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HOUSE OF REPRESENTATIVES

**FISHERIES LEGISLATION AMENDMENT BILL (No. 1) 1999**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Agriculture, Fisheries and Forestry, the Hon  
Warren Truss MP)

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## **FISHERIES LEGISLATION AMENDMENT BILL (No. 1) 1999**

### **GENERAL OUTLINE**

The purpose of the *Fisheries Legislation Amendment Bill (No. 1) 1999* is to introduce new measures for sustainable management of fisheries including, in particular, new powers, offences and sanctions to ensure compliance with fisheries management measures.

The Bill has two schedules. The first schedule deals with new forfeiture and enforcement powers. These measures are aimed at ensuring more effective fisheries surveillance and enforcement within the Australian fishing zone (AFZ).

The second schedule provides for the implementation of principles, rights and obligations associated with the *Agreement for the Implementation of the Provisions of the United Nations Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* ('UNIA' or the 'Fish Stocks Agreement'). Australia being a party to this agreement and the agreement coming into force will assist with the long term conservation and sustainable use of stocks of fish which either straddle the AFZ-high seas boundary or being highly migratory pass through the AFZ.

### **FINANCIAL IMPACT STATEMENT**

There is no direct financial impact from the components of the Bill associated with improving forfeiture and enforcement action against illegal fishing. The financial impact of the UN Fish Stocks Agreement provisions can be considered as relating to:

1. participation and membership costs of regional fisheries arrangements;
2. a general extension of a regulatory regime onto the high seas;
3. a capacity to undertake monitoring, control and surveillance on the high sea areas in the fisheries in which we participate.

The estimated costs of implementing the Fish Stocks Agreement, including full participation in regional fishery organisations/arrangements are in the range \$3 - \$5 million per annum. These costs, which are outlined in table 2.4 of the Regulation Impact Statement, vary associated with the nature of the conservation and management measures which may be determined by regional fishery organisations.

### **REGULATION IMPACT STATEMENT**

#### **Introduction**

The Regulation Impact Statement only deals with the proposal to ratify the Fish Stocks Agreement.

## **1. The Problem**

The UN Fish Stocks Agreement (the Agreement) was negotiated to ensure the long-term conservation and sustainable use of straddling fish stocks<sup>1</sup> and highly migratory species<sup>2</sup> through cooperative regulation of high seas fishing.

Under the United Nations Convention on the Law of the Sea (UNCLOS) coastal nations may claim an Exclusive Economic Zone (EEZ) up to 200nm from the baseline. Within this zone, nations have the sovereign right to explore and utilise the natural resources, both living and non-living, and an obligation to conserve and manage these resources. The high sea is the area beyond the EEZ. The high seas comprise around 60% of the world's oceans. By the 1990's, the proportion of the world's fish catch that was taken from the high seas had doubled to 11% from 1980 levels; a level considered by the United Nations Food and Agriculture Organisation (FAO) to be unsustainable. Unsustainable fishing activity exists on the high seas because it is an area where all countries have the freedom to fish and is beyond the control of any one country.

High seas fisheries are characterised by

- Lack of regulation
- Overcapitalisation
- Excessive fleet size
- Lack of cooperation between countries
- Vessel re-flagging to escape controls
- Insufficiently selective gear
- Unreliable databases

The problems associated with unregulated high seas fishing were discussed during the 1992 United Nations Conference on Environment and Development, which led to the adoption of 'Agenda 21' of the Rio Declaration. Agenda 21 recognises there has been ineffective international conservation, management and sustainable use of straddling stocks and highly migratory stocks.

It is generally agreed amongst fisheries managers and the international community that regulation and cooperation is necessary to manage and conserve the living resources of the high seas and the associated resources within EEZs. Recognising this, several countries initiated action through the United Nations and the UN Fish Stocks Agreement was negotiated. Because of our national interest in solving problems associated with unregulated high seas fishing through better management, Australia signed the UN Fish Stocks Agreement when it was finalised in 1995.

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<sup>1</sup> Straddling fish stocks: Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area of high seas beyond and adjacent to that zone.

<sup>2</sup> Highly Migratory fish species are those listed in Annex 1 of UNCLOS a copy of which is provided at Attachment 1. The list includes the major species on which Australian tuna and billfish fisheries are based.

Fishing on the high seas may also impact on non-fish migratory species of conservation concern such as cetaceans, seabirds and turtles. Regulation of fishing on the high seas may minimise these impacts.

### 1.1 Impact on Australia

The Australian EEZ is over 11 million square kilometres, and is largely comparable with the AFZ. Despite the size of our fishing zone, total fisheries production is relatively low as Australia's marine environment, whilst diverse, is low in nutrients and biological productivity. Australian fisheries production, however, is based on high value species such as prawns, lobsters, abalone and tuna. These species sustain lucrative industries that provide regional employment and significant export income.

High seas fisheries are often based on highly migratory species and straddling stocks, which are mainly managed on behalf of the Commonwealth by the Australian Fisheries Management Authority (AFMA). In the Australian context, straddling stocks are those that straddle the boundary of the (AFZ) and adjacent high seas. Orange roughy on the South Tasman Rise is an example of an Australian straddling stock. Patagonian toothfish in the area of the sub Antarctic external territories is also potentially a straddle stock. Highly migratory species are those that migrate through the AFZ, such as Southern Bluefin Tuna and other tunas and billfish. In the high seas discrete high seas fish stocks also exist which may neither be a straddling or highly migratory stock. Though some principles and obligations of the Fish Stocks Agreement may apply to these discrete stocks they are not the focus of management arrangements.

The problems associated with high seas fisheries impact on Australia and its domestic fishing industry in a number of ways. Overfishing of highly migratory and straddling stocks on the high seas not only threatens the sustainability of those high seas fisheries but also that of domestic fisheries for those stocks within the AFZ. Regulation of the fishing for those stocks on the high seas is necessary to ensure the integrity of sustainable management measures imposed on domestic fisheries for straddling and highly migratory stocks within the AFZ. The pressures on these resources are unlikely to be alleviated without regional cooperation and implementation of the Fish Stocks Agreement framework to ensure sustainable development. Australia must participate in international fora and take diplomatic action to promote cooperative management and protect our national fishing interests.

Due to the vast size of our fishing zone, illegal, unregulated and unreported (IUU) fishing has been a problem, particularly in some of our remote external territories. Illegal fishing differs from unregulated fishing on the high seas, where all countries have the freedom to fish.

Illegal fishing occurs where foreign vessels fish for stocks within the AFZ without authorisation from the relevant Australian authorities. This illegal fishing impacts on the sustainability of certain highly migratory and straddling stocks, in particular, the Patagonian toothfish. Regional conservation cooperative efforts in Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) are undermined by IUU fishing

## 1.2 Illegal, unregulated and unreported fishing

Unregulated fishing has been a recent issue on the South Tasman Rise, threatening the sustainability of the orange roughy stocks in the region. The vessels which were undermining the regionally agreed conservation measures were boats flagged by Countries which are expected to become parties to the Fish Stocks Agreement. If the Agreement were in force at the time of the incident occurring, Australia would have been able to board, inspect, and potentially have taken enforcement action against the vessels.

Heard and McDonald Islands (HIMI) is the Australian external Territory located approximately 4000 kilometres southwest of Perth. Waters surrounding the islands out to 200 nautical miles are part of the AFZ and adjoin the French EEZ associated with Kerguelen Island. The Islands are home to a fishery for Patagonian toothfish. The Patagonian toothfish is susceptible to overexploitation as they take over 10 years to reach sexual maturity and are relatively slow growing. AFMA has licensed only two vessels to fish the area. The fish is a high value species and the licensed vessels operate under strict environment controls to ensure the long-term sustainability of the fishery and the natural and heritage values of Heard Island.

The illegal catch is directly jeopardising the sustainability of the fishery, and export dollars for the Australian industry. The catch taken by those Australian operators and other authorised operators in the CCAMLR area, is only a fraction of the toothfish traded in recent years. There has been substantial illegal fishing in the waters associated with Australian, French and South African territories and unregulated fishing in the broader CCAMLR area.

The value to Australia of highly migratory and straddling stocks that the UN Fish Stocks Agreement will assist in sustaining amounts to over \$250 million per annum. The estimated value these stocks, based on projected 1999 national catches, is detailed in Table 1. This does not include the potential value to Australia of increased involvement in high seas fishing. It is expected that Australia still has much to gain.

*Table 1: Estimated value of highly migratory and straddling stocks based on projected 1999 national catches*

FISHERY	VALUE	TONNES
Southern Bluefin Tuna fishery	\$190 m	5265
South Tasman Rise Orange Roughy fishery	\$7.5 m	1800
East Coast Tuna and Billfish (yellowfin, big eye and albacore tunas, billfish and swordfish)	\$37.5m	5400
West Coast Tuna and Billfish Fishery (yellowfin, bigeye, billfish and swordfish)	\$7.2m	2220

Heard Island Patagonian toothfish	\$25 m	3590
TOTAL	\$267m	18275

Source: BRS, ABARE, AFMA

### 1.3 Implications of a do-nothing approach

As a signatory to the UN Fish Stocks Agreement, Australia is obliged to refrain from acts that would defeat the object and purpose of the Agreement (*Vienna Convention on the Law of Treaties* (ATS 1974, 2, Article18). Ratification of the Agreement will enable Australia to pursue the opportunities from its rights under the Agreement. Additionally, if legislation were not passed to enable Australia to implement its obligations under the UN Fish Stocks Agreement, Australian vessels currently fishing on the high seas would have to cease their operations until we are able to exercise flag State control. Australian vessels could also be excluded from participating in high seas fisheries subject to regional fisheries management arrangements where Australia was not a member or participating and cooperating with regional measures.

Ratifying the Agreement will maintain the international momentum in bringing the Agreement into force. Twenty three countries have ratified the Agreement, and other like-minded countries are close to finalising legislation to ratify. The Agreement will come into force once thirty countries have ratified. Widespread adoption of the Agreement is necessary in order that it will eventually become customary law and provide means of addressing the problems of unregulated and unreported fishing on the high seas.

A do-nothing approach would have a negative impact on Australia's reputation as a world leader in sustainable fisheries management and on Australia's role in environmental matters generally. Australia played an active role in negotiating the UN Fish Stocks Agreement and takes a strong stance in other fora in support of the objectives of the Agreement.

