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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FISHERIES LEGISLATION AMENDMENT BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Agriculture, Fisheries and Forestry, the Hon. Tony Burke, MP)
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GENERAL OUTLINE

The Fisheries Legislation Amendment Bill 2009 (the Bill) deals with three key matters and will amend the *Fisheries Management Act 1991* (the FM Act) and the *Torres Strait Fisheries Act 1984* (the TSF Act).

The Bill will:
1. improve the ability of the Australian Fisheries Management Authority (AFMA) to provide an efficient and cost effective fisheries management service through changes to the administration of fisheries licensing and the introduction of electronic decision-making;
2. ensure that fisheries officers engaged in investigating suspected illegal fishing can be properly equipped to safely perform that function; and
3. provide for consolidated arrangements regarding holders of fish receiver licences in the Torres Strait.

Electronic decision-making (eLicensing)

A core part of AFMA’s business under the FM Act is the granting of fishing concessions and the facilitation of transactions between concession holders, including the grant of a fishing permit upon the expiry of a previous permit, and the transfer of concessions. The Bill will enable AFMA to arrange for such routine, high volume decisions to be made automatically, by operation of a computer program, and will ensure that such decisions are valid. The computer program will apply the same considerations as would be applied by an AFMA delegate, and will make the same decision as the delegate would make. Any applications which require the exercise of judgement will be identified and referred for manual processing. Further, the computer program will only make a decision in favour of an applicant, if a ground exists on which an application may be refused, the matter will automatically be referred for manual processing.

Associated with eLicensing, the Bill removes some restrictions on the trading of fishing concessions. Restrictions on the transfer of concessions are removed by re-defining AFMA’s role as one of registering, rather than approving transfers, and by limiting AFMA’s discretion to refuse to register a transfer to certain prescribed circumstances. Those circumstances include: suspension of a fishing permit; the holder being investigated for a fisheries offence; the holder having been convicted of a fisheries offence; the levy on the permit not being paid; or other circumstances to be prescribed in the regulations.

The amendments are expected to result in a reduction in AFMA’s administrative costs, and subsequently the costs passed onto industry through fees and levies. It will also enable the market to operate more efficiently, including through the ability of concession holders to engage in ‘real time’ transactions. These measures will significantly assist AFMA to achieve its legislative objective of implementing efficient and cost effective fisheries management on behalf of the Commonwealth.
Defensive Equipment

AFMA fisheries officers are responsible for enforcing the FM Act through the investigation and detection of alleged illegal activities carried out by domestic and foreign fishers in the Australian Fishing Zone and Commonwealth managed fisheries.

Under revised arrangements with states and the Northern Territory which came into force on 1 July 2009, AFMA officers are undertaking front line fishery inspections and patrol activities previously undertaken by state and territory officers. While the ability of AFMA to issue officers involved in such work with the necessary defensive equipment is implicit in the FM Act, the Bill provides express authority for AFMA fisheries officers to be issued with, and carry, prescribed defensive equipment in the course of their duties.

Defensive equipment includes, for instance, bulletproof vests, extendible batons and handcuffs. Any other equipment would need to be prescribed under the regulations.

Torres Strait Fish Receiver Licence

Previous amendments to the TSF Act, (done under the Fisheries Legislation Amendment Act 2007) were intended to provide that all individuals who received fish directly from Torres Strait commercial fishers required a fish receiver licence. Upon implementation it became apparent that these provisions had created an overly cumbersome regulatory system.

The amendment will provide for it to be an offence if a person does not hold a fish receiver licence (or another type of licence that enables the person to receive fish) but receives fish directly and the fish were taken by someone required to hold a specified licence. In addition the person must intend to process the fish or sell the fish. It will also be an offence if a person holds a fish receiver licence but they receive fish from a person who is not a commercial fisher and the person intended to process or sell the fish. For both offences it is permissible for a person to not hold a fish receiver licence if they intend to process the fish for personal consumption or use.

The requirements will support the implementation of an effective quota monitoring system in Torres Strait fisheries by increasing reporting requirements on catch in the fishery. The system will provide the capacity to verify fishers’ catch records against records detailing information about product landed at a port. It is important that the Torres Strait Protected Zone Joint Authority has systems in place to regulate and monitor the amount of fish being caught for commercial purposes. The fish receiver licence is one of the measures that is utilised along with other reporting regimes that are currently in place or planned for implementation as part of a quota monitoring system such as log books, docket books and catch disposal records. As such the licence will be a mechanism for providing subsidiary records to AFMA as a method of cross-referencing and confirming other catch records.

FINANCIAL IMPACT STATEMENT

The amendments have been assessed as having an insignificant financial impact on the Australian Government or affected parties.
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NOTES ON ITEMS

Section 1: Short Title

Section 1 is a formal provision specifying the short title of the Act as the Fisheries Legislation Amendment Act 2009.

Section 2: Commencement

Section 2 provides for the commencement of the Act.

Sections 1 to 3 will commence upon Royal Assent.

