



Fisheries Legislation Amendment (International Obligations and Other Matters) Bill 2005

Angus Martyn
Law and Bills Digest Section

Contents

Purpose	2
Background	2
Regional Fisheries Management Organisations and the WCPF Convention.....	2
Main Provisions	4
Main amendments (Schedule 1 Part 1).....	4
<i>Fisheries Administration Act 1991</i>	4
<i>Fisheries Management Act 1991</i>	5
Contingent amendments (Schedule 1 Part 2)	9
Concluding Comments	10
Endnotes	10

Fisheries Legislation Amendment (International Obligations and Other Matters) Bill 2005

Date Introduced: 17 March 2005

House: Senate

Portfolio: Department of Agriculture, Fisheries and Forestry

Commencement: Much of the Bill commences, on, or immediately after, Royal Assent. However, those provisions that deal with surveillance and enforcement powers only commence on Proclamation. Proclamation of these provisions may take place any time within two years of Royal Assent.¹ A third set of provisions² also rely on, amongst other things, the commencement of the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005.

Purpose

The main purpose of the Bill is to amend the *Fisheries Management Act 1991* to implement Australia's obligations under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (the [WCPFC](#)). Amongst other matters, the amendments will enable the Commonwealth to require Australian nationals and Australian-flagged vessels to comply with whatever regional conservation and management measures are agreed under the WCPFC.

There are a number of subsidiary purposes to the Bill which are briefly covered under **items 10-21** in the main provision section of this Digest.

Background

Regional Fisheries Management Organisations and the WCPF Convention

Under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), a State has jurisdiction over fishing activities within its 200 nautical mile exclusive economic zone (EEZ), subject to various duties such as ensuring fish stocks are appropriately managed to prevent over-exploitation. However, the area in which a particular fish species occurs may often extend beyond a State's EEZ into either a neighbouring State's EEZ or international waters (the 'High Seas'). In such cases, UNCLOS provides that coastal States³ or other States fishing relevant species shall seek to develop agreed conservation and management measures through, amongst other ways, forming regional fisheries management organisations (RFMOs).⁴

This UNCLOS obligation to attempt cooperation between relevant States is expanded upon in a more comprehensive way under the 1995 United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish

Stocks (the Fish Stocks Agreement, or [FSA](#)). Importantly, the FSA provides that where management arrangements have been agreed for such fish stocks through a RFMO or other arrangement, States which have ratified the FSA must be members of the RFMO or otherwise agree to apply the conservation and management arrangements if they are to fish the stocks.⁵ *This applies even to a coastal State seeking to fish within its EEZ and/or territorial waters.* Australia ratified the FSA in December 1999 after passing relevant legislation earlier that year.⁶

Formal negotiation of the WCPFC started in the mid 1990s. It was finalised and open for signature in 2000. Australia signed the WCPFC in 2000, and ratified it in 2003, with it coming force in June 2004. Seventeen States have [ratified](#) the WCPFC, with a number of others having signed but not yet ratified. Four of the six major so-called ‘distant water fishing nations (DWFNs)’ have ratified the WCPFC – China, Korea, Taiwan and the European Union. The United States and Japan have commenced the ratification process – the United States is a member of the FSA, and thus cannot fish for relevant species in the area covered by the WCPFC unless agreeing to comply with the WCPFC conservation and management measures. The [area](#) covered by the WCPFC includes the Australian territorial waters and its EEZ. The WCPFC applies to the highly migratory tuna species such as skipjack, yellowfin, bigeye and albacore as well as swordfish, marlin and sailfish. As such the main species managed by the Commonwealth in its Eastern Tuna and Billfish [fishery](#) will be subject to any conservation and management measures agreed under the WCPFC.

