



Fisheries Legislation Amendment Bill (No.2) 2010

This is a later edition of a Bills Digest previously prepared for the 42nd Parliament

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Fisheries Legislation Amendment Bill (No.2) 2010

Date introduced: 29 September 2010

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Sections 1 to 3 commence on Royal Assent. Schedules 1, 2 and 3 commence on the 28th day after Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

This Bill lapsed on the proroguing of Parliament in July 2010. It has been re-introduced without any significant changes.

Purpose

The Fisheries Legislation Amendment (No. 2) Bill 2010 (the Bill) amends various Commonwealth fisheries legislation to enable the Australian Fisheries Management Authority (AFMA) to:

- enter into co-management arrangements with particular stakeholders and allow the AFMA CEO to delegate certain powers and functions to these stakeholders
- simplify the regulatory regime particularly in relation to requirements for plans of management
- allow AFMA to more easily restructure or merge fisheries management advisory committees
- enable AFMA to provide and charge for services to Commonwealth agencies, State or Territory government or bodies, a foreign country or another person.¹

Background

When first introduced on 26 May 2010, the Minister for Agriculture, Fisheries and Forestry stated in a media release introducing the legislation:

The Government is committed to consultative and cooperative fisheries management. New arrangements will allow AFMA to make agreements with primary stakeholders to share responsibility for fisheries management decisions in Commonwealth fisheries.

There will always be a balance between government and industry involvement in fisheries management, depending on the nature and extent of the management issue.

This new level of co-management will strengthen the collaborative approach that AFMA takes with stakeholders, where the fisheries have strong leadership and governance arrangements in

1. Explanatory Memorandum, Fisheries Legislation Amendment Bill (No. 2) 2010, p. 3.

place and a demonstrated commitment to sustainable fishing practices. These reforms have the support of the existing management advisory committees and will simplify the process by reducing the number of MACs from 12 to 6.²

The Bill is concerned with implementing provisions that will allow co-management arrangements to be put in place with the intention of enabling fisheries management to become much more effective and efficient and giving the stakeholders involved some degree of responsibility in managing the sustainability of the fishery. It will facilitate this by giving AFMA the ability to delegate powers and functions to primary stakeholders in relation to a particular fishery where a co-management arrangement is in place.

The interest in implementing co-management arrangements is driven by a number of factors and the Fisheries and Research Development Corporation³ report lists the following points as having increased interest in co-management:

- cost recovery policies of governments
- increasing economic pressures on commercial (and to an extent recreational) fishing
- desire to strengthen access rights for commercial and recreational fishers
- growing recognition of the need to formally accommodate Aboriginal and Torres Strait Islander traditional fishing practices.⁴

As noted in the report, the first time that industry responded in a major way to the problems besetting fisheries management was in a formal inquiry conducted by the Industry Commission⁵ in 1992 into cost recovery. The FRDC report noted the following:

“many participants in the inquiry objected to having to pay for management that they did not consider to be efficient.” Commercial fishers spoke of inefficient institutional arrangements; lack of integration of research with other aspects of fisheries management; failure to manage fisheries within a meaningful ecological framework; and high, uncompetitive operating costs in government agencies that were providing management services.⁶

The FRDC report discussed the fact that although the Industry Commission had recommended that collective fishing industry management services be formed so that they could take on a greater role

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2. T Burke (Minister for Agriculture, Fisheries and Forestry), *New era of collaboration for fisheries*, media release, 26 May 2010, viewed 5 October 2010, http://www.daff.gov.au/ludwig/media-releases/burke_media_releases/Burke-media-releases/2010/may/new_era_of_collaboration_for_fisheries
 3. The Fisheries Research and Development Corporation is a statutory corporation set up in 1991 under the *Primary Industries and Energy Research and Development Act 1989*. As the website states, it is a co-funded partnership between the Australian Government and the fishing industry, viewed 5 October 2010, <http://www.frdc.com.au/aboutus/about-us>
 4. Australian Government, Fisheries Research and Development Corporation, *Co-management: managing Australia's fisheries through partnership and delegation*, [Report of the FRDC's National Working Group](#) for the fisheries co-management initiative, Project no. 2006/068, Canberra 2006, p. 7.
 5. Industry Commission, *Cost recovery for managing fisheries*, report no. 17, Canberra, 1992.
 6. Op cit, p. 8.