Australia currently participates in a number of regional fisheries management organisations. When the Agreement comes into force, the ability of Regional Fisheries Management Organisations (RFMOs) such as CCSBT and CCAMLR to effectively manage fisheries will be strengthened. Additionally, our ability to deal effectively with unregulated fishing for example on the South Tasman Rise, and with non-parties to relevant RFMOs, will be increased.

We need to participate in new RFMOs, as members agree on such rights as participatory rights, allocations of allowable catch, or levels of fishing effort. It is in the national interest to be part of the decision making processes, as the rights of members who join later will then depend on the existing level of effort and the status of the highly migratory and straddling stocks managed by the RFMO.

If Australia does not become involved early in the process, we will have lost the opportunity to secure a share of high seas resources, and the sustainability of those stocks within the AFZ. As many of the fisheries in the AFZ are fully utilised it is increasingly important to secure opportunities to extend efforts to the high seas. To ensure sustainability of straddling and highly migratory fish stocks within the AFZ it is important to control unregulated fishing for these stocks on the high sea.

### 1.4 Why is government action needed to correct the problem?

Government action is needed to address the problem of unregulated fishing on the high seas because:

(a) the problem is one of market failure

The resources of the high seas – including fish stocks – are common resources. There are no property rights and few, if any, restrictions on their use. The United Nations Convention on the Law of the Sea (UNCLOS) provides for freedom of the high seas, qualified by an uncertain requirement to cooperate, that is, they are open to all countries so there is limited incentive to conserve the resource or regulate their catch when the actions of others would undermine these efforts. Consequently unregulated and unreported fishing makes sustainable management of high seas stocks extremely difficult. While UNCLOS Articles 116-119 covers all living resources of the high seas, the Fish Stocks Agreement only implements and clarifies the requirements to cooperate in the management of straddling stocks and highly migratory species. Government regulation and coastal State cooperation is necessary to ensure their use is sustainable.

(b) the problem requires international cooperation

In order to manage the common resources of the high seas sustainability, international cooperation is necessary. The UN Fish Stocks Agreement provides for the establishment of Regional Fisheries Management Organisations (RFMOs) or similar arrangements to devise and implement conservation and management measures for highly migratory and straddling stocks. It is clearly the role of Government to participate in the international negotiations that take place in these organisations, after appropriate consultation with stakeholders. Issues such as sovereign rights over resources of the EEZ and associated national revenue security may be impacted on through these negotiations.

(c) the magnitude of the problem and solutions require government intervention

As a party to UNCLOS convention, Australia has benefited through the articles of UNCLOS that provide for countries to claim 200nm exclusive economic zones. Within the EEZ, countries have exclusive rights to conserve and manage the living and non-living resources. Government intervention is needed for international negotiations and issues of national sovereignty and security related to management of our vast EEZ, particularly to combat IUU fishing. Marine surveillance and enforcement is costly and specialised and requires Government action to ensure this is carried out. Cooperation on compliance matters between parties to the Agreement will enable Government enforcement dollars to be more effective than when applied unilaterally.

## **2. Objectives**

### **2.1 What are the objectives of government action?**

The primary objective of Government action is to ensure the long-term conservation and sustainable use of Australian straddling fish stocks and highly migratory fish stocks throughout their range. The sub-objectives include:

- control overfishing and excess capacity that currently exists due to the current lack of regulation and freedom of access to the resources of the high seas.
- implementing sustainable management principles for Australian vessels fishing for stocks both within and outside the AFZ

- increased cooperation between countries to effectively regulate fishing on high seas
- reduce potential for conflict between countries over these resources
- increase cooperative enforcement to reduce illegal fishing for highly migratory and straddling stocks
- ensure a level playing field raising the global level of fisheries management to that implemented domestically in the AFZ
- ensure protection of national interest and sovereign rights over living resources in the AFZ
- to ensure our obligations under UNCLOS are met in relation to cooperating to conserve and manage high seas straddling and highly migratory stocks

## 2.2 Is there a regulation/ policy currently in place? Who administers it?

There are a number of regulations and policies currently in place which have a bearing on the management of highly migratory and straddling stocks including the UN Fish Stocks Agreement itself. Outlined below is the key legislation and international arrangements that are associated with regulation of high seas fishing and utilisation of straddling and highly migratory fish stocks<sup>3</sup>.

(a) The United Nations Convention on the Law of the Sea 1982.

The United Nations Convention of the Law of the Sea 1982 (UNCLOS) establishes a comprehensive framework for the regulation of all ocean space. It contains provisions on, *inter alia*, the limits of national jurisdiction over ocean space, access to the seas, navigation, protection and preservation of the marine environment, exploitation of living resources and conservation, scientific research and settlement of disputes. The Convention was opened for signature on 10 December 1982 after more than 14 years of work by over 150 countries. It entered into force for Australia and generally on 16 November 1994 and is a legally binding regime.

The key features of the Convention as they related to the management of straddling and highly migratory species include:

Coastal states have sovereign rights in a 200 nautical mile exclusive economic zone (EEZ) with respect to natural resources.

Articles 116-119 allow all States the freedom to fish on the high seas although they are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve the living resources of the high seas.

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<sup>3</sup> There are a considerable number of international arrangements in the marine environment area to which Australia is a party. A comprehensive review of these is provided in Australia's Oceans Policy, Background Paper 2, International Agreements, *Review of International Agreements, Conventions, Obligations and Other Instruments Influencing Use and Management of Australia's Marine Environment*, 1997.



Articles 63 & 64 provide specifically for the management of stocks that occur within and outside one EEZ. The Articles being: 63(1) where the stock is shared between two or more EEZ; 63(2) straddling stocks; and 64 highly migratory species.

### **Article 63 (2)**

This article requires that where the same stock or stocks of associated species occur both within the EEZ and in an area beyond and adjacent to the zone, the coastal State and the State fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organisations, to agree upon measures necessary for the conservation of these stocks in the adjacent area<sup>4</sup>

### **Article 64(1)**

This article requires that the coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex 1 of UNCLOS (see at Attachment A), shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organisation exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organisation and participate in its work.

The Convention is implemented by various Commonwealth agencies including AFMA, Environment Australia, AFFA, and the Australian Maritime Safety Authority.

#### **(b) Fisheries Management Act 1991**

The *Fisheries Management Act 1991* (FMA) provides the legislative basis for fisheries management by AFMA. The FMA provides for management of the Australian Fishing Zone (AFZ) which is defined to include the waters between three miles and two hundred nautical miles off the territorial sea baseline around Australia and the external Territories. The objectives include, *inter alia*:

- implementing efficient and cost effective fisheries management on behalf of the Commonwealth;
- ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle, in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment.

When implementing the objectives, AFMA is to have regard to the objectives of :

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<sup>4</sup> Straddle stocks differ from shared stocks that are covered by article 63(1) and are not covered by the UN Fish Stocks Agreement. A shared stock involves a fishery which straddles the boundary between two countries, and those countries should cooperate to develop arrangements for the stock which lies within their respective jurisdictions.

- ensuring, through proper conservation and management measures, that the living resources of the AFZ are not endangered by over-exploitation; and
- achieving the optimum utilisation of the living resources of the AFZ.

(c) Fisheries Administration Act 1991

The *Fisheries Administration Act 1991* (FAA) establishes AFMA and provides its objectives and functions. The Act also provides for the administration of the Authority including appointment of Directors, Chairperson and the establishment and administration arrangements for various committees.

(d) Australia's Oceans Policy

Australia's Oceans Policy was launched in December 1998 after Cabinet endorsement. The Policy establishes a framework for greater integration between ocean users and an ecosystem approach to planning and management. Australia's rights and obligations under UNCLOS were fundamental to the development of the Oceans Policy. Protecting Australia's national interest is a key goal of the policy, which states the Government's commitment to ratifying and implementing the UN Fish Stocks Agreement.

(e) National Fisheries Bycatch Policy

Focus on the take of non-target species in fishing - known as bycatch - has grown in importance over the past few years. The National Fisheries Bycatch Policy is an expression of intent by all fisheries ministers and the fishing industry about bycatch and provides a national framework for coordinating efforts for bycatch including development of more selective fishing gear and reduction of wastage through identification of markets. The Policy provides options by which each jurisdiction can manage bycatch according to its situation in a nationally coherent and consistent manner.

The Commonwealth is finalising a bycatch policy - the original model for the National Bycatch Policy - that should be released later in the year. Under the Commonwealth's policy, all Commonwealth fisheries will be required to prepare Bycatch Action Plans. Plans will be prepared for Commonwealth fisheries on a priority basis under the Commonwealth Bycatch Policy. The lead agency responsible for implementing the policy is AFMA.

(f) Environment Protection and Biodiversity Conservation Act 1999

The Environment Protection and Biodiversity Conservation Act 1999 (EPBCA), administered by Environment Australia, will come into force in the year 2000. Its objectives include to:

- provide for protection of the environment, particularly matters of national environmental significance;
- promote ecologically sustainable development of natural resources, and conservation of biodiversity; and
- assist in the cooperative implementation of Australia's international environmental responsibilities.

The Act will apply to the management of highly migratory and straddling stocks through strategic environment assessment of fisheries management plans dealing with these species.

The provisions of the Act are consistent with some of the general principles of the UN Fish Stocks Agreement including assessing the impacts of fishing and protecting biodiversity in the marine environment.

(g) Convention for the Conservation of Southern Bluefin Tuna (CCSBT)

The CCSBT was established to conserve and manage the global SBT stock. Australia, Japan and New Zealand are the only countries who have ratified the Convention although Indonesia, Taiwan and Korea are also significant SBT fishing countries. The Convention formalises the previous voluntary management arrangements observed by the three parties since the 1980's.

The Convention established the Commission for the Conservation of Southern Bluefin Tuna, which should determine an annual total allowable catch based on advice from its Scientific Committee, and allocate that catch between member nations. AFFA, AFMA and CSIRO are the key Australian agencies involved in the deliberations of the Commission.

Ratifying the UN Fish Stocks Agreement will strengthen the CCSBT and increase transparency through exchange of data and cooperative enforcement. Ratifying the Agreement will also create an incentive for current non-parties to join the CCSBT by the requirement to participate in the relevant RFMO or require their vessels and nationals to refrain from fishing for SBT.

