33.530°S, 115.003°E) to Left Handers Beach (33.883°S, 114.982°E).

5. The Program originally was intended to be carried out on behalf of the First Respondent by commercial operators who submitted successful tenders in response to DPC

	<p>1596 and DPC 1596 Addendum 1. However, only 1 commercial operator successfully tendered for the services sought to be provided in the SW MMA. The Second and Third Respondents have taken measures to protect the identity of the commercial operator who successfully tendered for the services sought to be provided in the SW MMA tender (the specifics of which are immaterial to this application).</p> <ol style="list-style-type: none"> <li>6. In the Metropolitan MMA, the Program is being carried out by the Third Respondent, through the WA Department of Fisheries' (DOF) personnel and equipment. The DOF is conducting the Program in the Metropolitan MMA purportedly in accordance with the activities sought under DPC 1596 and Addendum 1 to DPC 1596.</li> <li>7. The Second Respondent awarded the tender for the SW MMA under DPC 1596 and Addendum 1 to DPC 1596 on or about 16 January 2014.</li> <li>8. The Second Respondent assumed responsibility for the Program in the Metropolitan MMA on or about 16 January 2014.</li> <li>9. Implementation of the Program in the SW MMA began on or about 26 January 2014.</li> <li>10. Implementation of the Program began in the Metropolitan MMA on 31 January 2014.</li> <li>11. According to the DOF's "Register of Authorisations and Exemptions", on or about 21 January 2014, the Respondents purported to issue Exemption Nos. 2375 and 2376.</li> <li>12. Exemption No. 2375 purports to be a Ministerial exemption to the "State of Western Australia &amp; Graham William Pateman t/a Bouvard Fisheries" from "[a]ll provisions of the <i>Fish Resources Management Act 1994</i> &amp; subsidiary legislation made under the Act" in implementing the State Government's shark mitigation strategy "in the South West Coastal Area" and "responding to shark threats within that Area, under the Contract". By its terms, Exemption No. 2375 applies to the Shark Drum Line Program in the SW MMA.</li> </ol>
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13. Exemption No. 2376 purports to be a Ministerial exemption to the "State of Western Australia & Others As Listed in Schedule 1" from "[a]ll provisions of the *Fish Resources Management Act 1994* & subsidiary legislation made under the Act" in the "setting of baited drum lines in implementing the State Government's shark mitigation strategy" and the "taking, possession and disposal of Target Species and other species taken under the State Government's shark mitigation strategy". Schedule 1 purports to exempt the following persons: The State of Western Australia, Fisheries Officers appointed under ss 11 and 177 of the FRM Act, Police Officers appointed under the *Police Act 1892*, Wildlife Officers appointed under the *Wildlife Conservation Act 1950*, and Public service officers appointed under the *Public Service Management Act 1994* and who are employed by the Department of Transport.
14. Both Exemption Nos. 2375 and 2376 are expressed in their terms to expire on 30 April 2014.
15. The implementation of the Program, in both the Metropolitan MMA and the SW MMA, since the dates referred to at paragraphs 8 and 9 above respectively, has resulted in the following (among other consequences) as of 16 February 2014:
- (a) 43 sharks – all of them Tiger Sharks – being caught in the Metropolitan MMA by DOF crews;
  - (b) Of the 43 Tiger Sharks caught by DOF crews in the Metropolitan MMA, only 4 were of 3m or more in length while others were as small as 1.53m;
  - (c) Of the 43 Tiger Sharks caught by DOF crews in the Metropolitan MMA, 9 were either dead when retrieved or were destroyed;
  - (d) 23 sharks being caught in the SW MMA by the commercial operator awarded the tender under Request No DPC 1596;
  - (e) Of the 23 sharks caught in the SW MMA, all but 3 were Tiger Sharks – of the remainder, 2 were Mako Sharks and 1 was a Blacktip Shark;
  - (f) Of the 23 sharks caught in the SW MMA, 13 were of

3m or more in length while others were as small as 1.7m;

- (g) Of the 23 sharks caught in the SW MMA, 16 were either dead when retrieved (including both Mako Sharks) or were destroyed.

