



INFORMATION, ANALYSIS  
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 71 2003–04

## Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Bill 2003

ISSN 1328-8091

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Fisheries Legislation Amendment (High Seas Fishing  
Activities and Other Matters) Bill 2003

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8 January 2004

## Contents

Purpose. . . . .	1
Background. . . . .	1
Compliance Agreement. . . . .	1
Other amendments to the Fisheries Management Act. . . . .	3
Main Provisions . . . . .	3
Schedule 1 – Implementation of the Compliance Agreement in Australia . . . . .	3
Amendments to Fisheries Administration Act. . . . .	3
Amendments to Fisheries Management Act . . . . .	3
Extended application to fishing on the high seas . . . . .	3
Measures to prevent ‘re-flagging’ . . . . .	4
Creation of a High Seas Register . . . . .	5
Schedule 2 – Miscellaneous amendments of the Fisheries Management Act 1991 . . . . .	5
Logbooks for fisheries. . . . .	5
Power to stop and detain vehicles and aircraft without consent or warrant. . . . .	6
Charter boat fishing to be considered recreational fishing . . . . .	6
Amendments to the Treaty. . . . .	7
Concluding Comments. . . . .	7
Compliance Agreement. . . . .	7
Powers to search and detain vehicles and aircraft . . . . .	7
Endnotes. . . . .	8

# Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Bill 2003

**Date Introduced:** 28 November 2003

**House:** Senate

**Portfolio:** Agriculture, Fisheries and Forestry

**Commencement:** Schedule 1 will commence on a date fixed by proclamation, but not before the Compliance Agreement enters into force for Australia. At the latest, Schedule 1 will commence six months after the Compliance Agreement has come into force. Schedule 2 will commence on a date 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:

- ensure compliance with the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the ‘Compliance Agreement’) in preparation for Australia’s acceptance of that Agreement, and
- improve the efficiency and effectiveness of the Australian Fisheries Management Authority (AFMA).

## Background

### Compliance Agreement

The first part of the Bill gives effect to the United Nations Food and Agriculture Organisation’s (FAO) *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*. This agreement was approved by the FAO conference in November 1993, but only came into effect when the 25<sup>th</sup> Instrument of Acceptance was deposited with the FAO’s Director-General on 24 April 2003.<sup>1</sup> Australia has not yet accepted the Compliance Agreement as its laws do not yet comply with the agreement’s requirements. The Government has indicated that it will accept the agreement once this Bill has been passed by Parliament.<sup>2</sup>

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Under international law, specifically the *United Nations Convention on the Law of the Sea* (UNCLOS), all States have the right to fish on the high seas but also have a responsibility to conserve the living resources in those seas by enacting measures to govern their nationals who engage in high seas fishing (for example, through a system of licensing). The Compliance Agreement aims to improve compliance with that responsibility.

The Compliance Agreement was created in response to concerns about depletion of fish stocks in the high seas as a result of increasing illegal, unreported and unregulated (IUU) fishing. In particular, the Compliance Agreement attempts to address the problems of ‘re-flagging’ and ‘flag of convenience’ practices used by vessels engaged in IUU fishing. ‘Re-flagging’ involves switching the registration of a vessel from one jurisdiction to another to overcome the cancellation or suspension of high seas fishing rights in the first jurisdiction. This allows offenders to continue operating despite earlier punishment. ‘Flag of convenience’ practices involve registration of vessels in states that are either unwilling or unable to police the high seas fishing rights that they grant. According to the Minister for Fisheries, Forestry and Conservation, recent arrests by Australian and French authorities of boats engaged in IUU fishing in southern waters have all involved ‘flag of convenience’ vessels.<sup>3</sup>

The key obligations of the Compliance Agreement are:

- that States take responsibility for regulating the high seas fishing of boats carrying their flag, including making illegal fishing an offence in domestic law
- that States granting high seas fishing rights to boats carrying their flag have an effective system for ensuring compliance
- that States keep a record of all boats to which they have granted high seas fishing rights and that this record be shared with the FAO, thereby creating an international register,
- that States perform background checks on boats before high seas fishing licenses are granted to ensure that boats do not ‘re-flag’ to avoid suspension or cancellation as punishment for illegal fishing in another jurisdiction.

The Joint Standing Committee on Treaties (JSCOT) has recommended that Australia should participate in the agreement. JSCOT pointed out that the value to Australia of fishing on the high seas and fishing in Australian waters of species that migrate from the high seas was in the order of \$204.4 million for 2000-2001.<sup>4</sup> In addition to environmental motives to prevent over-fishing, this industry stands to benefit from protection from IUU fishing in the high seas.