(h) Indian Ocean Tuna Commission (IOTC)

The Indian Ocean Tuna Commission Agreement came into force on 27 March 1996 and established the IOTC as a regional fisheries body within the framework of the FAO. The membership includes Australia and other nations associated with the Indian Ocean region. The objective of the IOTC is to promote cooperation among members and to ensure through appropriate management the conservation, optimum use and sustainable development of stocks of tuna and billfish of the region. Australia's interests in respect of the IOTC focus on the conservation and management of the southern bluefin tuna stock and the tuna and tuna-like species found in the waters of the western and southern Australian EEZ. AFFA, AFMA and CSIRO are the key Australian agencies involved in the deliberations of the Commission.

(i) Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)

The Convention was drafted following recognition by the Antarctic Treaty Consultative Parties of the importance of safeguarding the marine living resources, environment and ecosystem of the seas surrounding Antarctica. Australia is a party to the Convention, which came into force generally on 7 April 1982. The objective of the Convention is the conservation of Antarctic marine living resources. This also includes rational use in line with the principles of ecosystem maintenance, stable recruitment and minimising impacts on the marine ecosystem.

Major problems with IUU fishing in the CCAMLR region could be dealt with more effectively if nations were parties to the UN Fish Stocks Agreement. CCAMLR has urged its members to sign and ratify the Agreement as soon as possible. Environment Australia, AFFA and AFMA are the key agencies involved in CCAMLR.

(j) South Pacific Forum Fisheries Convention

The South Pacific Forum (including Australia and New Zealand) agreed in 1979 to cooperate on fisheries matters through the establishment of a regional fisheries organisation, reflecting the strong view of Pacific island countries that they had sovereign rights to the living marine resources of the adjacent waters. The Forum adopted the Forum Fisheries Agencies Convention in July 1979, which came into force the following month. The FFA largely functions on donor contributions for various programs, which provide expert natural resource management and economic advice in the region to the Island States. The convention is designed to promote regional cooperation and coordination of fisheries policies, secure maximum benefits from the marine living resources and facilitate collection and exchange of data and management information.

The FFA first convened the Multilateral High Level conference in 1994. This conference is developing a convention for the tuna resources of the Western and Central Pacific. Australia's East Coast Tuna and Billfish Fishery depends on sustainable management of these resources. The present draft of the proposed convention draws heavily on the text of the Fish Stocks Agreement and contains a similar objective of ensuring the long-term conservation and sustainable management of highly migratory fish stocks in the western and central Pacific Ocean.

(k) The UN Fish Stocks Agreement

The UN Fish Stocks Agreement will implement provisions of the UNCLOS relating to straddling and highly migratory fish stocks, that is, articles 63 & 64. The UN Fish Stocks Agreement builds on articles 63 & 64 by providing general management principles to apply to the management of straddling and highly migratory stocks. The Agreement provides mechanisms for international cooperation for the management of straddling and highly migratory species in particular, the establishment of subregional and regional fisheries management organisations. Parties to the UN Fish Stocks Agreement are required to participate in the relevant RFMO where they have an interest in the fishery or to otherwise refrain from participating in that fishery.

As a signatory to the UN Fish Stocks Agreement, Australia is obliged to refrain from acts that would defeat its objectives and purpose. It is the role of the Department of Agriculture, Fisheries and Forestry and the Australian Fisheries Management Authority to oversee the Agreement.

The UN Fish Stocks Agreement is consistent with Australian fisheries management and environment policies within the AFZ. Many of the contemporary management principles provided in the UN Fish Stocks Agreement are contained in the FMA, although the Agreement provides guidance on practical implementation.

It is consistent with Australia's existing policy to seek membership of relevant RFMOs. The proposals will strengthen the current RFMOs in which Australia participates including providing for compulsory and binding settlement of disputes, increased transparency by data exchange and cooperative enforcement measures.

### **3. Options**

#### **A: Self or quasi regulation**

The approaches of self-regulation or quasi regulation are not considered to be feasible options for implementing the obligations of the UN Fish Stocks Agreement for the reasons outlined below. Government regulation is considered to be the only feasible option for implementing the UN Fish Stocks Agreement.

- The fish stocks involved are a common resource which requires regulation to prevent overfishing

Unregulated fishing for straddling and highly migratory fish stocks on the high seas has direct impacts on the sustainability of the stocks that also occur within the Australian Fishing Zone. The Australian Fishing industry depends on these stocks which account for almost 30% of the value of Commonwealth fisheries production. Tuna accounts for over 30% of the value of the fish component of Australia's aquaculture production. As fisheries for these stocks within the AFZ become fully utilised, there will be an expansion of the Australian industry involvement on the high seas.

- The high impact on other species of unregulated fishing

Unregulated fishing also impacts on associated or dependant species posing threats to species and biodiversity. Unregulated longlining for highly migratory and straddling stocks, threatens endangered species such as Albatross. Four species of albatross are listed as endangered and thirteen as vulnerable under the *Endangered Species Protection Act 1992*.

- There is strong public interest and concern about unsustainable IUU fishing

Conservation groups, fishing industry and the general community has expressed a strong interest in the issues of unsustainable high seas fishing and illegal, unregulated and unreported fishing, particularly as it affects Australia's living resources.

The World Wide Fund for Nature (WWF) ran an Endangered Seas campaign in 1996 and received over 1000 responses from members in support of immediate ratification of the UN Fish Stocks Agreement. More recently the Prime Minister has received numerous letters through a Greenpeace campaign from interested members of the community, expressing concern about the issues of IUU fishing particularly in the southern ocean and urging the Government to ratify the UN Fish Stocks Agreement as a matter of urgency.

Industry is concerned about the impacts of IUU fishing on the sustainability of the stocks on which they depend, particularly when the Australian industry operates under strict environmental controls.

- Specific provisions of the Agreement require Government action

Many of the legal rights and obligations of the Agreement are the clear role of Government, in particular enforcement. As a party to the UN Fish Stocks Agreement, Australia would be required to implement duties as a flag state including regulating the activities of its vessels on the high seas and in areas under the national jurisdiction of other States, including enforcement and criminal proceedings. The Agreement also requires Australia to cooperate with other parties for surveillance and enforcement including boarding, inspecting and potentially apprehension of foreign flagged vessels on the high seas

- Some provisions of the UN Fish Stocks Agreement would be difficult for industry to enforce

Australia has a right under UNCLOS to protect its sovereign rights to the resources of its EEZ. The Australian EEZ is vast, making surveillance and enforcement operations costly. Enforcement, particularly with foreign fishing, requires specialised training and technology only available to Government.

- Fisheries are managed under specific legislation

AFMA was established under the *Fisheries Administration Act 1991* and the legislative basis for its management activities is provided in the *Fisheries Management Act 1991*. Australia's obligations under the UN Fish Stocks Agreement are the responsibility of Government and largely fall under the management of AFMA. It would not be possible to pass these responsibilities to industry. Amending the legislative function and objectives of AFMA will be necessary to implement the Agreement.

## **B. Government regulation**

Government regulation is considered to be the only feasible option for the following reasons:

- The fish stocks involved are a common resource which requires regulation to prevent overfishing
- The high impact on other species of unregulated fishing
- There is strong public interest and concern about the problem
- Specific obligations, particularly surveillance and enforcement, require Government action
- A regulatory approach is consistent with the current fisheries management regime

Three regulatory options (B2,B3 and B4) are being considered as well as a do nothing approach (B1). The options are

**B1** do nothing: no regulation, do not ratify

**B2** Minimum regulation required in order to ratify and effectively meet obligations

**B3** Minimum regulation required in order to ratify, do not participate in RFMOs

**B4** Greater regulation associated with ratification

The UN Fish Stocks Agreement is an international legally binding treaty on Australia and other nations and has some minimum requirements (and prescriptive provisions) that are best implemented through amendments to current fisheries management legislation. Many of the obligations of the UN Fish Stocks Agreement may be implemented administratively or under existing provisions of the FMA and FAA. The regulatory options under consideration for **B2 & B3** include:

- amending the statutory functions and objectives of the Australian Fisheries Management Authority to reflect the international obligations of the UN Fish Stocks Agreement
- specific amendments, for example to create new offences or extend the geographical operation of existing provisions
- amending the statutory powers of AFMA officers to enable them to exercise enforcement powers on the high seas

The **B4** option would involve additional amendments including creating offences for Australian nationals on the high seas, a new regime for creating and administering fisheries masters licenses, and more prescriptive general management principles.

A summary of the costs and benefits of each option is at **Table 2**.

#### **4. Impact analysis**

##### **4.1 Who is affected by the problem and who is likely to be affected by its proposed solutions?**

Groups affected by the problem of, and solutions to, unregulated fishing of highly migratory and straddling stocks on the high seas include:

- 1) The Australian Fisheries Management Authority
- 2) The Department of Agriculture, Fisheries and Forestry – Australia
- 3) The Department of Environment and Heritage (including Environment Australia and the Australian Antarctic Division)
- 4) Environment groups/community
- 5) The Commonwealth fisheries<sup>5</sup> likely to be affected are those based on highly migratory and straddling stocks including the:

Eastern Tuna and Billfish fishery

South Tasman Rise and wider Tasman Seas High Seas fishery

Southern Bluefin tuna fishery

Sub-Antarctic fishing within the CCAMLR region including Heard and McDonald Islands fishery

Western Tuna and Billfish fishery

High Seas exploratory fisheries

##### **4.1 How will each proposed option affect existing regulation and the roles of existing regulatory authorities.**

The proposed options for amendments to Government legislation will have some impact on the scope of existing legislation and existing regulatory authorities, with a net result of extending and strengthening the existing regulations and policies to better manage highly migratory and straddling stocks.

The proposed options involve amending existing Commonwealth fisheries management legislation: The Fisheries Management Act 1991 and Fisheries Administration Act 1991, which are administered by AFMA. Implementing the UN Fish Stocks obligations will mean the role of AFMA will be extended to the high seas with a corresponding increase in operating costs. This will enable AFMA to more effectively manage straddling and highly migratory stocks through their range and have a higher level of confidence in managing these stocks within the AFZ.

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<sup>5</sup> Includes a class of activities by way of fishing identified by a species, type or description of fish, an area or method of fishing, a class of boats or persons or a purpose of activities.