The [National Interest Analysis](#) prepared for the 2003 [inquiry](#) of the Joint Standing Committee of Treaties (JSCOT) into the WCPFC provides a useful summary of Australia’s obligations once the WCPFC was ratified. Paraphrasing the analysis, these include:

- WCPFC conservation and management measures must be applied within Australia’s territorial sea and EEZ, and Australia must ensure that vessels flying its flag comply with these measures, including in WCPFC waters outside Australia.
- Australian vessels authorised to fish outside Australian waters will require satellite position-fixing transmitters and be prepared to accept on-board observers from the regional observer program.
- Australia will be under a general obligation to implement and enforce conservation and management measures through effective monitoring, control and surveillance. Where other members allege that Australian nationals have violated the WCPFC, Australia is to provide information to that member and to the WCPFC Commission.
- If there is sufficient evidence to indicate that an Australian flagged vessel has undertaken unauthorised fishing, Australia is obliged to institute appropriate proceedings. If a ‘serious violation’ of the Convention is proven, Australia is obliged to ensure that the vessel ceases fishing and does not engage in fishing activities again until all sanctions have been complied with. All investigations and judicial proceedings must be carried out expeditiously and sanctions for violations must be

sufficiently severe to secure compliance, discourage violations and deprive offenders of the benefits of illegal activities.

- Australia must collect and share fishing information - vessel positioning, catch (including bycatch) data, and results from research programs.
- Australia will be under a general obligation to apply the precautionary principle.
- Australia will have to make contributions to the budget of the Commission.⁷

Notwithstanding some reservations about the WCPFC, JSCOT unanimously recommended that it be ratified by Australia, mainly because this would enable Australian vessels to continue fishing for species covered by the Convention.⁸

Some of Australia's more general obligations under the WCPFC can likely be implemented through existing legislation. Those that cannot relate to enforcement of WCPFC conservation and management measures. However, no measures have yet been agreed by members of the WCPFC. Presumably this is why legislation was not required in order to ratify the WCPFC in 2003.

On the issue of enforcement, it should be noted that the boarding and inspection regime for fishing vessels operating in the WCPFC area has not yet been agreed by the members of the Convention. Should it not be agreed by June 2006,⁹ the regime operating under the FSA will apply.¹⁰ The Bill implements boarding and inspection-related legislation based on the FSA model. As the second reading speech states, if WCPFC members do agree on a boarding and inspection regime that is substantially different to the FSA, the relevant provisions in the Bill will not be proclaimed and new legislation will be drafted to reflect the agreed regime.¹¹

Main Provisions

Main amendments (Schedule 1 Part 1)

Fisheries Administration Act 1991

Item 1 amends the *Fisheries Administration Act 1991* (the FAA) to explicitly allow AMFA to disclose, or authorise a 'prescribed agency' to disclose, personal information where this relates to fishing activities that 'may involve a breach of the laws of Australia or of a foreign country'. Under the *Privacy Act 1998*, personal information is virtually any sort of material about an individual whose identity is apparent, or can reasonably be ascertained, from the information. Prescribed agencies may be listed by regulations.¹²

Item 2 allows AFMA to set conditions restricting whether the personal information can be in turn disclosed by the body receiving it. It is unclear whether there would be any legal sanctions should an officer within the receiving body break any such restrictions. **Item 44** also contains a related amendment.

Fisheries Management Act 1991

Items 3-9 insert various references to the WCPFC, and terms used in it, into *the Fisheries Management Act 1991* (the FMA).

Existing paragraph 10(2)(c) provides that the FMA overrides State and Territory laws 'relating to fishing' in cases where the later requires that fish caught under Commonwealth authorisation can only be landed in Australia under a State or Territory licence, permit, payment of a fee etc. **Items 10-12** amend various parts of section 10 to extend this override to include any State and Territory law 'relating to fish' that prohibits the landing of such fish or regulates the possession or other dealing in fish in such a way that the law is 'likely to substantially discourage the landing of such fish'. State and Territory public health and safety laws are not covered by the Commonwealth override. The Explanatory Memorandum comments that the:

amendment addresses current State legislation that prohibits the taking, possessing, processing, consigning or sale or purchase of fish that are defined as 'commercially protected species'.¹³

It is understood that State and Territory Governments, as well as industry and recreational fishing groups, have been consulted regarding the amendments, but neither the Explanatory Memorandum nor the second speech reveal whether these parties support the amendments.

