What is Native Title?

- Prior to Mabo no recognition by the common law of the traditional rights and customs of Australian Aboriginal people
- Mabo gave legal recognition to those traditional laws and customs which had existed in land and waters at the time sovereignty was acquired over Australia by Great Britain and had continued to exist thereafter.
- These rights are collectively called Native Title Rights and Interests and are recognised by both the common law and the Native Title Act 1993 (Commonwealth) as amended (the NTA)
Native Title Rights over Waters

• Native Title Rights can be recognised in the territorial sea (Commonwealth waters) and in waters under State control
• Because of the public rights to fish and navigate and rights of innocent passage these cannot be exclusive rights native title rights.
How is Native Title Established?

• The Native Title Act 1993 (Commonwealth)
• Claims are made and determined under that Act
• Determinations are made in very general terms and give little guidance about how rights are to be exercised
• Claims process is protracted
• 23 Native Title claims in SA one has reached conclusion.
• 7 claims sea and 2 involving the River Murray
The recognition and exercise of Native Title Rights Pending and Post a Determination of Native Title

- In some circumstances native title has extinguished and cannot be claimed over certain tenures
- Where native title may or does exist the Future Act Scheme in the NTA applies
- Where a licensing scheme exists under the general law section 211 NTA applies to suspend the operation of the scheme in certain circumstances to allow exercise of certain native title rights
Uncertainty created by section 211 in relation to Fishing

- Section 211 raised as a defence to fisheries prosecutions
- Native titleholders risk prosecution whenever they exercise native title rights over recreational limits
- Negative process for deciding native title l that applies in limited factual situations
- Inappropriate to by in Magistrates courts
- Little guidance to fisheries officers
- Ad hoc management of the resource
South Australian Response in relation to native title rights over waters fisheries management

- Indigenous Land Use Agreements under the Native Title Act
- SA Statewide ILUA process provides template agreements negotiated by peak bodies
- ILUA’s about fishing with a management plan attached
- Native title claim is withdrawn or consent determination made
The Scheme in the Template

• Operation of section 211 is suspended
• Codifies existing native title rights and provides benchmark rights that cannot be modified except by further ILUA
• Provides that rights are to be exercised under a management plan implemented under fisheries legislation
How the Template Governs the Plan

• Must implement the rights in the ILUA
• Provides for duration of the Plan and successive plans
• Provides for termination and suspension of the plan
• Standards for monitoring and compliance
Conclusion

- ILUA with Management Plan creates a separate traditional fishing sector that is properly managed by aboriginal traditional fishers in collaboration with PIRSA and the commercial sector.
- Traditional Fishing rights are negotiated with claimants with baseline rights guarantees contained in a document that cannot be modified except by further agreement.
- These rights cannot be exercised except in accordance with a management plan developed with the claimants and sensitive to cultural practices.