

EXPLANATORY STATEMENT

Issued by the authority of the Protected Zone Joint Authority

Torres Strait Fisheries Act 1984

Torres Strait Fisheries (Pearl Shell) Management Instrument 2020

The *Torres Strait Fisheries (Pearl Shell) Management Instrument 2020* (the Instrument) repeals the *Torres Strait Fisheries Management Instrument No. 7* (the Previous Instrument) which ceases on 31 December 2020 and makes a new instrument which updates the drafting style.

Subsection 16(1) of the *Torres Strait Fisheries Act 1984* (the Act) provides for the Minister to regulate fishing through an instrument registered on the Federal Register of Legislation. Subsection 35(1) of the Act provides for the Protected Zone Joint Authority (PZJA) to exercise the powers of the Minister under subsection 16(1) of the Act in respect of a ‘Protected Zone Joint Authority fishery’.

Subsection 28(1) of the Act provides that a ‘Protected Zone Joint Authority fishery’ is a fishery in respect of which an arrangement under Part V of the Act is in place. The *Arrangement between the Commonwealth and the State of Queensland under section 31 of the Torres Strait Fisheries Act 1984* (the PZJA Arrangement¹), made under Part V of the Act, provides that the PZJA is to have management of commercial fishing of any kind other than certain exceptions (as described in subsection 4(1) of the PZJA Arrangement), in the areas described in subsection 4(2) of the PZJA Arrangement. The pearl shell fishery, which is defined in section 4 of the Instrument by reference to the ‘area of the pearl shell fishery’ described in item 5 of the table in Schedule 2 to the *Torres Strait Fisheries Regulations 1985* (the Regulations), is within the area described in subsection 4(2) of the PZJA Arrangement. It follows that commercial fishing for pearl shell in the area of the pearl shell fishery is a ‘Protected Zone Joint Authority fishery’ for the purpose of subsection 28(1) of the Act and that the PZJA can exercise the power of the Minister under subsection 16(1) of the Act in relation to the pearl shell fishery.

The PZJA is established under section 30 of the Act and consists of the Minister administering the Act, the Queensland Minister administering the laws of Queensland relating to marine fishing in the Protected Zone and the Chairperson of the Torres Strait Regional Authority (TSRA), which is the Commonwealth agency established under the *Aboriginal and Torres Strait Islander Act 2005* that represents the interests of Torres Strait Islanders.

The Instrument is a legislative instrument for the purpose of the *Legislation Act 2003* (the Legislation Act) and is:

- not subject to disallowance by way of parliamentary scrutiny, by application of subsection 44(1) of the Legislation Act, as the PZJA in making this Instrument is an intergovernmental body involving the Commonwealth and the State of Queensland; and

¹ PZJA Arrangement means the document titled “*Arrangement between the Commonwealth and the State of Queensland under section 31 of the Torres Strait Fisheries Act 1984*” dated 17 March 1999 and published on the Federal Register of Legislation, as that document exists at the commencement of this Instrument.

Note: The PZJA Arrangement could in 2020 be viewed on the website of the Federal Register of Legislation (<https://www.legislation.gov.au/Details/F2008B00750>).

- not subject to sunseting by application of subsection 54(1) and paragraph 54(2)(b) of the Legislation Act, read together with item 63AB of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The Instrument is valid to the extent that it impacts upon native title rights and interests under subsection 24HA(1) of the *Native Title Act 1993*.

The pearl shell fishery

The Torres Strait pearl shell fishery is a small scale commercial fishery that mainly targets the gold-lip pearl shell (*Pinctada maxima*), although another six species, including the black-lip pearl shell (*Pinctada margaritifera*), are also harvested. Pearl shell is collected live for pearl culture farms, principally by divers using hookah equipment. Pearl farms purchase product from fishers for use in seeding for the production of pearls and also for use in making other shell products such as jewellery.

Commercial fishing activity in the pearl shell fishery in recent years has been low. In 2013, the PZJA agreed to issue developmental permits to existing licence holders for the taking of undersized pearl shell (*Pinctada maxima*). The objective of the permits was to support revitalisation of the Torres Strait pearl farming industry by developing a commercial trial to investigate whether using smaller shell for seeding and culture could increase the overall productivity of pearl farming. At the time, industry considered that smaller shell enabled them to maximise their seeding cycle potential due to more cycles, with the later seeding cycles producing larger and more valuable products.

Eight existing licence holders were subsequently issued developmental permits in 2015 with a competitive total allowable catch set of no more than 2,000 undersize pearl shell size between 100-130 mm to be taken within the allocated period of one year. Mandatory catch reporting of harvested pearl shell was a condition of the permit. Only two of the eight permits issued were active during the trial. A series of interviews with permit holders and buyers undertaken by AFMA in 2017 revealed that the primary reason as to why there is little interest in fishing the pearl shell fishery by both traditional inhabitant boat (TIB) fishers and transferable vessel holder (TVH) fishers is due to more lucrative opportunities in other Torres Strait fisheries.

