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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**FISHERIES LEGISLATION AMENDMENT (INTERNATIONAL
OBLIGATIONS AND OTHER MATTERS) BILL 2005**

EXPLANATORY MEMORANDUM

**(Circulated by authority of Senator the Hon Ian Macdonald, the Minister
for Fisheries, Forestry and Conservation)**

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FISHERIES LEGISLATION AMENDMENT (INTERNATIONAL OBLIGATIONS AND OTHER MATTERS) BILL 2003

1. GENERAL OUTLINE

- 1.1. This Bill will enable Australia to give effect to its obligations under international law, increase our capacity to exchange information about suspected illegal fishers with foreign governments and international intergovernmental organisations, and provide for improved management of Australia's fish stocks.
- 1.2. The principle purpose of this Bill is to implement Australia's obligations under the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* (WCPFC).
- 1.3. The WCPFC is between South Pacific Coastal States and the distant water fishing nations that fish in the western and central Pacific Ocean. It was ratified by Australia on 22 September 2003. The WCPFC establishes a Commission to manage and conserve highly migratory fish stocks such as tuna and billfish in the region. The Commission will develop regional conservation and management measures to control the sustainable utilisation of these fish stocks. All parties to the WCPFC will implement these measures.
- 1.4. To implement the WCPFC obligations into domestic law, it is necessary to amend the *Fisheries Management Act 1991* to:
 - Introduce the concept of WCPFC management and conservation measures;
 - Extend the application of surveillance and enforcement provisions to apply to the WCPFC area and boats registered to countries that are party to the WCPFC (known as WCPFC boats), and to allow for the investigation of unauthorised fishing outside the Australian Fishing Zone (AFZ). New offences will be created to cover Australian-flagged boats, Australian citizens on foreign boats (including WCPFC boats) and foreign citizens on WCPFC boats – to encourage such individuals to fish in accordance with WCPFC conservation and management measures. A boarding and inspection regime (modelled on the existing *United Nations Fish Stocks Agreement* (FSA) provisions) will be applicable to WCPFC boats once these provisions come into force;
 - Allow the suspension of fishing concessions after serious violations of the WCPFC;
 - Allow the reporting of the position of boats through vessel monitoring systems when on the high seas; and
 - Apply the WCPFC definition of “highly migratory fish stocks” to exclude sauries for the purpose of implementing the WCPFC.

- 1.5. The Bill also provides for amendments to the *Fisheries Management Act 1991* and *Fisheries Administration Act 1991* that will allow the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) and the Australian Fisheries Management Authority (AFMA) to disclose information, which may contain personal information about suspected illegal fishers, to foreign governments and international intergovernmental organisations. This information may assist in investigations and prosecutions for breaches of fisheries laws in foreign countries.
- 1.6. This measure enhances Australia's capacity to comply with international agreements (such as the FSA and the United Nations Food and Agriculture Organization's *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on High Sea*). Appropriate controls will apply to the disclosure of personal information.
- 1.7. The Bill will also extend the current domestic infringement notice scheme to incorporate foreign fishing offences. This will increase the Australian Government's capacity to take action against foreign nationals that are suspected of fishing in Australian waters without authority.
- 1.8. These measures will further the Australian Government's strong stance on the issue of illegal, unreported and unregulated fishing.
- 1.9. Part 1 of Schedule 1 of the Bill also contains other, miscellaneous amendments to the *Fisheries Management Act 1991* that will enable AFMA to improve its management of Commonwealth fisheries. These amendments will:
 - Require that management plans explicitly include objectives consistent with those under the legislation, and include criteria and time frames for performance review, consistent with Outcome 16 of the 2003 Commonwealth Fisheries Policy Review;
 - Ensure holders of Commonwealth fishery concessions are able to land their legitimate catch at any Australian port;
 - Remove the ability to use the ballot approach to allocate access rights to fisheries resources, consistent with Outcome 31 of the 2003 Commonwealth Fisheries Policy Review; and
 - Correct a drafting error in section 103.
- 1.10. Part 2 of Schedule 1 of the Bill provides contingent amendments to address the interaction between this Bill and the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005. These amendments are necessary because both Bills amend or refer to the same sections of the *Fisheries Management Act 1991*. The contingent amendments will ensure that the *Fisheries Management Act 1991* is amended consistently and that the same enforcement regime applies to those that breach the WCPFC offences. The contingent amendments also include a minor amendment to the *Migration Act 1958*, to ensure that WCPFC offences are considered 'fisheries detention offences' for the purposes of immigration detention.

Financial Impact Statement

The amendments are expected to involve only minor administrative costs to the Australian Government or the fishing industry.

The costs of incorporating the WCPFC into Australia's domestic fisheries legislation are minimal. Most of the minor administrative costs (estimated at less than \$10,000 per annum in total) which are associated with enacting Australia's obligations under the WCPFC will be shared between AFMA and the fishing industry.

Many of the obligations imposed by the WCPFC (such as the management and conservation, reporting and compliance measures) are already being met through the current activities of AFMA and DAFF. Possible new costs to the Australian fishing industry will include the reporting of data, implementing vessel monitoring systems and allowing observers on board vessels. However, these compliance measures should involve negligible additional costs to the fishing industry, as fishers are already required to comply with similar monitoring, control and surveillance standards under domestic compliance regimes.

The provision to disclose information is also not expected to impose a significant burden or cost on the Australian Government, as much of this capacity will be met through the current activities of AFMA and DAFF.

The costs associated with extending the domestic infringement notice scheme will be of a minor administrative nature and will be met from within AFMA's resources. Any revenue received would be paid to AFMA.

The only cost to the Australian Government associated with the other miscellaneous legislative amendments is the usual costs of developing and implementing the legislation.

Regulation Impact Statement

Regulation Impact Statement concerning the proposed amendments to the *Fisheries Management Act 1991* to remove the use of the ballot approach to allocate access rights to fisheries resources.

Problem

The *Fisheries Management Act 1991* regulates the use of Commonwealth fisheries. Under the *Fisheries Management Act 1991*, fishing concessions may be granted through auction, tender or ballot approaches or through other procedures (such as access criteria based on catch history or investment levels) set out in the public notices. These approaches apply to all fisheries, but it is Government policy that the auction, tender or ballot approaches may only be used in the case of a new or exploratory fishery. To date, auction, tender or ballot approaches have not yet been used to allocate statutory fishing rights, but AFMA has indicated its intention to use either auction or tender approaches in some fisheries in the future.

Part Three of the *Fisheries Management Act 1991* establishes the methods for allocating statutory fishing rights in a fishery. AFMA, through a public notice, must declare its intention to grant statutory fishing rights with respect to a specific fishery. In this notice, AFMA must describe the fishing activities to be permitted, what conditions a person must meet in order to be eligible to be granted a statutory fishing right, whether there are any fees payable by persons applying to register for eligibility, and the procedures, as identified in the plan of management, to be followed in selecting the successful rights holders.

Under section 28 of the *Fisheries Management Act 1991*, when statutory fishing rights are allocated by ballot, regulations must prescribe the procedures that will be used to conduct the ballot and to rank participants in the ballot in accordance with the order of precedence allocated to them by the ballot. Regulation 8 of the *Fisheries Management Regulations 1992* currently sets out the following procedures that AFMA must follow when using the ballot approach to select the person to whom the grant will be made:

- AFMA must write the name of each eligible person on a separate piece of paper (in this regulation referred to as the ballot paper) that is the same size as the other ballot papers;
- AFMA must ensure that a representative (as appointed by the Minister) is present when the ballot is conducted;
- AFMA must show the ballot papers to all persons who are present before the ballot is conducted;
- AFMA must place the ballot papers in a container within which the papers cannot become snagged or trapped;
- AFMA must shake or turn the container to mix the ballot papers;
- the representative must draw one ballot paper at a time from the container until it is empty; and
- AFMA must record the names of the eligible persons in the order in which the names were drawn.

The Australian Government recently completed a major review of Commonwealth fisheries policies in 2003, which included extensive consultation with fishing industry groups, non-governmental organisations, State Governments and other interested parties. During these consultations, the fishing industry almost universally opposed the use of auction, tender or ballot approaches to allocate access rights to new or exploratory fisheries. The main grounds for opposition were that these processes create uncertainty for investment and disincentives for exploration. Some industry proponents argue that the auction, tender or ballot approaches constitute a resource rent tax – a claim that is incorrect and not supported by the Australian Government. Some fishers would prefer the Government to use an allocation method that distributes some or all of the fishing rights - without cost - to those already operating in the fishery (that is, to the pioneers). Others say they want a process that gives everyone an equal and fair chance to obtain fishing rights in a new fishery.

