



## Fisheries Legislation Amendment (Cooperative Fisheries Arrangements and other Matters) Bill 2005

Angus Martyn  
Law and Bills Digest Section

### Contents

Purpose. . . . .	2
Background. . . . .	2
Statutory Objectives in Commonwealth fisheries legislation (Schedule 1) . . . . .	2
Commonwealth, State and Territory cooperative fisheries arrangements (Schedule 2) . . . . .	3
Main Provisions . . . . .	5
Schedule 1 – Objectives. . . . .	5
Fisheries Administration Act 1991 . . . . .	5
Fisheries Management Act 1991 . . . . .	6
Schedule 2 – Cooperative Arrangements. . . . .	6
Fisheries Administration Act 1991 . . . . .	6
Fisheries Management Act 1991 . . . . .	6
Concluding Comments. . . . .	8
Endnotes. . . . .	8

## **Fisheries Legislation Amendment (Cooperative Fisheries Arrangements and other Matters) Bill 2005**

**Date Introduced:** 7 December 2005

**House:** Senate

**Portfolio:** Fisheries, Forestry and Conservation

**Commencement:** On Royal Assent

### **Purpose**

To amend Commonwealth fisheries legislation for three main purposes:

- to clarify the meaning of some key objectives which the responsible Minister and Australian Fisheries Management Authority must ‘pursue’ in administering the legislation and/or performing their statutory functions
- to make it easier to vary cooperative fisheries arrangements between the Commonwealth, States and the Northern Territory; and
- to allow for a combination of Commonwealth, State and/or Northern Territory law to apply in a fishery that is subject to cooperative fisheries arrangements.

### **Background**

Statutory Objectives in Commonwealth fisheries legislation (Schedule 1)

*The Fisheries Administration Act 1991 (FAA) and the Fisheries Management Act 1991 (FMA) both contain a set of objectives which the responsible Minister and Australian Fisheries Management Authority (AFMA) must pursue in administering the legislation and/or performing their statutory functions. Whilst some objectives are only found in either the FAA or FMA, a number are common to both. Relevant to the Bill, these include:*

- 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 [emphasis added]; and
- **maximising economic efficiency** in the exploitation of fisheries resources [emphasis added].

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

These particular objectives have been subject to litigation brought by fishing operators against AFMA. Although the context of the litigation has varied, it has often related to conditions attached by AFMA to fishing permits, including vessel size, fish quotas etc.

In relation to the **maximising economic efficiency** objective, the leading case is *Bannister Quest v AFMA*,<sup>1</sup> decided in 1997 in the Federal Court by Drummond J. As noted by *Looking to the Future: A Review of Commonwealth Fisheries Policy*,<sup>2</sup> this case considered whether the objective could only be achieved if there was explicit recognition of the relative economic efficiency of individual operators by AFMA in its implementation of fisheries management arrangements. This view was rejected by the court, who found rather that AFMA should take relevant decisions to

...facilitate increasing the aggregate profit of the whole body of operators in a particular fishery.<sup>3</sup>

In other words, AFMA should seek to maximise the collective economic return from harvesting the total allowable catch of the relevant fishery without regard to the efficiency (or any other economic, social or equitable considerations) of individual operators.

In relation to the **ecologically sustainable development** (ESD) objective, ESD is not defined in the FMA or FAA. However, by examining the relevant second reading speech and other contemporaneous policy documents, Drummond J. in *Bannister Quest* concluded:

Section 3(1)(b), on its true construction, requires AFMA, in pursuing this objective in the performance of its functions, **to limit its consideration** to matters that relate to two things, ensuring the biological sustainability of fish stocks and ensuring the protection of the marine environment upon which those fish resources depend [emphasis added].<sup>4</sup>

*Looking to the Future: A Review of Commonwealth Fisheries Policy* recommended that a definition of ESD, consistent with that contained within the *Environment Protection and Biodiversity Act 1999*, be incorporated into fisheries legislation.<sup>5</sup>

## Commonwealth, State and Territory cooperative fisheries arrangements (Schedule 2)

Responsibility for the management of fisheries in Australian waters is shared between the Commonwealth, States and the Northern Territory. Whilst constitutionally the States and the Northern Territory have legal jurisdiction over waters out to three nautical miles (nm), the Offshore Constitutional Settlement (OCS) enables the Commonwealth, States and Northern Territory to enter into cooperative arrangements to manage fisheries where desirable – for example where a fishery straddles the three nm boundary. Depending on the particular arrangement, Commonwealth, State or Territory law will apply throughout the fishery. Such a fishery may be managed by AFMA or a State or Territory fisheries

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

authority, or in some cases a Joint Authority, comprising the Commonwealth and relevant State or Northern Territory.<sup>6</sup>

*Looking to the Future: A Review of Commonwealth Fisheries Policy* identified a number of concerns about the existing cooperative fisheries arrangements:

- There is a lack of consistency and effective cooperation on managing some fish stocks shared between Commonwealth, and state and Northern Territory-managed fisheries.
- The arrangements are generally not consistent with the principles of ecosystem-based fisheries management.
- There are increased costs to governments and fishers because of duplication of logbooks, use of satellite based vessel monitoring systems (VMS) and compliance programmes, and the lack of data sharing between jurisdictions.
- There are unresolved issues on the management of fish resources for different sectors, including recreational fisheries management.