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in fisheries management, little was done. The FRDC report considered that this came about because the necessary pre-conditions did not exist at the time to enable implementation of those recommendations to occur.⁷

What are Co-management Arrangements?

Co-management arrangements will, as the former Minister stated, 'represent a further evolution in the operating framework for Commonwealth fisheries management.'⁸ There have been a number of reports dealing with the subject of co-management. In 2006, the Fisheries Research and Development Corporation⁹ formed a working group to report on co-management in Australian fisheries. The report was released in 2006. They defined *co-management* in the following terms:

Fisheries co-management is an arrangement in which responsibilities and obligations for sustainable fisheries management are negotiated, shared and delegated between government, fishers and other interest groups and stakeholders.¹⁰

The Working Group stated that the report reflected:

The increasing recognition among fishers and fisheries managers alike of the need for a cultural change, away from an untrusting, often conflicted "them versus us" approach to one of partnership based on joint responsibility for decision-making and implementation in fisheries management.¹¹

In summary, the Working report discusses the nature of a co-management relationship and what it entails. The negotiation process for example is a two staged process involving a 'broad policy or strategic approach' initially on what the co-management framework will involve. Subsequently there is a more focussed negotiation on how the arrangements are to be implemented and this is done with the players who are directly involved in the particular fishery concerned.¹² The report talks about the transitional nature of the development from a centralised model to a delegated model. It is a staged process of development and not something that can be implemented immediately. It involves building relationships and trust so that a stage is reached where negotiated outcomes have been decided and functions and powers may be delegated to relevant stakeholders who then take responsibility to see that those functions are implemented within the terms of a formal agreement.

7. Ibid, p. 9.

8. A Burke, 'Second reading speech: Fisheries Legislation Amendment (No.2) Bill 2010', House of Representatives, *Debates*, 26 May 2010, p. 4119.

9. The Fisheries Research and Development Corporation is a statutory corporation set up under the *Primary Industries and Energy Research and Development Act 1989*. Its role is 'concerned with planning, investing in and managing fisheries research, development and extension', FRDC website, viewed 5 October 2010, <http://www.frdc.com.au/aboutus/about-us>

10. Australian Government, Fisheries Research and Development Corporation, *Co-management: managing Australia's fisheries through partnership and delegation*, [Report of the FRDC's National Working Group](#) for the fisheries co-management initiative, Project no. 2006/068, Canberra 2006.

11. Ibid.

12. Ibid., p. 1.

The report talks about the progression from a centralised model to a consultative model which then may mature into a collaborative model and then to a delegated model.¹³

The report notes that there are essential pre-conditions which must exist in order to create the appropriate conditions where co-management principles can flourish. These conditions include:

- a willingness by governments to consider alternative management models involving greater shared responsibility
- fishers groups with a significant proportion of members wanting to move to co-management
- identified “champion/s” who can negotiate with governments and build organisational ownership
- an effective fisher organisation structure with good governance and an ability to communicate with all fishers and other stakeholders
- a fisher organisation with sufficient resources and skills to implement and deliver services, or an ability to negotiate and attract such resources
- existence of a legislative basis to delegate powers
- ability to generate, and commit to, legally binding undertakings through an MOU, contract or other form of agreement between the parties
- ability for the fishers’ organisation to legally enforce agreements through civil, contractual or company law
- existence of conflict resolution mechanisms.¹⁴

The report further notes that there are some characteristics that will either indicate the degree of difficulty or the ease with which co-management strategies can be implemented. They are:

- clearly specified and legally recognised access or property rights in terms of species, quantity , time and place
- a fishery with clear geographic boundaries and low bycatch or environmental interactions
- a well documented and researched fishery, including its ecosystem impacts and dependencies
- fishers with a common interest in the fishery or similar economic interests in the fishery
- a sound working relationship between the resource user group and government, often demonstrated by the adoption of EMS¹⁵, codes of practice, or some prior service delivery arrangements.¹⁶

These factors do not all have to be met in order for co-management arrangements to be put in place but they will to a certain extent determine the difficulty of implementation and the nature of the delegated functions.¹⁷

13. Ibid., p. 2.

14. Australian Government, Fisheries Research and Development Corporation, *Co-management: managing Australia’s fisheries through partnership and delegation*, [Report of the FRDC’s National Working Group](#) for the fisheries co-management initiative, Project no. 2006/068, Canberra 2006, p. 19.

