



Fisheries Legislation Amendment Bill 2009

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Fisheries Legislation Amendment Bill 2009

Date introduced: 25 November 2009

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Section 1 to 3 on Royal Assent. Schedules 1 and 2 come into force on the 28th day after the Act receives 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

This Bill will amend the *Fisheries Management Act 1991* (the Act) to:

- introduce and enable electronic decision-making in relation to certain fisheries licensing decisions, and
- authorise certain types of defensive equipment to be issued to fisheries compliance officers.

This Bill will also amend the *Torres Strait Fisheries Act 1984* to clarify those persons required to hold a fish receiver licence.

Background

The Australian Fisheries Management Authority (AFMA) is a statutory authority established under the Act. It is responsible for managing Australia's commercial fisheries from three nautical miles off the Australian coast to the boundary of the Australian Fishing Zone (AFZ), 200 nautical miles out.¹

1. Australian Fisheries Management Authority, *Annual report, 2008–2009*, AFMA, Canberra 2009, p. 7.

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The Australian Fishing Zone

The AFZ is the same in area as Australia's Exclusive Economic Zone (EEZ) and was first declared in 1979.² It relates only to the management and protection of fisheries. The EEZ, however, relates to all resources such as fish, oil, gas and minerals for example.³ The AFZ is defined in section 4 of the Act as follows:

'Australian fishing zone' means:

(a) the waters adjacent to Australia within the outer limits of the exclusive economic zone adjacent to the coast of Australia; and

(b) the waters adjacent to each external territory within the outer limits of the exclusive economic zone adjacent to the coast of the external Territory;

but does not include:

(c) coastal waters of, or waters within the limits of, a State or internal Territory; or

(d) waters that are excepted waters.⁴

The EEZ is defined in the *Seas and Submerged Lands Act 1973* by reference to Articles 55 and 57 of the United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982. In its EEZ, Australia has sovereign rights to explore and exploit, conserve and manage 'all natural resources of the waters superjacent to the seabed and of the seabed and its subsoil together with other activities such as the production of energy

2. Department of Agriculture, Fisheries and Forestry, 'The Australian Fishing Zone and the Economic Exclusion Zone', *website*, viewed 14 January 2010, <http://www.daff.gov.au/fisheries/domestic/zone>

3. *Ibid.*

4. Geoscience Australia notes on its website that:

... 'the outer limit of the AFZ is the same as the outer limit of the EEZ other than in places where the "excepted waters" Proclamation in Gazette No. S 52 of 14 February 1992 remains relevant (see paragraph (d) of the definition). The 'excepted waters' Proclamation remains relevant in two areas—in the Torres Strait and in the waters adjacent to the Australian Antarctic Territory (Parts 5 and 6 of the 1992 Proclamation). The other parts of the 1992 'excepted waters' Proclamation have been rendered redundant by the Proclamation of the outer limits of the EEZ which entered into force on 1 August 1994. They have been rendered redundant because they largely cover the same lines as are used in the 1994 EEZ Proclamation.

See Geoscience Australia, 'Australian Fishing Zone', *website*, viewed 12 January 2010, http://www.ga.gov.au/oceans/mc_amb-bndrs.jsp#afz

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from water, currents and wind'.⁵ Jurisdiction also extends 'to the establishment and use of artificial islands, installations and structures, marine scientific research, the protection and preservation of the marine environment, and other rights and duties'.⁶

The AFZ is the third largest in the world, covering approximately nine million square kilometres. Within that area AFMA manages more than 20 Commonwealth commercial fisheries. The Australian states and the Northern Territory are responsible for the majority of recreational and commercial coastal and inland fishing and for inland and coastal aquaculture operations.⁷

Offshore Constitutional Settlement (OCS)

Under international law, Australia has sovereignty over specific waters called the 'territorial sea'. The territorial sea extends from the territorial sea baseline (or low water mark) and extends seaward for 12 nautical miles. A number of activities are managed within this area including mining for oil, gas and minerals, fishing, shipping and management of marine parks, navigation and shipwrecks.⁸

As AFMA explains:

The OCS is a jurisdictional arrangement between the Commonwealth and States/NT which sets out responsibilities for offshore fisheries, mining, shipping and navigation and crimes at sea. The OCS provides for State/NT laws to apply inside three nautical miles and for Commonwealth laws to apply from three to 200 nautical miles.⁹

In practical terms, the arrangements rationalise the management of particular species of fish. Under these arrangements, the states and Northern Territory manage 'coastal or