Governments have also disagreed over:

- different management approaches for shared stocks
- the resolution of access to fisheries resources for competing interests
- management of bycatch species
- duplication of licensing and enforcement requirements that increase costs for commercial fishers
- the fact that most governments do not seek to maximise economic efficiency in commercial fisheries.

State and territory governments, as well as the Commonwealth, have identified areas for improvements to the fisheries arrangements under OCS. The key areas include the above concerns; sharing stock assessment and other fisheries data; and greater coordination of fisheries research and development, and of compliance and enforcement arrangements.<sup>7</sup>

Discussions with the States and Territories over addressing these issues have been ongoing.

In Commonwealth legislation, the main provisions covering cooperative fisheries arrangements are found in Part 5 of the FMA. Schedule 2 makes two main changes to Part 5.

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Firstly, it allows for OCS cooperative arrangements to be varied (amended) without having to terminate the relevant arrangement and substitute an entirely new one as is currently the case. The ability to merely vary an arrangement allows the various management plans, permits and other instruments that operate under it to continue without danger of disruption, assuming these instruments are consistent with the amended arrangement. An associated change is that the power to enter into and terminate arrangements will be given to relevant Commonwealth and State/Northern Territory Ministers rather than the Governor-General and State/Northern Territory Governors.<sup>8</sup>

The second main change is to allow for a more flexible application of Commonwealth and/or State/Territory law in fisheries managed by Joint Authorities. Currently, where the fishery involves only one State or the Northern Territory and the Commonwealth, either Commonwealth or State/Territory law must apply to that fishery. Where the fishery involves the Commonwealth and two or more States or a State and the Northern Territory, only Commonwealth law may apply. The Bill will change this by allowing State/Territory laws to apply to a fishery which is managed by a Joint Authority involving the Commonwealth and more than one State/Territory. Also it will allow for a combination of the Commonwealth, State and North Territory law to apply to any fishery which is managed by a Joint Authority. In relation to this 'multi-jurisdictional' approach, the second reading speech comments:

This will work in practice by defining the areas to which each law would apply, with these areas most likely flanking each other but not overlapping. This option provides for greater flexibility for cooperative management arrangements and the ability to rationalise existing OCS fisheries arrangements.<sup>9</sup>

The move to a more flexible approach in managing fisheries that lie across jurisdictional boundaries was endorsed by the Natural Resource Management Ministerial Council in October 2003.<sup>10</sup>

## **Main Provisions**

### **Schedule 1 – Objectives**

#### **Fisheries Administration Act 1991**

**Items 1 and 4** combine to insert a definition of the 'principles of ecologically sustainable development'. The definition is taken from definition of ecologically sustainable development (ESD) in section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA).

Does this insertion change the existing meaning of the ESD objective? The question turns on whether the enactment of the EPBCA, containing as does a broad statutory definition what constitutes the principles of ESD,<sup>11</sup> overturns by implication the rather narrow

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

meaning given to the ESD objective by Drummond J in *Bannister Quest* (see passage quoted in background section above).<sup>12</sup> Any answer must be speculative since both the subject matter and intent of the EPBCA is wider than the FMA/FAA<sup>13</sup> and the ESD concept was still somewhat in its infancy when the FMA/FAA were drafted in the early 1990's. Even if as a matter of strict legal interpretation **Items 1 and 4** do represent a change in the law, it is unclear to what extent this will have any practical impact on AFMA's and the Minister's decision-making under the FAA/FMA.

**Item 3** replaces the existing maximising economic efficiency objective in paragraph 6(c) with a new version: 'maximising the net economic returns to the Australian community from the management of Australian fisheries'. This should have no impact on AFMA's and the Minister's decisions under the FAA. As the second reading speech expresses it:

The underlying meaning of the economic efficiency objective will not change. That is, AFMA will still be obliged to manage the effort and catch of a fishery to maximise the difference, at a fishery level, between total revenue and total costs, taking into account the impact of current catches on future stock levels.<sup>14</sup>

### **Fisheries Management Act 1991**

**Items 5-8** make corresponding changes in the FMA as those noted above for **items 1-4** for the FAA.

## Schedule 2 – Cooperative Arrangements

### **Fisheries Administration Act 1991**

**Items 1 and 2** are consequential changes to the FAA resulting from amendments made to the FMA. The changes are of an administrative nature only.