15. Environmental Management Systems.

16. Ibid., p. 20.

Co-Management Trials

The AFMA annual report for 2008-2009 comments on three trials presently underway incorporating co-management principles. The fisheries where the trials are currently being undertaken are the Southern and Eastern Scalefish and Shark Fishery through the port of Lakes Entrance, the Great Australian Bight Trawl Fishery and the Northern Prawn Fishery.¹⁸ The Annual Report further notes that all the trials have progressed to phase 2 after the positive feedback received about phase 1. All the trials will continue into 2010.

Stakeholders in the report considered that 'co-management trials would test the 'theory' about the necessary preconditions required for successful co-management, and eventually reveal more definitive information about which fisheries management tasks could be devolved to industry.'¹⁹

Nature of functions being assessed in the trials

The increasing interest in implementing co-management arrangements and the setting up of the AFMA co-management program highlighted a perceived knowledge gap in appropriate program evaluation for fisheries co-management in Australia. To address this gap, a report by the Bureau of Rural Sciences was commissioned to examine what is required to properly evaluate a fisheries co-management trial in Australia.²⁰

The Bureau of Rural Sciences discussion paper sets out the types of matters being assessed in terms of devolving functions and powers to interested stakeholders. They are summarised below. The Bureau's paper did not evaluate the trials individually but looked at how best to assess a trial and how to evaluate whether it demonstrates what is wanted. The trials mentioned are co-managing the following elements:

Southern and Eastern Scalefish and Shark Fishery- port of Lakes Entrance

- quota pooling and monitoring
- quota transaction and reconciliation processes
- automated data transmission and data collection protocols
- industry self-regulated compliance functions.²¹

Great Australian Bight Trawl Fishery

- to give the Industry Association (GABIA) responsibility for making recommendations to AFMA on the establishment and operation of the fishery harvest strategy

17. Ibid., p. 20.

18. Australian Fisheries Management Authority, *Annual Report 2008-2009*, AFMA, 2009, p. 31.

19. Op. cit., p. 5.

20. Ibid., p. 1.

21. N Mazur, 'Evaluating fisheries co-management trials- a discussion paper', Australian Government, Bureau of Rural Sciences, April 2010, p. 29.

- making recommendations to AFMA on total allowable catch, trigger catch limits and bycatch mitigation measures.
- ‘introduce contract-based compliance services to improve credibility, gain better control of association members and contain rising AFMA compliance costs, and towards that end GABIA would:
 - form member contracts that uphold codes of conduct and engender compliance with AFMA rules
 - hire contractors to monitor landings’.²²

Northern Prawn Fishery

- full administration of an electronic log-book system and contribution by NPF Industry Pty Ltd of scientific and crew based observations
- manage information required for stock assessments and management planning
- NPF Pty Ltd testing its capacity to fully run the management advisory role currently undertaken by NORMAC (Northern Prawn Fishery Management Advisory Committee)
- testing the potential for establishing third party observer and monitoring services for the fishery.²³

AFMA Co-Management Program

In 2008, AFMA set up a three year program to investigate the potential for implementing co-management arrangements in relation to Commonwealth fisheries. This Co-Management Program will run over a three year period and will involve a series of trials to test the possibilities and viability of implementing such arrangements. The primary objective of the program is:

For AFMA and industry to work together in designing a series of trials, across a range of fisheries/sectors, to test industry self-regulated functions and responsibilities and other arrangements that work beneficially for both parties and can be more broadly implemented across Commonwealth fisheries in the future.²⁴

Whilst the Explanatory Memorandum notes that ‘preliminary outcomes of [the three trials] are very positive’, neither it nor the second reading speech contain any details of these outcomes.

Management Advisory Committees

Management advisory committees (MACs) are established under section 56 of the *Fisheries Administration Act 1991*. They provide a vital link between stakeholders in a fishery and AFMA.

22. Ibid., p. 30.

23. Ibid., p. 30.

24. Ibid., p. 1.

AFMA's website states that they a major source of advice to AFMA,²⁵ and are a means of channelling the considerable experience and expertise of stakeholders with interests in the fishery to AFMA. They also provide a forum where stakeholders can raise issues and identify problems, have them discussed and be part of developing solutions.²⁶

In February 2009 the AFMA Commission made a decision to reduce the number of MACs from 12 to 6 over a three year period.²⁷ Currently there are ten MACs according to the AFMA website.²⁸ The number of people appointed to a committee is limited to nine and they are generally appointed for three year terms.²⁹ For example GABMAC³⁰ consists of a Chairperson, an AFMA member, a research member, an Environment/Conservation member, four industry members, a State government member and an executive officer.³¹

