

2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FISHERIES LEGISLATION AMENDMENT BILL (No. 2) 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture, Fisheries and Forestry,
Senator the Hon. Joe Ludwig)

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GENERAL OUTLINE

The Fisheries Legislation Amendment Bill (No. 2) 2010 will amend the *Fisheries Management Act 1991* (FM Act), the *Fisheries Administration Act 1991* (FA Act) and the *Fishing Levy Act 1991* (FL Act) to facilitate the implementation of co-management, regulatory simplification, the rationalisation of management advisory committees (MACs) and allow the Australian Fisheries Management Authority (AFMA) to provide services to other agencies.

The co-management and MAC amendments will enable industry to be given a more prominent and direct role in the management of fisheries, and will improve the effectiveness of MACs.

Co-management

The Bill will enhance the ability of AFMA to achieve efficient, cost effective and sustainable fisheries management, and to thereby meet its objectives under the FM Act and the FA Act, by facilitating the implementation of co-management with various stakeholders in Commonwealth fisheries. Co-management creates a partnership to achieve a shared responsibility for management of the resource within a rigorous framework of accountability and policy. The benefits of co-management are highlighted in the Fisheries Research and Development Corporation report, *Co-Management: Managing Australia's fisheries through partnership and delegation*.

Three trials were established to identify the most effective co-management arrangement approach for Australian fisheries. The preliminary outcomes of these trials are very positive and indicate that co-management can increase cost-effectiveness and deliver more efficient fisheries management. The trials also indicate that the fishing industry, given the right incentives, is a willing collaborator and can deliver stewardship over Australia's fisheries resources.

To enable the co-management arrangements to be fully implemented, the amendments will provide AFMA with the capacity to delegate powers and functions under the FM Act to primary stakeholders in a fishery in which there is a co-management arrangement. 'Primary stakeholders' are defined in the Bill as the holders of fishing concessions or an incorporated body that represents those holders, such as the Commonwealth Fishing Association or another person prescribed by the regulations. The exercise of those functions and powers by delegates will be subject to the directions of the AFMA Chief Executive Officer (CEO). The CEO will have the power to revoke a delegation. The power to delegate to primary stakeholders will also be subject to other requirements of the *Acts Interpretation Act 1901*.

Although some powers and functions will be delegated to primary stakeholders, AFMA will still have oversight capabilities to ensure governance and sustainability requirements under the Commonwealth Fisheries Harvest Strategy Policy and reporting under the *Environment Protection Biodiversity and Conservation Act 1999*. AFMA is also developing guidelines, standards and rules of operation for

co-management. These will be supported by procedures for AFMA to monitor, evaluate and audit industry.

The Commonwealth fishing industry and AFMA expect that co-management arrangements will lead to improved fisheries management outcomes, including increasing the sustainability of Australia's fish stocks, and creating optimal conditions for a viable and resilient fishing industry.

Regulatory simplification

The Bill will simplify the regulatory regime administered by AFMA by:

1. enabling the prescription of common conditions to the regulations that apply to the holders of fishing concessions across different fisheries; and
2. simplifying the requirements for amending fisheries plans of management to remove conditions that have been prescribed by the regulations, or which are otherwise redundant.

The Bill will remove the requirement that a plan of management for a fishery contains measures that duplicate administrative processes; which are redundant or already prescribed under regulation (and therefore result in unnecessary costs that are passed on to the holders of fishing concessions), particularly with regard to reporting and accountability; consolidate the powers in the FM Act to direct the closure or partial closure of a fishery; and simplify the procedures for making minor amendments to fisheries management plans (such as the correction of errors, or changes in format).

The Bill will also simplify the consultation processes for amending a plan of management, particularly for minor amendments. In cases where an amendment is more than a minor modification of a plan of management, consultation with at least the MAC and peak industry body representing holders of fishing concessions will be required.

The reduction of duplication and inconsistency across the Commonwealth fisheries through the streamlining of regulation may result in lower costs for the industry and AFMA.

Rationalisation of management advisory committees (MACs)

The Bill will also remove the restriction in subsection 56(4) of the FA Act on abolishing a MAC that is provided for in a fishery plan of management. Under the existing legislation, AFMA can abolish a MAC that is provided for in a plan, but only by amending the particular plan. This is a more costly process than would be achieved by the amendment, particularly if amendments are required to a number of plans. The Bill will simplify the process to reduce the number of MACs and enable the implementation of a dual advisory model, a model that enables a MAC to advise on more than one fishery.

