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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

FISHERIES LEGISLATION AMENDMENT (HIGH SEAS FISHING ACTIVITIES AND OTHER MATTERS) BILL 2004

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Fisheries, Forestry and Conservation
Senator the Hon Ian Macdonald)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE SENATE TO THE BILL AS INTRODUCED
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FISHERIES LEGISLATION AMENDMENT (HIGH SEAS FISHING ACTIVITIES AND OTHER MATTERS) BILL 2004
1. **GENERAL OUTLINE**

1.1. The Bill will give further effect to Australia’s international fisheries obligations and improve the management of Australia’s living marine resources.

1.2. Schedule 1 of the Bill provides for a number of amendments to the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991* to enable Australia to give effect in its domestic law to the obligations it would have as a Party to the *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the Compliance Agreement).

1.3. This Compliance Agreement was unanimously approved at the Food and Agriculture Organization of the United Nations (FAO) Conference in December 1993, in which Australia participated. The Compliance Agreement was entered into force internationally upon the receipt of the 25th Instrument of Acceptance on 24 April 2003.

1.4. The Joint Standing Committee on Treaties considered the Compliance Agreement in mid-2003. In its Report 47, the Committee supported the Compliance Agreement and recommended that Australia accept it. However, Australia cannot formally deposit its Instrument of Acceptance with the Director-General of the FAO until the Compliance Agreement has been implemented into domestic legislation. Passage of this Bill will, subject to Executive Council approval, enable Australia to deposit its Instrument of Acceptance.

1.5. The Compliance Agreement was developed as part of the international response to the lack of effective flag State control of high seas fishing vessels by fishing nations. This remains one of the main reasons for the increasing levels of illegal, unreported and unregulated fishing on the high seas. The Compliance Agreement aims, in particular, to combat the practice of vessels avoiding compliance with international fisheries management measures by ‘re-flagging’ to countries unable or unwilling to comply with those measures. It encourages greater international cooperation and compliance by requiring flag States to implement authorisation and recording systems for high seas fishing vessels and to share information required to be collected on the activities of those vessels on the high seas with the FAO, foreign countries and international bodies.

1.6. The Compliance Agreement forms an important part of the framework of internationally-agreed measures for fisheries conservation and management. It is consistent with the United Nations Convention on the Law of the Sea and all other global and regional fisheries conventions and agreements to which Australia is a Party. It forms a central element of the FAO Code of Conduct for Responsible Fisheries, which sets out principles and standards of behaviour for responsible fishing.
1.7. Australia is a responsible flag State and already abides by the essential obligations within the Compliance Agreement. However, amendments to our domestic law are required to provide for additional statutory functions and objectives for the Australian Fisheries Management Authority (AFMA) to enable it to ensure that fishing by Australian-flagged vessels on the high seas is conducted in a manner that is fully consistent with the Compliance Agreement and to ensure that AFMA is able to record the requisite information about high seas vessels and give effect to the Compliance Agreement’s information exchange obligations.

1.8. Schedule 2 of the Bill contains a number of miscellaneous amendments to the Fisheries Management Act 1991 that will improve the overall ability of AFMA to deliver and enforce effective fisheries management in Commonwealth fisheries. The amendments cover a diverse range of subjects including: a power to require fishing concession holders to keep and maintain logbooks on their activities in fisheries; limited powers of an officer to stop and detain vehicles and aircraft without a warrant or the consent of the owner or person in charge of the vehicle or aircraft; giving charter fishing a similar but separate status as recreational fishing; and amendments to the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America which is attached as Schedule 1 of the Fisheries Management Act 1991.

Financial Impact Statement

1.9. The amendments are not expected to impose a significant burden or cost on the Australian Government or the fishing industry. The costs of incorporating the Compliance Agreement into the Act are minimal, as Australian operators on the high seas are already required to meet most of the obligations contained in the Compliance Agreement. Most of the minor administrative costs (estimated at less than $10,000 per annum in total) associated with enacting Australia’s obligations under the Compliance Agreement will be shared between AFMA and the fishing industry. However, any minor additional licensing costs and the direct costs of collecting and reporting additional information to AFMA will be recovered from the holders of Australian high seas fishing concessions under the Government’s cost recovery policy. AFMA will fund the costs of compiling information and providing it to the FAO and foreign countries. Measures such as keeping logbooks for fisheries and charter fishing will have a negligible financial impact on industry or AFMA as they are existing activities. Costs associated with the limited power to detain vehicles and aircraft will be incurred as the need arises and will be shared between AFMA and the fishing industry.