Currently the Act restricts AFMA from abolishing a MAC that operates under a management plan. They can abolish a MAC but only by amending the plan which the Explanatory Memorandum claims is a costly process particularly if a number of plans require amendment.³² The Bill proposes to remove that restriction to allow AFMA to more easily restructure MACs and to improve their efficiency and effectiveness.³³

The Explanatory Memorandum states that industry and MAC members were 'supportive' of the decision to reduce the number of MACs.³⁴

Committee consideration

The Selection of Bills Committee resolved to recommend that this bill not be referred to Committees.³⁵ The Senate Standing Committee for the Scrutiny of Bills had no comment to make on this bill.³⁶

25. Australian Fisheries Management Authority, Management Advisory Committees (MACs), AFMA website, viewed 5 October 2010, <http://www.afma.gov.au/industry/macs/default.htm>

26. Ibid.

27. Australian Fisheries Management Authority, *Annual report 2008-2009*, p. 16.

28. AFMA website, op. cit.

29. Ibid.

30. GABMAC is the Great Australian Bight Trawl Sector Management Advisory Committee.

31. Australian Fisheries Management Authority, Great Australian Bight Trawl Sector Management Advisory Committee, AFMA website, http://www.afma.gov.au/fisheries/sess/sess_gab/mac/membership.htm

32. Explanatory Memorandum, Fisheries Legislation Amendment Bill (No. 2) 2010, p. 3.

33. Ibid., p. 3.

34. Explanatory Memorandum, Fisheries Legislation Amendment Bill (No.2) 2010 (43rd Parliament), p.3.

35. Senate Selection of Bills Committee, [Report No.11 of 2010](#), 30 September 2010.

36. Senate Standing Committee for the Scrutiny of Bills, Alert Digest, [No. 6 of 2010](#), 16 June 2010.

Financial implications

The Explanatory Memorandum states that the amendments have been assessed as having an insignificant financial impact on the Australian Government.³⁷

Main issues

The key features of this Bill are the provisions that will allow the AFMA CEO to delegate powers and functions to 'primary' stakeholders to co-manage Commonwealth fisheries. As the Explanatory Memorandum states, AFMA still retains 'oversight capabilities to ensure governance and sustainability requirements under the Commonwealth Fisheries Harvest Strategy Policy and reporting under the *Environment Protection Biodiversity and Conservation Act 1999*.'³⁸ The second reading speech notes that functions that could be delegated included determining the total allowable catch for fishery and the power to close all or part of a fishery. It also states that 'full implementation of co-management will only be accorded to fisheries with strong governance, leadership and demonstrated commitment to sustainability'.³⁹

Key provisions

Schedule 1—Amendment of the *Fisheries Administration Act 1991*

Item 1 inserts in subsection 4(1) a definition of *co-management* which has the same meaning given in section 88.

Item 2 inserts in subsection 4(1) a definition of *primary stakeholder* who is the holder of a fishing concession in the fishery, or an incorporated body representing those holders or a person prescribed in the regulations.

Australian Fisheries Management Authority

Section 7 of the Act sets out the functions of AFMA. **Item 3 repeals existing paragraph 7(1)(g)** and substitutes **proposed paragraphs 7(1)(fa) and (g)** to keep the existing power of AFMA to consult and exchange information with bodies in a state, territory or foreign country. In addition, the Authority is given the power to make its expertise available to entities in the Commonwealth or a state, territory

37. Explanatory Memorandum, Fisheries Legislation Amendment Bill (No. 2) 2010, p. 3.

38. Explanatory Memorandum, Fisheries Legislation Amendment Bill (No. 2) 2010, p. 2.

39. M Kelly, 'Second reading speech', Fisheries Legislation Amendment Bill (No.2) 2010, House of Representatives, *Debates*, 29 September 2010, p. 24.

or foreign country or to another person. Under existing section 94, AFMA is able to charge a fee 'for work done, services provided or information given.'⁴⁰

Item 5 repeals subsection 56(4) which stated that AFMA must not abolish MACs where the plan of management made provision for such a committee. Repealing the subsection will allow AFMA to 'restructure management advisory committees to achieve more efficient and effective representation through consolidated multi-fishery MACs, without having to amend relevant fisheries management plans individually'.⁴¹

Item 6 inserts proposed section 88 which will give AFMA power to enter into co-management arrangements with the relevant stakeholders in a particular fishery to assist the Authority in performing its functions and powers in relation sustainable fisheries management. There is no explicit provision for this agreement to be tabled in Parliament or otherwise published once made.