#### Grounds of Judicial Review

A. The sharks that have been taken, and the further sharks sought to be taken, by the decisions or conduct under challenge are protected from being taken by the statutory law of Western Australia and any taking of the sharks is unlawful. Accordingly, the decisions or conduct under challenge:

- (i) are *ultra vires* the FRM Act and FRM regulations; further or alternatively
- (ii) have been, and if continued to be acted upon or implemented will be, affected by jurisdictional error,

and thus:

- (iii) are not, as a matter of law, truly decisions or conduct capable of lawfully affecting rights, duties or obligations.

#### Particulars of Ground of Judicial Review

- (a) The three (3) species of sharks targeted under the Program are all prescribed to be "totally protected fish" under the FRM Act and FRM Regulations
- (b) Section 45 of the FRM Act provides for the prescription of protected fish, in the following material terms:

##### 45. Protected fish, prescription of

(1) A class of fish may be prescribed to be —

- (a) totally protected fish; or
- (b) commercially protected fish; or
- (c) recreationally protected fish,

for the purposes of this Act.

(c) Section 46 of the FRM Act provides that:

**46. Totally protected fish, offences as to**

A person must not —

- (a) take; or
- (b) have in the person's possession; or
- (c) sell or purchase; or
- (d) consign; or
- (e) bring into the State or into WA waters,

any totally protected fish.

(d) Regulation 10 of the FRM Regulations further provides that, for purposes of the Act, "the classes of fish listed in Schedule 2 Part 2 are totally protected fish".

(e) Schedule 2, part 2 of the FRM Regulations prescribes Great White Sharks, by name, to be "totally protected fish".

(f) Schedule 2, part 2 of the FRM Regulations prescribes "Whaler Sharks" to be "totally protected fish" in certain circumstances (based on size and location) as follows:

Shark, Whaler —

(a) taken from the waters of —

- (i) the South Coast Region; or
  - (ii) the West Coast Region;
- and

(b) with an interdorsal fin length of 70 cm or greater.

(g) Whaler Sharks are further defined by Schedule 7 of the FRM Regulations (List of common and scientific names). Schedule 7 indicates that for the common name "Shark, Whaler", the scientific name is "Family Carchathinidae". Sharks in the Family Carchathinidae include Tiger Sharks and Bull Sharks.

(h) The FRM Act does not define the word "person" used in the offences provisions of s 46. However the word is defined in s 5 of the *Interpretation Act 1984* (WA) in

the following terms:

*person* or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporated.

(i) Section 8 of the FRM Act is in the following terms:

**8. Crown bound**

(1) This Act binds the Crown in right of the State and, subject to the limits of the legislative power of the State, the Crown in all its other capacities.

(j) Each of the Respondents are thus "persons" within the meaning of the FRM Act and the proscriptions enacted in s 46 of the FRM Act in particular.

(k) Section 4 of the FRM Act defines the following material terms:

*take*, in relation to fish, includes catch, capture, entrap, enclose, gather, remove, poison, stun, kill or destroy fish by any means . . . .

*possession* includes having under control in any place, whether for the use or benefit of the person in relation to whom the term is used or another person, and whether or not another person has the actual possession or custody of the thing in question.

*sell* includes each of the following —

- (a) to auction;
- (b) to put out to tender;
- (c) to barter or exchange;
- (d) to supply for profit;
- (e) to offer for sale;
- (f) to receive or possess for sale;
- (g) to expose for sale;
- (h) to consign or deliver for sale;
- (i) to dispose of by way of raffle, lottery or other game of chance,

but does not include to conduct a prescribed transaction, or a transaction in a prescribed class of transactions, if the transaction is conducted by an Aboriginal person. . . .

(l) The First and Second Respondents have, by and through the commercial operator in the SW MMA and



by and through DOF personnel in the Metropolitan MMA, taken "possession" of "totally protected fish" in the course of undertaking activities under the Program.

