



Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008

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Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008

Date introduced: 20 March 2008

House: Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Section 1 to 3 on day of Royal Assent; Schedule 1 on 1 July 2008; Schedules 2 and 4 on 28th day after the day of Royal Assent; Schedule 3 on a date fixed by Proclamation or the day after a twelve month period from the date of Royal Assent.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The main purposes of the Bill include:

- amending the governance arrangements of the Australian Fisheries Management Authority to make them consistent with the recommendations of the 2003 Uhrig Review on Corporate Governance of Statutory Authorities and Office Holders;
- strengthening enforcement provisions of the *Fisheries Management Act 1991*; and
- enhance the enforcement provisions to take action against foreign vessels contravening international fisheries management measures.

Background

Review of the Corporate Governance of Statutory Authorities and Office Holders

Mr John Uhrig was commissioned by the former Prime Minister, Hon John Howard, to review the corporate governance of statutory authorities, and to examine particularly the relationships between the statutory authorities and the responsible Minister.¹ The stated

1. Dr. Richard Grant, 'The Uhrig Review and the future of statutory authorities', *Research Note*, no.50, Parliamentary Library, Canberra, 2004-05.

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purpose was to improve the performance of these bodies without in any way impinging or compromising on their statutory duties. The Review undertook to do the following:

A key task was to develop a broad template of governance principles that, subject to consideration by government, might be extended to all statutory authorities and office holders. As part of the process of developing that broad template, the Review was asked to consider the governance structures of a number of specific statutory authorities and best practice corporate governance structures in both the public and private sectors.²

The Review found that there were a number of governance issues affecting several of the authorities that were part of the Review. Some of those factors included

unclear boundaries in their delegation, a lack of clarity in their relationships with Ministers and portfolio departments, and a lack of accountability for the exercise of their power. This lack of governance arises primarily due to a ‘hands off’ attitude assumed by many when dealing with statutory authorities. This situation is often further complicated by the presence of a board, particularly those where it is impractical for government to provide the full governing powers required to be effective.³

Commonwealth Financial Framework

According to the Department of Finance and Deregulation website, the Australian Government’s financial framework is established and supported by key financial management and accountability legislation, comprising:

- [Financial Management and Accountability Act 1997](#) (FMA ACT)
- [Financial Management and Accountability Regulations 1997](#) (FMA Regulations)
- [Financial Management and Accountability Orders 2005](#) (FMA Orders 2005)
- [Financial Management and Accountability Orders \(Financial Statements\)](#) (FMOs)
- [Commonwealth Procurement Guidelines](#) (CPGs)
- [Fraud Control Guidelines](#)

The FMA Act sets out the financial management, accountability and audit obligations of agencies (including Departments) that are financially part of the Commonwealth (and form part of the General Government Sector), in particular:

- for managing public resources efficiently, effectively and ethically; and

2. John Uhrig, Review of the Corporate Governance of Statutory Authorities and Office Holders, 2003, p. 1.

3. *ibid*, p. 5.

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- for maintaining proper accounts and records of the receipt and expenditure of public money.⁴

The Commonwealth Authorities and Companies (CAC) legislation comprises:

- [Commonwealth Authorities and Companies Act 1997](#) (CAC Act)
- [Commonwealth Authorities and Companies Regulations 1997](#) (CAC Regulations)
- [Commonwealth Authorities and Companies \(Report of Operations\) Orders 2005](#) (CAC (ROO) Orders 2005)
- [Commonwealth Authorities and Companies Orders \(Financial Statements\)](#) (FMOs)

The CAC Act sets out the financial management, accountability and audit obligations on Commonwealth statutory authorities and companies in which the Commonwealth has at least a direct controlling interest. In particular, the Act provides:

- the reporting and audit obligations for directors of authorities;
- standards of conduct for officers of authorities; and
- requirements for ensuring that wholly-owned Commonwealth companies keep Ministers and Parliament informed of their activities.⁵

As at 1 May 2008, there are 100 agencies subject to the *FMA Act* and 89 bodies subject to the CAC Act.⁶

Australian Fisheries Management Authority– Current Governance Arrangements of AFMA

The Australian Fisheries Management Authority (AFMA) is a statutory authority responsible for the management and use of Commonwealth fish resources.

