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No. 70 2003–04

**Fisheries Legislation Amendment (Compliance
and Deterrence Measures and Other Matters) Bill
2003**

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Fisheries Legislation Amendment (Compliance and
Deterrence Measures and Other Matters) Bill 2003

Jacob Varghese
Law and Bills Digest Group
7 January 2004

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Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Bill 2003

Date Introduced: 4 December 2003

House: Senate

Portfolio: Agriculture, Fisheries and Forestry

Commencement: The main provisions commence on a date to be fixed by proclamation, or if this is not within six months of Royal Assent, the first day after that period.

Purpose

To amend the *Fisheries Administration Act 1991* and *Fisheries Management Act 1991* to:

- put in place a more effective deterrence and compliance regime, in particular deterring illegal, unreported and unregulated (IUU) fishing
- improve the operating efficiency and effectiveness of the Australian Fisheries Management Authority (AFMA), and
- promote the ecologically sustainable management of Commonwealth fisheries.

Background

This is the second of two recent Bills dealing with amendments to the Fisheries Administration Act and Fisheries Management Act, the first being the Fisheries Legislation (High Seas Fishing Activities and Other Matters) Bill 2003 (see Bills Digest No. 71, 2003–04).

This Bill provides miscellaneous amendments which:

- strengthen the existing regime for policing foreign boats fishing in Australian-controlled waters by allowing the Commonwealth to recover the costs of pursuing

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such boats fishing illegally and increasing penalties to foreign boats fishing illegally in the Australian Fishing Zone (AFZ), and

- reform the fisheries management regime administered by AFMA by:
 - relaxing the requirement for Commonwealth officers to identify themselves when making orders to vessels
 - creating a national register of fishing permits
 - giving AFMA more direct control over closure and partial closure of fisheries
 - requiring the return of instruments evidencing fishing entitlements when those entitlements are surrendered
 - allowing AFMA to waive levies for fishing permits that are surrendered before they are used, and
 - allowing remuneration and allowances to be paid to members of management advisory committees.

Illegal, Unregulated and Unreported Fishing

The strengthening of the regime for policing foreign fishing boats in the AFZ is prompted by concerns about IUU fishing. IUU fishing remains most common in Australia's northern waters. According to the Department of Agriculture, Fisheries and Forestry, in the calendar year 2002, 109 of the 111 boats apprehended for IUU fishing in the AFZ occurred in the north.¹

In recent years, however, large-scale IUU operations have occurred in southern waters around Heard and McDonald Islands. These have targeted Patagonian toothfish, a lucrative catch labelled 'white gold'. According to Greenpeace, the Patagonian toothfish is 'headed for commercial extinction' having already been fished out of existence in some areas.² The toothfish is a major food source for sperm whales and elephant seals, so reduced numbers are expected to have knock-on effects for those species. In addition, IUU fishers tend to disregard laws that attempt to minimise the environmental impact on aquatic and bird species. As well as undermining the ocean ecology, the illegal trade in this fishery competes with a legal industry worth around \$30 million a year.³ According to the Minister for Fisheries, Forestry and Conservation, the estimated illegal catch of toothfish in the waters around Heard and McDonald Islands was around 2500 tonnes in 2001/2002, almost matching the total allowable catch of 2815 tonnes.⁴

IUU fishing recently made headlines with the three week pursuit of the Uruguayan-flagged *Viarsa I* by Australian authorities in August 2003. The *Viarsa I* had been suspected of breaches of the Fisheries Management Act in the AFZ around Heard and

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MacDonald Islands. It was finally apprehended by authorities in the mid-Atlantic Ocean after a pursuit through dangerous southern waters. When caught, 85 tonnes of toothfish were allegedly found on board with an estimated value of \$1 million.⁵ The costs to the Commonwealth of the chase in terms of the charter of the patrol boat and re-imburement of the Governments of South Africa and the United Kingdom for their assistance (and not including the costs to the Navy in escorting the boat back to Australia) was around \$3.4 million.⁶ These events form the background to the amendments allowing the Commonwealth to recover the costs of pursuit.

The increased penalties proposed by the Bill do not apply to boats less than 24 metres in length. This indicates that the target of the Bill is large-scale commercial IUU operations such as those catching Patagonian toothfish in southern waters, rather than smaller scale traditional or artisan fishers that tend to be apprehended in the north. Under a Memorandum of Understanding reached between Australia and Indonesia in 1974, traditional Indonesian fishers are permitted to use certain Australian waters. These fishers can be apprehended if they stray out of the allowable area or use non-permitted fishing methods.