Details of the Instrument

The Instrument repeals and remakes the Previous Instrument. The key features of the Previous Instrument that are retained in the Instrument are:

- A general prohibition for the taking, processing or carrying of live pearl shell of the species *Pinctada maxima* or any other pearl shell species whether alive or dead, is prohibited in the area of the pearl shell fishery is in place subject to listed exemptions (sections 7 and 8 of the Instrument);
- A general prohibition for the taking, processing or carrying of dead pearl shell of the species *Pinctada maxima*, is prohibited in the area of the pearl shell fishery;
- The size limits for pearl shell species *Pinctada maxima* and *Pinctada margaritifera* are maintained. The method for measuring pearl shell for these purposes also remains the same (see section 9 of the Instrument; section 8 of the Previous Instrument);
- Prohibitions on the use of certain methods other than diving, or collecting by hand are maintained;

Finally, the Instrument notes that the PZJA does not have jurisdiction in relation to ‘traditional fishing’ conducted by ‘traditional inhabitants’ (defined in section 3 of the Act by reference to the Torres Strait Treaty). This is because subsection 4(1) of the PZJA Arrangement specifies that the PZJA is to have jurisdiction of the

management of commercial fisheries in the Torres Strait. A note to the prohibitions is provided in the Instrument.

Detail on the provisions of the Instrument is included at **Attachment A**.

Commencement

Subsection 16(4) of the Act provides that an instrument made under subsection 16(1) of the Act comes into force on the day it is published under subsection 16(9) or a later day as specified. Subsection 16(9) provides that the PZJA, by way of section 35, must publish or broadcast the contents of an instrument made under section 16 in such manner as is prescribed. In relation to the Instrument, the PZJA has elected to publish the Instrument. Those details have been prescribed in sections 3 and 4 of the Regulations respectively. Section 3 of the Regulations states that, for the purpose of subsection 16(9) of the Act, the manner of publication is by publication in such a newspaper as in the opinion of the PZJA is appropriate having regard to the nature of the contents of the notice.

The PZJA has considered the nature and the contents of the Instrument and have determined that it would be appropriate for the Instrument to be published in the *Cairns Post*, which has some circulation across the islands of the Torres Strait and Cape York.

When making the Instrument, the PZJA authorised staff members of AFMA to register the Instrument on the Federal Register of Legislation and publish the Instrument in the *Cairns Post*. The publication in the *Cairns Post* will occur in the week of 7 to 13 December 2020. It follows that the Instrument can come into force on the day specified in section 2 of the Instrument, being 30 December 2020.

Consultation

The PZJA and staff members of AFMA, who have been delegated responsibility for the day-to-day management of Torres Strait fisheries by the PZJA under paragraph 38(1)(b), are advised through a number of advisory forums established under subsection 40(7) of the Act, that incorporate representation from traditional inhabitants of the Torres Strait. The PZJA forums generally consist of an independent Chair and representatives from the government (AFMA, the Queensland Department of Agriculture and Fisheries and TSRA), scientific experts, economists, traditional inhabitant fishing industry and, where applicable, non-traditional inhabitant fishing industry.

Between 17 and 30 July 2020, the Torres Strait Hand Collectables Working Group (HCWG) was provided an opportunity to consider and provide advice on the remaking of the Instrument out of session. Having regard to HCWG advice, the PZJA agreed to remake the Instrument at their meeting on 27 August 2020.

Native Title

The making of the Instrument is a future act for the purposes of the *Native Title Act 1993* (the Native Title Act). In particular, sections 24HA and 24OA of the Native Title Act relevantly provides that the making of legislation in relation the management or regulation of living aquatic resources, such as the Instrument, is a valid future act insofar as it impacts upon native title rights and interests.

Statement of compatibility with human rights

As the Instrument is exempt from disallowance through the process of parliamentary scrutiny, by application of subsection 44(1) of the Legislation Act, a statement of compatibility with human rights does not have to be prepared for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement was not required for the Instrument (OBPR ID 42794).

Attachment A

Details of the *Torres Strait Fisheries (Pearl Shell) Management Instrument 2020*

Section 1 Provides that the name of the Instrument is the *Torres Strait Fisheries (Pearl Shell) Management Instrument 2020* (the Instrument).

Section 2 Provides for the commencement of the Instrument. As outlined above, subsection 16(4) of the Act provides that any prohibition contained within an instrument made under subsection 16(1) of the Act does not take effect *inter alia* until the instrument is published in accordance with subsection 16(9) of the Act and section 3 of the Regulations. The PZJA authorised AFMA to publish the Instrument in the *Cairns Post* and to register it on the Federal Register of Legislation. It follows that the commencement of the Instrument is the day specified in section 2, being 30 December 2020 complies with the Act and Regulations.