Regulation Impact Statement – Implementation of the Compliance Agreement

1.10. A Regulation Impact Statement regarding the Compliance Agreement was prepared and jointly tabled with a National Interest Analysis and the text of the proposed treaty action on 25 June 2002 when Australia’s acceptance of the Compliance Agreement was considered by the Joint Standing Committee on Treaties.
2. NOTES ON CLAUSES

Clause 1: Short title

2.1. Clause 1 is a formal provision specifying the short title of the Bill. The Act will be called the *Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2003*.

Clause 2: Commencement

2.2. Sections 1 to 3 and anything not contained in Schedules 1 and 2 of the Bill will commence on the day on which the Bill receives the Royal Assent.

2.3. The amendments and repeals as set out in Schedules 1 and 2 of the Bill will not take effect until the day set by Proclamation. For Schedule 1, the day set by Proclamation must not be before the day on which the Compliance Agreement enters into force for Australia. However, if any of the provisions do not commence within six months from the day the Compliance Agreement enters into force in Australia they will commence the first day after the end of that six-month period. For Schedule 2, if any of the provisions do not commence within six months from the day the Act receives the Royal Assent, they will commence the first day after the end of that 6 month period.

Clause 3: Schedules

2.4. Clause 3 states that the *Fisheries Administration Act 1991* and the *Fisheries Management Act 1991* are amended or repealed as set out in the applicable items in Schedules 1 and 2 of the Bill. Any other item in a Schedule to this Bill has effect according to its terms.

Schedule 1: Implementation of the Compliance Agreement in Australia

Item 1: Subsection 4(1)

2.5. This item inserts a definition of an Australian-flagged boat in the *Fisheries Administration Act 1991* and gives it the same meaning as it has in the *Fisheries Management Act 1991*.

Item 2: Subsection 4(1)

2.6. This item inserts a definition of the Compliance Agreement in the *Fisheries Administration Act 1991* and gives it the same meaning as it has in the *Fisheries Management Act 1991*.

Item 3: After paragraph 6(ba)
2.7. This item adds an additional objective under Section 6 of the Fisheries Administration Act 1991 for AFMA to pursue in the performance of its functions. The additional objective is for AFMA to ensure that fishing activities by Australian-flagged boats on the high seas are carried out in a manner that is consistent with Australia’s obligations under international law, the Compliance Agreement, or any other international agreement.
**Item 4: After paragraph 7(1)(aa)**

2.8. This item adds a function, under Section 7 of the *Fisheries Administration Act 1991*, to allow AFMA to devise and implement management regimes to ensure that fishing activities by Australian-flagged boats on the high seas are consistent with Australia’s obligations under international law, the Compliance Agreement, or any other international agreement.

**Item 5: Paragraph 7(1)(ga)**

2.9. This item amends a function under Section 7 of the *Fisheries Administration Act 1991* to enable AFMA to give information on matters relating to global, regional or subregional fisheries management organisations or arrangements to international bodies, where the provision of this information will enable Australia to meet its obligations under this Bill or any associated law, or under international law or international agreements, including the Compliance Agreement.

**Item 6: After paragraph 3(2)(c)**

2.10. This item adds an additional objective under Section 3 of the *Fisheries Management Act 1991* for AFMA to pursue in the performance of its functions. The additional objective is for AFMA to ensure that fishing activities by Australian-flagged boats on the high seas are carried out in a manner that is consistent with Australia’s obligations under international law, the Compliance Agreement, or any other international agreement.

**Item 7: Subsection 4(1)**

2.11. This item defines the meaning of the ‘Compliance Agreement’ for the purposes of the *Fisheries Management Act 1991*.

**Item 8: Subsection 4(1)**

2.12. This item defines the ‘FAO’ for the purposes of the *Fisheries Management Act 1991*.

**Item 9: Subsection 4(1)**

2.13. This item defines the meaning of an ‘international conservation and management measure’ for the purposes of the *Fisheries Management Act 1991*. This is consistent with the definition of an ‘international conservation and management measure’ in the Compliance Agreement.

**Item 10: Subsection 7(3) (first sentence)**

2.14. This item explicitly enables all Australian-flagged boats to be covered by the provisions in the *Fisheries Management Act 1991* and enables AFMA to have authority over Australian-flagged boats fishing on the high seas and to give effect to its obligations under the Compliance Agreement that are set out in other provisions such as those relating to the implementation of recording systems for Australian-flagged boats, the monitoring of the activities of Australian-flagged
boats on the high seas and the sharing of information with the FAO, foreign countries and international bodies.