The Australian Government supports the retention of auction and tender processes. These methods have already proven successful in allocating limited access rights in the petroleum, forestry and telecommunications industries. They are transparent and effective ways of allocating rights to a fishery and they allow the market value of the

fishery to be determined through competitive bidding. Auction and tender processes result in access rights being allocated to those that most value the fishing right. The Australian Government believes that, unlike the ballot approach, these processes encourage the maximum economic return from the fishery.

Objectives

In administering the *Fisheries Management Act 1991*, AFMA and the portfolio Minister must pursue efficient and cost effective fisheries management, ecologically sustainable development and economic efficiency in the exploitation of fisheries resources. There are also requirements for AFMA to be accountable for its actions (section 3 of the *Fisheries Management Act 1991*). As such, fishing rights need to be allocated in a responsible, equitable and legally defensible manner.

Options

There are two options to consider:

- Option 1 - retention of the ballot allocation method in the *Fisheries Management Act 1991* (that is, the status quo) and
- Option 2 - the removal of the ballot approach in the *Fisheries Management Act 1991* as an option for AFMA to use when allocating statutory fishing rights to Commonwealth fisheries.

Impact Analysis

As the allocation methods do not determine the total level of fishing allowed, and it is Government policy to limit the use of the ballot method to new or exploratory fisheries, the groups that will be affected by the choice of allocation methods will be:

- those who wish to obtain fishing rights to new fisheries,
- Australian Government bodies that have responsibility for Commonwealth fisheries management (DAFF and AFMA), and
- the general public, who have an interest in the use and management of common property resources.

Option 1 – Status quo – retention of the ballot approach from the *Fisheries Management Act 1991*

If the status quo were maintained, the AFMA Board would have discretion to select one of the four possible approaches to allocate statutory fishing rights, including the ballot approach.

Advantages of the ballot approach

The ballot approach has the benefit (like auction and tender) of providing a transparent basis for decision-making. In the ballot approach, all eligible fishers, regardless of their wealth, have an equal chance of being allocated statutory fishing rights. Depending upon the eligibility criteria set by AFMA, the use of the ballot approach rather than auction or tender processes might make it easier for new entrants with less capital to

be allocated statutory fishing rights, and it might be a simpler and less expensive process to administer.

In September 2002, the National Competition Policy (NCP) Review supported the retention of ballot, auction and tender processes under the *Fisheries Management Act 1991*. The NCP Review found that these approaches were legally defensible methods that provide clear grounds for determining the allocation of rights.

The NCP Review cited the objectivity of auction, tender or ballot approaches as the key reason to retain these three approaches in the *Fisheries Management Act 1991*. However, the NCP Review drew an incorrect distinction between these approaches and the use of access criteria (such as catch history or investment levels). The NCP Review suggested that access criteria (which can restrict people's eligibility to participate in the allocation of rights) could be subjective. This is because the access criteria are not explicitly stated in the *Fisheries Management Act 1991*, but are determined by the AFMA Board during the development of the relevant plan of management. The NCP Review consequently found that the use of access criteria was open to legal challenge as individual circumstances such as health, participation in diversified operations or even conservation ethics could affect a person's eligibility for the allocation of rights. What the NCP Review failed to note is that participation in an auction, tender or ballot can be restricted by eligibility criteria, which are also left unspecified in the *Fisheries Management Act 1991*.

Despite this, DAFF and AFMA consider that the determination and assessment of eligibility and access criteria in all allocation models to be objective. The AFMA Board has established Independent Advisory Allocation Panels to provide independent and objective advice on allocation decisions. This increases transparency in the decision making process.

Disadvantages of the ballot approach

While the ballot method may be legally defensible, it is a random selection of a prospective owner of the rights to the fishery and effectively a lottery for access to the resource. The ballot approach is unpopular with both the fishing industry and the Australian Government for these reasons.

This allocation option is inequitable to the general public in that it does not reflect the market value of the fishery or the impact that fishing will have on this common property resource. It is the failure to account for any market value (which is provided by auction or tender processes) or to reflect the commitment already made by some fishers to the fishery through fisheries exploration (that could be set out in access criteria or eligibility criteria) that underlies the Australian Government's fundamental objection to this allocation method.

Option 2 – Removal of the ballot approach from the *Fisheries Management Act 1991*

Advantages of removing the ballot approach

The removal of the ballot approach would address the disadvantages outlined above. It would remove the possibility that an allocation method based on chance could ever be used to determine access to the resource. This is consistent with the views of the Australian Government and industry.

If the ballot approach were removed from the *Fisheries Management Act 1991*, the AFMA Board would have discretion to select either auction, tender or other procedures (such as the use of access criteria) to allocate statutory fishing rights.

Disadvantages of removing the ballot approach

Removing the ballot approach from the *Fisheries Management Act 1991* will reduce the options legally available to AFMA in selecting a method to use to allocate statutory fishing rights. The allocation of rights would have to be based on either market mechanisms or other procedures such as access criteria.

Impact on Sectors

Retention of the ballot approach would have a limited impact on Government or business as this method has not been used before and is very unlikely to be used in the future.

The removal of this approach, however, would remove the possibility that an allocation method based on chance could ever be used to determine access to resources. This would provide certainty to both industry and the general public that the Government would use market based mechanisms or other criteria that may reflect investment made in the fishery to distribute rights to a fishery.

Impact on Government

If the ballot approach were removed from the *Fisheries Management Act 1991*, there would be no cost to Government, except those involved with the legislative amendment process.

While the ballot approach might be easier and cheaper to administer than other approaches, it is not considered an appropriate allocation tool and the Government does not intend to use it in the future.

Impact on Industry

It is a long-standing Government policy that the auction, tender or ballot approaches may only be used in the case of a new or exploratory fishery. To date, there have been limited opportunities for Australian fishers to develop new or exploratory fisheries. They are likely to be far off shore and operators would need significant start up capital to participate in the fishery. Thus, there would only be a small portion of the fishing industry (the pioneers and those with sufficient capital to be potential new entrants to a fishery) that would be potentially impacted by a decision to remove the ballot approach from the *Fisheries Management Act 1991*. There should be no impact on small businesses in other industries.

The removal of this approach from the *Fisheries Management Act 1991* will not impose any costs on the fishing industry or others.

Impact on General Public

The removal of the ballot approach from the *Fisheries Management Act 1991* will not have any impact on the general public, as it will not change the arrangements that would be put in place to manage the fisheries resources.

Consultation

The parties most affected by changing the available methods of allocating fishing rights are the fishers who may wish to obtain fishing rights to new fisheries and the Australian Government bodies that have responsibility for fisheries management (DAFF and AFMA).

During the Commonwealth Fisheries Policy Review, the Australian Government canvassed the opinions of industry groups, non-governmental organisations, State Governments and other interested parties on a variety of matters (including the removal of the ballot approach). Public meetings were held in fishing communities around Australia and written submissions were received by the steering committee (constituted by industry and other stakeholders) that managed the review. The review found overwhelming support for the removal of the auction, tender or ballot approach by the fishing industry.

Industry and non-governmental organisations were consulted again in March 2004 and their support for the removal of the ballot approach was again reiterated.

Conclusion and recommended option

One of the outcomes of the Commonwealth Fisheries Policy Review, which was released in June 2003, was that the ballot approach should be removed from the *Fisheries Management Act 1991*. The Australian Government's view is that the ballot approach leaves the allocation of rights to chance and, therefore, is potentially arbitrary and unfair, and that there are alternatives available for allocating access rights to new fishery resources that are more appropriate to use.

It is recommended that the ballot approach be removed from the *Fisheries Management Act 1991* as both the Australian Government and the fishing industry do not support the use of this allocation method to allocate statutory fishing rights.

Implementation and Review

The recommendation may be implemented by amending the *Fisheries Management Act 1991* to remove all references to the ballot approach.

Commonwealth fisheries policy and legislation is under regular review by DAFF and AFMA. Industry and non-governmental organisations are always able to raise

concerns on matters of Commonwealth policy with DAFF, AFMA or with the portfolio Minister. In addition, specific forums exist in which any concerns can be raised, including the recently initiated Australian Fisheries and Seafood Forum and the Management Advisory Committees.

2.NOTES ON CLAUSES

Clause 1: Short title

- 2.1. Clause 1 is a formal provision specifying the short title of the Act. The Act will be called the *Fisheries Legislation Amendment (International Obligations and Other Matters) Act 2005*.