Australia already has a system for regulating commercial fishing rights, which is administered by the Australian Fisheries Management Authority (AFMA) under the

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Fisheries Management Act. This Bill proposes to amend that system to ensure conformity with the Compliance Agreement.

### **Other amendments to the Fisheries Management Act**

Aside from preparing Australian law for acceptance of the Compliance Agreement, the Bill also makes other amendments to the Fisheries Management Act that are intended to ‘improve the operating efficiency and effectiveness’ of AFMA.<sup>5</sup> The most significant is an increase to the powers of AFMA and other agencies to intercept, detain, board and search vehicles and aircraft without the consent of the owner or a warrant. According to the second reading speech, this change is necessary because ‘there is not always time to get a warrant and, if the suspicion has foundation, consent may not be forthcoming’.<sup>6</sup> No information was provided in the speech regarding how often this has been a significant operational problem for AFMA.

## **Main Provisions**

### Schedule 1 – Implementation of the Compliance Agreement in Australia

#### **Amendments to Fisheries Administration Act**

**Items 1 to 5** provide minor amendments to the Fisheries Administration Act to reflect intended international obligations that will arise under the Compliance Agreement or other international agreements. Specifically, **items 3, 4 and 5** incorporate adherence to international obligations into the objectives of the Act and into the functions of AFMA.

#### **Amendments to Fisheries Management Act**

##### Extended application to fishing on the high seas

A central requirement of the Compliance Agreement is that States take responsibility for management of boats under their flags engaging in high seas fishing. Accordingly, the Bill extends the application of the Fisheries Management Act to ensure that high seas fishing by Australian-flagged boats comes under AFMA regulation.

**Item 10** amends the Fisheries Management Act to extend its application to all fishing activities in waters outside the Australian Fishing Zone (AFZ), where Australian or Australian-flagged boats are involved. **Item 11** provides that regulations may extend the application of the Act to Australian citizens, companies, boats and Australian-flagged boats in respect of the ‘high seas generally’. Currently the Fisheries Management Act only applies to specified waters outside the AFZ.

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**Item 12** provides that the Act can apply to ‘Australian-flagged’ boats fishing outside the AFZ, regardless of whether they are ‘Australian’ (ie Australian-owned) boats. **Item 16** provides that rights to undertake high seas fishing granted under the Fisheries Management Act cease when a boat ceases to be Australian-flagged (in compliance with Article 3(4) of the Compliance Agreement).

#### Measures to prevent ‘re-flagging’

In an attempt to stop the practice of re-flagging the Compliance Agreement requires States to make background checks before allowing high seas fishing [Article 3(5)].

To comply with this requirement, **item 13** provides a new substantive provision, **proposed section 16B**. This provides that AFMA must not grant a concession authorising fishing on the high seas to an Australian-flagged boat where that boat’s high seas fishing rights are on suspension or have been cancelled within the last three years in another jurisdiction due to a breach of international conservation and management measures by the owner or operator. An exception to this rule applies where it can be shown the owner or operator that earned the suspension or cancellation of the boat no longer has an interest in or control over the boat. Further, AFMA may grant a concession despite suspension or cancellation elsewhere, where it is satisfied that the grant is unlikely to undermine international conservation and management measures. These provisions match the requirements of the Compliance Agreement.

Notably, the Bill does not make provision for decisions made by AFMA under **proposed section 16B** to be reviewable by the Administrative Appeals Tribunal (AAT). Currently, most decisions by AFMA relating to granting concessions are appealable to the AAT. Without provision for AAT review (through a consequential amendment to s 165 of the Fisheries Management Act), people denied fishing concessions due to an alleged earlier suspension or cancellation in another jurisdiction will have no avenue for review of the decision on the merits.

**Item 14** amends the Act to allow AFMA to grant concessions to fish on the high seas to a particular boat, with a condition that those concessions can only be transferred to another boat with AFMA’s permission. Currently, rights can be transferred to another boat without AFMA’s agreement, which could be used as a loophole to avoid background checking. Similarly, **item 15** requires agreement from AFMA before fishing rights can be substituted to another boat and, in the case of high seas fishing rights, that boat must be Australian-flagged. Notably, this will apply to boats seeking rights to fish in the AFZ (as well as those seeking high seas fishing rights) which is not required by the Compliance Agreement.