Existing section 17 deals with plans of management for Commonwealth fisheries. Under subsection 17(5), these plans must contain criteria by which the performance of its various measures are to be assessed. **Item 13** inserts an additional requirement – that the plans incorporate specified timeframes within which the measures are to be assessed. Under **item 14**, the objectives of a plan must also be 'consistent' with the objectives of the FMA contained in section 3. These amendments were recommended in the 2003 [report](#) of the Commonwealth Fisheries Policy Review.¹⁴

Items 15-21 remove references to the ballot system as a method of creating a fishing right. The ballot system was criticised in the Commonwealth Fisheries Policy Review:

Stakeholder feedback during this Review strongly supported the removal of the use of ballot approaches from the FM Act. Unlike auction and tender, ballot approaches were seen as failing to demonstrate a market-based mechanism for valuing access rights to new fisheries resources. It is appropriate to remove the ballot approaches from the legislation.¹⁵

More detail on the existing ballot system is contained in page 6 of the Explanatory Memorandum.

Existing section 38 allows AFMA to suspend a fishing concession for specified reasons.¹⁶ **Item 23** inserts a new reason - if the concession holder has committed a 'serious violation' of a WCPFC conservation and management measure which has led to sanctions being applied to the guilty party by Australia or a foreign country, but those sanctions have not been complied with. Given the strong wording in the relevant provision of the WCPFC,¹⁷ it is perhaps arguable that the provision should create a rebuttable presumption that AFMA must suspend the concession, rather than having it as a discretionary decision.¹⁸

Existing Division 1 of Part 6 of the FMA contains the surveillance and enforcement powers of FMA officers. **Items 24 to 33** separate Division 1 into four Parts (**new subdivisions A to D**) and insert various powers specifically concerning (foreign) 'WCPFC boats'.¹⁹ These new powers are contained in **new subdivision C, new sections 87FA to 87FD**. These provisions are modelled on the existing powers that are available to officers in relation to FSA boats, that is, foreign boats registered in a State that is a party to the FSA.²⁰

Most of the more coercive new powers (such as arresting without warrant or seizing a vessel and catch) can only be exercised with a respect to a WCPFC boat that is either in Australian waters or on the High Seas within the Convention area if the conditions in **new section 87FC** are satisfied.²¹ In particular, the officer must

- believe on reasonable grounds that a person or persons have committed an offence against **new sections 105H or 105I**
- notify the appropriate authority of the country of nationality of the boat of this belief, and
- reasonably believe that the country has authorised the action²² (ie arrest, seizure etc), except that this not necessary if the country has not acted in accordance with its international obligations arising from the notification²³ *and* a person on board the boat has 'seriously violated' a WCPFC conservation and management measure.

The circumstances in which a person 'serious violates' a WCPFC conservation and management measure are listed in new subsection 87FC(5). **There appears to be a significant drafting oversight in relation to new paragraph 87FC(5)(a)**. This paragraph states that a person seriously violates a measure if they commit a **new section 105H or 105I** offence through one or more of seven categories of actions. These categories are individual listed as **new subparagraphs 87FC(5)(a)(i)-(vii)**. **A required element of new section 105H or 105I offences is using a boat for fishing – if you do not use, or attempt to use, a boat for fishing, you cannot commit a new section 105H or 105I offence. However, using a boat for fishing is not a required element of six of the seven categories of actions mentioned above.** To provide an example from the Bill, subparagraph 87FC(5)(a)(vi) provides that

A person seriously violates a WCPFC conservation and management measure in relation to a boat if...the person commits an offence against section 105H or 105I **by changing or hiding the markings of the boat**' [emphasis added]