**Item 11: Subsection 8(1)**

2.15. This item extends the area that is subject to regulation under the *Fisheries Management Act 1991* to include the high seas. It enables AFMA to give effect to Australia’s obligations under the Compliance Agreement.

**Item 12: Subsection 8(1)(c) and (d)**

2.16. This item extends the application of regulations under the *Fisheries Management Act 1991* to include Australian-flagged boats and people aboard Australian-flagged boats that are operating outside the Australian fishing zone and/or the high seas. This enables AFMA to give effect to Australia’s obligations under the Compliance Agreement.

**Item 13: After section 16A**

2.17. This item requires AFMA to make certain background checks on the boats it authorises to fish on the high seas. AFMA is also required to refuse, in certain circumstances, to authorise an Australian-flagged boat to fish on the high seas if it believes, on reasonable grounds, that the boat undermined international conservation and management measures when it was previously registered in a foreign country. This item enables AFMA to prevent boats avoiding compliance with international fisheries management measures by ‘re-flagging’ from one country to another.

**Item 14: After subsection 22(5)**

2.18. This item broadens AFMA’s power to have discretion over the nomination of boats to a statutory fishing right that authorises an Australian-flagged boat to fish on the high seas. It enables AFMA to attach conditions to a statutory fishing right to ensure an Australian-flagged boat is not substituted for another without obtaining AFMA’s prior written approval to the substitution. This item prevents boats from avoiding the requirements under the Compliance Agreement that are embodied in item 13 in Schedule 1 of the Bill. It allows AFMA to fulfil its obligations under item 13 and to ensure that boats cannot be nominated to a high seas fishing concession without the proper checks required under the Compliance Agreement. At present, a boat can be nominated to a statutory fishing right simply by notice, and AFMA has no discretion to prevent the substitution of one boat for another.

**Item 15: After subsection 32(1B)**

2.19. This item requires a person with a fishing permit to fish in the Australian fishing zone or a specified fishery to obtain AFMA’s written agreement to substitute the boat that is specified in the permit with another boat. The subsection also requires a boat that is nominated for the purposes of a permit to fish in a specified fishery on the high seas to be an Australian-flagged boat. By providing AFMA with discretion over boat nominations to fishing permits, this item complements item
14, which allows AFMA discretion over boat nominations to statutory fishing rights.

2.20. Under current arrangements, once AFMA has exercised the discretion to grant the permit, it has no direct power to restrict the boat that the permit holder may subsequently nominate in respect of the permit. By providing AFMA with discretion to refuse boat nominations for fishing, AFMA is empowered to prevent the separation of licences between fishing boats thereby thwarting attempts to increase fishing capacity.
**Item 16: At the end of section 39**

2.21. This item gives AFMA the authority to cancel a boat’s high seas fishing concession if the boat ceases to be entitled to be an Australian-flagged boat. It gives effect to the obligation under the Compliance Agreement that a Party cancel a boat’s high seas fishing authorisation if that boat ceases to be entitled to fly that Party’s flag. The provision will bolster the concept of ‘flag-State control’ over fishing boats on the high seas.

**Item 17: Section 57**

2.22. This item repeals the existing section 57 of the *Fisheries Management Act 1991*.

2.23. The existing subsection 57(a) contains an offence provision relating to the intentional making or causing of a false entry into the Register of Statutory Fishing Rights. The offence is now covered by the Commonwealth *Criminal Code* and the *Crimes Act 1914 (Cth)*. Repealing this subsection and removing this offence provision from the Act will, in effect, reduce the maximum penalty for this offence from imprisonment for two years under the existing subsection 57(a) offence to one year, under Part 7.4 of the *Criminal Code*.

2.24. The existing subsection 57(b) contains an offence provision relating to the production and tendering into evidence of a document falsely purported to be an instrument, or a copy or an extract of an instrument or a copy or an extract from an entry in the Register. The wording of the existing subsection 57(b) has been slightly modified and separated into new subsections 57(a) and 57(b). The offence provision is retained due to concerns that the *Criminal Code* and the *Crimes Act 1914* may not completely cover conduct falling under the existing subsection 57(b) offence. The maximum penalty remains imprisonment for two years.

**Item 18: After Part 4**

2.25. This item gives effect to Australia’s obligations under the Compliance Agreement to implement authorisation and recording systems for Australian-flagged high seas fishing boats and to share information required to be collected on the activities of those boats on the high seas.