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5. Geoscience Australia, 'Maritime Boundary Definitions', *website*, viewed 14 January 2010, http://www.ga.gov.au/oceans/mc_amb-bndrs.jsp#eez
 6. Ibid.
 7. Australian Fisheries Management Authority, 'Fact sheet: The Australian Fishing Zone', *website*, viewed 12 January 2010, http://www.afma.gov.au/information/publications/education/pdfs/fs02_afz.pdf
 8. Attorney-General's Department, 'The Offshore Constitutional Settlement', *website*, viewed 12 January 2010, http://www.ag.gov.au/www/agd/agd.nsf/Page/InternationalLaw_TheOffshoreConstitutionalSettlement
 9. Department of Agriculture, Fisheries and Forestry, 'Fact Sheet: Management processes affecting Commonwealth Fisheries', *website*, viewed 23 December 2009, http://www.daff.gov.au/_data/assets/pdf_file/0005/5792/res_share_factsheet.pdf

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inshore species such as rock lobster and abalone, while the Commonwealth manages offshore or migratory species such as tuna'.¹⁰

The Department of Agriculture, Fisheries and Forestry comments that:

OCS fisheries arrangements allow the existing jurisdictional boundaries described above to be overridden by agreement between the Commonwealth and relevant States/NT. OCS arrangements are developed when those default boundaries do not allow sensible fisheries management. This allows management of fisheries on a species basis.

Under the terms of these arrangements, the States/NT generally manage coastal, slow moving or inshore species (such as rock lobster and abalone) while the Australian Government manages deepwater or migratory species and species subject to international agreements (such as orange roughy, tuna and billfish) throughout their range.¹¹

AFMA provides fisheries management services in the Torres Strait on behalf of the Torres Strait Protected Zone Joint Authority (the Joint Authority) (which was established under the *Torres Strait Fisheries Act 1984*).¹² It comprises the Commonwealth Minister for Agriculture, Fisheries and Forestry; the Queensland Minister for Primary Industries Fisheries and Rural and Regional Queensland; and the Chair of the Torres Strait Regional Authority. The Joint Authority is responsible for commercial and traditional fishing activities (involving traditional inhabitants of the Torres Strait) in the Torres Strait and designated adjacent waters.¹³

eLicensing: electronic decision-making

AFMA has been developing a package of electronic services to improve the cost effectiveness of Commonwealth fisheries. The cornerstone of the package is the eLicensing system, which 'enables a range of high volume, routine licensing decisions under the Act to be made electronically'.¹⁴ According to the Minister for Agriculture,

10. Australian Fisheries Management Authority, *Annual report*, op. cit.

11. Department of Agriculture, Fisheries and Forestry, 'Fact sheet: Management Processes affecting Commonwealth Fisheries', op. cit.

12. Ibid.

13. Torres Strait Protected Zone Joint Authority, *website*, viewed 14 January 2010, <http://www.pzja.gov.au/>

14. T Burke MP, 'Second reading speech: Fisheries Legislation Amendment Bill 2009,' House of Representatives, *Debates*, 25 November 2009, p. 12 792.

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Fisheries and Forestry, Tony Burke MP, AFMA estimates that 80 per cent of transactions will be done by eLicensing by 2011. In 2008–09 there were 4562 transactions.¹⁵

GOFish is the self-service portal developed by AFMA to enable the fishing industry to log on to its website and complete a range of licensing transactions (such as transferring fishing concessions and viewing quota holdings).¹⁶

The Bill authorises AFMA to approve the use of a computer program to make ‘high volume, routine decisions that do not require the exercise of judgment by an AFMA officer’.¹⁷ This means, for example, that when the holder of a fishing permit applies via GOFish to have the permit renewed, the decision will be made by a computer program under AFMA’s control without any involvement or intervention by a person employed or authorised by AFMA, ‘other than in the prior construction of the computer program’.¹⁸

Committee consideration

The Fisheries Legislation Amendment Bill 2009 will be considered at the next meeting of the Senate Selection of Bills Committee in 2010.¹⁹

Financial implications

The Explanatory Memorandum states that the Bill will have an insignificant financial impact on the Australian Government or affected parties.²⁰

Main provisions

Schedule 1—*Fisheries Management Act 1991*

Items 1-9 insert definitions of various terms into subsection 4(1) of the Act.

Item 11 repeals existing **subsection 32(1BA)** and inserts a new provision in its place. **Proposed subsection 32(1BA)** provides that for a boat to be nominated for the grant of a

15. Australian Fisheries Management Authority, Annual report 2008-2009, Table 5: Transactions effort as at 30 June 2009, AFMA, Canberra, 2009, p. 60.

