**EXPLANATORY STATEMENT**

Issued by the authority of the Assistant Minister for Forestry and Fisheries

Parliamentary Secretary to the Minister for Agriculture, Drought and Emergency Management

*Fisheries Management Act 1991*

*Fisheries Management Amendment (Scientific Research) Regulations 2021*

**Legislative Authority**

The *Fisheries Management Act 1991* (the Act) is an Act in relation to fisheries. The Act establishes management plans for fisheries and sets out the legislative basis for statutory fishing rights, licences and permits. It also provides for the enforcement powers of the Australian Fisheries Management Authority (AFMA). The Act defines the Australian Fishing Zone (AFZ) and provides for Commonwealth fisheries offences.

Section 168 of the Act provides that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or that are necessary or convenient to be prescribed in carrying out or giving effect to the Act.

**Purpose**

The purpose of the *Fisheries Management Amendment (Scientific Research) Regulations 2021* (the Amendment Regulations) is to amend the *Fisheries Management Regulations 2019* (the Regulations) to allow Commonwealth, State and Territory government research vessels to engage in fishing in the AFZ for the purposes of scientific research.

**Background**

Under the Act, the AFMA regulates and manages fisheries resources. The Regulationsare made under the Act and prescribe specific regulatory requirements. This includes subsection 20(2) of the Regulations, which provides for the strict liability offence if a person uses a boat longer than 130 metres in length to engage in fishing in the AFZ. The Amendment Regulations insert an exception to the strict liability offence in subsection 20(2) of the Regulations to allow certain persons to use vessels which are longer than 130 metres in length, and which owned and operated by or on behalf of the Commonwealth, a State or a Territory, to engage in fishing in the AFZ for the purposes of scientific research.

**Impact and Effect**

The Amendment Regulations have the effect that Commonwealth, State and Territory government research vessels which are longer than 130 metres in length may be used to engage in fishing for scientific research purposes in the AFZ in certain circumstances.

It is a standard requirement for scientific research vessels to deploy sampling equipment into the marine environment to collect biota, seawater and sediments for research purposes. Obtaining samples enables scientists to study, monitor, make assessments and inform effective management of the marine environment. Data obtained from samples collected from research vessel deployments directly informs Australian Government policy.

The Office of Best Practice Regulation advised that there is minor regulatory impact and that a Regulation Impact Statement is not required (OBPR ID 44790).

**Consultation**

Consultation has been undertaken with the AFMA on the Proposed Regulations. Public consultation was not considered appropriate as the proposed amendments relate to fishing activities conducted by the Commonwealth, States and Territories for the purposes of scientific research.

**Details and Operation**

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

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations commence on the day after registration.

**Other**

The Amendment Regulations are compatible with human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

**ATTACHMENT A**

**Details of the *Fisheries Management Amendment (Scientific Research) Regulations 2021***

Section 1 – Name

This section provides that the name of the instrument is the *Fisheries Management Amendment (Scientific Research) Regulations 2021* (the Amendment Regulations).

Section 2 – Commencement

This section provides that the Amendment Regulations commence on the day after the instrument is registered on the Federal Register of Legislation. The note below the table provides that the table relates only to the provisions of the Amendment Regulations as originally made. It would not be amended to deal with later amendments of the Amendment Regulations. The purpose of this note is to clarify that the commencement of any subsequent amendments would not be reflected in this table.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Amendment Regulations. This clarifies that information may be inserted in column 3 of the table, or information in it may be edited, in any published version of the Amendment Regulations.

Section 3 – Authority

This section provides that the Amendment Regulations are made under the *Fisheries Management Act 1991* (the Act).

Section 4 – Schedules

This section provides for the amendment or repeal of instruments as set out in a Schedule to the Amendment Regulations. This enables the amendment of the *Fisheries Management Regulations 2019* (the Regulations) (see Schedule 1 below).

Schedule 1 – Amendments

*Fisheries Management Regulations 2019*

**Item [1] – At the end of section 20**

Section 14 of the Act provides that, for the purpose of conserving the marine environment, the regulations may prohibit, or make provision for the regulation of, the engaging in specified activities, or the use of specified practices, by persons engaged in fishing in the AFZ and Australian boats, and persons on Australian boats, engaged in fishing outside the AFZ.

Section 20 of the *Fisheries Management Regulations 2019* (the Regulations) is made for the purposes of section 14 of the Act and currently provides that a person commits an offence of strict liability if the person uses a boat to engage in fishing in the AFZ and the boat is more than 130 metres in length (subsection 20(2)).

Item 1 of Schedule 1 to the Amendment Regulations inserts new subsection 20(3) at the end of section 20 of the Regulations.

New subsection 20(3) provides that subsection 20(2) does not apply if:

* the boat is owned and operated by or on behalf of the Commonwealth, or a State or Territory; and
* a scientific permit is in force authorising the use of the boat by a person; and
* the person engages in fishing in the AFZ for scientific purposes in accordance with the conditions of the permit.

Under section 33 of the Act, a person may apply to AFMA for a scientific permit in respect of a specified boat authorising the use of the boat by the person, or a person acting on that person’s behalf, for scientific research purposes in a specified area of the AFZ.