Operational reforms to AFMA

The reforms proposed by the Bill relating to AFMA and the fisheries management regime deal with operational issues. According to the *Explanatory Memorandum*, these proposals have been prepared in consultation with the Australian fishing industry through AFMA's management advisory committee process and have been approved by the AFMA Board.⁷

Most of the changes relate to AFMA's use of permits and licenses to regulate fishing in fisheries for which no plan of management has yet been developed. Under the Fisheries Management Act, where a plan of management has been produced, statutory fishing rights can be granted. These are indefinite and tradeable rights to use a fishery and are maintained on a public register. Where a plan of management applies AFMA may issue directives regarding the use of the fishery to ensure fish stocks are maintained, including closure of the fishery for certain periods. Where no plan of management exists, AFMA regulates a fishery by use of limited-term permits and licenses. In these cases, AFMA has less direct control over the use of the fishery once a permit or license has been granted. The amendments proposed in this Bill mostly attempt to tighten the management of permits and licenses by creating a central register, requiring return of instruments once they are surrendered, encouraging return of unused permits and licenses and, most significantly, allowing AFMA to issue directives affecting the operation of permits and licenses, including closure of a fishery.

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Main Provisions

Recovery by the Commonwealth of pursuit costs

The most significant change to the Fisheries Management Act proposed by the Bill would allow the Commonwealth to recover pursuit and apprehension costs from owners of vessels suspected of fishing offences that do not stop for officers on request (**item 27**). The Bill would allow AFMA to impose a penalty equal to the pursuit costs where:

- a foreign boat fails to stop or move to a certain place on the requirement of an officer
- the boat is in the AFZ or Australian territory or the officer has reasonable grounds to believe it has been or will be used to fish in the AFZ
- pursuit of the boat is required as a result of its failure to stop or move to the required place
- the pursuit results in the boat arriving at a place in Australia or an external territory, and
- the boat is automatically forfeited under s 106A of the Fisheries Management Act⁸.

The debt applies after AFMA has served on the owner a preliminary notice of debt and, subsequently, full particulars of the debt, unless the owner notifies AFMA within 30 days that he or she intends to contest the debt. If the owner does notify AFMA of an intention to contest the debt, he or she has two months to apply to the Federal Court to have the debt set aside. The Court may set aside the debt on the grounds that the boat was not forfeited under s 106A, that is that a relevant offence had not occurred. Notably, the onus of proof lies with the owner of the boat to show (on the balance of probabilities) that the boat was not forfeited. The Court may also set aside the debt or part of it if the pursuit costs have not been reasonably incurred. In this case the onus is on the Commonwealth to show that the foreign boat did not comply with a lawful request to stop, that the pursuit was necessary and that the costs are reasonable and correctly calculated. The manner for calculating pursuit costs is to be outlined in regulations.

The Bill also provides that the pursuit costs can be demanded by AFMA as a ‘bond’ when a confiscated boat is returned to its owner (**item 24**).

Increased penalties

Item 26 proposes an increase of the maximum fine payable for conviction of the offence of having a foreign boat equipped for fishing in the AFZ from 5000 penalty units to 7500 penalty units (that is from \$550 000 to \$825 000). An exception will apply to boats that

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are under 24 metres long, for which a fine of up to 5000 penalty units will continue to apply.

Direct power to AFMA to close or partially close a fishery

The Bill gives AFMA the power to close or partially close a fishery by a directive published in the *Gazette* and sent to all relevant concession-holders (primarily **item 20** and consequentially **items 8, 9, 11, 12, 14, 15, 17 and 18**). This may be done where:

- there is no plan of management for the fishery
- consultation has occurred with the relevant management advisory committee (MAC)⁹ and all relevant concession-holders, and
- AFMA is satisfied that closure or partial closure is necessary for the pursuit of its objectives.

Currently, AFMA controls use of fisheries that are not under a plan of management, including closure and partial closure, through conditions placed on permits and licences. Where a permit is varied to provide for full closure, this may be beyond AFMA's power as it is effectively negating any use of the license or permit. This Bill provides a more direct mechanism for AFMA to exercise control over the use of fisheries and avoids this potential problem.

Under the current regime, decisions made by AFMA to vary conditions of permits or licences can be appealed to the Administrative Appeals Tribunal for review on the merits of the decision (under s 165). However, under the proposed scheme, no provision is made to allow merits review of directives made by AFMA to close or partially close a fishery. A person aggrieved by such a decision would only have the limited avenue of judicial review (see Concluding Comments below).

The Bill does provide that these AFMA directives be 'disallowable instruments' under the *Acts Interpretation Act 1901*.¹⁰ Accordingly, they would be subject to parliamentary disallowance.