The amendment will therefore enable AFMA to complete the restructure of the MACs. Industry and MAC members participated in (and were supportive of) the decision to reduce the MAC structure from 12 to six. This decision was considered by all parties to be appropriate to improve efficiency and effectiveness in the delivery of advice to AFMA, with the added benefit of lowering the fisheries administration costs borne by industry.

Provision of services

The Bill will serve the national interest by enabling AFMA to make its expertise in fisheries management available to Commonwealth, state, Northern Territory or overseas agencies by, for example, making trained fisheries observers available to other government fisheries management agencies, or by sharing its technical expertise in the installation and use of vessel monitoring systems. This amendment will also allow AFMA to charge the Commonwealth and other agencies for the provision of services under the existing section 94 of the FA Act. The ability to provide these services to other agencies would increase the economies of scale and lower the costs to AFMA and the Commonwealth of developing such technologies.

Each of these measures is expected to result in a reduction in the costs that are passed onto industry.

FINANCIAL IMPACT STATEMENT

The amendments have been assessed as having an insignificant financial impact on the Australian Government.

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NOTES ON ITEMS

Section 1: Short Title

Section 1 is a formal provision specifying the short title of the Act may be cited as the *Fisheries Legislation Amendment Act (No.2) 2010*.

Section 2: Commencement

Section 2 provides for the commencement of the Act.

Sections 1 to 3 will commence upon Royal Assent.

Schedules 1 and 2 will commence on the 28th day after this Act receives the Royal Assent.

Section 3: Schedule(s)

Section 3 provides that each Act specified in a Schedule to the Act is amended or repealed as set out in the applicable items of the Schedule concerned, and any other item in a Schedule to the Act has effect according to its terms.

SCHEDULE 1—AMENDMENT OF THE FISHERIES ADMINISTRATION ACT 1991

Item 1 – Subsection 4(1)

This item inserts a definition of ‘co-management arrangement’ by providing that it has the meaning given in new section 88 (see Schedule 1, Item 6).

Item 2 – Subsection 4(1)

This item inserts a definition of ‘primary stakeholder’, for the purpose of new paragraph 93(1)(f) of the FA Act, new subsections 17(11) and 41A(2C) of the FM Act. A description of primary stakeholder is required to define organisations or persons to which AFMA is able to delegate powers and functions under co-management arrangements.

Item 3 – Paragraph 7(1)(g)

This item repeals paragraph 7(1)(g) of the FM Act and substitutes new paragraphs 7(1)(fa) and (g). Paragraph 7(1)(fa) is in the same terms as the former paragraph 7(1)(g). New paragraph 7(1)(g) gives AFMA an additional function of making its expertise available to an entity in the Commonwealth, a State, a Territory or a foreign country, or to another person. Such expertise includes expertise in information technology, technical capability (such as in vessel monitoring systems), and technical experts (such as observers engaged pursuant to AFMA’s function in paragraph 7(1)(ea) of the FA Act).

Item 4 – Section 54

This item removes from section 54 the words “subject to subsection 56(4)”. It is consequential to the repeal of subsection 56(4) (see Schedule 1, item 5).

Item 5 – Subsection 56(4)

This item repeals subsection 56(4), which provides that AFMA cannot abolish a management advisory committee while the relevant fisheries management plan (determined under s17 of the FM Act) makes provision for the committee.

Subsection 56(2) retains the requirement for AFMA to establish management advisory committees to assist it in the performance of its fisheries management powers and functions. The repeal of subsection 56(4) enables AFMA to restructure management advisory committees to achieve more efficient and effective representation through consolidated multi-fishery management advisory committees, without having to amend relevant fisheries management plans individually. AFMA will therefore be able to restructure management advisory committees by a more efficient and less costly process.

Item 6 – After section 87

This item inserts a new section 88, which provides that AFMA may enter into a co-management arrangement with stakeholders in a fishery under which the stakeholders assist AFMA to perform its functions and powers for the sustainable management of a fishery. Stakeholders in a fishery might include concession holders, industry representative bodies, indigenous and environmental groups.