The exception provided for by new subsection 20(3) allows research vessels longer than 130 metres in length, which are owned and operated by or on behalf of the Commonwealth, or a State or Territory, to conduct fishing for scientific research purposes. New subsection 20(3) also makes clear that the exception cannot be used by any other vessels (such as commercial vessels) to facilitate fishing in the AFZ.

Further, new subsection 20(3) requires that the use of the vessel by the person must be authorised by a scientific permit, and that the fishing activities must be engaged in by the person for scientific purposes in accordance with the conditions of the permit. This means that the exception does not apply where the fishing activities contravene the conditions of the scientific permit, or the permit is no longer in force.

The note following new subsection 20(3) clarifies that the defendant bears an evidential burden in relation to the matters in subsection 20(3) and refers the reader to subsection 13.3(3) of the *Criminal Code*. This is consistent with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, because the matters outlined in new subsection 20(3), including the issue of whether the fishing is being conducted for scientific purposes, is within the scope of knowledge of the defendant. It is likely to be significantly more difficult and costly for the prosecution to disprove this point, than for the defendant to establish whether the fishing is being conducted for scientific purposes.

Further, the evidential burden that is placed on the defendant is not central to the question of culpability for the relevant strict liability offence in subsection 20(2), but rather only applies to a defendant seeking to rely on the exception to that offence. This approach is consistent with the approach taken for other exceptions to strict liability offences prescribed in the Regulations such as those in subsections 80(7) and 86(2) of the Regulations.

The intention of new subsection 20(3) is to promote certain fishing activities in the AFZ, which are conducted by the Commonwealth, States and Territories for the purposes of scientific research. It is important that Commonwealth, State and Territory government research vessels are able to conduct scientific research operations in the AFZ, including for sea-floor, sea-ice, sea life and atmospheric research. It is a standard requirement for scientific research vessels to deploy sampling equipment into the marine environment. Obtaining samples enables scientists to study, monitor, make assessments and inform effective management of the marine environment. Data obtained from samples collected from research vessel deployments directly informs Australian Government policy.

**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 (Scientific Research) Regulations 2021***

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

**Overview of the Legislative Instrument**

The purpose of the *Fisheries Management Amendment (Scientific Research) Regulations 2021* (the Amendment Regulations) is to amend the *Fisheries Management Regulations 2019* (the Regulations) to allow Commonwealth, State and Territory government research vessels to engage in fishing for scientific research purposes, in the Australian Fishing Zone (AFZ).

Subsection 20(2) of the Regulations currently provides that a person commits a strict liability offence if that person uses a boat to engage in fishing in the AFZ and the boat is more than 130 metres in length.

New subsection 20(3) provides for an exception to the strict liability offence in subsection 20(2) of the Regulations. Under new subsection 20(3), subsection 20(2) does not apply if:

* the boat is owned and operated by or on behalf of the Commonwealth, or a State or Territory; and
* a scientific permit is in force authorising the use of the boat by a person; and
* the person engages in fishing in the AFZ for scientific purposes in accordance with the conditions of the permit.

The intention of new subsection 20(3) is to promote certain fishing activities in the AFZ, which are conducted by the Commonwealth, States and Territories for the purposes of scientific research. It is important that Commonwealth, State and Territory government research vessels are able to conduct scientific research operations in the AFZ.

**Human rights implications**

The Legislative Instrument may engage the right to the presumption of innocence in Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

Right to the presumption of innocence (Article 14(2) of the ICCPR)

Under Article 14(2) of the ICCPR, the presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt. The note following new subsection 20(3) alerts the reader that the defendant bears the evidential burden in relation to the matter in subsection 20(3) and refers the reader to subsection 13.3(3) of the *Criminal Code*. That is, the defendant bears the evidential burden in proving that the exception in subsection 20(3) exists.

The Australian Government *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) notes that placing the burden on the defendant should be limited to where the matter is peculiarly within the knowledge of the defendant and where it is significant more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The Guide also notes that a reverse burden provision is more readily justified if the matter in question is not central to the question of culpability for the offence, and the penalties are at the lower end of the scale.

The Legislative Instrument proposes to insert an exception to the strict liability offence in subsection 20(2), which imposes a reverse evidential burden. However, the reverse burden only applies to a defendant seeking to rely on the exception in new subsection 20(3) that they are authorised to engage in the conduct which is the subject of the relevant offence.

In this way, to the extent that the reverse burden that attaches to the offence limits the right to the presumption of innocence under Article 14(2), this only applies in relation to the exception, and is not central to the question of culpability for the relevant offence. Further, the maximum penalty for an offence against subsection 20(2) of the Regulations is 25 penalty units, which falls toward the lower end of the scale.

**Conclusion**

This Legislative Instrument is compatible with human rights because to the extent that it may limit the right to the presumption of innocence in Article 14(2) of the ICCPR, those limitations are reasonable, necessary and proportionate.

**Senator the Hon. Jonathon Duniam**

**Assistant Minister for Forestry and Fisheries**

**Parliamentary Secretary to the Minister for Agriculture, Drought and Emergency Management**