16. Ibid.

17. Ibid.

18. Explanatory Memorandum: Fisheries Legislation Amendment Bill 2009, p. 8–9.

19. Senate Selection of Bills Committee, *Report No. 19*, 30 November 2009, viewed 23 December 2009, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2009/rep1909.pdf

20. Explanatory Memorandum: Fisheries Legislation Amendment Bill 2009, p. 3.

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fishing permit under subsections 32(1A) or 32(1B), the requirements set out in proposed paragraphs 32(1BA) (a), (b) and (c) have to be satisfied.

Item 12 repeals **subsections 32(9A) and (10)** which become redundant as a result of the introduction of the electronic licensing system. Currently, subsection 32(9A) requires a person to return the original permit after it ceases to be in force, while subsection 32(10) enables AFMA to transfer a permit from the permit holder to another person.

Transfer of fishing permits

Item 13 inserts **proposed section 32A** to regulate the transfer of fishing permits and in effect replace existing subsection 32(10). The holder of a permit must apply to AFMA to register the transfer of a permit. The transfer takes effect once AFMA has registered the transfer (**subsection 32A(3)**). **Subsection 32A(4)** provides that AFMA must register the transfer unless one of the circumstances set out in paragraphs (a) to (d) apply:

- the fishing permit is suspended under section 38
- the permit holder is being investigated for a fisheries offence or has been convicted of a fisheries offence
- there is an unpaid levy on the fishing permit, or
- other circumstances exist that are prescribed in the regulations.

Proposed subsection 32A(5) provides that proposed subsection 32A(4) applies, despite the fact that a requirement in a plan of management relating to the transfer has not been satisfied. In effect the operation of **proposed section 32A** means that it will override all requirements in management plans relating to the approval of transfers of fishing permits which, as the Explanatory Memorandum states, will no longer apply.²¹ **Proposed section 32A** does not apply to a fishing permit that is stated to be non-transferable (**proposed subsection 32A(6)**).

Transfer of a lease or a transfer of ownership of a fishing right

Item 18 inserts **proposed subsection 46(4D)** which provides similar conditions in relation to a lease or a transfer of ownership of a fishing right as apply to the transfer of a fishing permit in proposed subsection 32A(4). The Explanatory Memorandum notes that 'AFMA will develop a policy to guide the exercise of the discretion to refuse to register a lease or transfer where one of the prescribed circumstances exist'.²² **Proposed subsection 46(4E)** provides that subsection 46(4D) still applies (that is, AFMA must register a lease or transfer of ownership) despite the fact that any requirement relating to a lease or transfer in a plan of management has not been satisfied.

21. Ibid, p. 6.

22. Ibid, p. 7.

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Defensive Equipment

Item 20 inserts **proposed section 89A** which relates to the use of defensive equipment by AFMA fisheries officers. The second reading speech notes that:

Work undertaken by AFMA compliance officers is potentially dangerous. There are a number of documented assaults against fisheries officers engaged in such work, and it is essential that these officers are adequately equipped and trained to ensure their own safety in appropriate circumstances.²³

‘Defensive equipment’ is defined in **proposed subsection 89A(2)** as a bulletproof vest, an extendible baton, handcuffs or other equipment as prescribed in the regulations. The CEO of AFMA may authorise a fisheries officer to be issued with defensive equipment and to carry, use and store it if the CEO considers it reasonably necessary for the officer to use the equipment in order to perform his functions and exercise his powers under the *Fisheries Management Act 1991*. Authorised use is dependent upon the officer having received adequate training in the ‘effective, lawful and safe carriage, use and storage’ of such equipment (**proposed subsection 89A(3)**). The authorisation may be subject to conditions (**proposed subsection 89A(4)**).

Proposed subsection 89A(5) provides that the officer may use the defensive equipment if the officer considers it reasonably necessary to do so in order to perform functions or exercise powers under the Act (or its associated regulations) subject to any conditions placed on the authorisation and section 87J of the Act (which relates to the use of force in relation to a boat). **Proposed subsection 89A(6)** creates an offence that is committed by a person who has been issued with defensive equipment and who is no longer an officer but who has failed as soon as possible to return the defensive equipment to the CEO. The penalty is two penalty units (a maximum penalty of \$220), however if the person has a reasonable excuse subsection (6) does not apply (**proposed subsection 89A(7)**). This is an offence of strict liability (**proposed subsection 89A(8)**).²⁴

eLicensing

Item 21 inserts **Division 1—Electronic decision-making** into Part 9 of the Act. **Proposed subsection 163B(1)** provides that AFMA may approve a computer program (under AFMA’s control) to be used to make certain decisions under the following sections of the Act:

- section 32 (granting of fishing permits)
- section 32A (transferring of fishing permits)

23. T Burke, ‘Second reading speech’, op. cit., p. 12794.

24. See section 6.1 of the *Criminal Code*.

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- section 46 (the creation, assigning, transferring, transmitting or extinguishing of interests in a fishing right)
- section 91 (grant of fish receiver permits)
- a plan of management, or
- any other provision of the Act prescribed in the regulations.