How can a person commit an offence against **new sections 105H or 105I** by (merely) changing or hiding the markings of the boat? As **new sections 105H and 105I** are currently drafted, it is not possible. The concept of a 'serious violation' of a regional conservation and management measure originally comes from Article 21(11) of the FSA. That Article does not require the act of fishing to occur. **Thus if the Bill is intended to reflect this aspect of the FSA, new sections 105H and 105I may have to be redrafted to delete fishing as a key physical element.**²⁴

New section 87FD sets out some particular procedures that an officer must follow in exercising any section 84 power on a WCPFC boat. Notably, when exercising a power on the basis that the officer believes that boat has been used in a **new section 105H or 105I** offence, they must as soon as practicable show the vessel's master a copy of the relevant WCPFC measure that has been violated: **new subsection 87FD(2)**.²⁵ There is no requirement that it be in any language other than English. The officer must also notify the flag State as soon as practical of the boarding and inspection (**new subsection 87FD(3)**) as well as a 'report of the exercise of the powers' once these have been completed.²⁶ Should the master ask that an objection or statement be noted in the report, it must be done so. Officers are under no obligation to bring this right to the attention of the master.

Item 36 inserts two new offences, **new sections 105AA and 105AB**, into the FMA for persons 'us[ing]' Australian registered vessels 'for fishing' in the High Seas portion of the WCPFC area. The offences occur where the vessel is fishing for a species covered by the WCPFC without proper authorisation. The Explanatory Memorandum states that:

There are already some provisions in the *Fisheries Management Act 1991* which will, in part, fulfil the obligations of Article 24(2). These include sections 95(5), 95(1AA), 105A and 105B of the *Fisheries Management Act 1991* which make it an offence for a concession holder to contravene a condition of his/her concession or for a master of an Australian-flagged boat to engage in unauthorised fishing on the high seas. These provisions do not adequately cover crewmembers using a fishing boat where there is no concession in place relating to the fishing being undertaken by the boat or the person.²⁷

Because of the broad definition of 'fishing' in existing section 4 of the FMA, all crew members would be subject to both new section **105AA** and **105AB** offences. **New section 105AA** is a strict liability offence and is subject to a maximum penalty of 60 penalty units (\$6 600). In relation to **new section 105AA**, the Explanatory Memorandum comments that:

A strict liability offence is considered appropriate in this case, as the requirement to prove all fault elements could create a substantial impediment to the prosecution of such offences. Evidence of intention and recklessness is often very difficult to obtain in the absence of admissions or independent evidence. In the context of a boat operating

without authorisation, there will not be an observer on board to provide independent evidence of this nature. The matter is particularly within the knowledge of the defendant and admissions are particularly difficult to obtain if a foreign citizen is involved. However, where such evidence is available it would be desirable to prosecute for the full offence that carries a much greater penalty.²⁸

Broadly similar strict liability offences already exist in the FMA, for example in subsections 95(2) and (5) and sections 99 and 100.

It is worth noting that, for strict liability offences, (reasonable) mistake of fact is available as a complete defence. In relation to **new section 105AB**, if crew members were ignorant of the fact that the fishing in question was not authorised by a concession, what level of inquiry (say of the vessels master or owner) would they have to demonstrate that this mistake was reasonable? Of course, if the Commonwealth decided on the evidence available that some crew members should not shoulder the blame for any unlawful fishing, it may exercise its discretion not to prosecute them.

Existing sections 105A-D cover offences involving Australian-flagged vessels outside the Australian Fishing Zone (AFZ).²⁹ Existing subsection 105D(4) allows AFMA to authorise officials of a foreign country party to the FSA to investigate a possible contravention of a regional management and conservation measure. The vessel must have been boarded on the High Seas and the foreign country must have informed Australia that there are reasonable grounds for suspecting the contravention. The authorisation can only be given if AFMA is satisfied that the investigation will be carried out in accordance with the FSA. The authorisation can be withdrawn at any time. **Item 39** simply extends these provisions to suspected contraventions of WCPFC management and conservation measures.