Clause 2: Commencement

- 2.2. Clause 2 provides that sections 1 to 3 and anything not covered in the commencement table will commence on the day on which the Act receives the Royal Assent.
- 2.3. In Schedule 1 of the Bill, Items 1 to 4, 6 to 23, 34 to 36 and 42 to 47 will commence on the day after the Act receives the Royal Assent.
- 2.4. In Schedule 1 of the Bill, Items 5, 24 to 33 and 37 to 41 will commence on a single day fixed by Proclamation. The provisions must be proclaimed within the period of two years beginning on the day on which this Act receives the Royal Assent; otherwise the provisions will be repealed on the first day after the end of that period. These Items cannot enter into force unless the Commission established by the WCPFC has determined a boarding and inspection regime similar or identical to the regime under the FSA.
- 2.5. The Commission must determine the boarding and inspection regime to be applied to WCPFC boats within two years of the Convention entering into force (that is, by June 2006). This is in accordance with Article 26 of the WCPFC. It is expected that the new regime will be consistent with the FSA and the WCPFC itself provides the FSA as a default, should the Commission be unable to agree on a new regime within the two year deadline.
- 2.6. As the Commission has not yet determined the applicable procedures for boarding and inspection, it would be inappropriate to immediately implement these provisions into the *Fisheries Management Act 1991*. However, by having these provisions ready for proclamation, Australia will be able to quickly implement the relevant boarding and inspection regime for WCPFC boats if, as expected, it replicates the FSA regime.
- 2.7. If the Commission determines a regime that is substantially different to the FSA regime, then the relevant provisions in the Bill will not be proclaimed and, after two years, the provisions will be automatically repealed and not come into effect. Under these circumstances, new legislation will need to be drafted based on the regime as determined by the Commission.
- 2.8. In Schedule 1 of the Bill, Items 48 to 58 will commence immediately after the commencement of Part 2 of Schedule 1 to the *Border Protection legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005* and Items 5, 24

to 33 and 37 to 41 of this Bill. Items 48 to 58 are contingent on both sets of amendments coming into force, and will ensure that amendments made to the *Fisheries Management Act 1991* regarding the detention of illegal foreign fishers are consistent and that all references are up-to-date.

- 2.9. In Schedule 1 of the Bill, Item 59 will commence immediately after the commencement of Part 1 of Schedule 2 to the *Border Protection legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005* and Items 5, 24 to 33 and 37 to 41 of this Bill. Item 59 is contingent on both sets of amendments coming into force, and will ensure that amendments made to the *Migration Act 1958* regarding fisheries detention are consistent and that all references are up-to-date.

Clause 3: Schedule(s)

- 2.10. Clause 3 provides that the *Fisheries Management Act 1991*, the *Fisheries Administration Act 1991* and the *Migration Act 1958* are amended or repealed as set out in the Items in Schedule 1 of the Bill.

Schedule 1: Amendments

Part 1 – Main Amendments

Fisheries Administration Act 1991

Item 1: After paragraph 7(1)(ga)

- 2.11. This Item inserts a new function of AFMA into the *Fisheries Administration Act 1991*. This function allows AFMA to disclose information relating to fishing activities that may involve a breach of the laws of Australia or of a foreign country. This information may include personal information relating to the fishing activities of individuals suspected of illegally fishing. AFMA will also have the capacity to authorise the disclosure of such information by a prescribed agency. This will facilitate the communication of such information, for example, through diplomatic channels.
- 2.12. This new function of AFMA will allow it to validly disclose information if the Minister delegates such decision to AFMA under the new section 108B of the *Fisheries Management Act 1991*, which shall be inserted by Item 44 of this Bill. The delegation power is in section 163 of the *Fisheries Management Act 1991*.
- 2.13. The disclosure of this information constitutes an exception to the Information Privacy Principles of the *Privacy Act 1988*. As such, controls on the use of the disclosed information are provided in Item 2 of Schedule 1 of the Bill.

Item 2: At the end of section 7

- 2.14. Item 2 provides possible limits on the use of information if it is disclosed by AFMA in accordance with paragraphs 7(1) (g), (ga), (gb) or (ma) of the *Fisheries Administration Act 1991*. AFMA may require that the body to which the information is disclosed does not further disclose this information or, if such a disclosure is permitted, that it is only made for such purposes and on such conditions as AFMA specifies. AFMA could, for example, limit the use of the information for the purpose of an investigation only.
- 2.15. Subsection 7(4) provides that agencies may be prescribed to disclose information on behalf of AFMA. The agencies must fit within the meaning of section 7 of the *Public Service Act 1999* and must be prescribed through regulations, which will be subject to Parliamentary scrutiny.
- 2.16. The Australian Government Department of Foreign Affairs and Trade (DFAT) is an agency that will be prescribed in regulations to transmit such information to the governments of foreign countries using diplomatic channels. However, this section will not allow DFAT (or any other agency prescribed in the regulations) to control the information for their own purposes.

Fisheries Management Act 1991

Item 3: Subsection 4(1)

- 2.17. This Item inserts a definition of the ‘Convention area’ into the *Fisheries Management Act 1991*. ‘Convention area’ is defined to have the same meaning as Article 3 of the WCPFC. The Convention area covers the migration paths of highly migratory fish stocks such as tuna and billfish and includes parts of the AFZ, the high seas and other countries’ exclusive economic zones.
- 2.18. The term ‘Convention area’ is used in certain offence provisions in the Bill to specify the area within which breaches of WCPFC conservation and management measures may occur.

Item 4: Subsection 4(1)

- 2.19. This Item inserts a definition of a ‘party to the WCPFC’ into the *Fisheries Management Act 1991*. This term has its ordinary meaning (being those States that ratify, accept or approve the WCPFC) and also includes a fishing entity that has agreed to be bound by the regime established by the WCPFC in accordance with the provisions of Annex I to the WCPFC.
- 2.20. The term ‘fishing entity’ was used in the WCPFC to allow entities that are not formally recognised as a State, whose vessels fish for highly migratory fish stocks in the Convention area, to also be bound by the provisions of the WCPFC.

Item 5: Subsection 4(1) (definition of seriously violate)

- 2.21. Item 5 repeals the current definition of ‘seriously violate’ in the *Fisheries Management Act 1991*. It then substitutes a new definition of ‘seriously violate’ which is cross referenced to subsection 87E(4) if the term is used in relation to an Australian regional management measure, or new subsection 87FC(5) (inserted by Item 26 of this Bill) if the term is used in relation to a WCPFC conservation and management measure.
- 2.22. The definitions in subsection 87E(4) and new subsection 87FC(5) of the *Fisheries Management Act 1991* are consistent, except that they respectively relate to Australian regional management measures and to WCPFC conservation and management measures.
- 2.23. There must be a ‘serious violation’ of either an Australian regional management measure or a WCPFC conservation and management measure to warrant action by officers in regard to FSA and WCPFC offences in the *Fisheries Management Act 1991*.

Item 6: Subsection 4(1)

- 2.24. This Item inserts a definition of ‘WCPFC’ into the *Fisheries Management Act 1991*. The WCPFC means the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* done at Honolulu on 5 September 2000.

Item 7: Subsection 4(1)

- 2.25. This Item inserts a definition of ‘WCPFC boat’ into the *Fisheries Management Act 1991*. A WCPFC boat means a boat registered under the laws of a foreign country that is a party to the WCPFC. A party to the WCPFC is defined under Item 4 to include fishing entities. The term ‘WCPFC boat’ is used in some of the offences and the sections that provide boarding and inspection powers in this Bill.

Item 8: Subsection 4(1)

- 2.26. Item 8 inserts a definition of a ‘WCPFC conservation and management measure’ into the *Fisheries Management Act 1991*. The Commission that is established by Article 9 of the WCPFC will have the capacity to determine such measures. The measures may relate to the conservation or management of one or more WCPFC fish stocks in all or a part of the Convention area over which the Commission has jurisdiction.
- 2.27. For the purpose of Parliamentary scrutiny and public availability, the measures determined by the Commission will be set out in regulations. This is important as the WCPFC conservation and management measures will constitute a main element of some of the new offences in this Bill.

Item 9: Subsection 4(1)

- 2.28. This Item defines a ‘WCPFC fish stock’ in the *Fisheries Management Act 1991* with reference to the list of highly migratory species in Annex I to the *United Nations Convention on the Law of the Sea*, except that it does not include sauries. This is in accordance with Article 1 of the WCPFC.