Section 3 Provides that the Instrument is made under subsection 16 of the Act.

Section 16 of the Act provides that the Minister may, by legislative instrument, prohibit certain activities. As outlined in the Explanatory Statement, as commercial fishing in the pearl shell fishery is a Protected Zone Joint Authority fishery within the meaning of subsection 28(1) of the Act, the power of the Minister under section 16 may be exercised by the PZJA (see paragraph 35(1)(a) of the Act).

Section 4 Provides the relevant definitions for the purpose of the Instrument.

Section 5 Provides authority for Schedule 1 to the Instrument, which repeals the Previous Instrument.

Section 6 Paragraph 16(1)(a) of the Act relevantly provides that the PZJA may, by legislative instrument, prohibit the taking, processing or carrying of a class of fish specified in the instrument. Section 6 of the Instrument is made for this purpose.

Subsection 6(1) provides that the taking, processing or carrying of live pearl of the species *Pinctada maxima* or any other pearl shell species whether alive or dead, is prohibited in the area of the pearl shell fishery.

Subsection 6(2) provides that the taking, processing or carrying of dead pearl of the species *Pinctada maxima* is prohibited in the area of the pearl shell fishery. These general prohibitions restrict persons, other than the persons that fall within the exceptions listed in section 7, from engaging in commercial fishing for pearl shell in the area of the pearl shell fishery.

It is noted at this section that the prohibition in section 6 does not apply to traditional inhabitants engaged in traditional fishing. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement.

Section 7 Pursuant to paragraph 16(1A)(d) of the Act, section 7 provides the exemptions to which subsection 6(1) applies. Those exemptions apply where:

- a person holding a licence granted under either subsection 19(2) or 19(3) of the Act that entitles the person to take, process or carry pearl shell; and

- if a person is engaged in community fishing where that person uses a boat which does not exceed 6 metres in length; or
- a person holding a licence granted under the *Queensland Fisheries Act 1994* that entitles that person to engage in pearl shell farming.

These subparagraphs are intended to clarify the intentions of paragraphs 7(a), 7(c) and 7(d) of the Previous Instrument.

Paragraph 7(e) of the Previous Instrument, which provided an exemption to the prohibition in subsection 6(1) for a person using a boat in the course of traditional fishing, has been removed in this Instrument. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement. An explanatory note to this effect is provided under section 6.

Section 8

Pursuant to paragraph 16(1A)(d) of the Act, section 8 provides an exemption to which section 6 applies. Those exemptions apply where:

- a person takes, carries or processes pearl shell on a boat for which a Treaty endorsement under section 20 of the Act is in force; and
- the pearl shell is taken, carried or processed in accordance with conditions specified by the PZJA on the Treaty endorsement under section 22 of the Act.

Section 8 is intended to replicate and clarify paragraph 7(b) of the Previous Instrument.

Section 9

Subparagraph 16(1)(b)(ii) of the Act relevantly provides that the PZJA may, be legislative instrument, prohibit the taking, processing or carrying of fish included in a specified class that have a dimension less than a dimension specified in the Instrument. Section 9 of the Instrument is made for this purpose. Section 9 of this Instrument is intended to replicate section 8 of the Previous Instrument.

Under section 9, it is prohibited for a person in the pearl shell fishery to take pearl shell if:

- in the case of the species *Pinctada maxima* (commonly known as gold lip, silver lip or white shell) – the length is less than 130 millimetres or greater than 230 millimetres; and
- in the case of the species *Pinctada margaritifera* (commonly known as black lip pearl shell) – the length is less than 90 millimetres.

Subsection 9(2) outlines the method by which the size of pearl shells are to be measured for the purpose of subsection 9(1) of the Instrument. This paragraph provides that the pearl shell is to be measured in its original form as fished, across the shell overall from the butt or hinge to the opposite edge of the lip. This paragraph is intended to replicate Section 9 of the Previous Instrument.

Section 10 of the Previous Instrument, which provided an exemption to the prohibition on taking, processing or carrying pearl shell of a dimension less than a dimension specified in section 8 of the Previous Instrument, by persons engaged in traditional fishing has been removed in this Instrument. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement.

It follows that in this section it is noted that the prohibition in section 9 does not apply to traditional inhabitants engaged in traditional fishing.

Section 10 Subparagraph 16(1)(c) of the Act relevantly provides that the PZJA may, be legislative instrument, prohibit the taking, processing or carrying of fish included in a specified class with the use of certain methods as specified in the Instrument. Section 10 of the Instrument is made for this purpose by providing that the taking, processing or carrying of pearl shell is prohibited by a fishing method other than diving, or collecting by hand. This section is intended to replicate section 11 of the Previous Instrument.

It is noted at this section that the prohibition in section 10 does not apply to traditional inhabitants engaged in traditional fishing. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement.

Schedule 1 Repeals *Torres Strait Fisheries Management Instrument No. 7*