Item 7 – After paragraph 93(1)(e)

This item inserts new paragraph 93(1)(f), which adds a primary stakeholder in a co-management arrangement to the persons or entities to which AFMA’s CEO may delegate functions or powers that have been delegated to the CEO by the Commission. Under subsection 92(6) a delegate of the CEO is subject to the directions of the CEO. The CEO may remove a delegation if the CEO deems this appropriate. The delegation of powers under section 92 is also subject to other requirements of the *Acts Interpretation Act 1901*.

‘Primary stakeholder’ is defined in new subsection 4(1) (see Schedule 1, Item 2).

SCHEDULE 2 – AMENDMENT OF THE FISHING LEVY ACT 1991

Item 1– numbering system in section 7

This item provides for the inclusion of a second part to section 7 (see Schedule 2, Item 2).

Item 2 – Definition of ‘holder’

This item inserts into the FL Act a definition of ‘holder’ for the purpose of section 7.

SCHEDULE 3 – AMENDMENT OF THE FISHERIES MANAGEMENT ACT 1991

Item 1 – Subsection 4(1)

This item inserts a definition of ‘holder’ of a fishing concession, to make clear that unless the contrary intention appears, the ‘holder’ of a licence (including foreign fishing licence or foreign master fishing licence), fishing permit, or statutory fishing right means the person to whom the licence, permit or right was granted or transferred; and, in the case of a statutory fishing right that is leased to another person, the lessee of the right. Therefore, unless the contrary intention appears, both the owner of a statutory fishing right and a person who has temporary use of the right (such as under a lease agreement) are holders of the right. This means, for example, and depending on the circumstances of the contravention, that both the owner of a statutory fishing right and/or a lessee of the right could be prosecuted for a breach of paragraphs 95(1)(d) or (e) of the FM Act.

The definition reflects the fact that fishing permits, foreign fishing licences and foreign master fishing licences authorise particular individuals to engage in the specified activity, and therefore cannot be leased or otherwise temporarily assigned. Leasing of statutory fishing rights is defined under subsection 4(1) of the FM Act.

Item 2 – Subsection 4(1)

This item inserts a definition of ‘primary stakeholder’, which mirrors the definition in the FA Act (see Schedule 1, item 2).

Item 3 – Subsection 17(5)

This item makes it optional, rather than mandatory, for a plan of management for a fishery to set out the objectives of the plan, the measures by which the objectives are to be attained, and the performance criteria against which, and timeframes within which, the measures taken under the plan may be assessed. These requirements currently duplicate administrative processes, which are redundant or already prescribed under regulations, including accountability and performance assessment requirements.

The current requirement that a plan of management include a statement of objectives, has led to repetition of the objectives AFMA is required to pursue as set out in section 3 of the FM Act and section 6 of the FA Act within plans of management.

AFMA is required to pursue these objectives in the performance of all of its functions, including its function of devising and implementing management regimes for Commonwealth fisheries. By making the inclusion of objectives in a plan of management optional, unnecessary duplication of objectives is eliminated.

The removal of duplication of objectives prescribed in legislation and plans of management for individual fisheries, removes the duplication of AFMA's reporting requirements. AFMA is required to provide comprehensive performance assessments through its Annual Report to Parliament; its various reports and assessment to the Department of Sustainability, Environment, Water, Population and Communities, including as a condition of the accreditation of plans of management under the *Environment Protection Biodiversity and Conservation Act 1999*; and to the Department of Agriculture, Fisheries and Forestry through the Australian Bureau of Agricultural and Resource Economics – Bureau of Rural Sciences (ABARE–BRS).

The proposed regulatory simplification will mean that fisheries will be increasingly managed under common rules and not under fishery specific management plans. The plans will provide for the allocation and definition of statutory fishing rights, but will no longer form all encompassing sets of rules that lend themselves to performance assessment of the management of fisheries.

Item 4 – Subsections 17(5A) and (5B)

This item repeals two subsections, because their requirements are replaced by the amendment to s41A. All directions by AFMA that fishing is not to be engaged in, either in a fishery, or in a particular part of a fishery, whether or not a plan of management is in force for the fishery, will be given under s41A (see Schedule 3, item 9).

Item 5 – Subsection 17(6B)

This item repeals and replaces subsection 17(6B) to define a determination as a legislative instrument.