Item 10: Subsection 10(2)

- 2.29. This Item amends section 10(2) of the *Fisheries Management Act 1991*. Section 10 deals with the operation of certain State and Territory laws. Section 10(2) provides that the *Fisheries Management Act 1991* is intended to apply to the exclusion of any State or Territory law relating to fishing as far as that law related to: (a) activities in the AFZ, (b) activities in the coastal waters of a State or Territory for specified fisheries or (c) the landing of fish in a State or Territory taken under a statutory fishing right or a fishing permit.
- 2.30. The amendment to Section 10(2) provides that State or Territory laws that relate to fish (in addition to laws that relate to fishing) will also be excluded from operation, if these laws apply to: (a) activities in the AFZ, (b) activities in the coastal waters of a State or Territory for specified fisheries or (c) the landing of fish in a State or Territory taken under a statutory fishing right or a fishing permit issued by AFMA.
- 2.31. The purpose of this amendment is to prevent States or Territories from prohibiting the landing of fish caught legitimately in accordance with Commonwealth fishing concessions, by regulating fishing activities or other activities related to the landing of fish which are not specifically within the definition of “fishing” under the *Fisheries Management Act 1991*. An example of such an activity is the possession of fish.
- 2.32. This amendment upholds the right of fishers that fish under a statutory fishing right or fishing permit granted under the *Fisheries Management Act 1991* to land their legitimate catch at any port in Australia. The amendment will mean that State or Territory laws that can be characterised as relating to fish or fishing (including fisheries management, environmental or threatened and endangered species legislation) will be overridden to the extent of their inconsistency with the right to land catch as permitted by the *Fisheries Management Act 1991*.

Item 11: Paragraph 10(2)(c)

- 2.33. This Item amends section 10(2)(c) of the *Fisheries Management Act 1991* by expanding the types of State or Territory laws that would be excluded from operation if these laws apply to the landing of fish under a Commonwealth statutory fishing right or fishing permit. The existing paragraph already refers to State and Territory laws that apply to the landing of fish by requiring the activity to be done in accordance with a licence, permit or similar instrument or upon the payment of a fee or charge. The paragraph will be amended to also exclude State and Territory laws from operation if they prohibit the landing of legitimate catch.

2.34. The amendment addresses current State legislation that prohibits the taking, possessing, processing, consigning or sale or purchase of fish that are defined as “commercially protected species.” This State legislation impacts on Commonwealth fisheries concession holders that are lawfully able to take fish in accordance with their statutory fishing right or fishing permit but are prohibited from landing the fish due to the existing and contradictory State legislation.

Item 12: At the end of section 10

2.35. This Item adds two further subsections to section 10 of the *Fisheries Management Act 1991*.

2.36. Subsection 10(4) focuses on the meaning of the “prohibition” of landing fish in a State or Territory under a statutory fishing right or fishing permit. Under subsection 10(4), paragraph 10(2)(c) should be read to include direct prohibitions on landing fish as well as any direct prohibition or indirect regulation on the possession, processing or other dealing with such fish that would have the effect of substantially discouraging the landing of such fish in the State or Territory. Subsection 10(4) will address the situations where a State or Territory may seek to regulate the landing of fish but does so through indirect regulation, such as making the landing of such fish to be uneconomical or excessively inconvenient so as to discourage the landing of the fish.

2.37. Subsection 10(5) provides that subsection 10(2) does not intent to override State or Territory legislation that is related to fish or fishing but which is directed at the protection of public health, or for ensuring safety or for any similar objective. This Item is to avoid any doubt over the types of laws that would be excluded from operation and the purpose of the amendments in Items 10, 11 and 12 of this Bill.

Item 13: Paragraph 17(5)(c)

2.38. This Item amends section 17(5) of the *Fisheries Management Act 1991* to clarify that plans of management must explicitly include criteria and time frames for performance review, so that the performance of the plan could be assessed against the objectives that AFMA is pursuing in a particular plan. This amendment delivers upon Outcome 16 of the Commonwealth Fisheries Policy Review and will provide improved accountability for stakeholders.

Item 14: After subsection 17(5)

2.39. This Item inserts a new subsection (5AA) into section 17 of the *Fisheries Management Act 1991*. Section 17 of the *Fisheries Management Act 1991* sets out in what circumstances and how a plan of management must be created for a fishery. Section 17(5) states that a plan of management must set out objectives of the plan of management, measures by which the objectives are to be attained and performance criteria against which measures can be assessed.

The new subsection (5AA) provides that the objectives of a plan of management under paragraph (5)(a) must explicitly include, but not be limited to, objectives consistent with those already in the *Fisheries Management Act 1991*. This amendment delivers upon Outcome 16 of the Commonwealth Fisheries Policy Review and will ensure that fisheries are all managed according to the same broad objectives.

Item 15: Subparagraphs 17(6)(d)(ii) and (iii)

- 2.40. This Item repeals subparagraphs 17(6)(d)(ii) and (iii) of the *Fisheries Management Act 1991* and substitutes a new subparagraph 17(6)(d)(ii) to remove a reference to the conducting of a ballot to select persons to whom fishing concessions may be granted under the *Fisheries Management Act 1991*. This amendment is consistent with Outcome 31 of the Commonwealth Fisheries Policy Review.

Item 16: Paragraphs 23(1)(b) and (c)

- 2.41. This Item repeals paragraphs 23(1)(b) and (c) of the *Fisheries Management Act 1991* and substitutes a new paragraph 23(1)(b) to remove a reference to the conducting of a ballot in respect of a grant of a fishing right.

Item 17: Paragraph 25(b)

- 2.42. This Item amends paragraph 25(b) of the *Fisheries Management Act 1991* to remove the reference to a grant of fishing rights by a ballot under the *Fisheries Management Act 1991*.

Item 18: Subsection 28(1)

- 2.43. This Item amends subsection 28(1) of the *Fisheries Management Act 1991* to remove the reference to a grant of fishing rights by a ballot under the *Fisheries Management Act 1991*.

Item 19: Paragraph 28(2)(c)

- 2.44. This Item repeals paragraph 28(2)(c) of the *Fisheries Management Act 1991* to remove the references to the procedural requirements for conducting a ballot to allocate fishing rights under the *Fisheries Management Act 1991*.

Item 20: Paragraph 28(2)(d)

- 2.45. This Item amends paragraph 28(2)(d) of the *Fisheries Management Act 1991* to remove the references to the conducting of a ballot (for allocating fishing rights) from the *Fisheries Management Act 1991*.

Item 21: Subsection 29(2)

- 2.46. This Item amends subsection 29(2) of the *Fisheries Management Act 1991* to remove the references to the conducting of a ballot (for allocating fishing rights) from the *Fisheries Management Act 1991*.

Item 22: Subsection 38(2)

- 2.47. This Item amends subsection 38(2) of the *Fisheries Management Act 1991* to include a reference to the new subsection 38(3A) which is inserted at Item 23. The new subsection 38(3A) provides an exception to the general rule on suspended fishing concessions provided in subsection 38(2).

Item 23: After subsection 38(3)

- 2.48. This Item inserts a new subsection (3A) into section 38 of the *Fisheries Management Act 1991*. Section 38 allows for fishing concessions to be suspended for particular reasons. The new subsection allows AFMA to suspend fishing concessions if the concession holder has seriously violated a WCPFC conservation and management measure and this violation has led to the sanctions being applied by Australia or a foreign country. The fishing concession can be suspended until the sanctions are fully complied with.
- 2.49. This Item fulfils Australia's obligations under Article 25(4) of the WCPFC which obliges parties to take action against boats that seriously violate the Convention or conservation and management measures adopted by the Commission and, in particular, to ensure that the boats cease to fish in the Convention area until all sanctions have been complied with. The sanctions that may be applied are not specified in the WCPFC.

Item 24: Before section 83

- 2.50. This Item inserts a new heading into Division 1 of Part 6 of the *Fisheries Management Act 1991*. Sections 83 to 87 are grouped under the heading "Subdivision A—General surveillance and enforcement powers of officers."

Item 25: After section 87

- 2.51. This Item inserts a new heading into Division 1 of Part 6 of the *Fisheries Management Act 1991*. Sections 87A to 87F are grouped under the heading "Subdivision B—Surveillance and enforcement powers of officers concerning FSA boats."

Item 26: After section 87F

- 2.52. This Item inserts a new heading into Division 1 of Part 6 of the *Fisheries Management Act 1991*. The new sections 87FA to 87FD (also inserted by this Item) are grouped under the heading "Subdivision C—Surveillance and enforcement powers of officers concerning WCPFC boats."