2.26. Sections 57A, 57B and 57C require AFMA to establish and maintain a separate register of all Australian-flagged boats authorised to fish on the high seas. They set out the responsibilities of AFMA to gather, record and maintain information on the High Seas Register and to provide information to the FAO and, in certain circumstances, to foreign countries. Section 57D requires the High Seas Register to be available for inspection by members of the public. Section 57E enables existing provisions relating to evidence, orders for rectification and correction of clerical errors in the Register, and AFMA’s liability for an omission or act done in good faith, to apply equally to the Register of Statutory Fishing Rights and the High Seas Register.

2.27. Section 57F contains a new offence provision which is a replication of the new subsections 57(a) and 57(b) (see item 17 in Schedule 1 of the Bill). The offence relates to the production or tendering into evidence of a document, which falsely
purports to be an instrument, copy of or extract from an instrument, lodged with AFMA under this Part or a copy of or extract from an entry in the High Seas Register. The maximum penalty is imprisonment for two years. The new sections 57 and 57F would result in consistent offences for the new High Seas Register and the existing Register of Statutory Fishing Rights.

Item 19: At the end of the Act add: Schedule 3 – Compliance Agreement

2.28. This item allows the full text of the Compliance Agreement to be attached as Schedule 3 to the Fisheries Management Act 1991.

Schedule 2 - Miscellaneous amendments of the Fisheries Management Act 1991
Part 1 – Logbooks for fisheries

Item 1: Subsection 42(1)

2.29. This item repeals the existing subsection 42(1) which provides that the Governor General may make regulations requiring holders of a fishing concession to record and furnish information on the taking, sale, carrying, disposal and processing of fish. Under this power, regulations have been made that gave the power to determine the form and information to be included in logbooks to AFMA. However, in a recent court case, the Tasmanian Supreme Court found this system to be invalid on the grounds that the regulations empowering AFMA to determine logbooks were ultra vires as being sub-delegation of the Governor General’s power.

2.30. As an interim measure, AFMA has continued its logbook program by placing conditions on fishing concessions, a practice which was approved by the Supreme Court. As the completion of logbooks is central to AFMA’s effective fisheries management, a more formalised structure is preferred.

2.31. The new subsection 42(1) removes doubt as to the source of the law regarding obligations of fishing concession holders to keep and maintain logbooks. It increases AFMA’s powers to enable it to determine that logbooks be kept and maintained for fisheries and to decide the form and storage of the logbooks and the information to be recorded in the logbooks. The obligations arising from a determination made under this subsection override any previous provision in a plan of management for that fishery or in a condition in a fishing concession.

Item 2: Subsection 42(2)

2.32. This item requires a holder of a fishing concession to comply with any requirements of any determination that AFMA has made under subsection 42(1).

Item 3: At the end of section 42

2.33. This item provides for a determination under subsection 42(1) to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901.

Item 4: Paragraph 95(1)(g)

2.34. Under the existing subsection 42(1) of the Fisheries Management Act 1991, the regulations may provide for the holders of fishing concessions to record and furnish returns containing certain information. This item repeals the existing offence provision that a person must not make or purport to make a record, or furnish or purport to furnish, relating to a matter specified in the existing subsection 42(1) knowing that the record or return contains a statement in respect of that matter that is false or misleading in a material particular.

2.35. The existing offence provision is replaced with one that is similar but which, to be consistent with the new item 1 in Schedule 2 of the Bill, refers to a logbook instead of a record.
Item 5: Subsection 106(2A)

2.36. This item amends an existing forfeiture provision to remove references to a record and include references to a logbook. This enables the forfeiture provision to be consistent with the new item 1 in Schedule 2 of the Bill relating to the keeping and maintaining of logbooks by holders of fishing concessions.

Item 6: Subsection 167(1)

2.37. This item repeals the existing subsection 167(1) which requires AFMA to compile statistics based on returns furnished under the existing subsection 42(1) and from other sources, and to publish or make available some or all of those statistics. The substitute subsections are similar to the existing subsection and require AFMA to compile statistics based on logbooks or returns in relation to matters mentioned in the new subsection 42(1B) in Item 1 of Schedule 2 of the Bill. The substitute subsections also give AFMA the option to publish or make available any of those statistics it has compiled.

Item 7: Paragraph 168(2)(i)

2.38. This item allows for regulations to be made enabling a person who is alleged to have contravened section 93 or 95 or a determination made for the purposes of section 42 to pay to AFMA, as an alternative to prosecution, a specified penalty, not exceeding the maximum penalty by which a contravention of that provision is otherwise punishable. The amendment is consistent with the increases to AFMA’s powers under item 1 of Schedule 2 of the Bill that enables AFMA to determine that logbooks be kept and maintained for fisheries and to decide the form and storage of the logbooks and the information to be recorded in the logbooks.