The **B2** option has no immediate additional resource or policy implications for the Defence portfolio. It is noted that Defence has already participated in a constabulary role in apprehending foreign illegal fishers impacting on Australian natural resources. There may be longer-term implications that may flow from future discussions on implementation affecting the nature and areas where Defence support may be required for protecting sovereign rights. Defence will be involved in ongoing inter-departmental discussions on the issue. Option **B4** would have implications possibly for agencies such as the Department of Immigration and Multicultural Affairs in cases requiring extradition.

The UN Fish Stocks obligations are consistent with UNCLOS, which Australia has ratified. They are also consistent with Australia's approach in RFMOs and regional arrangements. For example, CCAMLR measures already implemented by Australia include mandatory use of a vessel monitoring system (VMS) and, development of a vessel register and uniform vessel and gear marking which is a minimum standard for flag state responsibility under the UN Fish Stocks Agreement. The Agreement has already become a reference document for the adoption of standards and guidelines; and for the harmonisation of management measures within regional fisheries organisations.

**TABLE 2: summary of the expected impacts of the proposed options as likely benefits or likely costs**

OPTION	COSTS	BENEFITS
<p><b>B1</b></p> <p><b>Do nothing: No regulation do not ratify</b></p>	<p>Unable to authorise and monitor Australian vessels on the high seas</p> <p>Share of in zone (EEZ) resources worth approximately \$250 million per annum threatened</p> <p>No extension of Australian conservation measures and research (eg threat abatement plan for the incidental catch of seabirds )</p> <p>No support for combating illegal fishing in remote AFZ areas – no cooperation in compliance of remote AZ areas and high seas</p> <p>Limited exchange of fisheries data</p> <p>Loss of international credibility as leader in sustainable fisheries management</p>	<p>Low administrative cost and burden</p>
<p><b>B2</b></p> <p><b>Regulation as outlined, ie Ratify Agreement and participate in RFMOs</b></p> <p><b>(Refer to tables 1-3 for a quantitative assessment of the costs of this option)</b></p>	<p>Resources required:</p> <ul style="list-style-type: none"> <li>• Establish and administer a high sea fishing concession system and record of Australian boats fishing on the high seas</li> <li>• Fisheries officers for high seas management, enforcement and participation in RFMOs</li> <li>• Membership fees for RFMOs</li> </ul> <p>Possible cost to industry for high seas licence (if not already participating in relevant fishery) and marginal cost increases to meet obligations including carrying a satellite based vessel monitoring system (VMS) and completing catch and effort logbooks.</p> <p>Refer to tables 2.1-2.3 for a summary of estimated costs</p>	<p>Able to authorise Australian vessels to fish on the high seas</p> <p>Assist in sustaining highly migratory stocks both on high seas and within AFZ through compatible management regimes</p> <p>Access to international fisheries data for management</p> <p>Ability to combat illegal, unregulated and unreported fishing through increased surveillance and enforcement powers</p> <p>Strengthen existing RFMOs including CCSBT</p> <p>Security for current domestic industry for straddling and highly migratory stocks worth over \$250 million per annum</p>

OPTION	COSTS	BENEFITS
<p><b>B3</b>  <b>Regulation as outlined in B2</b>  <b>Ratify the Agreement but do not participate in regional organisations</b>  <b>Limited flag state monitoring and control</b>  <b>Limited authorised fishing</b></p>	<p>No protection of national interest in RFMOs  Share of resources threatened  Impact on in zone (EEZ) fisheries  No extension of Australian conservation measures and research (eg threat abatement plan for longline catch of Albatross) through RFMOs  No support for combating illegal fishing in remote AFZ areas – no cooperation in compliance  Limited exchange of fisheries data</p>	<p>Lower cost and administrative burden compared with option B2 due to the avoidance of costs associated with participation in RFMOs. These costs are outlined in Table 2.2.</p>
<p><b>B4</b>  <b>Greater Regulation</b>  <b>Offences for nationals</b>  <b>Administration of masters licences (need new regime)</b>  <b>Monitoring nationals on foreign boats</b>  <b>More prescriptive general principles</b></p>	<p>Costs as outlined for option B2 plus:  Increased administrative costs and burden for Government in establishing new master licence regime  Increased cost and paper burden for industry  Increased fees  Difficult and costly to monitor  Increased impact on the role of other agencies  Duplication of effort and provisions in other existing legislation</p>	<p>Greater control over nationals on foreign fishing boats</p>

The following Tables detail the estimated costs for option **B2**. The activities listed in the first table would be the minimum required if Australia ratifies the Agreement and authorises Australian fishing on the high seas. The second table details the cost of participation in RFMOs and the third table details some additional costs for activities that would not necessarily need to be undertaken to meet obligations.

**Table 2.1/ Option B2 - Estimated Operating and Compliance Costs - AFMA**

<b>Activity</b>	<b>Cost</b> <small>(based on 40 boats – see “Assumptions”)</small>	<b>Government contribution</b>	<b>Industry contribution</b>	<b>Description</b>
Authorisation of operations/ licensing	\$34,560 one-off cost  \$24,750 p.a		100%  100%	Establishment of fishing concessions unit register and development of conditions  Ongoing fishing concessions register maintenance
Compliance Monitoring	\$32,400 p.a.	50%	50%	VMS reporting at the rate of 6 reports per day. Includes an allowance for immediate polls and text communication costs
Log book data and entry	\$11,000 p.a.		100%	Based on current average per vessel cost for all tuna vessels (ECT and SBT) monitored by AFMA, and also includes printing of additional logbooks.
Compliance Planning in RFMOs				Responsible for : <ul style="list-style-type: none"> <li>• RFMO compliance program planing</li> <li>• Project management and strategic liaison</li> <li>• Coordinating compliance activities</li> <li>•</li> </ul>
	– Travel \$135,000 – Other \$23,600 Admin \$11,800 pa	100% 100% 100%		
<b>Total</b>	<b>\$273,110</b>	<b>\$186,600</b>	<b>\$86,510</b>	

**Table 2.2/ Option B2 - Participation in RFMOs – AFFA and AFMA**

<b>Activity</b>	<b>Cost</b>	<b>Government contribution</b>	<b>Industry contribution</b>	<b>Description</b>
Membership fees required for existing RFMOs	\$105,000 pa	100%		Membership fees for the IOTC. (Membership fees for CCMLAR are covered by DFAT and CCSBT by AFFA.)
Estimated membership fees for proposed new RFMOs	\$350,000 pa	100%		For proposed Tasman Sea Regional arrangements and Central and Western Pacific Commission
Policy development in RFMOs – AFFA	\$800,000 pa	100%		4 ASL to participate in existing and proposed RFMOs. Includes travel and overheads.
Policy development in RFMOs - AFMA	\$1,070,152 pa	100%		Includes 7 ASL to participate in new and existing RFMOs. Includes travel and overheads.
Technical support (scientific and legal)	\$750,000 pa	100 %		Scientific and legal advice for participation in RFMOs eg devising conservation and management measures.
<b>TOTAL</b>	<b>\$3,075,152</b>	<b>\$3,075,152</b>	<b>NIL</b>	

**Table 2.3/ B2 - Special Tasking – Variable**

<b>Activity</b>	<b>Cost</b>	<b>Government contribution</b>	<b>Industry contribution</b>	<b>Description</b>
Charter Boat Patrols against illegal foreign fishing in RFMO regions	\$1,180,000 pa	100%		Based on 1 patrol in each RFMO area-MHLC, CCSBT, duration of each patrol is 20 days (includes the cost of vessel lease, 3 fisheries officers onboard and vessel contract negotiation and legal costs plus overheads.
Observers	\$648,000 pa		\$648,000	Based on current observer running costs of \$800.00 per day with 10% coverage of 40 boats fishing for 200 days (including travel for the deployment of observers).

The attribution of costs between Government and industry are based on the extension of the principles of the current “Commonwealth policy for cost recovery for managing fisheries” to the high seas context. Some elements of the application of the policy to the high seas will need to be further developed. The initial management and establishment costs for establishing a high seas fishery, largely involving participation in international forums, should be met by Government. As regional conservation and management arrangements develop, over time, costs would be recovered from industry operators where management measures are directly attributable to them as beneficiaries.

**Table 2.4/ TOTAL COST FOR OPTION B2**

	<b>Government</b>	<b>Industry</b>	<b>Total Cost</b>	<b>Comments</b>
<b>One –off costs</b>		\$34,560	<b>\$34,560</b>	Establishment of Statutory fishing rights register
<b>Ongoing per annum costs</b>	\$186,600	\$51,950	<b>\$238,550</b>	Operating and Compliance Costs
	\$3,075,152		<b>\$3,075,152</b>	Participation in RFMOs inc. membership fees
<b>TOTAL ESSENTIAL COSTS</b>	<b>\$3,261,752</b>	<b>\$86,510</b>	<b>\$3,348,262</b>	
<b>Optional</b>	\$1,180,000	\$648,000	<b>\$1,828,000</b>	Charter boat patrols and observers
<b>TOTAL ESSENTIAL PLUS OPTIONAL</b>	<b>\$4,441,752</b>	<b>\$734,510</b>	<b>\$5,176,262</b>	

#### 4.2 Benefits of option B2

Ratifying the UN Fish Stocks Agreement will provide for the establishment of a management framework to conserve and manage straddling and highly migratory fish stocks and the associated marine environment. Pursuing this objective will benefit the Australian commercial, recreational and charter fishing industries, environment interests, the Australian community and regional economies.

##### **Benefits to the commercial fishing industry**

Implementation of the UN Fish Stocks Agreement and regulation of fishing on the high seas will assist in ensuring sustainable levels of valuable fish stocks such as tuna, which pass through the Australian Fishing Zone, and straddling stocks such as orange roughy and potentially, Patagonian toothfish. In 1997-98 the estimated gross value of tuna rose by 16% or \$15 million. Farmed tuna production increased by a significant 76% or \$31 million. The tuna farming industry in Australia is now valued at \$190 million per annum. These regionally valuable industries are export oriented and depend on the sustainability of tuna stocks through their range.

Ratifying the UN Fish Stocks Agreement and participating in RFMOs will help to secure an equitable share of these resources as they pass through the AFZ and will allow for expansion of the Australian industry on the high seas now and in the future. There has been a growing interest by Australian operators in fishing for tuna in remote areas such as off NorthWest Australia and the high seas. There is significant scope for increased development of fisheries for albacore, yellowfin and bigeye tuna particularly off Western Australia and within the Australian offshore territories.