- 2.53. Sections 87FA to 87FD insert new boarding and inspections powers into the *Fisheries Management Act 1991*. These powers are applicable to WCPFC boats and the new offences (sections 105H and 105I) to be inserted the *Fisheries Management Act 1991*. Sections 87FA to 87FD replicates the existing sections 87B, 87C, 87E and 87F which apply to FSA boats.
- 2.54. These provisions will not come into force upon royal assent because the Commission established by the WCPFC has not yet determined the boarding and inspection regime that will apply to WCPFC. Article 26 of the WCPFC provides that the Commission must determine the regime within two years of the Convention entering into force (that is, by June 2006). It is expected the new regime will be consistent with or identical to the FSA regime.
- 2.55. Section 87FA applies Articles 21 and 22 of the FSA which relate to the right of a non-flag State to board and inspect boats on the high seas. These powers balance the rights and interests of the fishing boat that is registered under the laws of a foreign country that is a party to the WCPFC, and the inspecting State (in this case, Australia). The prescribed boarding and inspection process is implemented through a modification of the current powers of fisheries officers in section 84 of the *Fisheries Management Act 1991*.
- 2.56. Section 87FB applies Article 21(14) of the FSA, which relates to the situation where a fisheries officer has reason to believe that a boat has been used on the high seas in contravention of a regional management measure (in this case, a WCPFC conservation and management measure) and the boat has since entered the AFZ after the contravention. This section further modifies the powers that apply in relation to a WCPFC boat as prescribed by section 84 and already modified by section 87FA of the *Fisheries Management Act 1991*.
- 2.57. Section 87FC limits the exercise of certain powers of officers while on WCPFC boats. Before an officer may exercise the specified boarding and inspection powers, the officer must believe on reasonable grounds that a person or persons have committed an offence against sections 105H or 105I and must notify the appropriate authority of the country of nationality of the boat of this belief. The officer must also obtain an authorisation from the country of nationality of the boat before exercising the specified powers. However, such an authorisation will not be necessary if the country has not acted in accordance with its international obligations arising from the notification and the boat has seriously violated a WCPFC conservation and management measure. Subsection 87FC(5) defines what “seriously violates” means in this context. This definition is based on Article 21(11) of the FSA.
- 2.58. Subsection 87FC(3) clarifies that an instrument which is used to notify a foreign country that a boat is suspected to have committed an offence against sections 105H or 105I is not a legislative instrument. This is because the instrument does not have a character of a legislative instrument, as specified by the *Legislative Instruments Act 2003*.

- 2.59. Section 87FD relates to the procedures which must be undertaken by a fisheries officer when exercising powers on a WCPFC boat. This Item is consistent with the obligations under Article 22 of the FSA regarding the prescribed inspection processes for a non-flag State boarding a boat on the high seas. Officers must show documents to the master including the copy of the text of the measure, provisions of the *Fisheries Management Act 1991* and regulations that relate to the measure (for example, the offence provisions). The officer must give notice to the country of nationality of the boat that an officer has boarded and is inspecting the boat. The officer must leave the boat as soon as possible after finding no evidence that a person has seriously violated a WCPFC conservation and management measure. The officer must give the master and the country of nationality of the boat a report of the exercise of the powers on the boat during the period while one or more officers were on the boat. The report should contain a note of any objection or statement the master of the boat asked an officer to include in the report. The officer must also comply with any other requirements prescribed in the regulations.
- 2.60. Subsection 87FD(6) clarifies that a note issued to the country of nationality of the boat (informing them of the boarding and inspection) and the report issued to the master and the country of nationality of the boat (regarding the exercise of powers on the boat) are not a legislative instruments. This is because the instruments do not have the character of legislative instruments, as specified by the *Legislative Instruments Act 2003*.

Item 27: Before section 87G

- 2.61. This Item inserts a new heading into Division 1 of Part 6 of the *Fisheries Management Act 1991*. Sections 87G to 90 are grouped under the heading “Subdivision D—Miscellaneous provisions relating to surveillance and enforcement powers of officers.”

Item 28: Subsection 87H(1) (note)

- 2.62. This Item repeals and substitutes the note to subsection 87H(1) of the *Fisheries Management Act 1991*. Section 87H deals with an officer’s powers to board and inspect a boat on the high seas where the boat appears to not have a nationality. This note provides that, in circumstances where the officer discovers after boarding the boat that the boat does have a nationality, certain boarding and inspection powers will apply. The note is amended to provide for the circumstance where the boat is in fact a WCPFC boat, and in this case, section 87FA will apply section 84 to allow an officer to exercise certain powers in regard to the WCPFC boat.

Item 29: Paragraph 87H(5)(b)

- 2.63. This Item amends subsection 87H(5) of the *Fisheries Management Act 1991*, which relates to obligations to issue a report to the master if an officer boards a boat, on the high seas, that does not have nationality. Paragraph 87H(5)(b)

provides that duplication should be avoided where several sections of the *Fisheries Management Act 1991* require that the master be issued with a report. Item 29 amends paragraph 87H(5)(b) to take account of the new section 87FD regarding WCPFC boats so that, if section 87FD already requires a report to be issued, then a further report should not be issued.

Item 30: Subsection 87H(5) (note)

- 2.64. This Item repeals and substitutes the note to subsection 87H(5) to include a reference to the new section 87FD, which relates to the procedures that must be undertaken by a fisheries officer when exercising powers on a WCPFC boat.

Item 31: Subsections 87J(1) and 88(1)

- 2.65. This Item amends subsections 87J(1) and 88(1) to include a reference to the new sections 87FA and 87FB as they modify an officer's powers under section 84 of the *Fisheries Management Act 1991*.
- 2.66. Subsection 87J(1) relates to the use of reasonable force in the exercise of an officer's powers on a boat. The amendment will provide that an officer cannot use reasonable force unless it is necessary to ensure the safety of an officer or to overcome obstruction of an officer in the exercise of an officer's duties when on board a WCPFC boat.
- 2.67. Subsection 88(1) relates to the release of seized property that comes under the control of an officer because of an exercise of power under section 84 of the *Fisheries Management Act 1991*. The amendment will allow an officer to release such property (such as a WCPFC boat) on such conditions as AFMA see fit. This could include the giving of security.

Item 32: Subsection 88A(1)

- 2.68. This Item repeals and substitutes subsection 88A(1) to include a reference to a WCPFC boat where an officer may be controlling the boat due to the investigation of a relevant offence. The amendment will allow the officer to release FSA and WCPFC boats to the appropriate authority of the country of nationality if the authority requests Australia or AFMA to do so.

Item 33: Subsection 88A(4)

- 2.69. This Item is a consequential amendment to the introduction of WCPFC offences and boarding and inspection powers in the *Fisheries Management Act 1991*. Item 33 amends subsection 88A(4) to include references to sections 87FA and 87FB, which are the boarding and inspection powers that an officer may exercise in relation to a WCPFC boat. Section 88A relates to the release of FSA and WCPFC boats to the appropriate authority of the country of nationality if the authority requests Australia or AFMA to do so.

Item 34: At the end of subsection 103(1B)

- 2.70. This Item corrects a technical error in section 103 of the *Fisheries Management Act 1991*. Section 103 makes it an offence for the master of a foreign boat to intentionally land or tranship fish in Australia or an external Territory where there is no authorisation for this. An offence will not be committed if the person has a reasonable excuse. The *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001* amended this section to include a note under the 'reasonable excuse' provision regarding the evidential burden, in line with 13.3(3) of the Criminal Code. A technical error was made when this section was amended and the 'reasonable excuse' provision was duplicated.
- 2.71. Item 34 adds the note regarding the evidential burden, directly under the first occurring reference to a 'reasonable excuse.'

Item 35: Subsection 103(1A) (the subsection (1A) inserted by item 208 of Schedule 1 to the Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001)

- 2.72. Item 35 also corrects the technical mistake in section 103 of the *Fisheries Management Act 1991*. The error was made by Item 208 of Schedule 1 to the *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001* when it inserted a new subsection 103(1A) into the *Fisheries Management Act 1991* to include reference to a 'reasonable excuse' as a defence for foreign boats landing fish in Australia.
- 2.73. There are currently two references to a 'reasonable excuse' in this section and also two versions of subsection 103(1A). Item 35 repeals the second occurrence of subsection 103(1A). Items 34 and 35 do not make any substantial changes to the *Fisheries Management Act 1991*.