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## Creation of a High Seas Register

A key plank of the Compliance Agreement is the requirement that States keep registers of boats that have been granted high seas fishing rights (or had rights suspended or cancelled) and share these registers with the FAO.

In proposing a **new Part 4A** to the Fisheries Management Act, **item 18** provides for Australia's compliance with this requirement. It creates a High Seas Register to be administered by AFMA, in addition to the Register of Statutory Fishing Rights. This register is to include:

- the name and address of the owner
- the nature of concessions granted to fish on the high seas
- certain identifying information
- details of any suspensions of cancellations of rights, including the reasons for these, and
- any changes to this information.

The information in the register is to be shared with the FAO so that it can maintain an international register of boats involved in high seas fishing. The register is to be a public document, although a fee may be charged to inspect it. Providing false documentation purporting to be an extract from the register or an instrument lodged with AFMA is to be a criminal offence punishable by up to two years imprisonment.

## Schedule 2 – Miscellaneous amendments of the Fisheries Management Act 1991

### Logbooks for fisheries

**Item 1** repeals a provision which allows regulations to be made requiring the production and furnishing of records relating to the use of a fishery by a concession holder. This is replaced by a provision allowing AFMA to directly determine whether and how logbooks are to be required of concession holders. Recent practice has been that AFMA has developed rules relating to logbooks under authority provided by the Fisheries Management Regulations. However, a recent Tasmanian Supreme Court case, *R v Turner (No 6)*,<sup>7</sup> held that it was beyond the power of the Governor-General to delegate this power through regulations to AFMA. This amendment would overcome this problem, giving AFMA direct control over the rules relating to the logbooks. Rules made by AFMA under this provision would be disallowable by Parliament.

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**Items 2 – 7** make amendments consequential to this change. **Item 8** ensures that logbooks required by conditions placed on concessions, a method used to enforce logbooks by AFMA since *R v Turner*, remain valid regardless of this amendment.

### **Power to stop and detain vehicles and aircraft without consent or warrant**

**Items 9 and 10** provide amendments that would allow officers of AFMA, Australian Federal Police, Defence Force or Customs, in certain circumstances, to stop and detain vehicles and aircraft without the consent of the owner or operator and without a warrant. This includes the power to enter and search the vehicle or aircraft, break open and search any compartment that might reasonably contain evidence and to examine or take possession of evidence.

Currently, these powers can only be exercised with the consent of the owner or operator or with a warrant. Warrants are obtained from magistrates and, in cases where urgency is required or where the execution of the warrant would otherwise be frustrated, warrants can be obtained electronically (by telephone, fax or other electronic means).

Under the Bill, detention and search without consent or warrant would be allowed when:

- consent to stop and detain etc has been refused
- the officer has reasonable grounds to believe the vehicle contains evidence of an offence against the Act, and
- the officer has reasonable grounds to believe the delay involved in obtaining the warrant would frustrate its execution.

If it is practicable, the officer must notify the owner or operator that this power is to be exercised and that reasons for the powers being exercised may be requested. Upon request, these reasons must be given in writing.

### **Charter boat fishing to be considered recreational fishing**

Charter boats are used by businesses that charge recreational fishers for fishing trips, where the fish caught are not sold. Currently, the Fisheries Management Act treats charter fishing as a commercial activity. **Items 11 to 15** provide amendments that would treat charter fishing in the same way as recreational fishing. This will mean that day-to-day management of charter fishing rights will be conducted under State and Territory law, although AFMA will retain an ability to prohibit or regulate charter fishing through its plans of management or temporary orders.

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## **Amendments to the Treaty**

**Item 16** provides an amendment that would not require regulations to be made every time there is a change to the *Treaty on Fisheries between the Governments of Certain Pacific Islands and the Government of the United States of America*. Those changes that would not affect fishing in the AFZ would not require regulation and would, therefore, not be subject to parliamentary disallowance. Changes to the treaty that would affect fishing in the AFZ would still require regulation.

## **Concluding Comments**

### **Compliance Agreement**

Schedule 1 makes the necessary changes that will bring Australian law in line with the Compliance Agreement, thereby allowing acceptance of the agreement.