Implementing the Agreement will assist in creating a 'level playing field' for the Australian industry by requiring the adoption of contemporary fisheries management principles similar to those already adopted in the AFZ. The obligations of the Fish Stocks Agreement will be implemented in a manner that does not disadvantage national interests to the benefit of international interests. The UN Fish Stocks Agreement will significantly increase the capacity of Government to reduce the problems of illegal, unregulated and unreported foreign fishing activities in our areas of interest through new management, compliance and enforcement powers

Due to overfishing, the population size of SBT in 1997 is substantially below that which would provide maximum production and the highest yield in terms of tonnes and dollars from the fishery and therefore yielding well below its potential. The 1996/97 quota was 11750 tonnes with a potential sustainable yield several times greater than this upon recovery of the stocks.

Recreation charter/game fishing industries will also benefit through integrating high seas management as these industries are based on the species that will be sustainability managed under the UN Fish Stocks Agreement.

### **Benefits for the environment**

As well as the sustainability of fish stocks, the environment will benefit through the widespread adoption of contemporary management principle such as the precautionary approach including precautionary reference points. There will also be a greater focus on management of associated and dependent species.

### **Benefits for AFFA and AFMA**

Government will benefit through enhanced monitoring, data collection and sharing of international data and the use of agreed reference points to trigger and guide management action. Additionally compatible domestic and high seas management principles will facilitate cooperation with other countries to manage highly migratory and straddling stocks.

### **Benefits to the Australian community**

The Australian community will benefit through sustainable management of highly migratory and straddling stocks, which provide employment, food and income for current and future generations. Ratifying the Agreement will strengthen our ability to protect sovereign rights to these resources.



The fisheries affected include:

### **Eastern Tuna and Billfish Fishery**

The Eastern Tuna and Billfish Fishery (ETBF) extends along Australia's entire eastern seaboard from the tip of Cape York to the southernmost point of the AFZ. It covers Commonwealth waters off Queensland, New South Wales, Victoria and Tasmania out to the 200nm limit of the AFZ.

The principal commercial target species are yellowfin, bigeye and albacore tuna and broadbill swordfish and skipjack tuna. Tuna and billfish species found off the east coast of Australia are highly migratory and are thought to form part of wider Western and Central Pacific (WCP) Stocks. The Australian catch of tuna and billfish in the eastern AFZ is a small part of the overall fishery production in the WCP although the domestic fleet is expanding rapidly and occupying the niche previously filled by foreign access.

The fishery is dependent on highly migratory species and unregulated fishing of these stocks in the Western and Central Pacific region would directly impact on the sustainability of the stocks and viability of the domestic industry that relies on these stocks. There are approximately 310 boats in the fishery.

### **Southern Bluefin Tuna Fishery**

Southern bluefin tuna (SBT) is a highly migratory species that is widely distributed throughout the waters of the southern oceans, including the AFZ. Australia, Japan and New Zealand undertake management of the global SBT Fishery as members of the CCSBT, under the Convention for the Conservation of Southern bluefin tuna. The Commission sets a total allowable catch and allocates it among member countries.

The fishery is overfished, the spawning stock is severely depleted, and its rebuilding is in doubt. The quota set by the Commission is intended to allow the spawning stock to rebuild, although Japan has increased its catch against the views of Australia and New Zealand. The Commission has been unable to set a quota in recent years because of divergent views on the rate of rebuilding of the stock. A dispute resolution process is presently underway because of Japan's unilateral decision to undertake an Experimental Fishing Program involving additional catch.

The Australian industry has relied on the stock since the 1950's when the bulk of the catch was canned. Today, the participants target larger fish for the high value Japanese sashimi market and fatten tuna in tuna farms, an industry now worth approximately \$190 million per annum.

### **Southern and Western Tuna and Billfish Fishery**

The Southern Tuna and Billfish fishery extends from Cape Leeuwin across the Great Australian Bight to the South Australian/Victorian border. The Western Tuna and Billfish fishery extends westward from Cape York in northern Queensland to Cape Leeuwin in the south west of Western Australia. The fisheries cover tuna and billfish excluding southern bluefin tuna. There are 7 boats in the Western fishery only, 44 boats in the Southern only, and approximately 59 that cover both fisheries. There is also a growing recreational game fishery, which targets sailfishes, which are highly migratory species under the UN Fish Stocks Agreement.

### **Heard and McDonald Island fishery**

The Heard and McDonald Islands are part of Australia's external territories located in the Southern Indian Ocean about 4000 km southwest of Perth. The waters between 12nm and 200nm surrounding the islands are managed by AFMA and also fall under the jurisdiction of the Commission for the Conservation of Antarctic Marine Living resources. Australia applied to the Commission to initiate two fisheries and the first season of fishing took place in 1997. The main species are Patagonian toothfish and mackerel icefish. Total allowable catches are set by CCAMLR to protect the target fish stocks and species that depend upon them. Access is restricted to two boats with strict environmental conditions. Illegal fishing in the region threatens fishery sustainability. The UN Fish Stocks Agreement amendments will bring the regulation of subantarctic commercial fishing under the FMA and remove the present duplication with the AAD and CCAMLR Act.

#### 4.3 Identify the data sources and assumptions used in making these assessments.

The costs outlined for option **B2** are based on a number of assumptions:

- possible 40 new Australian vessels operating on the high seas. It should be noted that in the event that only existing operators are authorised to operate on the high seas then there will be only small additional costs associated with licensing and data entry/logbooks.
- Aerial surveillance coverage in the Central and Western Pacific would be covered under the current ADF "Solania" P3C program
- Any additional maritime surveillance in the Indian Ocean would need to be supplied and funded by the ADF or some other provider.

Supporting information includes:

ABARE 1998, Australian Fisheries Statistics 1998, Canberra

Cox, A., Stubbs, M. and Davies, L. 1999, Southern Bluefin Tuna and CITES: An Economic Perspective, Report for the Fisheries Resource Research Fund and Environment Australia, ABRAE Research Report 99.2, Canberra.

AFMA 1998, Australian Fisheries Management Authority Annual Report 1997-98, Canberra.

Bureau of Rural Sciences 1998, Fishery Status Reports 1998: Resource Assessments of Australia Commonwealth Fisheries, Canberra.

Commonwealth of Australia 1998, Australia's Oceans Policy, Canberra

McIlgorm, Dr. A., and Tsamenyi, M., Final Report of the FRDC Project: International Environmental Instruments – Their effect on the fishing industry, University of Wollongong and Australian Maritime college, 1995.

Industry Commission 1992, Report No. 17: Cost Recovery for Managing Fisheries, AGPS, Canberra.

AFMA, Fisheries Administration Paper Series, FAP NO. 3: Interpreting the Cost Recovery Policy.

## **5. Consultation**

### **5.1 What are the views of the main affected parties**

Consultation on the implications of the UN Fish Stocks Agreement took place throughout the negotiation of the text of the Agreement and Australia's signature in 1995, and subsequently in considering ratification of the Agreement. The final Agreement is consistent with the Australian negotiating position during the conference, which was developed in consultation with Commonwealth and State agencies, industry and other NGOs. There was whole of Government support to sign the Agreement in 1995.

In the months following signature of the UN Fish Stocks Agreement, the then Minister for Resources and Energy agreed to the establishment a Consultative Committee on High Seas and Remote Area Fishing. The principal focus of the Committee was to provide advice to Government on the practical implementation of the UN Fish Stocks Agreement. The Committee is chaired by the Assistant Secretary, Fisheries and Aquaculture Branch of AFFA and membership includes representatives from AFMA, Department of Foreign Affairs and Trade, the Department of Industry, Science and Tourism (CSIRO), Environment Australia, a conservation NGO (WWF) and four industry representatives. The Committee has developed an agreed policy framework for the implementation of the UN Fish Stocks Agreement including how to meet flag state obligations for the control of high seas fishing by Australian vessels. The policy framework is the basis for the proposed amendments to Commonwealth fisheries legislation as outlined in option **B2**.

The Ministerial Council on Forestry, Fisheries and Aquaculture endorsed the proposal to proceed towards ratification earlier this year. Management Advisory Committees for all relevant fisheries (refer to a list of fisheries under 4. Impact Analysis) have been informed of the proposal to ratify the UN Fish Stocks Agreement and have not objected to proceeding with the necessary legislation. More consultation on the financial implications will be required before there is full stakeholder support to ratify the Agreement. The AFMA Board has also given their support.

#### **Southern Tuna and Billfish Management Advisory Committee (Southern Tuna MAC)**

Southern Tuna MAC, one of the relevant fisheries committees has emphasised its strong support of the potential role of the UN Fish Stocks Agreement in:

- strengthening the regional management status of the CCSBT
- encouraging non-members to join the CCSBT
- data sharing
- cooperative compliance.

#### **World Wide Fund for Nature (WWF)**

Correspondence from WWF indicated strong support for the signature and rapid ratification of the UN Fish Stocks Agreement as a major step toward the development of ecologically sustainable fisheries

## 5.2 Where consultation was limited or not undertaken, why was full consultation inappropriate

The process of consulting with stakeholders is ongoing and consultation on the implications of the Agreement will continue during the preparation of a National Interest Analysis, and consideration by the Joint Standing Committee on treaties.

## 6. Conclusion and recommended option

### 6.1 What is the preferred option

The preferred option is option **B2** for Government regulation through amendments to current Commonwealth fisheries management legislation in order to meet the obligations of the UN Fish Stocks Agreement and participate in relevant RFMOs.

### 6.2 Why is this option preferred and others rejected

The approach preferred is the minimal regulation necessary to effectively meet the legal obligations of the UN Fish Stocks Agreement. The approach also has support from the key consultative body established to examine the practical implementation of the UN Fish Stocks Agreement obligations. The amendments are considered the minimum that is required for both efficiency and effectiveness.

A more stringent approach such as option **B4** may involve for example, creating offences to apply to nationals and create masters licences, which would impose greater costs and administrative burden. More prescriptive legislation may have been drafted for implementation of some of the general principles of the UN Fish Stocks Agreement. However, some are covered within existing and proposed new environment legislation, such as assessing the impacts of fishing, and AFMA and Environment Australia currently work together in addressing these issues. The UN Fish Stocks is a framework document and the RFMOs will have the ability to determine more stringent conservation and management measures. The amendment proposed to fisheries legislation will give AFMA flexibility to incorporate these measures as licence conditions.

The do nothing approach **B1** would not be in the national interest, and the **B3** approach to ratify but not participate in RFMOs would also be contrary to securing resources for our industry on the high seas and within the AFZ.

