

## EXPLANATORY STATEMENT

### *Fisheries Management Amendment (Transfer of Fishing Concessions) Regulations 2019*

Issued by the Authority of the Assistant Minister for Agriculture and Water Resources and Parliamentary Secretary to the Minister for Agriculture and Water Resources

*Fisheries Management Act 1991*

#### **Legislative authority**

Section 168 of the *Fisheries Management Act 1991* (the Management Act) provides that the Governor-General may make regulations not inconsistent with the Management Act prescribing all matters required or permitted by the Management Act to be prescribed or as may be necessary or convenient to be prescribed in carrying out or giving effect to the Management Act. The *Fisheries Management Regulations 1992* (the Principal Regulations) were made upon commencement of the Management Act for this purpose.

#### **Purpose**

The purpose of the *Fisheries Management Amendment (Transfer of Fishing Concessions) Regulations 2019* (the Amendment Regulations) is to amend the Principal Regulations to insert Division 2A of Part 3 in the Principal Regulations to prescribe additional circumstances, for the purposes of paragraphs 32A(4)(d) and 46(4D)(d) of the Management Act, in which the Australian Fisheries Management Authority (AFMA) must not register the transfer of a fishing concession. Those circumstances are if:

- the holder of the fishing concession, other than a lessee of that concession, has notified AFMA, in the approved form, that there is a caveat on the transfer of their fishing concession for the benefit of another person; and
- the holder of the benefit has not withdrawn the caveat, or otherwise consented to the transfer of the relevant fishing concession.

#### **Background**

It is an offence to engage in commercial fishing in a Commonwealth fishery unless authorised to do so by a fishing concession (see subparagraph 95(1)(a)(i) of the Management Act). A fishing concession, as defined by subsection 4(1) of the Management Act, relevantly includes a fishing permit granted by AFMA under section 32 of the Management Act or a statutory fishing right (SFR) granted by AFMA pursuant to section 31 of the Management Act. Once a fishing permit or SFR has been granted, it is entered on the Fishing Permits Register maintained by AFMA (under subsection 57G(1) of the Management Act) or the Register of Statutory Fishing Rights kept by AFMA (under subsection 44(1) of the Management Act) including the details prescribed in Part 6A of the Principal Regulations.

Section 32A of the Management Act provides that the holder of a fishing permit must apply to AFMA to register the transfer of that permit to another person. After receiving such an application AFMA must, under subsection 32A(4) of the Management Act, register the transfer unless any of the circumstances provided in paragraphs 32A(4)(a) to (d) of the Management Act, described below, apply.

The Management Act provides for a similar process for the transfer or lease of an SFR. Section 46 of the Management Act provides for the registration of a dealing which would relevantly have the effect of

transferring an interest in a fishing right or leasing a fishing right. Subsection 46(3) of the Management Act provides that a party to a dealing may apply to AFMA to register the dealing. After receiving such an application, and having notified any person who has claimed an interest in the SFR in the manner required by subsection 46(4C) of the Management Act, AFMA must register the transfer on the Register of Statutory Fishing Rights unless one or more of the circumstances in paragraphs 46(4D)(a) to (d) of the Management Act, described below, applies.

Currently, the circumstances in which AFMA is not required to register the transfer of a fishing permit, or the transfer or lease of an SFR, are that:

- the fishing concession is suspended by AFMA under section 38 of the Management Act (paragraphs 32A(4)(a) and 46(4D)(a) for fishing permits and SFRs respectively);
- the holder of the fishing concession (which includes a person who has leased a fishing right from the owner), is being investigated for, or convicted of, a ‘fisheries offence’ (paragraphs 32A(4)(b) and 46(4D)(b) of the Management Act). A ‘fisheries offence’ is defined in subsection 4(1) of the Management Act to be an offence against the Management Act, the regulations and an offence against another Act that relates to a fishing concession;
- a levy on the fishing concession (imposed by the *Fishing Levy Act 1991* and regulations made under that Act) that is due has not been paid (paragraphs 32A(4)(c) and 46(4D)(c) of the Management Act); or
- other circumstances that are prescribed in the regulations exist (paragraph 32A(4)(d) and 46(4D)(d) of the Management Act). Nothing is currently prescribed for this purpose.

The Amendment Regulations prescribe, for the purposes of paragraphs 32A(4)(d) and 46(4D)(d) of the Management Act, circumstances in which AFMA must not register the transfer of a fishing permit or SFR respectively (regulation 8J). The provision deliberately constrains AFMA’s discretion to register a transfer when prescribed circumstances apply. These circumstances are that the holder of a fishing concession, other than a lessee of a fishing concession, has caused a caveat to be placed on a transfer of the fishing concession for the benefit of another person and the other person has not withdrawn the caveat or consented to the transfer of the fishing concession.

Regulation 8J of the Regulations does not prescribe circumstances in which AFMA must not register a lease for the purposes of 46(4D)(d) of the Management Act.