Existing subsection 105D(5) allows the Attorney-General to authorise a foreign country to enforce its law regarding a regional measure contravention. This authorisation can be given on completion of an investigation referred to above and only if the enforcement will be taken in accordance with the regional measure. The authorisation can be withdrawn at any time. **Item 40** simply extends these provisions to suspected contraventions of WCPFC management and conservation measures.

New sections 105DA-DD create offences for Australian citizens aboard foreign vessels that contravene WCPFC measures in the either foreign waters or High Seas covered by the WCPFC area. The other main elements (the person uses the boat for fishing, the fishing is for WCPFC stock etc) are essentially the same as for **new sections 105AA** and **105AB**. Again, there are both offences in which fault must be proved and ones of strict liability. A person cannot be convicted under **new sections 105DA-DB** (which deal with Australian citizens unlawfully fishing in foreign waters) if they have already been convicted or acquitted by the relevant foreign State for the same act of unlawful fishing.

New sections 105H and **105I** create offences of persons using a WCPFC boat for fishing in a way that contravenes WCPFC measures on the high seas. The Attorney-General's

consent is required before a charge can be proceeded with by Australian authorities: **new section 105J**. The Attorney-General must take into account views expressed by the foreign government³⁰ whose boat is alleged to be involved in the offence. Note that the Attorney-General's consent is not necessary to arrest and charge a person, nor is required to commence proceedings for their extradition to Australia (if relevant) or for remanding them in custody or on bail. However, if the Attorney-General does not give consent to the prosecution, any extradition or remand proceedings would also cease.

Item 44 inserts **new section 108B** regarding the disclosure of personal information. The sort of information, and the circumstances under which it may be disclosed, largely replicate **items 1-2**. However, in **new section 108B** it is the Minister (rather than AFMA) that has the power to disclose, or authorise it, and the disclosure can only be made to foreign governments and/or their instrumentalities, or international intergovernmental bodies.³¹

Paragraph 168(2)(i) currently allows regulations to be made to apply an infringement notice scheme to alleged offences under existing section 93 and 95. This scheme allows for a fine to be paid as an alternative to prosecution. **Item 46** will extend this to alleged existing section 100 offences – persons using a foreign boat in the AFZ for unauthorised commercial fishing. Although no reason is given for the extension, presumably this is to allow another means of sanction where it is considered to difficult or inappropriate to attempt to gain a conviction.

Item 47 inserts **new paragraph 168(2)(na)** to allow regulations to be made requiring the use of vessel monitoring systems on Australian vessels on the High Seas in the WCPFC area. These systems will only be required when the vessel is in the area for a 'purpose related to fishing for a WCPFC fish'. This provision is this is to enable compliance with Article 24(8) of the WCPFC.

Contingent amendments (Schedule 1 Part 2)

The Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 (the Border Protection Bill) was introduced into Parliament in February 2005. It proposes to amend the *Fisheries Management Act 1991*³² to provide for a law enforcement and detention regime for suspected illegal foreign fishers consistent with the *Migration Act 1958*.

The current Bill also deals in part with the issue of suspected illegal foreign fishers. To the extent that it is allowable under the WCPFC, it is obviously desirable that the law enforcement and detention powers relating to violations of WCPFC offences are consistent with other comparable other offences in the FMA as (prospectively) amended by the Border Protection Bill. **Items 48 to 59** are designed to achieve this consistency. However, even should the Border Protection Bill come into force, these items will not themselves come into force until the relevant enforcement and surveillance provisions in the main part of the Bill are proclaimed. It is likely that such proclamation will only occur once the

States that are party to the WCPFC have decided on an enforcement regime for the Convention and the Commonwealth Government has decided that this regime is compatible with the main elements of the Border Protection Bill.