## 7. Implementation and review

### 7.1 How will the preferred option be implemented

The preferred option will be implemented through amendments to existing legislation and through regulations and administrative arrangements administered by AFMA.

AFMA will be the key agency involved in the practical implementation of the UN Fish Stocks Agreement. Once the Agreement comes into force AFMA will authorise Australia fishing on the high seas. Fishing will be authorised by utilising the existing statutory fishing concession regimes established under the FMA with relevant conditions attached.

Amendments will be made under the FMA to provide for:

- marking of vessels and fishing gear in accordance with uniform and internationally recognisable vessel and gear-marking systems
- position reporting and logbook requirements
- setting out the process for AFMA officers in carrying out boarding and inspection procedures.

The UN Fish Stocks Agreement general principles will be implemented through fisheries management plans that are provided for under the current legislation.

#### 7.2 Is the preferred option clear, consistent, comprehensible and accessible to users

The preferred approach is clear and consistent with our obligations under UNCLOS and the UN Fish Stocks Agreement. The preferred approach where possible would use existing administrative procedures, which are familiar to stakeholders and made more accessible to users through AFMA's Management Advisory Committees.

#### 7.4 Is it sufficiently flexible to adapt to various situations and circumstances

The preferred option is flexible as the UN Fish Stocks Agreement is a framework document and many of the conservation and management measures will be determined in the RFMOs. Where possible existing legislation will be used for implementation. Under this legislation there is flexibility in administrative processes, for example, giving AFMA flexibility to apply licence conditions and to include measures in the management planning process. AFMA has a comprehensive system of management advisory committees in place for securing stakeholder interest in what is a dynamic and adaptive process of developing management measures.

#### 7.5 What is the impact on business, including small business, and how will the compliance and paper burden costs be minimised

The impact on business, including small business will be minimised through use of existing legislation where possible. For example, fishing on the high seas will be authorised through utilising the existing statutory fishing concession regimes under the FMA. This will avoid both the costs of establishing a new licensing system and the administrative and paper burden both for business and AFMA.

#### 7.6 How will the effectiveness of the preferred option be assessed/ how frequently? If the preferred option takes the form of regulation, is there a built in provision to review or revoke the regulation after it has been in place for a certain time

Four years after the date of entry into force of the UN Fish Stocks Agreement, the Secretary-General of the United Nations must convene a conference with a view to assessing the

effectiveness of the Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks. The conference will review and assess the adequacy of the provisions of the Agreement and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order to better address any continuing problems in the conservation of straddling and highly migratory stocks.

The preferred option for implementing the UN Fish Stocks Agreement is the minimum approach determined to be effective. The effectiveness of the approach will be reviewed in preparation for the United National review conference and in light of any recommendations of the conference.

Many of the obligations of the UN Fish Stocks may be implemented administratively through plans of management determined under the FMA. The plans of management set out objectives; measures by which the objectives are to be attained; and performance criteria against which the measures taken may be assessed.

Other options for monitoring progress may include

- monitoring incidents of IUU fishing
- the Resources Assessments of Commonwealth Fisheries carried out by the Bureau of Rural Sciences
- examination of the annual Australian fisheries statistics compiled by the Australian Bureau of Agricultural and Resource Economics

**Attachment A – highly migratory species**

- 1) Albacore tuna: *Thunnus alalunga*
- 2) Bluefin tuna: *Thunnus thynnus*
- 3) Bigeye tuna: *Thunnus obesus*
- 4) Skipjack tuna: *Katsuwonus pelamis*
- 5) Yellowfin tuna: *Thunnus albacares*
- 6) Blackfin tuna: *Thunnus atlanticus*
- 7) Little tunas: *Euthynnus alletteratus*; *Euthynnus affinis*
- 8) Southern bluefin tuna: *Thunnus maccoyii*
- 9) Frigate mackerel: *Auxis thazard*; *Auxis rochei*
- 10) Pomfrets: Family *Bramidae*
- 11) Marlins: *Tetrapturus angustirostris*; *Tetrapturus belone*; *Tetrapturus pfluegeri*; *Tetrapturus albidus*; *Tetrapturus audax*; *Tetrapturus georgei*; *Makaira mazara*; *Makaira indica*; *Makaira nigricans*
- 12) Sail-fishes: *Istiophorus platypterus*; *Istiophorus albicans*
- 13) Swordfish: *Xiphias gladius*
- 14) Sauries: *Scomberesox saurus*; *Cololabis saira*; *Cololabis adocetus*; *Scomberesox saurus scombroides*
- 15) Dolphin-fish: *Coryphaena hippurus* *Coryphaena equiselis*
- 16) Oceanic sharks: *Hexanchus griseus*; *Cetorhinus maximus*; Family *Alopiidae*; *Rhincodon typus*; Family *Carcharhinidae*; Family *Sphyrnidae*; Family *Isurida*
- 17) Cetaceans: Family *Physeteridae*; Family *Balaenopteridae*; Family *Eschrichtiidae*; Family *Monodontidae*; Family *Ziphiidae*; Family *Delphinidae*

## NOTES ON INDIVIDUAL CLAUSES

### **Item 1: Short title**

This item provides for the Act to be called the *Fisheries Legislation Amendment Act (No. 1) 1999*.

### **Item 2: Commencement**

The Act is to commence on Royal Assent, subject to the variations below.

Schedule 1 commences on a day or days to be fixed by Proclamation. Should a Part of this Schedule not have commenced within six months of the Act receiving Royal Assent, the Part will commence the day after this period.

Schedule 2 is to commence by Proclamation subject to the Fish Stocks Agreement having entered into force.

### **Item 3: Schedule(s)**

This clause provides that the Acts referred to in the Schedules are amended as set out in the Schedules and the other items in the Schedules have effect according to their terms.

## **Schedule 1 – Enforcement**

### **Part 1 - Use of force to enable boarding**

#### **Item 1: Subsection 4(1)**

The Fish Stocks Agreement requires Australia to take “flag State responsibility.” This definition of an Australian boat’s flag at international law covers the boats which are recorded on Australia’s national shipping register or are entitled to be on that register. This is a new item.

#### **Item 2: Before paragraph 84(1)(a)**

This item implements Australia’s right at international law to stop a boat for the purposes of boarding and inspection and for escalation to the use of reasonable force against a foreign fishing vessel should it not stop. This is a new item, which clarifies and extends the powers of fisheries officers.

#### **Item 3: Subsection 84(6)**

This item removes the requirement for a fisheries officer to produce an identity card for inspection prior to making a request for the master to stop for the purposes of boarding. This is an amending item.

### **Part 2 - Certain actions not to be affected by crossing high seas**

**Item 4: Subsection 4(1) (paragraph(a) of the definition of *Australian fishing zone*)**

**Item 5: Subsection 4(1) (paragraph(b) of the definition of *Australian fishing zone*)**



**Item 6: Subsection 4(1) (definition of *exclusive economic zone*)**

These items amend references to the Exclusive Economic Zone so as to give the term an international meaning.

**Item 7: Subsection 4(1)**

This item provides a definition of the high seas as an area outside a coastal State's national jurisdiction consistent with the United Nations Convention of the Law of the Sea. This is a new item to support the introduction of the Fish Stocks Agreement.

**Item 8: After subsection 84(1A)**

This item is to avoid any doubt of the validity of Australian fisheries officers' powers when a fishing vessel apprehended in the waters surrounding Australia's external territories is in transit across the high sea en-route to a mainland port for further investigation.

**Part 3 - Doubling penalties for foreign fishing**

**Item 9: After subsection 95(5)**

This item is to confirm that certain fishing offences with lesser fine levels will be treated as strict liability offences. This is an amending item in support of the introduction of increased penalties for various foreign fishing offences.

**Item 10: Section 99 (penalty)**

**Item 11: At the end of section 99**

These items are to double the penalty for foreign fishing offences involving recreational fishing in the AFZ, and to confirm that strict liability will be applied in the prosecution of this offence respectively. These are amending items.

**Item 12: After subsection 100(2)**

This item is to confirm that strict liability will be applied when considering a lower level of penalty in prosecuting the use of a foreign boat for illegal fishing in the AFZ. This is an amending item.

**Item 13: After section 100**

This item inserts new section 100A creating a new fault element offence, with a maximum fine of 5000 penalty units, relating to the use of a foreign boat for fishing in the AFZ. This approach is in line with Commonwealth criminal law policy, which requires that where penalties have reached a substantial level, a fault element by the illegal foreign fishers is required when pursuing prosecution.

**Item 14: After subsection 101(2)**

This item is to confirm that strict liability will be applied when considering a lower level of penalty in prosecuting offences relating to having possession of a foreign boat equipped for fishing in the AFZ. This is an amending item.

**Item 15: After subsection 101**

This item inserts a new section 101A creating a new fault element offence with a maximum fine of 5000 penalty units relating to having a foreign boat equipped for fishing in the AFZ. This approach is in line with Commonwealth criminal law policy, which requires that where penalties have reached a substantial level, a fault is required when pursuing prosecution.

**Item 16: Application**

This item is to avoid any doubt as to the timing of commencement of the items under Part 3.

**Part 4 – Boats outside AFZ supporting illegal foreign fishing in AFZ**

**Item 17: Before section 102**

This item inserts a new section 101B relating to the use of support boats (motherships) outside the AFZ to support foreign fishing within the AFZ. It enables enforcement action, including boarding, against support boats. It also creates a new fault element offence punishable on conviction by a fine not exceeding 5000 penalty units. Support boats will also be subject to automatic forfeiture under a new section 106A.

**Part 5 – Automatic forfeiture for offences**

**Item 18: After paragraph 84(1)(g)**

This item confirms the power of officers to seize boat/net, trap or other equipment/fish which have been automatically forfeited to the Commonwealth (under a new section 106A), or which the officer has reasonable grounds to believe have been forfeited, as a result of illegal fishing in the AFZ by foreign boats or support of the illegal activities of these boats.

**Item 19: At the end of subsection 84(1A)**

This item provides an explicit cross-reference between the powers of the officer to undertake seizure of automatically forfeited things (see Item 18) and his or her requirements to give notice of his or her actions under a new section 106C.

**Item 20: Before section 106**

**Item 21: Subsection 106(1)**

**Item 22: Subsection 106(2)**

**(Subdivision A-Forfeiture by court order)**

These items clarify offences in relation to the use of Australian boats where automatic forfeiture is not to apply. These are amending items.