Commercial fishers regularly raise capital for their business activities using their concessions, both fishing permits and SFRs, as security for loans from financial institutions.

Regulation 3 of the *Fisheries (Administration) Regulations 1992* prescribes the Commonwealth Fishing Association as the ‘peak industry body’ representing Commonwealth commercial fishers under the *Fisheries Administration Act 1991*. The Commonwealth Fishing Association (CFA) advised AFMA that Commonwealth fishing concession holders may be able to access higher loan value ratios (known as LVRs) and lower interest rates from financial institutions if the owners of fishing concessions could cause a caveat to be placed on the transfer of a fishing concession (for the benefit of a financial institution), which would prevent AFMA from registering the transfer of the relevant fishing concession.

For example, if a concession holder wishes to raise capital against an SFR to conduct fishing activities, they could undertake to the financial institution that they would place a caveat on transfer of that fishing concession under regulation 8J of the Principal Regulations for the benefit of the institution. This would

prevent any transfer of ownership of that SFR being registered on AFMA's Register of Statutory Fishing Rights until the financial institution had either removed their caveat, upon expiration of their interest, or otherwise given consent for the transfer to occur.

### **Impact and effect**

The Commonwealth Fisheries Association have advised AFMA, and the Assistant Minister for Agriculture and Water Resources, that the implementation of a voluntary system whereby the concession owner could notify AFMA to prevent the transfer of a Commonwealth fishing concession, and the financial institution could either withdraw the caveat or provide consent for the transfer, would be of significant benefit to the fishing industry. **Related legislative instruments**

Amendments made to the Principal Regulations by the Amendment Regulations will be in effect from the day after the Amendment Regulations are registered until the commencement of the *Fisheries Management Regulations 2019* (2019 Regulations) on 1 October 2019, which will contain an identical provision concerning the transfer of fishing concessions (section 107).

### **Consultation**

An exposure draft of the 2019 Regulations was released to the Commonwealth Fisheries Association (CFA), other relevant fishing industry associations,<sup>1</sup> the Private International and Commercial Law Section within the Attorney-General's Department (PIL Section) and other Commonwealth agencies. The Australian Banking Association (ABA) was provided an exposure draft of the Amendment Regulations in January and February 2019. The CFA and the PIL Section support section 107 of the 2019 Regulations, which is identical to the measures contained in the Amendment Regulations. The ABA stated it does not object to the Amendment Regulations.

### **Regulation impact statement**

The Office of Best Practice Regulation (OBPR) was consulted prior to making the Amendment Regulations. OBPR advised that the Amendment Regulations are minor in nature and that a Regulation Impact Statement was not required (OBPR ID 22674).

### **Details**

Details of the Amendment Regulations are set out in **Attachment A**.

The Amendment Regulations are compatible with the human rights and freedoms for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act.

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<sup>1</sup> The exposure draft was provided to the Australian Southern Bluefin Tuna Industry Association, the Great Australian Bight Fishing Industry Association, Northern Prawn Fishery Industry, the Scallop Fisherman's Association of Tasmania, the Seafood Industry Association, the South East Trawl Fishing Industry Association, the Southern Shark Fishing Association, the Southern Shark Industry Association, members of the Southern Squid Jig Fishery, and Tuna Australia.

## ATTACHMENT A

### **Details of the *Fisheries Management Amendment (Transfer of Fishing Concessions) Regulations 2019***

#### **Section 1—Name**

This section provides that the name of the instrument is the *Fisheries Management Amendment (Transfer of Fishing Concessions) Regulations 2019* (Amendment Regulations).

#### **Section 2—Commencement**

This section provides that the Amendment Regulations commence on the day after registration.

#### **Section 3—Authority**

This section provides that the authority for making the Amendment Regulations is the *Fisheries Management Act 1991* (Management Act).

#### **Section 4—Schedules**

This section provides that each instrument specified in a Schedule to the Amendment Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Amendment Regulations has effect according to its terms.

#### **Schedule 1—Amendments**

##### **Item 1—After Division 2 of Part 3**

This item inserts a new division, Division 2A of Part 3, into the *Fisheries Management Regulations 1992* (the Principal Regulations), containing proposed regulation 8J only.

Subregulation 8J(1) provides that the Amendment Regulations are made for the purpose of paragraphs 32A(4)(d) and 46(4D)(d) of the Management Act and prescribes circumstances that relate to a fishing permit and a statutory fishing right (SFR).