AFMA's operations are overseen by an eight member board of Directors, consisting of:

- a Chairperson;
- a Director representing the Commonwealth Government;
- AFMA's Managing Director; and
- five directors nominated via a legislative selection committee.

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4. Department of Finance and Deregulation, *FMA Legislation Overview*, http://www.finance.gov.au/finframework/fma_legislation.html
 5. Department of Finance and Deregulation, CAC Legislation Overview, http://www.finance.gov.au/finframework/cac_legislation.html
 6. Flip Chart of FMA Act agencies and CAC Act bodies, <http://www.finance.gov.au/finframework/docs/FMACACFlipchart.pdf>

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The Board is responsible for setting the policy framework and for ensuring that adequate resources and expertise are available to meet AFMA's legislative obligations. Responsibility for the implementation of fisheries management decisions and AFMA's day-to-day business affairs resides with the Managing Director.⁷ A full list of AFMA's functions are set out in section 7 of the *Fisheries Administration Act 1991*.

Proposed Governance Arrangements for AFMA

The governance arrangements proposed by the Bill are in accordance with the recommendations of the Uhrig Review and contained in the Department of Finance's policy document *Governance Arrangements for Australian Government Bodies*. This provides guidance in implementing the changed governance arrangements for the AFMA. 'It is intended that corporate governance arrangements of statutory authorities be such that they promote the effective implementation of policy.'⁸

In the case of AFMA, the governance arrangements will be changed so that it will be a prescribed agency under the *FMA Act* and a statutory agency under the *Public Service Act 1999*.

These bodies are financially part of the Commonwealth, holding public money that can only be spent under the authority of an appropriation from the Australian Parliament. The FMA Act should especially apply to primarily budget-funded bodies, regulators and bodies that raise public money under a Commonwealth law.⁹

The Bill removes the existing board of directors and establishes a Commission with a Chairperson and a limit of 8 commissioners including the Chief Executive Officer (CEO). The CEO replaces the existing position of Managing Director. The Commission and the CEO will perform the functions and powers of AFMA. The Commission will be responsible for domestic fisheries management and the CEO for foreign compliance matters. The CEO will report directly to the Minister on these matters and the Explanatory Memorandum suggests that this may have implications for foreign policy and should also enable a better integration with border protection operations.

The Bill also sets out detailed provisions requiring Commissioners to disclose conflicts of interest on appointment and during their terms of office are obliged to report any conflicts of interest arising in relation to a matter under consideration by the Commission.

⁷. Australian Fisheries Management Authority, <http://www.afma.gov.au/about/who/board/default.htm>, accessed on 14 May 2008.

⁸. Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, August 2005.

⁹. *ibid.*

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Management of International Treaty Obligations

Australia has responsibilities under the 1995 United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement) which Australia ratified on 23 December 1999.

To date Australia 'has taken on greater responsibilities for monitoring and controlling the activities of domestic and foreign fishing vessels on the high seas as well as in the Australian Fishing Zone (AFZ). Australia has an important role in negotiations to establish regional management and conservation measures and to secure the rights of existing and prospective fishing by Australian vessels. This is particularly applicable with highly migratory species, where the conservation measures and exploitation rates adopted for the high seas have a direct impact on sustainability levels inside the AFZ.'¹⁰

Australia is a key member of a number of international and regional fisheries and fisheries related forums, including the Commission for the Conservation of Southern Bluefin Tuna, Indian Ocean Tuna Commission, the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and the Convention on the Conservation of Antarctic Marine Living Resources.

In Schedule 3, the Bill widens a number of the definitions to broaden the application of the *Fisheries Management Act 1991* to encompass references to fish stocks by any prescribed international fisheries management organisation and not just the UN Fish Stocks Agreement. It provides a more comprehensive framework to allow for authorised officers to exercise powers under section 84 of the *Fisheries Management Act 1991* more broadly. That is, under certain circumstances, to allow for the boarding and inspection of foreign vessels not only in Australian waters, but also on the high seas or in the waters of a foreign country. These provisions can be found in new section 87HA. According to the Explanatory Memorandum:

Under international law Australia has the right to take surveillance and enforcement action against foreign vessels in relation to breaches of international fisheries management measures as are authorised by the country to which the vessel concerned is flagged.¹¹

10. Australian Fisheries Management Authority, Annual Report, 2006-07, p.84.

11. Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and other Matters) Bill 2008, Explanatory Memorandum, p.34.