Item 8: Saving provision

2.39. This item ensures that existing logbooks that currently are being kept in accordance with a condition that AFMA has attached to a fishing concession will remain valid in relation to past fishing activities.

Part 2 – Power to stop and detain vehicles and aircraft

Item 9: Paragraph 84(1)(e)

2.40. This item gives an officer (as defined under the Fisheries Management Act 1991) limited powers to stop, detain and search a vehicle or aircraft without the consent of the owner or person in charge of the vehicle or aircraft or a warrant. This is only permissible if there are reasonable grounds to believe that there is anything in the vehicle or aircraft that may be evidence of the commission of an offence against the Fisheries Management Act 1991. These powers are subject to safeguards set out in the new subsections 84(1)(1AA) and 84(1)(1AB) in item 10 of Schedule 1 of the Bill.

Item 10: After subsection 84(1)
2.41. The safeguards imposed in subsections 84(1)(1AA) and 84(1)(1AB) include ensuring that the power to stop and detain may only be exercised if the owner or person in charge of the vehicle or aircraft refuses to consent to an officer stopping, detaining and searching the vehicle under item 9 of Schedule 1 of the Bill and the officer has reasonable grounds to suspect that: the vehicle contains evidence of an offence under the *Fisheries Management Act 1991*; and that a warrant cannot be obtained without a delay frustrating the effective execution of the warrant. The subsections also ensure that the owner of the vehicle is notified of the search where possible, that the reasons for the stop and search are recorded, and that those reasons are available to the owner upon request.

**Part 3 – Charter fishing**

2.42. Part 3 gives charter fishing a similar but separate status under *Fisheries Management Act 1991* as recreational fishing. The amendment will bring AFMA’s responsibilities for charter fishing in line with those for recreational fishing (that is, an overall stewardship role) and is consistent with Outcome 24 of the report, *Looking to the Future, A Review of Commonwealth Fisheries Policy*, published by the Australian Government Department of Agriculture, Fisheries and Forestry in June 2003.

**Item 11: Subsection 4(5)**

2.43. This item repeals the current subsection 4(5) of the *Fisheries Management Act 1991* that provides that a charter boat and the person in charge of a charter boat are engaged in commercial fishing. The substitute subsection 4(5) provides that a charter boat and a person in charge of a charter boat are engaged in recreational fishing. This is consistent with the existing definition of a charter boat in subsection 4(1) of the *Fisheries Management Act 1991*.

**Item 12: Paragraph 10(3)(a)**

2.44. This item means that, generally, the *Fisheries Management Act 1991* will no longer apply to charter fishing carried on in the Australian fishing zone or outside the Australian fishing zone by an Australian boat. The Act will only apply to recreational and charter fishing that is prohibited or regulated by a plan of management or temporary order.

**Item 13: Paragraph 10(3)(b)**

2.45. This item means that, generally, the *Fisheries Management Act 1991* will no longer apply to charter fishing carried on by the use of an Australian boat in the coastal waters of a State or Territory. The Act will only apply to recreational and charter fishing that is prohibited or regulated by a plan of management or temporary order.

**Item 14: Paragraph 15A(1)(b)**

2.46. This item repeals the existing paragraph 15A(1)(b) which restricts the taking of blue marlin or black marlin in the Australian fishing zone to a holder of a
scientific permit or a recreational fisher or charter boat. A substitute paragraph 15A(1)(b) includes fishing from a charter boat as a subset of recreational fishing. The effect of the paragraph remains the same.

**Item 15: Paragraphs 32(4)(b) and (c)**

2.47. This item repeals the current paragraphs 32(4)(b) and (c) that relate to fishing permits authorising the use of a boat for recreational fishing generally or as a charter boat. The substitute paragraph 32(4)(b) lists charter fishing as a subset of recreational fishing. The effect of the paragraph remains the same.

**Part 4 – Amendments to the Treaty**

**Item 16: Subsection 4(7)**

2.48. This item allows Australia to give effect to amendments to the *Treaty on Fisheries between the Government of Certain Pacific Islands and the Government of the United States* (the Treaty) without the need for regulation only if the Treaty amendments do not affect Treaty boats in the Australian fishing zone under a Treaty licence. The proposed provision will ensure that amendments to the Treaty that do not affect Australia can proceed without Parliamentary involvement. However, those amendments to the Treaty that have the capacity to impact on Australian domestic law will continue to be identified by Regulation. This change in procedure removes the need for Australia to make regulations each time the Treaty is amended. At present, an amendment of the Treaty has no effect on domestic law unless that amendment is declared by Regulations to have effect and, furthermore, it takes effect only from a day determined by Regulations.