Item 36: After section 105A

- 2.74. Item 36 inserts two new offences into the *Fisheries Management Act 1991*. Sections 105AA and 105AB seek to implement the obligations under the WCPFC which relate to Australian-flagged fishing vessels. Under Article 24 (2) of the WCPFC, members of the Commission must ensure flagged fishing vessels do not fish for highly migratory fish stocks in the Convention area beyond national jurisdiction, unless they are authorised to do so. Where they are so authorised, this must be in accordance with the WCPFC obligations.
- 2.75. There are already some provisions in the *Fisheries Management Act 1991* which will, in part, fulfil the obligations of Article 24(2). These include sections 95(5), 95(1AA), 105A and 105B of the *Fisheries Management Act 1991* which make it an offence for a concession holder to contravene a condition of his/her concession or for a master of an Australian-flagged boat to engage in unauthorised fishing on the high seas. These provisions do not adequately cover crewmembers using a fishing boat where there is no

concession in place relating to the fishing being undertaken by the boat or the person.

- 2.76. Sections 105AA and 105AB target Australian-flagged boats operating on the high seas in part of the Convention area. The offences apply equally to Australian and foreign citizens using such boats for fishing where that fishing is unauthorised by a fishing concession. These new offences will apply to crewmembers as well as masters of the boat and will ensure that all people on board the boat comply with the WCPFC.
- 2.77. The offences are serious as any violation of a WCPFC conservation and management measure by an Australian citizen is a breach of international law. Any unauthorised fishing in the Convention area has the potential to undermine the work of the WCPFC Commission which aims to ensure the long term conservation and sustainable use of highly migratory fish stocks in the region. It is thus necessary to strictly control the activities of Australian-flagged boats in the Convention area.
- 2.78. Sections 105AA and 105AB provide a two-tiered offence regime, with section 105AA being a strict liability offence. The two-tiered system provides flexibility in the prosecution of such offences and will enhance the integrity and effectiveness of the regulatory regime for WCPFC obligations.
- 2.79. A strict liability offence is considered appropriate in this case, as the requirement to prove all fault elements could create a substantial impediment to the prosecution of such offences. Evidence of intention and recklessness is often very difficult to obtain in the absence of admissions or independent evidence. In the context of a boat operating without authorisation, there will not be an observer on board to provide independent evidence of this nature. The matter is particularly within the knowledge of the defendant and admissions are particularly difficult to obtain if a foreign citizen is involved. However, where such evidence is available it would be desirable to prosecute for the full offence that carries a much greater penalty. The strict liability offence is drafted consistently with the Section 6.1 of the Criminal Code.
- 2.80. Section 105AB carries a maximum penalty of 500 penalty units. This penalty highlights the serious nature of the offence (as a breach of international law) and is consistent with penalties for similar existing offences in the *Fisheries Management Act 1991* (such as sections 105A and 105B). Section 105AA carries a much lower maximum penalty of 60 penalty units, which is consistent with Australian Government policy and principles on strict liability offences. The offence is not punishable by imprisonment.

Item 37: Subsection 105D(1)

- 2.81. This Item inserts a reference to the WCPFC into subsection 105D(1) of the *Fisheries Management Act 1991*. Currently, section 105D allows AFMA to authorise foreign officials to board and inspect Australian-flagged boats, if the country is a party to the FSA. The amendment to subsection 105D(1) will

allow the same boarding inspection regime to apply to foreign officials of those countries that are members of the WCPFC.

Item 38: At the end of paragraph 105D(1)(c)

- 2.82. This Item inserts a reference to the WCPFC into paragraph 105D(1)(c) of the *Fisheries Management Act 1991*. As with Item 37, this amendment is consequential to the creation of WCPFC specific offences. As amended, section 105D will allow AFMA to authorise foreign officials to board and inspect Australian-flagged boats as long as this is in accordance with the FSA or the WCPFC, depending on which applies to the situation.

Item 39: After subsection 105D(2)

- 2.83. This Item inserts a new subsection 105D(2A) into the *Fisheries Management Act 1991*, which enables AFMA to authorise a foreign country that is party to the WCPFC to investigate alleged breaches of WCPFC conservation and management measures involving an Australian-flagged boat. The new subsection mirrors subsection 105D(2), which deals with alleged breaches of regional conservation and management measures, as per the FSA. The investigations can only be made under certain specified conditions, such as adequate notification and following assurances that the investigation will be carried out in accordance with the WCPFC.

Item 40: Subsection 105D(5)

- 2.84. This Item repeals and substitutes subsection 105D(5) of the *Fisheries Management Act 1991* to take into account the WCPFC. This subsection allows the Attorney-General to authorise a foreign country to enforce its laws against an Australian-flagged boat on the high seas that is alleged to have contravened a WCPFC or other regional management measure. The subsection provides that the Attorney-General must be satisfied that the enforcement action will be taken in accordance with either the WCPFC or the FSA, whichever is relevant to the alleged contravention. The subsection has only varied to the extent that it takes into account the WCPFC.

Item 41: Saving provision

- 2.85. This Item is a saving provision to provide continuing validity for authorisations made before the repeal of subsection 105D(5) of the *Fisheries Management Act 1991*. The provision states that such authorisations continue to be in force as if they had been given by the Attorney-General under subsection 105D(5) of the *Fisheries Management Act 1991* as amended by this Bill.

Item 42: After section 105D

- 2.86. Item 42 inserts a new subdivision and four new offences into Division 5A of Part 6 of the *Fisheries Management Act 1991*. Division 5A relates to offences in places beyond the AFZ and the new subdivision AA specifically relates to

Australian citizens fishing in foreign boats beyond the AFZ. All the new offences relate to the contravention of WCPFC conservation and management measures but can be grouped into two categories. Sections 105DA and 105DB which relate to fishing in foreign waters and, sections 105DC and 105DD which relate to fishing on the high seas.

- 2.87. Sections 105DA and 105DB both deal with the offence of fishing without authorisation in the Convention area, in the exclusive economic zone, territorial sea, archipelagic waters or internal waters, of a foreign country. This authorisation should be in accordance with WCPFC obligations as mandated by the WCPFC.
- 2.88. Sections 105DA and 105DB seek to implement the obligations under Article 23(5) of the WCPFC, which require that members of the WCPFC, to the greatest extent possible, ensure that their nationals and boats owned or controlled by its nationals comply with the WCPFC conservation and management measures in the Convention area. Section 105C of the *Fisheries Management Act 1991* will already, in part; fulfil the obligations of Article 23(5) of the WCPFC in relation to foreign waters. Section 105C makes it an offence for people on Australian boats to fish without authorisation in the exclusive economic zone of another country. Sections 105DA and 105DB addresses gaps in the legislation where Australian citizens are on board foreign boats that are fishing without authorisation. Australia is not obliged by the WCPFC nor does it have sufficient jurisdiction to regulate foreign citizens on board foreign boats that are fishing without authorisation in foreign waters.
- 2.89. Subsections 105DA(4) and 105DB(3) are double jeopardy provisions, that provide that a person cannot be convicted of an offence under these sections if they have already been convicted or acquitted in a foreign jurisdiction of an offence involving the same fishing.
- 2.90. The offences in sections 105DC and 105DD deal with Australian citizens fishing on foreign boats that are not WCPFC boats, where that fishing contravenes a WCPFC conservation and management measures on the high seas in part of the Convention area. Sections 105DC and 105DD also seek to implement the obligations under Article 23(5) of the WCPFC that require members to the WCPFC, to the greatest extent possible, to ensure that their nationals and vessels owned or controlled by its nationals comply with the WCPFC conservation and management measures.
- 2.91. There are already some provisions in the *Fisheries Management Act 1991* that will, in part, fulfil the obligations of Article 23(5) of the WCPFC in relation to the high seas. Sections 105E and 105F of the *Fisheries Management Act 1991* deal with contraventions of Australian regional management measures on the high seas by persons using a FSA boat. Item 43 of the Bill will insert two new offences (sections 105H and 105I) that will cover people on WCPFC boats. However, there is still a gap relating to Australian nationals on board foreign boats (which are not WCPFC boats) that are violating WCPFC conservation

and management measures on the high seas. Sections 105DC and 105DD will close this gap.

- 2.92. The offences are serious as any violation of a WCPFC conservation and management measure by an Australian citizen is a breach of international law. Additionally, any fishing which breaches a WCPFC conservation and management measure has the potential to undermine the work of the WCPFC Commission which aims to ensure the long term conservation and sustainable use of highly migratory fish stocks in the region.
- 2.93. Both sections 105DA and 105DB and sections 105DC and 105DD provide a two-tiered offence regime, with sections 105DA and 105DC being strict liability offences. The two-tiered system provides flexibility in the prosecution of such offences and will enhance the integrity and effectiveness of the regulatory regime for WCPFC obligations.
- 2.94. Strict liability offences are considered appropriate in this situation as it allows Australia to more effectively regulate activities in the Convention area. The requirement to prove all fault elements as part of an offence can create a substantial impediment to the prosecution of such offences, as evidence of intention and recklessness is often very difficult to obtain in the absence of admissions or independent evidence. However, where such evidence is available it would be desirable to prosecute for the full offence that carries a much greater penalty. The strict liability offence is drafted consistently with the Section 6.1 of the Criminal Code.
- 2.95. Sections 105DB and 105DD carry a maximum penalty of 500 penalty units. This penalty highlights the serious nature of the offence (as a breach of international law) and is consistent with penalties for similar existing offences in the *Fisheries Management Act 1991* (such as sections 105C, 105E and 105F). Sections 105DA and 105DC carry a much lower maximum penalty of 60 penalty units, which is consistent with Commonwealth policy and principles on strict liability offences. The offence is not punishable by imprisonment.