**Item 23: After section 106**

**(Subdivision B-Automatic forfeiture of things used in offences)**

This subdivision enables operation of a new regime of automatic forfeiture to the Commonwealth of foreign boats, support boats, net/trap/equipment, or catch involved in, or resulting from, illegal foreign fishing in the AFZ. In an effort to increase deterrence of illegal foreign fishers, the onus will now be placed on them to establish their legitimacy for being present in the AFZ without authorisation.

**(Subdivision C-Dealing with things seized as automatically forfeited)**

**106B Application of this subdivision**

This new item clarifies the basis on which officers can seize automatically forfeited foreign boats, support boats, net/trap/equipment, or catch involved in, or resulting from, illegal foreign fishing in the AFZ.

#### **106C Notice of seizure**

This new item specifies the details of the processes for issuing written notice of the seizure and the contents of such written notices. The notice will specify that the thing seized will be condemned as forfeited unless a claim is made within 30 days.

#### **106D Dealing with thing before it is condemned**

This new item specifies the circumstances under which the Australian Fisheries Management Authority (AFMA), on behalf of the Commonwealth, may undertake rapid disposal or destruction of seized boat or catch prior to possible court action by the claimant. These circumstances include unseaworthiness of the boat, and serious quarantine or environmental risks.

#### **106E Thing condemned if not claimed in time**

This new item sets a deadline of 30 days after issue of the notice of seizure for receipt by the Managing Director of AFMA of a written claim otherwise the seized things are condemned as forfeited to the Commonwealth.

#### **106F Dealing with claim for thing**

This new item sets out the responsibilities of the Managing Director of AFMA in responding to any claim received. The Managing Director may give the claimant a notice allowing the claimant two months to institute action for recovery or to overturn the forfeiture.

#### **106G Condemnation of thing if it is claimed**

This new item sets out timing deadlines to avoid protracted action over a claim. It also covers the possibility of Commonwealth payment to claimants even if seized things have been disposed of or destroyed.

#### **106H Dealing with thing after it is condemned**

This new item requires Ministerial direction for disposal of things condemned as forfeited to the Commonwealth.

#### **(Subdivision D-Giving false or misleading information)**

This heading is inserted for clarification. The heading does not change the existing material content of section 107 on false or misleading information.

#### **Item 24: After section 107**

##### **(Subdivision E- Obstruction of officers)**

This heading is inserted for clarification. The heading does not change the existing material content of section 108 on obstruction of officers.

#### **Item 25: Application**

This item is to avoid any doubt as to the timing of commencement of the new items under section 106.

## **Part 6 - Precedence over Admiralty Act 1988**

### **Item 26: At the end of Division 6 of Part 6**

### **Item 27: Application**

Item 26 provides explicitly for the automatic forfeiture provisions of the *Fisheries Management Act 1991* to prevail over the *Admiralty Act*. This should ensure that Australian investigations and judicial action are not frustrated by third parties such as foreign mortgagees. Australia's unsuccessful efforts in the seizure of the *Aliza Glacial* (a Norwegian fishing vessel caught operating illegally in Australia's sub-Antarctic waters) have prompted this approach. Item 27 confirms the timing of the application of this item. These items are new.

## **Schedule 2 - Implementing the Fish Stocks Agreement**

### **Part 1 – Fisheries Administration Act 1991**

#### **Item 1: After paragraph 6(b)**

This item adds to the objectives of the Australian Fisheries Management Authority (AFMA) a further objective of ensuring the utilisation of fish stocks (including target, non-target and ecologically related species) both on the high sea and within the AFZ is carried out consistently with international agreements. This new objective enables AFMA to possibly avoid legal challenge when implementing measures developed in regional fisheries and other international fora that may possibly be inconsistent with other objectives such as maximising economic efficiency.

#### **Item 2: After paragraph 7(a)**

#### **Item 3: After paragraph 7(g)**

This item inserts new functions of the AFMA providing for international cooperation in the management of fish stocks including:

- implementation of conservation and management measures which are agreed with foreign countries which also have an interest in the fishery; and
- exchange of information with organisations such as fisheries commissions.

#### **Item 4: After paragraph 7(m)**

This item inserts a new function that implements Article 17 of the Fish Stocks Agreement to support taking action such as regulation of port access so that as to not support high seas fishing activities which are undermining regionally developed conservation measures.

#### **Item 5: At the end of section 7**

This item provides that each of the functions of AFMA may be read as mutually exclusive.

### **Part 2 – Fisheries Management Act 1991**

#### **Item 6: After paragraph 3(2)(b)**

A new objective which AFMA must have regard to in the administration of the Act (as per Item 1). This may enable AFMA to possibly avoid legal challenge when implementing

measures developed in regional fisheries and other international fora that may possibly be inconsistent with other objectives such as maximising economic efficiency.

**Item 7: Subsection 4(1)**

This item provides a definition to limit (in addition to the general requirements of the Agreement) the conservation and management measures that may be checked and enforced by Australia to those measures made in regional organisations and arrangements in which Australia is participating.

**Item 8: Subsection 4(1)**

This item provides a definition providing a short name for the Agreement.

**Item 9: Subsection 4(1)**

This item provides a definition which is utilised to limit the nationality of the boats which may be boarded on the high sea to those flagged or entitled to be flagged by a foreign country that is also party to the Agreement. (may also board boats which appear to not have nationality)

**Item 10: Subsection 4(1)**

This item provides a name for a group of fish species (includes major commercial tuna and billfish species) as consistent with the Agreement and UNCLOS.

**Item 11: Subsection 4(1)**

This item provides a definition of an internationally agreed measure that should be implemented by AFMA and may be enforced on the high seas.

**Item 12: Subsection 4(1)**

This item provides a definition of the entities or arrangements that may produce conservation and management measures.

**Item 13: Subsection 4(1)**

This item provides a definition of a group of transgressions that, if detected, can provide for further courses of action.

**Item 14: Subsection 4(1)**

This item provides a collective name for fish stocks that straddle the EEZ – high sea boundary consistent with the Agreement and UNCLOS.

**Item 15: Subsection 4(1)**

This item provides a definition of the territorial sea. This is an area of sea within the jurisdiction of a coastal state inside of the exclusive economic zone.

**Item 16: Subsection 4(1)(definition of *Treaty*)**

A definition numbering the only schedule to the Act as 1 so allowing for further schedules.

**Item 17: At the end of subsection 7(1)**

**Item 18: Subsection 7(3)**

**Item 19: At the end of section 8**

Extension of the application of the Act to provide for regulation, monitoring and inspection of high seas fishing including that fishing outside the EEZ which is not covered by a Regulation extending the Australian fishing zone. A note is provided identifying some of the new sections (along with other enforcement and offence sections) which apply extraterritorially. The reference to the Act not applying to foreign boats is removed to allow for non-flag State high sea boarding and inspection of foreign flag fishing vessels as part of the enforcement arrangements included in the Agreement. Where Regulations are made describing a fishery under Section 8 the Act has wide application to provide for compliance of Australian fishing activities with regional management measures.

**Item 20: Paragraphs 10(3)(a) and (b)**

This item provides for application of this Act to recreational fishing where such fishing is subject to a temporary order. It may be necessary to regulate recreational fishing to comply with international obligations. eg. when a regional fisheries organisation decides that recreational fishing is required to be controlled for conservation of a fish stock.

**Item 21: At the end of Division 1 of Part 3**

This item implements requirements in the Agreement with respect to compliance and enforcement by the flag State. Where it is established that an Australian boat has been involved in a serious violation of a high sea conservation measure that vessel should not fish on the high sea until satisfaction of sanctions imposed.

**Item 22: After subsection 17(5B)**

The same fisheries management principles shall be applied to the management of a straddling and highly migratory fish stock by both AFMA and regional organisations. This item requires the inclusion in fishery management plans of stock specific reference points being a key component of the precautionary approach.

**Item 23: Application and saving of existing plans**

This item adds new clauses to allow a year from these provisions commencing for the inclusion in existing plans of management stock-specific reference points for relevant fisheries.

**Item 24: At the end of subsection 22(3)**

A note indicating that in addition to the conditions which may be specified on a statutory fishing right section 42 provides for conditions on fishing concessions of general application.

**Item 25: Subsection 32(1)**

**Item 26: Subsections 32(1A) and (1B)**

**Item 27: After subsection 32(1C)**

This item adds new clauses providing that a fishing permit should not be issued for a boat to fish on the high sea which was used in the commission of an offence and the penalties for the offences have not been complied with.

**Item 28: At the end of subsection 32(5)**

A note indicating that in addition to the conditions which may be specified on a fishing permit section 42 provides for conditions on fishing concessions of general application.

**Item 29: At the end of subsection 33(3)**

A note indicating that in addition to the conditions that may be specified on a scientific permit section 42 provides for conditions on fishing concessions of general application.

**Item 30: At the end of section 39**

This item provides for the cancellation of a fishing concession that authorises fishing in a fishery in which Australia is not involved in the regional organisation or arrangement. This would enable cancellation of a fishing concession if it was issued in error, AFMA not being aware of the existence of the regional arrangement.

**Item 31: At the end of section 42(1)**

This item provides for regulations to be made the making position and course reporting at regular intervals a condition on fishing concessions. This reporting can be undertaken through a satellite-based vessel monitoring system (VMS) the characteristics of which would be defined in the Fisheries Regulations. Monitoring of high seas fishing vessels by use of a VMS will assist in meeting the flag state responsibility provisions of the Fish Stocks Agreement.

**Item 32: After section 42**

This item places a condition on high sea fishing concessions to facilitate boarding and inspection by foreign fisheries officers from a country party to the Fish Stocks Agreement for the purposes of checking compliance with regional management measures. The inspecting officers should act in accordance with the procedures outlined in Article 22 of the agreement. Following instruction from AFMA to cooperate and facilitate an inspection by foreign officials' failure to comply can lead to suspension of the fishing concession.

**Item 33: At the end of paragraph 43(1)(a)**

This item adds new clauses to the section on Temporary orders. This provides for quick action to be taken to implement a regionally agreed measures, for straddling fish stocks, highly migratory fish stocks or ecologically related species, whilst arrangements are made for inclusion of the measure in a plan of management.