- (m) Moreover, DPC 1596 and Addendum 1 to DPC 1596 "put out to tender" the Shark Drum Line Deployment, Management and Associated Services described in Schedule 2 of DPC 1596, which in turn target "totally protected fish". Specifically, DPC 1596 provides, in relevant part:

Through this Request, the Department of the Premier and Cabinet (DPC) is seeking the services of an experienced licenced commercial fishing organisation to deploy, manage and maintain drum lines off the Western Australian (WA) coast in specific locations in the Metropolitan and South West areas. The services will also involve responding to shark threats including deployment of additional drum lines.

- (n) Sections 1.2 and 1.4 of DPC 1596 further requires offers to be submitted to the State's "Tendering Services" and provides that advice on delivering offers will be provided by "Tendering Services".

- (o) By their conduct as pleaded the each of the Respondents thus:

- (i) have at material times acted in prima facie breach of the FRMA; and
- (ii) are likely to, unless enjoined or otherwise restrained from doing so, continue to so act in the foreseeable future.

- (p) Sections 7 and 43 of the FRM Act empower the Minister may exempt certain activities from the prohibitions enacted in s 46 of the FRM Act.

- (q) Section 7 of the FRM Act provides:

**7. Exemptions from Act, grant of by Minister**

(1) The Minister may, by instrument in writing, exempt a specified person or specified class of persons from all or any of the provisions of this Act.

(2) The Minister may only grant an exemption under subsection (1) for one or more of these purposes —

- (a) research;
- (b) environmental protection;
- (c) public safety;
- (d) public health;
- (e) commercial purposes;
- (f) community education about and compliance with this Act;
- (g) enforcement of this Act.

(f) While the procedural requirements surrounding the exemption by an "instrument in writing" under s 7 of the FRM Act are in terms specified, s 41 of the *Interpretation Act 1984* relevantly provides:

(1) Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall —

(a) be published in the *Gazette*;

(b) subject to section 42, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day.

(s) Section 5 of the *Interpretation Act 1984* defines "subsidiary legislation" to mean "any . . . instrument, made under any written law and having legislative effect".

(t) An "instrument in writing" purporting to express and create an exemption under s 7 of the FRM Act is subject to the operation of ss 5 and 41 of the *Interpretation Act 1984*.

(u) Second 43 of the FRM Act provides for a second, limited exemption for otherwise prohibited activities, in the following material terms:

#### 43. Minister may prohibit fishing

(1) The Minister may, by order published in the *Gazette*, prohibit persons or any specified class of persons from engaging in any fishing activity of a specified class.

(2) An order may prohibit a fishing activity at all times or during any specified period.

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(5) The Minister may, by further order published in the *Gazette*, amend or revoke an order made under this section.

(v) Orders issued by the Minister under s 43 of the FRM Act are expressly subject to disallowance by Parliament under s 44 of the FRMA. However the regulations prescribing the three (3) material species of sharks to be "totally protected" were made under s 45 of the FRM Act, not s 43 of the FRM Act.

(w) Since the sharks were protected under regulations made under s 45 of the FRM Act s 45, rather than by a Ministerial order made under s 43 of the FRM Act, a Ministerial order under s 43 purporting to remove the regulatory protection would be inoperative.


(x) No exemption under either s 7 or s 43 of the FRM Act has been proclaimed and published in the *Government Gazette*.

(y) In light of their nature and, by their terms, their scope and breadth (and notwithstanding their characterisation by the Respondents) Exemption Nos. 2375 and 2376 have legislative effect and are therefore "subsidiary legislation" within the meaning of the *Interpretation Act 1984*.

(z) There having been no compliance with a statutory provision which conditions their validity and operation, the exemptions do not operate lawfully to excuse the Respondents from the operation of s 46 of the FRMA. Thus the Respondents conduct continues to be, notwithstanding the purported exemptions, *prima facie* in breach of that provision and unlawful accordingly.

Not Applicable

Signature of Applicants  
or lawyer



R.L. Hooker  
Francis Burt Chambers  
Counsel for the Applicants

Date:

26 February 2014