Subregulation 8J(2) provides the circumstances in which AFMA must not register the transfer of a fishing concession or ownership of a fishing concession, namely if:

- AFMA has received a notification in the approved form for the purpose of regulation 8J (paragraph 8J(2)(a));
- the notification was made by the holder of the fishing concession, other than a lessee of a fishing concession (paragraph 8J(2)(b)). A ‘holder’ of a fishing concession is defined in subsection 4(1) of the Management Act to relevantly include the person granted a fishing permit or SFR, or a person subsequently transferred that fishing permit or SFR, as well as a lessee of an SFR registered under section 46 of the Management Act. Paragraph 8J(2)(b) would exclude the lessee of a fishing concession from being able to notify AFMA of the placement of a caveat under this proposed regulation. A holder of a fishing concession, other than the lessee of a fishing concession, will be determined by AFMA by reference to the relevant Register, which contains information concerning all

‘holders’ of fishing concessions as defined by subsection 4(1) of the Management Act. As SFRs can be leased on a temporary basis, the Register of Statutory Fishing Rights contains entries identifying both the lessor and lessee of those SFRs (both parties being a holder of the SFR for the purposes of the Management Act, see item 2 of the table in regulation 21A of the Principal Regulations);

- the notification is expressed as having the effect of placing a caveat on a transfer of the fishing concession for the benefit of another person (paragraph 8J(2)(c));
- either the caveat has not been withdrawn by the person for whose benefit the caveat exists by further notification to AFMA in the approved form (subparagraph 8J(2)(d)(i)), or the transfer is not being made with the consent of that person given to AFMA in the approved form (subparagraph 8J(2)(d)(ii)); and
- subregulation 8J(3), described below, does not apply (paragraph 8J(2)(e)).

These prescribed circumstances implement a binary caveat system for stakeholders, enabling the owner of the fishing concession to place the caveat on transfer and subsequently enabling the person with the benefit of the caveat to either withdraw the caveat or to provide consent for the transfer to occur.

A caveat that lodged by a concession owner under regulation 8J does not restrict any other concession holder, or a party to a dealing in an SFR, from lodging an application for the transfer of a fishing concession with AFMA under subsections 32A(2) and 46(3) of the Management Act, for fishing permits and SFRs respectively.

Should such an application for a transfer be lodged with AFMA, however, the person lodging the application will be notified that a caveat is placed on the transfer of their concession. The person holding the benefit of the caveat will also be notified of the application for transfer being lodged, and requested to either withdraw the caveat or to provide consent for the transfer. Persons holding the benefit of the caveat is also able to withdraw the caveat prior to a transfer of the relevant concession being lodged.

For the purpose of paragraph 8J(2)(e), subregulation 8J(3) applies if AFMA is satisfied, on the application of the concession holder, other than a lessee of the fishing concession, who made the notification (under proposed paragraph 8J(2)(b)), that the transfer should be registered on account of an order made by a court.

A note after subregulation 8J(3) provides that sections 54 and 57K of the Management Act (which relate to the Register of Statutory Fishing Rights and the Fishing Permits Register respectively) provide for applications to be made to a prescribed court to rectify the Register. Subsection 54(1) of the Management Act provides that an application to a prescribed court for an order to rectify the Register is available to a person should they be aggrieved by the omission of an entry from the Register, an entry made in the Register without sufficient cause, an entry wrongly existing in the Register, or an error or defect in the Register. A ‘prescribed court’ is defined in subsection 54(6) of the Management Act to be the Federal Court of Australia, the Supreme Court of a State, the Supreme Court of the Australian Capital Territory, the Supreme Court of the Northern Territory or the Supreme Court of Norfolk Island.

If a person for whose benefit the caveat exists refuses to withdraw the caveat or provide consent for the transfer of a fishing concession, subregulation 8J(3) has the effect that, should an order be made by a court pursuant to sections 54 or 57K of the Management Act, AFMA is required to register the transfer of a fishing concession despite the person for whose benefit the caveat exists having not withdrawn the caveat, or provided consent for the transfer to occur.

Subregulation 8J(4) provides that AFMA is not required to be satisfied as to the accuracy or validity of any information or matter that is notified under regulation 8J. This is intended to clarify that AFMA is not required to make any assessment as to the accuracy or validity of any reason for which the caveat is being lodged by the relevant holder of the fishing concession.

## **ATTACHMENT B**

### **Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

#### ***Fisheries Management Amendment (Transfer of Concessions) Regulations 2019***

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the legislative instrument**

The purpose of the *Fisheries Management Amendment (Transfer of Fishing Concessions) Regulations 2019* (Amendment Regulations) is to prescribe circumstances which the Australian Fisheries Management Authority (AFMA) must not register the transfer of a fishing concession for the purposes of paragraphs 32A(4)(d) and 46(4D)(d) of the *Fisheries Management Act 1991* in the *Fisheries Management Regulations 1992* (Regulations).

Those circumstances are if:

- the holder of the fishing concession, other than a lessee of that concession, has notified AFMA, in the approved form, that there is a caveat on the transfer of their fishing concession for the benefit of another person; and
- the holder of the benefit has not withdrawn the caveat, or otherwise consented to the transfer of the relevant fishing concession.

#### **Human rights implications**

This legislative instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

**Senator the Hon. Richard Colbeck**

**Assistant Minister for Agriculture and Water Resources**

**Parliamentary Secretary for Agriculture and Water Resources**