Creation of Fishing Permits Register

Item 21 proposes the creation of a new Fishing Permits Register, akin to the Register of Statutory Fishing Rights that already exists. The new register will provide a central record of the short-term non-tradeable permits and licenses. This register will be similar in operation to the Register of Statutory Fishing Rights, including providing a right for members of the public to inspect the register and creating an offence of furnishing a false document purporting to be a copy or extract of an instrument lodged with AFMA for the purpose of the register or of the register itself (punishable by up to 2 years imprisonment).

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Requirement that instruments be returned to AFMA on surrender of rights

Items 7, 10, 13, 16 and 19 require holders of statutory fishing rights, fishing permits, scientific permits, foreign fishing licenses and foreign master fishing licenses respectively to provide AFMA with the original instrument evidencing the permit or license when they surrender their rights. Currently, surrender of fishing rights merely requires written notice to AFMA. The holder may keep the original instrument. In these circumstances, AFMA officers in the field cannot conveniently determine the validity of an instrument they inspect.

Waiver of levies where no fishing has taken place under a permit

Item 28 provides an amendment that would allow AFMA to waive a levy payable on a fishing permit when that permit is surrendered without any fishing having been performed under it. This seems to be aimed at encouraging return of unused permits so that new permits may be issued to reduce ‘latent effort’ fisheries¹¹ – that is the amount of fish not caught within allocated quotas.

Relaxation of obligation for officers to show identification when making requirements

Items 22 and 23 propose amendments that will reduce the obligation of officers making requirements of people under the Fisheries Management Act to show written identification.

Currently, under s 84(6) of the Fisheries Management Act, an officer making a requirement of a person must show written identification or an identification card to that person. That person need only comply with the requirement when identification has been shown. An exemption to this rule applies where an officer requires a person to bring a boat to a stop or to take it to a certain place so that it may be boarded. In these circumstances, there is no requirement that the officer produce identification, even after the event.

Under the Bill’s proposal, it would not be necessary to show identification where it is impossible in the circumstances to do so – for example, as suggested by the Minister, when the requirement is being made over radio¹². However, the officer must take all reasonable steps to identify him or herself at the time and produce identification at the first available opportunity. This includes where a requirement is made that a boat stop so that it can be boarded.

The practical effect of this change is that officers will be able to make the following requirements of people without immediately showing identification:

- that the master of a boat take the boat to a certain place and remain in control of the boat until permitted to leave (where there are reasonable grounds to believe that boat has been used or is intended to be used in contravention of the Fisheries Management Act)

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- that the master of a boat give information regarding the boat, its crew and other people on board
- that any equipment be lifted from the sea (where there are reasonable grounds to believe the equipment is being used in contravention of the Fisheries Management Act), and
- that a person on board a boat state their name and address (where there is a reasonable suspicion that he or she has committed an offence).

Remuneration and allowances to members of management advisory committees

The Bill amends the Fisheries Administration Act to allow remuneration and allowances to be paid to members of AFMA's management advisory committees (MACs), as determined by the Remuneration Tribunal (**Items 1-6**). The MACs comprise stakeholders in the relevant fisheries, normally including commercial fishers, scientists, conservationists and AFMA representatives. They provide advice to AFMA on the management of these fisheries. There are currently 11 MACs in operation.¹³ Remuneration and allowance for some out-of-pocket expenses was recommended by a review of the MAC process commissioned by AFMA from ACIL Consulting. It was suggested that, although a fee for sitting on a MAC could never compensate for the fishing time lost by participating, it would signal to participants that their participation is valued and indicate the importance of MACs. It was acknowledged, however, that some stakeholders consulted on the issue thought that the payment of fees could require a higher levy burden on fishers.¹⁴

Concluding Comments

Compliance and deterrence measures and the problem of overfishing

The extent to which higher penalties and recovery of pursuit costs will act as a deterrent against IUU fishing remains to be seen. It is likely to take more to overcome the attraction of high profits that can be made in the illegal trade. Having said that, the Bill is one of several unilateral and multilateral steps Australia has taken to prevent IUU fishing in the AFZ and on the High Seas, including leading participation in the *Convention on the Conservation of Antarctic Living Marine Resources* and the *International Plan of Action to Prevent and Deter IUU Fishing*.

This Bill only addresses the issue of overfishing from the perspective of illegal foreign vessels in Australian water, not the possibility of overfishing under the legal regime. Greenpeace has argued that measures to prevent illegal fishers are not sufficient to preserve fish stocks.¹⁵ The environmental organisation advocates a moratorium on all Patagonian toothfish fishing and an international ban on trade in the fish until IUU fishing

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has been ‘driven out’. It argues that the scientific basis for determining a sustainable legal catch rate is undermined by the illegal trade. Accordingly, the legal fishing trade could be contributing to overfishing.