Item 43: At the end of Division 5A of Part 6

- 2.96. Item 43 inserts a new subdivision into Division 5A of Part 6 of the *Fisheries Management Act 1991*. Division 5A relates to offences in places beyond the AFZ and the new subdivision C specifically relates to WCPFC boats on high seas. This Item also inserts two new offences into the *Fisheries Management Act 1991* and also provides that the Attorney-General's written consent is required before a charge of an offence against this Subdivision can proceed to a hearing or a determination.
- 2.97. Sections 105H and 105I create offences that target people using a WCPFC boat to fish on the high seas without authorisation, in a manner that contravenes WCPFC conservation and management measures. These sections seek to implement the obligations under Article 23(5) of the WCPFC that require members to the WCPFC, to the greatest extent possible, to ensure that

their nationals and vessels owned or controlled by its nationals comply with the WCPFC conservation and management measures in the Convention area. These provisions also seek to address Article 25 (11) of the WCPFC which provides that members of the WCPFC may take action to deter fishing vessels that have engaged in activities that undermine the effectiveness of the WCPFC conservation and management measures until the appropriate actions are taken by the flag state.

- 2.98. Sections 105H and 105I relate to both Australian and foreign citizens, however it is clear from the WCPFC that there are far stronger obligations for Australia to take action against Australian citizens on board WCPFC boats rather than foreign citizens. The boarding and inspection powers that are linked to section 105H and 105I will be used to implement the obligations to “deter fishing” by giving officers sufficient and effective powers. This includes the capacity to seize or detain fishing gear or the boat. These powers are inserted by Item 26 of the Bill but are, by necessity, linked to offences in section 105H and 105I. The appropriateness of charging foreign citizens under these provisions will be safeguarded by the requirement under section 105J to obtain the Attorney-General’s consent before charges can proceed to a hearing or a determination.
- 2.99. The offences are serious as a violation of a WCPFC conservation and management measure is a breach of international law. Additionally, any fishing which breaches a WCPFC conservation and management measure has the potential to undermine the work of the WCPFC Commission which aims to ensure the long term conservation and sustainable use of highly migratory fish stocks in the region.
- 2.100. Sections 105H and 105I provide a two-tiered offence regime, with section 105H being a strict liability offence. The two-tiered system provides flexibility in the prosecution of such offences and this will enhance the integrity and effectiveness of the regulatory regime for WCPFC obligations
- 2.101. A strict liability offence is considered appropriate in this situation as the requirement to prove all fault elements as part of an offence could create a substantial impediment to the prosecution of such offences, as evidence of intention and recklessness is often very difficult to obtain in the absence of admissions or independent evidence. However, where such evidence is available it would be desirable to prosecute for the full offence that carries a much greater penalty. The strict liability offence is drafted consistently with the Section 6.1 of the Criminal Code.
- 2.102. Section 105H carries a maximum penalty of 500 penalty units. This penalty highlights the serious nature of the offence (as a breach of international law) and is consistent with penalties for similar existing offences in the *Fisheries Management Act 1991* (such as sections 105E and 105F). Section 105I carries a much lower maximum penalty of 60 penalty units, which is consistent with Commonwealth policy and principles on strict liability offences. The offence is not punishable by imprisonment.

- 2.103. Item 43 also inserts section 105J into the *Fisheries Management Act 1991* which provides a protection for foreign citizens regarding prosecutions under the *Fisheries Management Act 1991*. It mandates that the Attorney-General's written consent is required before a charge under sections 105H and 105I can proceed to hearing or determination. The Attorney-General must take into account views expressed by either the foreign government or the fishing entity whose boat is alleged to be involved in the offence. It is also an opportunity for the Attorney-General to consider the relevant international law which underlies the particular offence. Consent is not required to arrest or lay a charge against of the suspected offender, or to commence proceedings for the extradition to Australia of the suspected offender or to commence proceedings for remanding the suspected offender in custody or on bail. However, if the Attorney-General does not grant consent, the court must permanently stay proceedings on such charges.
- 2.104. Subsection 105J(2) clarifies that the Attorney-General's written consent is not a legislative instrument. This is because the consent does not have the character of a legislative instrument, as specified by the *Legislative Instruments Act 2003*.

Item 44: At the end of Division 6 of Part 6

- 2.105. This Item inserts a new subdivision into Division 6 of Part 6 of the *Fisheries Management Act 1991*. Division 6 of Part 6 relates generally to surveillance and enforcement. The new Subdivision G relates to disclosure of information regarding illegal fishing activities.
- 2.106. Item 44 also inserts section 108B into the *Fisheries Management Act 1991*, which gives the Minister the authority to disclose information relating to fishing activities that may involve a breach of the laws of Australia or of a foreign country. This information may include personal information relating to the fishing activities of individuals suspected of illegally fishing. This information may be disclosed to the government or instrumentality of a foreign country or an international intergovernmental body.
- 2.107. The Minister may delegate such decision to AFMA or DAFF under the existing delegation power (section 163 of the *Fisheries Management Act 1991*). The new section 108B will also give the Minister the capacity to authorise the disclosure of such information by another prescribed agency. This will facilitate the communication of such information, for example, through diplomatic channels. The agencies must fit within the meaning of section 7 of the *Public Service Act 1999* and be prescribed through regulations and thus will be subject to Parliamentary scrutiny.
- 2.108. DFAT is an agency that will be prescribed in regulations to transmit such information to the governments of foreign countries using diplomatic channels. However, this section will not allow DFAT (or any other agency prescribed in the regulations) to control the use of the information for their own purposes.

2.109. The disclosure of this information constitutes an exception to the Information Privacy Principles of the *Privacy Act 1988*. As such, controls are provided for the use of the disclosed information. The Minister can require that the body to which the information is disclosed to does not further disclose this information or, if such a disclosure is permitted, that is only be made for such purposes and on such conditions as the Minister specifies. The Minister could for example, limit the use of the information for the purpose of an investigation only.

Item 45: Subsection 165(1) (definition of relevant decision)

2.110. This Item amends subsection 165(1) of the *Fisheries Management Act 1991* to remove the references to the ballot approach for allocation fishing rights from the *Fisheries Management Act 1991*, consistent with Outcome 31 of the Commonwealth Fisheries Policy Review, June 2003.

Item 46: Paragraph 168(2)(i)

2.111. This Item amends the regulation-making power in paragraph 168(2)(i) of the *Fisheries Management Act 1991* to include a reference to the offence in section 100. The effect of this amendment is to extend the infringement notice scheme that currently applies to domestic boats.

2.112. Section 100 provides that it is an offence for a person to use a foreign boat for commercial fishing in the AFZ where this fishing is unauthorised (that is, where there is no foreign fishing or Treaty license in force with respect to the use of that boat). The extension of the infringement notice scheme will target both masters and crew on board foreign boats when they are caught illegally fishing. Section 100 is a strict liability offence.

2.113. The infringement notice scheme is implemented through regulations to the *Fisheries Management Act 1991*. This scheme is consistent with Australian Government policy and principles on infringement notice schemes. However, some additional regulations will also be needed to:

- specify the time period in which the infringement notice can be given;
- provide a power to withdraw the infringement notice (and grounds upon which discretion can be used to withdraw the notice);
- provide for money to be refunded if the penalty is paid and the notice is withdrawn; and
- provide for representations to be made as to why the notice may be withdrawn (and these should be within a reasonable time period).

Item 47: After paragraph 168(2)(n)

2.114. Item 47 inserts a new paragraph into section 168 of the *Fisheries Management Act 1991*. Paragraph 168(2)(na) provides that regulations may be made regarding the application of vessel monitoring systems on the high seas in a part of the Convention area, where this is related to fishing for a WCPFC fish stock. This is to implement the obligation in Article 24(8) of the WCPFC that

flag fishing vessels that are authorised to fish beyond areas of national jurisdiction for highly migratory fish stocks use satellite position-fixing transmitters which are in accordance with the WCPFC Commission's specifications.