### **Fisheries Management Act 1991**

**Item 6** amends existing section 71 of the FMA to allow for multi-jurisdictional arrangements to apply in fisheries managed by Joint Authorities – that is, it enables a fishery to be managed in accordance with the law of the Commonwealth *and* the law of the relevant State<sup>15</sup> (**new subsection 71(2)**) or States (**new subsection 71(3)**). In cases where a multi-jurisdiction arrangement is to apply, the geographical areas for which each jurisdiction has management responsibility must be identified, such that they do not overlap: **new subsection 71(4)**. Also, for that part of the fisheries to be managed by the State(s), the arrangement may, if required by the Commonwealth, provide for giving effect to Australia's obligations under international law: **new subsection 71(5)**.

**Items 9 and 12-14** amend various parts of existing sections 74 and 75 so as effectively transfer the power to enter into and terminate arrangements from the Governor-General

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

and State/Northern Territory Governors to relevant Commonwealth and State/Northern Territory Ministers.

**Item 11** adds **new section 74A**. Currently, Part 5 does not contain the legislative power to vary cooperative arrangements – only to create or terminate them. **Item 11** will allow for arrangements to be varied by an instrument approved by relevant Commonwealth and State/Northern Territory Ministers without having to terminate the relevant arrangement and substitute an entirely new one. The ability to vary an arrangement allows, subject to **new subsection 74A(4)**, that the various management plans, permits and other instruments that operate under the arrangement to continue without danger of disruption. The Ministerial powers of creation, variation and termination cannot be delegated: **item 21**.

Variations made through **new section 74A** must be published in the *Gazette*. The variation cannot take effect before the date of publication: **new subsection 74A(2)**. Any plans of management, fishing permits etc that are inconsistent with the variation cease to have effect to the extent of the inconsistency: **new subsection 74A(4)**.

An instrument which creates, varies or terminates an arrangement is not a legislative instrument: **items 10, 11 and 15**. The Explanatory Memorandum to the Bill comments that such instruments do not themselves

determine the law or vary the content of the law, and does not affect any privileges, interests, obligations or rights within the meaning of section 5 of the [*Legislative Instruments Act 2003*].<sup>16</sup>

**Items 17, 18 and 20** make consequential amendments to existing sections 76, 77 and 78 respectively to take account of the possibility of multi-jurisdictional arrangements applying within a fishery. Where a fishery or part of fishery within a State's three nm coastal waters is to be managed under Commonwealth law, the relevant waters are to be treated as part of the Australian Fishing Zone for the purposes of the FMA: **item 17**. Conversely, where a fishery or part of fishery is to be managed under State law, the FMA (other than Division 3) does not apply to the fishery: **item 18**. However, matters relating to foreign vessels always remain subject to Commonwealth law. Fisheries managed by Joint Authorities for which part of the fishery is to be managed under Commonwealth law, AFMA has the same powers over that part as if it were managed by AFMA: **item 20**. These items do not represent any significant changes to existing sections 76, 77 and 78.

**Item 22** deals with various transitional and commencement issues. In particular, the amendments made in **Schedule 2** do not apply to a State (and hence any cooperative fisheries arrangements with that State) until the Commonwealth Minister has published a notice in the *Gazette* that amendments are to commence in respect of that State. This will allow the States and Territories to amend any necessary parts of their own legislation to align with the provisions of the Bill.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

## Concluding Comments

As noted the main provisions section of this digest, one of the main effects of the Bill is to make it easier to revise cooperative fisheries arrangements between the Commonwealth, States and the Northern Territory. The Bill also provides that any existing plans of management, fishing permits etc that are inconsistent with a varied arrangement cease to have effect to the extent of the inconsistency (**new subsection 74A(4)**). With this in mind, it will obviously be important to take into account the interests of all relevant stakeholders in making any variations to a cooperative arrangements applying to a particular fishery.

## Endnotes

---

- 1 (1997) 48 ALD 53.
- 2 Department of Agriculture Fisheries and Forestry, June 2003.
- 3 *ibid.*, at p. 69.
- 4 *ibid.*, at p. 73.
- 5 p. 18.
- 6 The Commonwealth always retains legal jurisdiction for managing foreign fishing operations in Australian waters.
- 7 *op .cit.*, p. 41
- 8 The power to amend arrangements will likewise reside with the relevant Commonwealth and State/Northern Territory Ministers.
- 9 Senator the Hon. Chris Ellison, *Senate Debates*, 7 December 2005, p. 6.
- 10 Council Communique, 3 October 2003, p. 4.
- 11 For example, the ‘new’ ESD meaning explicitly incorporates social and equity considerations.
- 12 Note that this case involved AFMA decisions made under the FMA rather than the FAA, but the court’s interpretation of the relevant objectives of the FMA also apply to the corresponding objectives in the FAA.
- 13 See discussion of the *in pari materia* (‘in analogous cases’) principle in Pearce, *Statutory Interpretation in Australia*, 2001 paragraphs 3.33–3.35.
- 14 Senator the Hon. Chris Ellison, *Senate Debates*, 7 December 2005, p. 5.
- 15 Note that for the purposes of Part 5 of the FMA, section 59 effectively provides that the term ‘State’ also includes the Northern Territory.
- 16 Explanatory Memorandum, pp. 11–12.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



---

© Copyright Commonwealth of Australia 2006

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 2764.

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*