As mentioned above, Australia does allow fishing for Patagonian toothfish in the Heard and MacDonal Island fishery, with a total allowable catch of 2815 tonnes in 2001/2002. Although AFMA takes estimates of illegal fishing into account in determining allowable catches, it notes that these figures are ‘minimum estimates only’ given the inherent difficulty in accounting for the IUU catch.¹⁶ In support of continuing legal fishing, AFMA suggests that the presence of legal fishers helps to locate and monitor an illegal presence and may also act as a deterrent to illegal fishing.¹⁷

Prevention of merits review for decisions by AFMA to close or partially close a fishery

As discussed above, the grant of power to AFMA to make directives closing or partially closing a fishery does not come with a right to appeal those directives to the AAT. This significantly changes the current practice in which similar restrictions are reviewable.

Under the proposed regime, concession holders who feel aggrieved by a decision to close a fishery will be able to pursue *judicial review* but not *merits review*. Merits review involves consideration by a tribunal as to whether the decision was a correct or preferable one in all the circumstances. Judicial review involves consideration by a court only as to whether the decision was legal – that is, within the legal power of the decision-maker – regardless of the merits of the decision itself.

Aside from judicial review, the only other remedy for the aggrieved concession-holder would be disallowance of the directive. However this would be a matter for Parliament and the concession-holder could only be indirectly involved in this process.

This involves a substantial reduction in the rights of permit and license holders.

Identification of officials – possibility for impersonation

The rule that officers must produce identification when making requirements serves two purposes. Firstly, it ensures that the person of whom the requirement is made knows who to hold to account if they object to the requirement. Secondly, it ensures that the person knows that they are being required to do something by a genuine official. The Bill preserves the first purpose by requiring that identification be produced at the first available opportunity. However, the relaxing of requirements to show identification does open the possibility that criminals or pirates could take advantage of the proposed rule by impersonating officers, in order to manipulate a boat in preparation for hijacking or robbery. To some extent, this problem already exists given that the current rules allow officers to require a boat to stop or go to a certain place without producing identification. This Bill extends this approach to other types of requirements, which are possibly less open to criminal abuse than the existing exception.

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Endnotes

- 1 DAFF website at <http://www.affa.gov.au/content/output.cfm?ObjectID=446232C4-D2A2-4D87-9FE743D39C47AFF9>.
- 2 Greenpeace website at:
http://www.greenpeace.org/international_en/extra/?forward%5fdestination%5fanchor=%2finternational%5fen%2fcampaigns%2fintro%3fcampaign%255fid%3d4022&campaign%5fid=4022&forward%5fsource%5fanchor=Pirate%20fishing%20Introduction&item%5fid=6771.
- 3 Senator the Hon Ian MacDonald, 'The Howard Governments efforts to deter illegal fishing activities' Address to the National Press Club, 19 August 2003.
- 4 *ibid.*
- 5 Luke Elliot 'Toothfish epic docks in port' *The West Australian*, 4 October 2003, 8.
- 6 *Senate Hansard*, 27 November 2003, 18043.
- 7 *Explanatory Memorandum*, Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Bill 2003, 3.
- 8 Section 106A provides for forfeiture of a boat to the Commonwealth where certain offences have been committed.
- 9 See page 7 under 'Remuneration and allowance to members of management advisory committees' for description of MACs.
- 10 Note that on the commencement of the Legislative Instruments (Transitional and Consequential Amendments) Bill 2003, instruments such as these will be disallowable legislative instruments under the *Legislative Instruments Act 2003*.
- 11 *Senate Hansard*, 4 December 2003, 18570.
- 12 *ibid.*
- 13 'Management Advisory Committees' page on AFMA website at:
<http://www.afma.gov.au/about/macs.php>.
- 14 ACIL Consulting, *Management Advisory Committees: A report to the Australian Fisheries Management Authority*, January 2001. Available from AFMA website at:
<http://www.afma.gov.au/pubs/reviews/acilmacs.pdf>.
- 15 'Patagonian toothfish (Chilean/Antarctic sea bass)' on Greenpeace website at:
http://archive.greenpeace.org/oceans/southernocceans/expedition2000/moreinfo/bg_toothfish.html
- 16 AFMA, *The Future of the Heard Island and Macdonald Island Fishery – A Discussion Paper*, December 1999, 11 at website:
<http://www.afma.gov.au/fisheries/himi/discussion%20papers/heard%20and%20mcdonald%20islands%20management%20plan%20discussion%20paper%20december%201999.doc>.
- 17 *ibid.*, 12–13.

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