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Financial implications

According to the Explanatory Memorandum there are no significant additional administrative costs to the Australian Government. There is no reduction in AFMA's net funding or cash reserves. However changes to AFMA's tax liabilities will save AFMA approximately \$900,000 per annum. Some of these savings will be passed on to the industry through reduced annual levies. AFMA estimates that increased reporting requirements required by the FMA Act and the Public Service Act will cost approximately \$250,000 annually. The amendments to deter illegal, unreported and unregulated (IUU) fishing will not have direct additional implications. AFMA will fund apprehensions and prosecutions from its existing compliance budget in the short term.¹²

Main provisions

Schedule 1 – New Governance Arrangements for AFMA

Amendments to the *Fisheries Administration Act 1991*

Item 21, new subsection 8(2) provides that Australian Fisheries Management Authority (AFMA) will no longer have the power to acquire or dispose of real or personal property, cannot enter into contracts or have the power to lease land or buildings for the AFMA. It should be noted that certain other agencies still have some or all of these powers even though they are subject to the FMA Act and a prescribed agency under the FMA Regulations 1997.

Item 25, new subsection 10(1) provides that the AFMA is a body corporate, it must have a seal and may sue or be sued in its own name. **New subsection 10(2)** provides that the seal must only be used for authorised purposes for the performance or exercise of domestic fisheries functions or foreign compliance functions by AFMA. **New subsection 10(3)** provides that judicial notice of the seal on a document must be taken by courts, judges or persons acting judicially.

New subsection 10B(1) provides that there will be a Commission and a Chief Executive (CEO). The Commission will have responsibility for domestic fisheries management (**new subsection 10B(2)**) while the CEO is responsible for the foreign compliance functions and giving effect to decisions of the Commission (**new subsection 10B(3)**). Importantly, the CEO is not subject to direction by the Commission in relation to the CEO's powers and functions under the *Financial Management and Accountability Act 1997* (FMA Act) or the *Public Service Act 1999* or the foreign compliance functions and powers of AFMA (**new subsection 10B(4)**).

¹² Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008, Explanatory Memorandum, p.6.

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New subsection 10C(1) provides that the Minister can give written directions to the CEO relating to the foreign compliance functions and powers of AFMA. A direction can relate to one situation only (**new subsection 10C(2)**). Directions must be tabled within 15 days after the direction is made (**new subsection 10C(4)**). Note that the wording of **subsection 10C(4)** is expressed in terms of the phrase ‘of that House’ is somewhat unclear in terms of its plain English meaning. The Minister can determine not to table a direction if he or she determines it would be ‘prejudicial to the national interest to’ do so (**new subsection 10C(5)**). Both the direction and the determination made under section 10C are not legislative instruments (**new subsection 10C(6)**) and so they cannot be disallowed by Parliament.

Division 2– Constitution of Commission

New subsection 11(1) provides the constitution of the Commission will consist of a Chairperson, part-time commissioners and the CEO. There will be a limit of 8 part-time commissioners including the Chairperson (**new subsection 11(2)**).

Division 3–Appointment of Commissioners

As is currently the case with the AFMA Board (except the Managing Director) the Commissioners will be appointed by the Minister.

Item 26, new subsection 12 (3) provides a list of eligibility criteria for appointment as a commissioner and also lists the areas of expertise from which persons may be considered. These are broadly similar to the criteria in existing section 30 that relate to the five directors that are nominated via the legislative selection committee.

However a new provision is that a commissioner must not hold any of the following (**new paragraph 12(3)(b)**):

- an executive position in a fishing industry association;
- a fishing concession under the *Fisheries Management Act 1991*;
- a fishing licence or permit under the *Torres Strait Fisheries Act 1984*;
- an executive position in a company that holds a fishing concession, licence or permit.

The appointment of a commissioner is automatically terminated if the Commissioner becomes the holder of any of the above positions (**new subsection 21(3)**). These are presumably designed to minimise any conflicts of interest.

Item 42, new subsection 20(1) provides that a commissioner must give the Minister a written statement of any interest, pecuniary or otherwise which may conflict with the functions of the commissioner when appointed. A Commissioner must make disclosures during the term of appointment if conflicts arise (**new subsection 20(2)**) and as soon as

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possible after they become known to the Commissioner (**new subsection 20(3)**). A register of interests must be maintained by the Commission (**new subsection 20(4)**).