Part 2 – Contingent Amendments

Fisheries Management Act 1991

2.115. Items 48 to 59 are amendments contingent on the passing and commencement of the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* and Items 24-33 of this Bill. These amendments are necessary because both Bills amend or refer to the same sections of the *Fisheries Management Act 1991*. Additionally, the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* implements a new detention regime between the *Fisheries Management Act 1991* and the *Migration Act 1958* and it is important that the detention arrangements relating to violations of WCPFC offences are consistent with the other detainable offences in the *Fisheries Management Act 1991*.

Item 48: Subsection 87FA(1) (after table item 2)

2.116. Item 48 amends the table under subsection 87FA(1) which inserts new boarding and inspections powers applicable to WCPFC boats into the *Fisheries Management Act 1991*. New section 87FA (inserted by Item 26) replicates provisions which already apply to FSA boats. The table modifies the current powers of fisheries officers in section 84 to apply to WCPFC boats.

2.117. This Item adds a new table item to subsection 87FA(1) which refers to new paragraph 84(1)(aaa) which is inserted into the *Fisheries Management Act 1991* by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*. Item 48 will allow officers to search without warrant a person on a boat that the officer reasonably suspects is a foreign boat used in the commission of an offence against section 105H or 105I of the *Fisheries Management Act 1991*. The officer may search the person and their clothing to find a weapon or other thing which could be used to inflict bodily injury on another person. The officer may not search for evidence of a crime. The provision is solely aimed at securing the safety of officers while they are boarding a WCPFC boat. This Item will ensure that after the commencement of the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* and this Bill, the *Fisheries Management Act 1991* will be correctly updated.

Item 49: Paragraph 87FC(1)(b)

2.118. Item 49 amends paragraph 87FC(1)(b) to update the reference to the power to detain a person under the *Fisheries Management Act 1991*. The *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* will repeal paragraph 84(1)(ia) and the power to detain will now be

contained in Schedule 1A of the *Fisheries Management Act 1991*. This Item will ensure that after the commencement of the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* and this Bill, the *Fisheries Management Act 1991* will be correctly updated.

Item 50: Paragraph 87FC(1)(c)

2.119. Item 50 amends paragraph 87FC(1)(c) to update the reference to the power to move a person detained in Australia or an External Territory to another place in Australia or an External Territory. The *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* will repeal paragraph 84(1)(ib) and the power to move detained people will now be contained in Schedule 1A of the *Fisheries Management Act 1991*. This Item will ensure that after the commencement of the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* and this Bill, the *Fisheries Management Act 1991* will be correctly updated.

Item 51: Paragraph 87FC(6)

2.120. Item 51 amends paragraph 87FC(6) to update the reference to the power to detain a person or to move a detainee to another place in Australia or an External Territory. The *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* will repeal paragraphs 84(1)(ia) and (ib) and these provisions will now be contained in Schedule 1A of the *Fisheries Management Act 1991*. This Item will ensure that after the commencement of the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* and this Bill, the *Fisheries Management Act 1991* will be correctly updated.

Item 52: Subclause 8(1) of Schedule 1A

2.121. Item 52 amends subclause 8(1) of Schedule 1A of the *Fisheries Management Act 1991*. Clause 8 is to be inserted into the *Fisheries Management Act 1991* by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*. Clause 8 provides officers with the power to detain people who are suspected of committing an illegal foreign fishing offence. This section substantially replicates the power contained in section 84(1)(ia) of the *Fisheries Management Act 1991*, which is to be repealed by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*.

2.122. Subclause 8(1) of Schedule 1A gives an officer the power to detain a person for the purposes of deciding whether or not to charge them with committing an offence against sections 99, 100, 100A, 101, 101A, 101B, 105E or 105F of the *Fisheries Management Act 1991*, or an offence against section 6 of the *Crimes Act 1914* relating to such an offence. Item 52 will also allow an officer to detain a person for the purposes of deciding whether or not to charge them with committing an offence against sections 105H and 105I of the *Fisheries Management Act 1991*. The power to detain is subject to section 87FC, which

is inserted by Item 26 of the Bill, to ensure that boarding and inspection powers are consistent with the WCPFC and the FSA.

Item 53: Subclause 8(3) of Schedule 1A

- 2.123. Item 53 amends subclause 8(3) of Schedule 1A of the *Fisheries Management Act 1991*. Clause 8 is to be inserted into the *Fisheries Management Act 1991* by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*. Clause 8 provides officers with the power to detain people who are suspected of committing an illegal foreign fishing offence. Subclause 8(3) preserves the effect of section 87E of the *Fisheries Management Act 1991* which sets limits to the exercise of certain powers in relation to FSA boats. Item 53 amends subclause 8(3) to ensure that the power to detain is also subject to the limits set out in section 87FC to ensure that these powers are consistent with both the WCPFC and the FSA.

Item 54: Note to subclause 8(3) of Schedule 1A

- 2.124. Item 54 amends the note to subclause 8(3) of Schedule 1A of the *Fisheries Management Act 1991* to make reference to section 87FC which sets limits on the exercise of certain powers in relation to the boarding and inspection of WCPFC boats and the detention of illegal foreign fishers.

Item 55: Subclause 10(1) of Schedule 1A

- 2.125. Item 55 amends subclause 10(1) of Schedule 1A of the *Fisheries Management Act 1991*. Clause 10 is to be inserted into the *Fisheries Management Act 1991* by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*. Clause 10 allows detention officers to continue the detention arrangements for an illegal foreign fisher following the initial detention of a person by an officer, in order to facilitate the investigation of an offence against the *Fisheries Management Act 1991*. Item 55 amends subclause 10(1) to allow a detainee to continue to be held in detention by a detention officer for the purpose of determining whether or not to prosecute them with an offence against sections 105H and 105I of the *Fisheries Management Act 1991*.

Item 56: Subclause 12(4) of Schedule 1A

- 2.126. Item 56 amends subclause 12(4) of Schedule 1A of the *Fisheries Management Act 1991*. Clause 12 is to be inserted into the *Fisheries Management Act 1991* by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*. Clause 12 provides officers and detention officers with the power to move detainees. This clause substantially replicates section 84(1)(ib) of the *Fisheries Management Act 1991*, which is to be repealed by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*.

- 2.127. Item 56 amends subclause 12(4) to ensure that the power to move detainees is subject to the limits set out in section 87FC to ensure that these powers are consistent with the WCPFC as well as the FSA.

Item 57: Note to subclause 12(4) of Schedule 1A

- 2.128. Item 57 amends the note to subclause 12(4) of Schedule 1A of the *Fisheries Management Act 1991* to make reference to section 87FC which sets limits on the exercise of powers in relation to the boarding and inspection of WCPFC boats and the detention of illegal foreign fishers.

Item 58: Subparagraph 15(1)(b)(i) of Schedule 1A

- 2.129. Item 58 amends subparagraph 15(1)(b)(i) of Schedule 1A of the *Fisheries Management Act 1991*. Clause 15 is to be inserted into the *Fisheries Management Act 1991* by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*. Clause 15 allows for an authorised officer to search a detainee in certain circumstances. This clause substantially replicates paragraph 84(1)(ic) of the *Fisheries Management Act 1991*, which is to be repealed by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*.
- 2.130. Item 55 amends subparagraph 15(1)(b)(i) to allow a detainee, and any clothes or property under the immediate control of the detainee, to be searched without a warrant for the purpose of determining whether the person has in their possession any evidence of the commission of an offence against sections 105H or 105I of the *Fisheries Management Act 1991*. This provision is consistent with treatment of other detained fishers and allows for the preservation of evidence and the administration of justice.

Migration Act 1958

Item 59: Subsection 5(1) (paragraph (a) of the definition of fisheries detention offence)

- 2.131. Item 59 repeals and substitutes a new paragraph (a) to subsection 5(1) of the *Migration Act 1958*. Subsection 5(1) of the *Migration Act 1958*, which will be amended by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*, defines a fisheries detention offence to include certain offences under the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984* and section 6 of the *Crimes Act 1914* (as it relates to the other offences listed in the definition). Item 59 of this Bill further amends this subsection to include WCPFC offences under sections 105H or 105I of the *Fisheries Management Act 1991*.
- 2.132. Item 59 will ensure that exemptions from certain visa requirements contained in the *Migration Act 1958* apply to people detained under the WCPFC offences in the *Fisheries Management Act 1991*. Once a person is detained under these

offences, an enforcement visa will be granted to the non-citizen by operation of law.