Concluding Comments

As noted in the background section of this Digest, once the WCPFC came into force in 2004, ratification of the Convention by Australia was necessary if Australian vessels were continue to fish for tuna and other species coming within its scope. This includes fishing taking place within Australia's AFZ. The various major provisions in the Bill, particularly those related enforcement will be required as WCPFC conservation and management measures and boarding and inspection arrangements are progressively agreed and implemented by Convention members.

The readers attention is drawn to the apparent drafting error affecting the definition of 'seriously violates' a WCPFC conservation and management measure in **new subsection 87FC(5)**. If the analysis in the main provisions section of this Digest is correct, the provision does not properly reflect the width of the WCPFC and will presumably require amendment.

Endnotes

- 1 However, if proclamation does not take place within this time, the relevant provisions (**items 3, 5 and 7** in the table contained in clause 2 of the Bill) will automatically be repealed.
- 2 The provisions in **items 9 and 10** in the table contained in clause 2 of the Bill.
- 3 In this context coastal States are countries in whose EEZ the relevant fish stocks occur.
- 4 FSA, Article 63(2).
- 5 FSA, Article 17(2).
- 6 The *Fisheries Legislation Amendment Act (No. 1) 1999*. The relevant [Bills Digest](#) provides more detail on the FSA.
- 7 The contribution is small, due to the relatively low value of the Australian catch in the Convention area. The annual contribution is around US\$17 000 from a budget of US\$975 000.
- 8 Paragraphs 7.99-106, at pp. 87-88.
- 9 That is, within two years of the WCPFC entering into force.
- 10 WCPFC, Article 26(2).
- 11 Senator Chris Ellison, *Senate Hansard*, 17 March 2005 pp. 9-10.
- 12 There would appear to be no need for the existing section 168 of the FMA, which contains the regulation-making power, to be amended to specifically allow this.

- 13 At p. 15.
- 14 Outcome 16, at p. 22.
- 15 At p. 29.
- 16 A fishing concession is defined in existing section 4 of the FMA as ‘a statutory fishing right or fishing permit or a foreign fishing licence’.
- 17 Article 25(4) says in part ‘Each member of the Commission shall ensure that, where it has been established, in accordance with its laws, that a fishing vessel flying its flag has been involved in the commission of a serious violation of the provisions of this Convention or of any conservation and management measures adopted by the Commission, the vessel concerned ceases fishing activities and does not engage in such activities in the Convention Area until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with.’
- 18 Of course, AFMA may have administrative guidelines setting out the situations under which concessions should be suspended under section 38 of the FMA.
- 19 WCPFC boats are foreign boats registered in a State that is a party to the WCPFC.
- 20 See particularly existing sections 87A-87J of the FMA.
- 21 Although the restrictions do not apply in respect to an officer’s power in relation to a number of existing offence provisions listed in **new subsection 87FC(6)**.
- 22 This authorisation can be in ‘general terms’ rather than specific authorisation – presumably the officer does not have to wait for a response from the flag State as long as the intended action is within the scope of an enforcement regime previously agreed between members of the WCPFC.
- 23 The flag State must, for example, cooperate with the reporting State in taking appropriate enforcement action: Article 25(6).
- 24 Note that the same applies to existing section 105F, which is intended to implement the FSA.
- 25 As well as the sections of the FMA and regulations relating the violation of that measure.
- 26 The exercise of the powers may take some time to complete if for example if an officer orders that the boat be taken into port in Australia from the High Seas.
- 27 At p. 22.
- 28 At pp. 22-23.
- 29 The outer limits of the AFZ are the same as the EEZ.
- 30 Due to diplomatic issues, Taiwan is referred to as a ‘entity’ rather a State, but in practice there is no difference.
- 31 Although, as the Explanatory Memorandum notes at p. 28, the Minister may, under the existing section 163, delegate this power to AFMA or the department.
- 32 And the *Torres Strait Fisheries Act 1984*.

© Copyright Commonwealth of Australia 2005

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Information and Research Service, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 02 62772764.