Division 4–Operation of the Commission

Item 55, new subsection 23(6) provides that if a commissioner has to leave a meeting because an interest in a matter has arisen and he or she can no longer participate in the meeting and there is no longer a quorum, the remaining commissioners will constitute a quorum for the meeting’s deliberations and decisions. The Commission must keep minutes (**new subsection 23(7)**) and the Commission may invite persons to meetings to advise commissioners on any matter (**new subsection 23(8)**).

Item 56, new subsection 24(1) provides that a commissioner with an ‘interest’ in a matter being considered by a meeting must disclose the nature of the ‘interest’ to the meeting and do so as soon as he or she becomes aware of the facts (**new subsection 24(2)**). These disclosures are to be recorded in the minutes (**new subsection 24(3)**). The Commissioner is not to be present when the matter is dealt with and must not participate in any decision on the matter (**new subsection 24(4)**) unless the Commission determines otherwise and that will be recorded in the minutes (**new subsection 24(6)**).

New subsection 25 (1) provides the Commission is taken to have made a decision without a meeting if a majority of commissioners agree and the agreement is in accordance with a pre-determined method and all commissioners were informed of the proposed decision. The Commission must keep a record of such decisions (**new subsection 25(4)**).

Division 6 – Staff and Consultants

Item 66, new section 68 provides that the staff of AFMA will be employed under the *Public Service Act 1999* (**new subsection 68(1)**) and that for the purposes of the *Public Service Act 1999* AFMA will be a statutory agency with the CEO as its Head.

Item 72 repeals Division 8 of Part 2 which relates to the financial activities of AFMA as a CAC Act agency.

Item 73, new section 87 is inserted which provides that AFMA must prepare and submit an annual report to the Minister for presentation to Parliament. **New subsection 87(2)** lists the elements to be contained in the report.

Item 79, new section 92 provides that the Commission may delegate functions and powers of the Authority to the CEO in relation to domestic fisheries management. The CEO is subject to the directions of the Commission in relation to this delegation of power (**new subsection 92(2)**). The CEO may then sub-delegate these powers, except the power of delegation (*Acts Interpretation Act 1901* section 34AB) (**new subsection 92(3)**).

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New section 94B provides for the establishment of the AFMA special account for the purposes of the FMA Act .

Amendments to the *Fisheries Management Act 1991*

Item 111 repeals Division 2 of Part 8 – Selection and nomination process for members of the Statutory Fishing Rights Allocation Review Panel.

Division 2–Nomination and selection process for members of the Panel

Provisions relating to the appointment of Presiding member and the Acting Presiding Member have been transferred from the *Fisheries Administration Act 1991* to the *Fisheries Management Act 1991*. **New sections 139 to 141Q** relate to the operations of the selection committees which as the Explanatory Memorandum states retains the relevant process for nominating members for the Minister to appoint to the Statutory Fishing Rights Allocation Review Panel.¹³

Schedule 2: Foreign boats equipped for fishing

Existing sections 101-101AA contain offence provisions dealing with foreign boats equipped for fishing or with other fishing equipment being unlawfully in Australian waters. However, the offences do not generally occur if the boat's fishing equipment is properly stowed away. Schedule 2 makes some technical amendments to clarify the operation of these provisions to make them easier to enforce. However, the amendments do not appear to materially change the law.

Schedule 3: Boats beyond the AFZ

Amendments to the *Fisheries Management Act 1991*

Item 1, subsection 4(1) is amended by inserting a definition of 'Australian national' to include a citizen, a resident, or a body corporate incorporated in Australia or any other body corporate that carries on its activities principally in Australia. The definition is required because **item 52** introduces offence provisions applicable to Australian nationals that contravene international fisheries management measures.

Under Part 6 of the *Fisheries Management Act 1991*, authorised officers have wide-ranging enforcement powers, including at-sea boarding and inspection powers. However,

13. Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008, Explanatory Memorandum, p.20.

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in relation to international fisheries, these powers currently generally only apply to foreign boats registered in countries that are parties to the UN Fish Stocks Agreement. **Item 32** expands these powers so that they can be used in relation to enforcing other international (including regional or bilateral) fisheries agreements or arrangements to which Australia is a party.