Item 6 – Subsection 17(11)

This item repeals and replaces subsection 17(11). The amendment is a consequence of the repeal of subsections 17(5A) and (5B) and also provides that, in addition to the CEO, AFMA may delegate any power conferred upon it under a plan of management for a fishery in accordance with paragraph 17(6)(aa) to a *primary stakeholder* who is to assist AFMA to manage the fishery under a co-management arrangement (within the meaning of the FA Act).

Item 7 – Subsections 19(2) and (3)

This item repeals subsections 19(2) and 19(3). These provisions make reference to sections under the *Acts Interpretation Act 1901* which have now been superseded in the *Legislative Instruments Act 2003*.

Item 8 – At the end of section 20

This item inserts new subsections 20(6) to 20(8).

Subsection 20(6) provides that consultation requirements (as prescribed under subsections 20(2), subsections 17(1B) to (4), section 18 and section 19 of the FM Act) do not apply to an amendment of a plan of management that is minor in nature or where the amendment brings the plan into line with legislation or regulations. The types of amendments are specified in paragraphs 20(6)(a) to (d) and include:

- (a) corrections to an error in the plan; or
- (b) changes to the format or presentation of the plan; or
- (c) changes to a matter in the plan to make the plan consistent with the FM Act or another Act, or the regulations. An example is the removal of conditions in plans that concern the closure of fisheries, or parts of fisheries, to fishing activities, following the repeal by this Bill of s17(5A) of the FM Act; or
- (d) removal of conditions from the plan if conditions dealing with the same subject matter (for example, conditions prescribing the requirements for boats to have an operational vessel monitoring system) have been prescribed in the regulations, whether or not the conditions are in the same terms. In this circumstance, AFMA would necessarily have engaged in extensive prior consultation, including with the Minister, as part of the regulation making process.

As section 18 does not apply, Ministerial acceptance of a plan of management is not required, before an amendment to a plan of management is determined. In addition, after making the amendment, AFMA is not required to give notification to the holders of statutory fishing rights that were granted under the plan.

Subsection 20(7) provides that certain consultation requirements (as prescribed under subsections 20(2), subsections 17(1B) to (4) and section 19) do not apply to an amendment of a plan if AFMA has engaged in prior consultation as prescribed in the subsection.

However, an amendment in accordance with subsection 20(7) requires the Minister to accept the amendment in accordance with section 18 before the plan of management can be determined (as part of the requirement of subsection 20(5)). In considering the amendment, the Minister must consider, and be satisfied, that AFMA engaged in prior adequate consultation, and gave due consideration to any representations received. The Minister must also consider, and be satisfied, that the plan is consistent with AFMA's corporate plan and current operational plan.

Item 9 – subsections 41A(1) and (2)

This item repeals and substitutes subsections 41A(1) and (2). This item also replaces subsections 17(5A) and (5B).

The new subsections 41A(1) and (2) apply to all fisheries, whether or not a plan of management is in force; and provide that before directing that fishing is not to be engaged in, either in a fishery, or in a particular part of a fishery (a closure direction),

AFMA must consult with the management advisory committee for the fishery, or, if there is no management advisory committee, with all holders of fishing concessions, scientific permits or foreign master fishing licences for the fishery.

New subsection 41A(2A) provides that AFMA must tell all holders of fishing concessions, scientific permits or foreign master fishing licences about the direction, in writing, at least 7 days before the direction takes effect; unless the direction is given in an emergency.

New subsection 41A(2B) provides that if a direction is given in an emergency, AFMA must give that notice about the direction as soon as it can practicably do so.

New subsection 41A(2C) provides that AFMA may delegate the power to give a closure direction to the CEO or to a *primary stakeholder* who is to assist AFMA to manage the fishery under a co-management arrangement (within the meaning of the FA Act).

Item 10 – After section 42A

This item inserts new s42B, which provides that the regulations may prescribe conditions that apply to fishing concessions or foreign master fishing licences; and that a provision of a plan of management has no effect to the extent that it is inconsistent with such regulations.

Item 11 – Paragraph 57H(1)(a)

This item replaces in paragraph 57H(1)(a) the reference to the “person to whom the permit is granted” with the “holder of the permit”. The amendment makes clear that AFMA is required to enter into the Fishing Permits Register both the name of the person to whom a permit is initially granted, and a person to whom the permit is transferred.