**Item 34: At the end of paragraph 43(2)(d)**

This item adds new clauses to the section on Temporary orders. An additional situation for which a temporary order may be issued to includes fishing for a stock that is subject to an international agreement which involves fishing outside the AFZ.

**Item 35: Paragraph 43(4)(c)**

This item extends the duration of a temporary order from 3 to 6 months to allow adequate time for consultation and the statutory requirements for the making of amendments to a fishery plan of management.

**Item 36: Application**

This item provides a note that the extended duration of temporary orders only applies only to orders made after the commencement of this Schedule.

**Item 37: After section 87**

**87A Officers' powers: FSA boat on the high seas**

This clause implements Article 20(6) of the Agreement. It provides for cooperation with a foreign country, party to the fish stocks agreement, to apprehend on the high sea, a foreign boat that has illegally fished in the AFZ. A foreign flagged fishing boat on the high seas which is believed to have engaged in illegal fishing in the AFZ may, following authorisation being provided by the boat's national authorities, be boarded and inspected by an officer using a subset of his powers. This item does not limit 'hot pursuit' arrangements or the right to board and inspect boats flagged by parties to the fish stocks agreement for the purposes of checking compliance with regional management measures.

**87B Officers' powers: FSA boat illegally fishing on the high seas**

This clause implements Articles 21 and 22 of the Agreement which provides a right for non-flag State (the inspecting State) boarding and inspection on the high sea. Foreign boats with a nationality of parties to the fish stocks agreement may be boarded and inspected for the purposes of checking compliance with regional management measures. The Agreement provides a prescribed boarding and inspection process to protect the interests of the fishing boat and the inspecting State. The prescribed boarding and inspection process is implemented through modification of the present powers of fisheries officers' (in section 84 of the Act). The inspecting State is initially limited to powers that may be used to *inspect*. Following an inspection, further powers may be exercised to *investigate* (including taking the boat to the nearest appropriate port) when either:

- a) there is grounds for believing the boat has contravened a regional management measure and the flag State has authorised the inspecting State to undertake further investigation; or
- b) a serious violation has been committed and the flag State fails to respond by undertaking to conduct their own investigation or authorising the inspecting State.



### **87C Officers' powers: FSA boat in Australian waters**

This clause implements Article 21(14) of the Agreement. When an officer has reason to believe that a foreign fishing boat, which is within Australian waters and has a nationality of a party to the fish stocks agreement, has on that fishing trip committed an offence on the high sea, the officer should notify the flag State and follow the prescribed inspection and investigation process. This item gives an officer the modified powers that apply to fish stocks agreement boats in these circumstances.

### **87D Officers' powers: FSA boat in foreign country waters**

This clause provides for the continued operation of officers' powers when a boat, with a nationality of a party to the fish stocks agreement that has committed a serious violation, is brought to a foreign port.

### **87E Limits on exercising certain powers in relation to FSA boats**

These provisions implement the escalation of powers as provided in Article 21 of the Agreement. The powers of an officer undertaking an inspection of a boat with a nationality of a party to the fish stocks agreement are limited until certain requirements are met. These provision sets these limits to Australian fisheries officers' powers to those, which are comparable with the powers, used in the inspection process prescribed in the agreement. Also the requirements to be met before further powers are exercised is stipulated involving describing what is defined in the Agreement as being a *serious violation* and the authorisation of further investigation.

### **87F Procedures relating to exercise of powers on FSA boat**

These clauses implement the prescribed inspection process of Article 22 of the Agreement for non flag State high seas boarding in the terms and context of the *Fisheries Management Act 1991*.

### **87G Officers' powers: Australian-flagged boat beyond the AFZ**

This provision provides, with respect to an Australian flagged fishing boat outside the AFZ, the full of set of a fishery officers' powers. To undertake flag State responsibility Australia should monitor fishing activities and investigate offences committed by an Australian boat wherever they occur.

### **87H Officers' powers: boat on high seas without nationality**

This provision implements the right of visit in the Law of the Sea and the Agreement to board and inspect a boat that the officer believes does not have a nationality. This provides for boarding of a boat that may either have no nationality or may be hiding it's markings or otherwise not displaying it's identity. The boarding and inspection process to be implemented is as if the boat had the nationality of a party to the Agreement.

### **87J Use of force to exercise powers relating to boat**

This clause provides that an officer's use of force must not be more than is reasonably required.

### **Item 38: Subsection 88(1)**

The item adds a provision on the use of reasonable force to the powers of a fisheries officer.

**Item 39: After section 88**

**88A Release of FSA boats being investigated for high seas offences**

This item provides for the release to the flag-State of a boat that is under the control of an officer because the boat is believed to have committed a contravention of high seas offence. It is possible under the inspection and enforcement arrangements in the agreement for flag State to, following authorising Australia to investigate, decide at any time to take control and undertake its own investigative and enforcement action.

**Item 40: After subsection 95(1)**

This item provides that the offence of breaching conditions of a fishing concession applies whether the contravention occurs inside or outside the AFZ.

**Item 41: After subsection 98(1)**

This item adds to the section: Court may make certain orders. The provisions allow a court to make an order that, a person convicted of an offence, for a period of time not be on board an Australian flagged fishing boat on the high sea. This item, in addition to fines and forfeiture, implements Article 19(2) of the Agreement.

**Item 42: Subsection 98(2)**

This item adds to the section: Court may make certain orders. This additional clause makes it an offence, for the contravention of an order made by a court, that a person not be on a Australian flagged boat on the high sea.

**Item 43: Subsection 101B(6)**

This item omits a reference in a foreign fishing boat offence section to the application of the Act that relates to changes introduced in Schedule 1 amendments.

**Item 44: Paragraph 102(1)(c)**

This item adds high sea officer power cross references to the section: Certain foreign boats not to enter Australian ports. This allows for it to not be an offence, of bringing a foreign boat into an Australian port without a permit, when the boat is under the direction of an officer. The item adds references to those new powers which relating to the investigation of offences on the high seas.

**Item 45: Subsection 103(1)**

This item replaces the present section titled: Foreign boats not to land fish in Australia. The section provides for the regulation of foreign fishing boat landing and transhipment in port. Approval for landing and transhipment may be granted by the Minister and be subject to conditions. This regulation may be exercised to not permit landing of fish that is taken in a manner which either contravenes or undermines regional management arrangements for straddling or highly migratory fish stocks.

**Item 46: After Division 5 of Part 6**

**Division 5A—Offences in places beyond the AFZ**

**Subdivision A—Australian-flagged boats beyond the AFZ**

### **105A Australian-flagged boat with fish on high seas**

This item is a new offence provision for an Australian flagged fishing boat taking, or having in his or her possession, fish on the high sea, which is not authorised by a fishing concession or scientific permit. This item implements a duty of Australia as a flag State.

### **105B Australian-flagged boat on high seas equipped for fishing**

This item is a new the offence provision. Australian flagged fishing boats going out onto the high sea are required to have a fishing concession or scientific permit. This item implements a duty of Australia as a flag State.

### **105C Australian-flagged boat fishing in foreign waters**

This item is a new offence provision implementing the flag-State responsibility requirements of the Agreement (Article18). It provides an offence, under Australian law, for an Australian flagged fishing boat to conduct unauthorised fishing in the waters under the jurisdiction of a foreign country. It is envisaged that Australia shall monitor the activities of our fishing boats outside the AFZ so that boats do not illegally fish in other countries fishing zones. The offence includes a provision that a person can not be convicted for the same matter in Australia if they have already been convicted or acquitted by the foreign country.

### **105D Authorising foreign officials' action affecting Australian-flagged boats**

This item implements the non flag-State boarding process of the Agreement Article 21 with respect to Australian flag boats. This provision allows for authorisation to be given to foreign official to exercise further powers under his law following a high sea boarding and inspection of an Australian fishing boat. Following Australia being informed that there are grounds for believing that the boat has committed a high sea fishing offence, AFMA may authorise the foreign country to undertake further investigations involving possibly direction of the boat to an appropriate port for further investigation. Alternately, on this advice AFMA may respond through initiating an investigation and keep the inspecting State informed of the findings and any action taken.

## **Subdivision B—FSA boats on high seas**

### **105E FSA boat contravening management measure on high seas**

### **105F FSA boat fishing on high seas without flag State's authority**

### **105G Attorney-General's consent required for prosecution**

This item contains clauses which implement provisions of Article 21 of the Agreement with respect to foreign flagged boats which are party to the Agreement. Where Australia has inspected and investigated such a foreign boat on the high seas the flag-State may authorise Australia to take *enforcement* action. This provision makes the offences in Australian law for boats fishing either without authorisation from their flag-State or in contravention of regionally agreed measures on the high seas. These offences can only be applied with consent of the flag-State. To allow for the authority to be given within Australian jurisdiction and to ensure that such prosecution action is consistent with international law including the Fish Stocks Agreement the consent to proceed to a hearing and determination rests with the Attorney-General.

**Item 47: Subsection 106(1)**

**Item 48: Subsection 106(1)**

These items add to the Forfeiture section references to the new high seas offences. A court may order forfeiture of the boat, catch or fishing gear following conviction of a high sea fishing offence. This implements the provisions of the agreement, which in Article 19 require that sanctions adequate to discourage violations and deprive offenders of the benefits accruing from the illegal activities.

**Item 49: Paragraph 108(c)**

This item adds to the section: Obstruction of officers etc. References are added for the appropriate new parts of section 87, which contains the new high seas fisheries officer powers, an offence to obstruct an officer.

**Item 50: After paragraph 168(2)(h)**

This item adds a clause to the Regulation making section. The clause allows for regulations to be made requiring Australian flagged boats that operate on the high sea to be marked, and for fishing gear to be marked, in accordance with an internationally recognised system. This implements a duty on the flag-State in the Agreement.

**Item 51: Paragraph 168(2)(l)**

This item provides for Regulations to be made facilitating the exercise by officers of their powers with respect to foreign boats on the high sea with a nationality of a party to the Fish Stocks Agreement.

**Item 52: Schedule (heading)**

This item provides a schedule number to the heading for the United States treaty and so provides for additional schedules to be added to the *Fisheries Management Act 1991*.

**Item 53: At the end of the Act.**

**Schedule 2 – Fish Stocks Agreement**

This item adds to the Act a new schedule containing the text of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (Fish Stocks Agreement). Making the Agreement accessible and associated with the *Fisheries Management Act 1991* may assist in interpretation and implementation by AFMA of its new objective.