Specifically, **new subsection 87HA(1)** provides that an officer may exercise powers under existing section 84 if he or she believes that a foreign boat has contravened international fisheries measures and the action taken by the officer is authorised by the country of nationality of the boat.

New subsection 87HA(2) provides that an officer may exercise powers under section 84 in relation to a foreign boat on the high seas if he believes it has been used, is being used or intended to be used for fishing and the appropriate country of nationality of the boat has authorised the exercise of those powers.

New subsection 87HA(3) provides that an officer can exercise powers under section 84 in the waters of a foreign country, in the Exclusive Economic Zone, territorial sea, archipelagic waters or the inland waters of a foreign country with the authorisation of the country of nationality of the boat and the country in whose waters the boat is situated. **Item 35, new section 88A** provides that regulations may provide that some or all of the Act dealing the seizure and forfeiture of property do not apply to foreign boats in specified circumstances. Particular procedures may be specified in the regulations (**new subsection 88A(2)**).

Subdivision B—Using foreign boat to contravene international fisheries management measure

Offences

Item 52, new subsection 105E provides that a person in a foreign boat on the high seas commits an offence if the person contravenes an international fisheries management measure. The maximum penalty is 60 penalty units or \$6600. Strict liability applies which means that the person is liable under section 6.1 of the *Criminal Code 1995* even in the absence of negligence or intention. The defence of mistake of fact under section 9.2 of the criminal Code is available (**new subsection 105E(2)**). **New subsection 105E(1)** does not apply if the boat is authorised by the country of nationality of the boat. **New subsection 105EA** provides that where an offence is committed and there is evidence of fault elements of intention, knowledge, recklessness or negligence in contravening an international fisheries measure that would allow a prosecution to proceed, then a much greater penalty will apply— a maximum 500 penalty units or \$55,000.

New subsection 105EB(1) provides that the Attorney-General is required to provide written consent before the prosecution of a foreign national can proceed. The Attorney-General must take account of the views of the country of nationality of the boat (**new subsection 105EB(2)**). In the absence of consent, there are to be no delays in arresting,

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charging or commencing extradition proceedings or remanding an offender in custody or on bail (**new subsection 105EB(3)**). If the Attorney-General does not grant consent, the court cannot proceed to hear the case (**new subsection 105EB(4)**).

New section 105F creates a strict liability offence for an Australian national in a foreign boat in the Exclusive Economic Zone, territorial sea, archipelagic waters or internal waters of a foreign country and who contravenes an international fisheries measure – carrying a maximum penalty 60 penalty units or \$6600. **New section 105FA** provides that where an Australian national on a foreign boat in the Exclusive Economic Zone, territorial sea, archipelagic waters or the internal waters of a foreign country has committed an offence and there is evidence of the fault elements of intention, knowledge, recklessness or negligence in contravening an international fisheries measure, then a much greater penalty will apply – 500 penalty units or \$55,000.

Subdivision C – Unauthorised foreign boat on high seas

New section 105H creates an offence where the law of the country of nationality of the boat requires authorisation to fish and the boat does not have that authorisation. The penalty is 60 penalty units or \$6600. Strict liability applies to this offence.

New section 105I creates an offence that where there is sufficient evidence of intention, knowledge, recklessness or negligence for a person on a foreign boat on the high seas and the law of the country of nationality of the boat require authorisation and the fishing is not authorised and there is evidence to support a prosecution, then the maximum penalty is 500 penalty units or \$55,000.

Concluding comments

This Bill is one of many over the two years or so that have dealt with implementation of the recommendations of the Uhrig Review on Corporate Governance of Statutory Authorities and Office Holders.¹⁴ On the face of it, the proposed governance changes may not have any significant effect on either Commonwealth fisheries management policy or AFMA's day-to-day operations. However, neither the second reading speech nor the Explanatory Memorandum provide any detail about whether stakeholders in the fisheries management sector have been consulted regarding the proposed changes.

14. Others include: [Governance Review Implementation \(Treasury Portfolio Agencies\) Bill 2007](#), [Governance Review Implementation \(Science Research Agencies\) Bill 2007](#), [Australian Wine and Brandy Corporation Amendment Bill \(No.1\) 2007](#).

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