Proposed subsection 163B(2) provides that an electronic decision made by the approved computer program is taken to be a decision made by AFMA. AFMA's approval of the computer program must be in writing (**proposed subsection 163B(3)**). An approval under this section is not a legislative instrument (**proposed subsection 163B(4)**) which means that it is not subject to parliamentary disallowance under the *Legislative Instruments Act 2003*.

Section 163C(1) applies if AFMA is satisfied that an electronic decision was made when the computer program was not functioning properly, for example because of a computer virus or a typographical error. The program is not functioning correctly if the decision made by the computer program is not the same as the decision that would have been made by an AFMA employee (**proposed subsection 163C(2)**). The Explanatory Memorandum emphasises that the decisions to be made electronically are purely factual and have no discretionary elements and concludes:

Therefore, a computer program, functioning correctly, will in all cases make the same decision that an employee of AFMA would make on the same facts.²⁵

Proposed subsection 163C(3) provides that AFMA may revoke the electronic decision and replace it with the correct AFMA decision. **Proposed subsection 163C(4)** provides that AFMA may revoke the electronic decision and replace it with the decision that would have been made by an AFMA employee, either on its own initiative or on the written application of the person/entity who sought the electronic decision initially. If AFMA revokes the electronic decision after notifying the applicant about the 'electronic decision', it must then notify the applicant that the decision has been revoked and the reasons for doing so. It must also inform the applicant of the new decision (**proposed subsection 163C(5)**).

Proposed section 163D provides that a 'computer function notice' is prima facie evidence of the matters stated in the notice (**proposed subsection 163D(1)**). A 'computer function notice' is defined as a document signed or purportedly signed by the CEO stating whether or not a specified computer program was functioning correctly in relation to a specified electronic decision and at a specified time or period (**proposed subsection 163D(2)**).

25. Explanatory Memorandum, op. cit., p. 9.

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Schedule 2—*Torres Strait Fisheries Act 1984*

Offences

Items 1-3 of Schedule 2 to the Bill insert definitions of various terms into subsection 3(1) of the *Torres Strait Fisheries Act 1984*.

Item 4 repeals existing section 46AA and substitutes **proposed section 46AA** which concerns offences in relation to a ‘fish receiver licence’.²⁶ **Proposed section 46AA** applies to fish taken from the Protected Zone or an area of waters which is the subject of a declaration under section 15(1).²⁷ **Proposed subsection 46AA(2)** creates an offence that is committed if :

- a person receives fish directly from another person
- the fish were taken by the other person in circumstances that requires him or her to hold a commercial fishing license or Treaty endorsement²⁸, and
- the person intends to process the fish (other than for personal consumption or use) or sell the fish but does not have a licence to receive fish under the Act. The penalty is 50 penalty units (a maximum penalty of \$5500).

Proposed subsection 46AA(3) provides that a person receives fish directly from another person if the person received the fish from the other person or from someone engaged by that person to transport the fish. **Proposed subsection 46AA(4)** creates an offence that is committed by a person who holds a fish receiver licence and receives fish from someone who is not a commercial fisher, and the person intends to process the fish (other than for personal consumption or use) or sell the fish. The penalty is 50 penalty units (a maximum penalty of \$5500).

Concluding comments

This Bill enables efficiencies to be made in the administration of Australian fishing, particularly through the approval of computer programs that will allow faster processing of routine licensing decisions. The Bill also clarifies the types of defensive equipment that can be employed by fisheries officers when investigating illegal fishing activities so that

26. The term ‘commercial fishing licence’ is inserted into existing subsection 3(1) by item 2. It is defined to mean a licence that is in force under subsection 19(2) or (4). Section 19 of the *Torres Strait Fisheries Act 1984* deals generally with commercial fishing and fish receiver licences.

27. Section 15 of the *Torres Strait Fisheries Act 1984* deals with proclamations by the Governor-General to declare areas of waters adjacent to the Protected Zone. ‘Protected Zone’ is defined in section 3 of the Act.

28. ‘Treaty Endorsement’ is defined in section 3(1) of the *Torres Strait Fisheries Act 1984* as an ‘endorsement of a Papua New Guinea licence made under section 20(1)’. Such endorsements are made pursuant to Article 26 of the Torres Strait Treaty.

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they are better able to protect and defend themselves if need be. The Bill provides for additional equipment to be prescribed in the regulations at a future date. The Bill also seeks to improve the licensing system by clarifying the persons required to hold fish receiver licences.

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