Item 7 inserts proposed paragraph 93(1)(f) to allow the CEO of AFMA to delegate powers and functions to a primary stakeholder under a co-management arrangement. Under existing provisions, a delegate is still subject to the direction of the CEO.

Schedule 2— Amendment of the Fishing Levy Act 1991

Section 7 of the *Fishing Levy Act 1991* deals with who is liable to pay a levy. **Item 2 inserts proposed subsection 7(2)** which defines the holder of a fishing concession as the person to whom a concession was granted or if the fishing concession has been transferred, the person to whom it was transferred will be the holder of the fishing concession.

Schedule 3—Amendment of the Fisheries Management Act 1991

Item 3 amends subsection 17(5) to make the requirement that a fisheries management plan state objectives and how they are to be met as well as the performance criteria necessary to meet those objectives optional. This means that the requirement is no longer mandatory. The Explanatory Memorandum summarises the reason for making the requirement optional.⁴²

Item 4 repeals subsections 17(5A) and (5B) which deal with directions by AFMA in relation to the operation of fisheries. Such directions will now be made under **proposed section 41A**.

Item 6 repeals and substitutes subsection 17(11) to allow AFMA to delegate any powers conferred on it under a plan of management not only to the CEO but now may be delegated to a primary stakeholder as well to assist AFMA to manage the fishery under a co-management arrangement.

40. Section 94, *Fisheries Administration Act 1991*.

41. *Ibid.*, p.6.

42. Explanatory Memorandum, Fisheries Legislation Amendment (No. 2) Bill 2010, p.7.

Section 20 of the Act deals with the amendment or revocation of a plan of management. **Item 8 inserts proposed subsections 20(6), (7) and (8).** **Proposed subsection 20(6)** provides that subsection 20(2), subsections 17(1B) to 4 and sections 18 and 19 do not apply in relation to the following types of amendments:

- Corrections of an error in the plan
- Change of format or presentation of the plan
- Changes which make the plan consistent with this Act or another Act or regulations
- Removal of conditions from the plan which already exist in the regulations whether or not they are in the same terms.

Subsections 17(1B) to (4) relate to notification matters in relation to plans of management, section 18 to procedures to be followed once a plan of management has been determined by AFMA, and section 19 relates to tabling and disallowance procedures in relation to determinations.

Proposed subsection 20(7) provides that subsections 17(1B) to (4) and section 19 do not apply to an amendment to the plan to remove a provision from the plan, if 28 days written notice of the proposed amendment has been made to the following entities:

- The management advisory committee, or
- The peak body representing holders of statutory fishing rights under the plan, or
- Holders of the licenses, permits or rights for the fishery.

Proposed subsection 20(8) provides that section 18 will apply to an amendment to the plan in the same way as it applies to a plan of management. Section 18 deals with the procedures for Ministerial approval of a plan of management.

Under section 41A of the Act, AFMA may give directions in relation to the closure or partial closure of a fishery. **Item 9 repeals existing subsections 41A(1) and (2) and substitutes proposed subsections 41A(1)** so as to now apply to all fisheries and not just to fisheries without a management plan as before. The requirements contained in the repealed provisions of subsections 17(5A) and (5B) are incorporated into section 41A. They dealt with the ability of AFMA to issue directions concerning the regulation of fishing activities during specified periods and notification processes to the relevant holders of fishing concessions etc.

Proposed subsection 41A(2) enables AFMA to issue directions concerning fishing activities during specified periods. AFMA must notify fishing concessions, scientific permits or foreign master fishing licences in writing about the direction, at least 7 days before it takes effect (**proposed subsection 41A(2A)**).

If a direction is given in an emergency situation, notifying the holders of fishing concessions etc should be done as soon as is practicable to do so (**proposed subsection 41A (2B)**).

Proposed subsection 41A(2C) provides that AFMA may delegate its power to give directions to the CEO or a primary stakeholder involved in a co-management arrangement.

Item 10 proposed 42B inserts a regulation-making power for conditions that will apply to fishing concessions or foreign master fishing licences. If plans of management contain provisions that are inconsistent with the regulations under this section, they will have no effect. This raises the question about how any such inconsistencies brought about by changes in regulations will be brought to the attention of stakeholders.

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