How effective the Compliance Agreement will be remains a moot point. It is notable that many of the States that are alleged by the Government to be ‘flag of convenience’ states – such as Panama, Belize, Togo, Russia, Netherlands Antilles, St Vincent and San Tome<sup>8</sup> – are not parties to the agreement. However, the exchange of information between the parties about the activities of non-party flagged boats, as required by the agreement, may assist in gaining a global picture of the problem. To the extent that ‘re-flagging’ is a problem between party states, the international register should provide an effective means of preventing this.

Aside from this the agreement has a political role, demonstrating the determination of the parties to prevent IUU fishing on the high seas and providing a structured international system that non-parties can be encouraged to join. In this role the Compliance Agreement should be seen as one of many planks in Australia’s participation in the international regulation of high seas fishing, which includes UNCLOS and the *International Plan of Action to Prevent, Deter and Eliminate IUU Fishing* among other instruments.

### **Powers to search and detain vehicles and aircraft**

Granting power to AFMA and other officers to stop, detain and search vehicles and aircraft without consent or warrant, albeit with important limitations, is a significant increase in the power of those officers. As with all powers to detain and search without a warrant, the absence of a third party who must be convinced that the detention is on reasonable grounds carries a risk of capricious use and potential abuse of civil liberties and privacy. On the other hand, Australian criminal law already recognises that operational aspects of investigation may require these powers, providing similar powers to police to search without a warrant in an emergency (for example, s 3T *Crimes Act 1914* (Cth)).

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Parliament may want to consider whether AFMA's operational experience and the seriousness of the offences justify this extension of power. The Senate Standing Committee for the Scrutiny of Bills has suggested that the impracticability of obtaining a warrant – including where vehicles, ships and aircraft are involved – may justify an exception to the general principle that consent or a warrant should be required before such powers may be exercised.<sup>9</sup> However, the Committee also noted that 'impracticability should be assessed in the context of current technology'. The Fisheries Management Act already provides that warrants may be obtained by electronic means in urgent circumstances, with 'electronic means' defined widely enough to accommodate emerging communication technologies.

If it is thought that the extension of power is justified in this instance, Parliament may want to consider whether further restrictions on the exercise of that power should be adopted. For example, the Crimes Act, which allows searches of 'conveyances' (i.e. vehicles) without consent or warrants in some circumstances, requires that an officer exercising that power must:

- search the conveyance at a place where members of the public have ready access
- not detain the conveyance for any longer than necessary to carry out the search, and
- not damage the conveyance or any container on it by forcing it open, unless the operator of the conveyance has been given a reasonable opportunity to open it (unless it is impossible to give that person that opportunity).

Further, the Crimes Act only allows searches to occur without a warrant or consent where the 'circumstances are serious and urgent'. Although some degree of *urgency* is required by the current Bill (the delay in applying for a warrant must frustrate the effective execution of the warrant), it contains no requirement for *seriousness*. Accordingly, the power could be used even where minor offences are suspected. The Senate Standing Committee for the Scrutiny of Bills considered that the Crimes Act should constitute the 'high water mark' for search and entry powers.<sup>10</sup> This Bill does appear to go further in its grant of powers than the Crimes Act.

## Endnotes

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- 1 Current parties to the Compliance Agreement are Argentina, Barbados, Benin, Canada, Cyprus, Egypt, European Community, Georgia, Ghana, Japan, Madagascar, Mauritius, Mexico, Morocco, Myanmar, Namibia, Norway, Peru, Republic of Korea, St Kitts & Nevis, St Lucia, Seychelles, Sweden, Syrian Arab Republic, Tanzania, USA and Uruguay.
- 2 *Senate Hansard*, 28 November 2003, 18050.

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- 3 Senator The Hon Ian Macdonald, 'The Howard Government's efforts to deter illegal fishing activities', Speech to National Press Club, 19 August 2003.
- 4 Joint Standing Committee on Treaties, *Report 47 - Treaties Tabled on 18 and 25 June 2002*, Commonwealth of Australia, 2002, 41. Available on-line at: [http://www.aph.gov.au/house/committee/jsct/18\\_25\\_june\\_2002/index.htm](http://www.aph.gov.au/house/committee/jsct/18_25_june_2002/index.htm).
- 5 *Senate Hansard*, 28 November 2003, 18049.
- 6 *Senate Hansard*, 28 November 2003, 18050.
- 7 [2001] TASSC 89, para 23
- 8 Senator Macdonald, op. cit.
- 9 Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation*, 2000, 75. Available on-line at: <http://www.aph.gov.au/senate/committee/scrutiny/bills00/b04.pdf>.
- 10 *ibid.*, 81.

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