Schedules 1 and 2 commence on the 28th day after this Act receives the Royal Assent. This will allow sufficient time for AFMA to make necessary arrangements in relation to eLicensing and defensive equipment and for agencies in the Torres Strait to implement administrative requirements to issue fish receiver licences.

Section 3: Schedule(s)

Section 3 provides that each Act specified in a Schedule to the Act is amended or repealed as set out in the applicable items of the Schedule concerned, and any other item in a Schedule to the Act has effect according to its terms.

Schedule 1—Amendment of the Fisheries Management Act 1991

Item 1: Subsection 4(1)

This item inserts into subsection 4(1) a definition of ‘being investigated for a fisheries offence’.

Item 2: Subsection 4(1)

This item inserts into subsection 4(1) a definition of ‘computer function notice’, by reference to section 163D.

Item 3: Subsection 4(1)

This item inserts into subsection 4(1) a definition of ‘defensive equipment’, by reference to section 89A.

Item 4: Subsection 4(1)

This item inserts into subsection 4(1) a definition of ‘electronic decision’, by reference to section 163B.
**Item 5: Subsection 4(1)**

This item inserts into subsection 4(1) a definition of ‘fisheries legislation’. It provides that ‘fisheries legislation’ means the FM Act or regulations, or another Act or regulations that are administered by the Minister and prescribed under the regulations. This will enable other provisions of the FM Act, or of another Act or regulations administered by the Minister, to be prescribed as provisions under which an electronic decision may be made, without amending the FM Act.

**Item 6: Subsection 4(1)**

This item inserts into subsection 4(1) a definition of ‘fisheries offence’.

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

This item inserts into subsection 4(1) a definition of ‘fishing concession certificate’ by reference to section 163E.

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

This item inserts into subsection 4(1) a definition of ‘law enforcement agency’.

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

This item inserts into subsection 4(1) a definition of ‘lease’ which applies where the FM Act refers to the lease of a statutory fishing right. See item 18.

**Item 10: Subsection 22(7)**

This item repeals subsection 22(7). With the introduction of the electronic licensing system (eLicensing) and developments in electronic record keeping, the requirement of subsection 22(7) that the original certificate evidencing the fishing right be returned upon the surrender of the right is redundant.

**Item 11: Subsection 32(1BA)**

This item repeals and substitutes subsection 32A(1BA). The new subsection provides that a boat may be nominated under subsection 32A(1A) or 32A(1B) only if each of the requirements of paragraphs (a), (b) and (c) are satisfied. This means that a permit granted by AFMA under subsection 32(1) will authorise the use of an Australian boat, nominated by the person to whom the permit is granted under subsections 32(1A) or (1B), if each of the requirements of subsection 32(1BA) are satisfied.

**Item 12: Subsections 32(9A) and (10)**

This item repeals subsections 32(9A) and (10).

With the introduction of the electronic licensing system (eLicensing) and developments in electronic record keeping, the requirement of subsection 32(9A) that the original permit be returned upon the surrender of a fishing permit is redundant.
The repeal of subsection 32(10) is consequent upon the insertion of new subsection 32A.

**Item 13: At the end of Division 5 of Part 3**

This item is about the holder of a fishing permit transferring the right to another person and it effectively replaces subsection 32(10). Previously, under subsection 32(10), the transfer of a fishing permit was subject to AFMA approval. Subsection 32A provides that the holder of the fishing permit must apply to AFMA in the approved form to register the transfer, the transfer takes place upon registration and AFMA must register the transfer unless one of the circumstances specified in paragraphs 32A(4) applies. Where one of those circumstances applies, AFMA may use its discretion to register the transfer. Those circumstances are: the fishing right has been suspended; the holder of the fishing right is being investigated, or has been convicted of a fisheries offence; a levy on a fishing right has not been paid; or other circumstances prescribed under regulations exist.

Subsection 32A(5) requires AFMA to register a transfer in accordance with subsection 32A(4) even if a requirement of a plan of management made under section 17 of the FM Act is not satisfied. This makes clear that subsection 32A overrides all of the requirements in plans of management concerned with the approval of transfers of fishing permits, which will no longer apply.

**Item 14: Subsection 33(7A)**

This item repeals subsection 33(7A). With the introduction of the electronic licensing system (eLicensing) and developments in electronic record keeping, the requirement of subsection 33(7A) that the original permit be returned upon the surrender of a scientific permit is redundant.

**Item 15: Subsection 34(10A)**

This item repeals subsection 34(10A). With the introduction of the electronic licensing system (eLicensing) and developments in electronic record keeping, the requirement of subsection 34(10A) that the original licence be returned upon the surrender of a foreign fishing licence is redundant.

**Item 16: Subsection 40(6A)**

This item repeals subsection 40(6A). With the introduction of the electronic licensing system (eLicensing) and developments in electronic monitoring, the requirement of subsection 40(6A) that the original licence be returned upon the surrender of a foreign master fishing licence is redundant.

**Item 17: Subsection 46(4)**

The insertion of subsection 46(4D) replaces section 49.

Subsection 46(4) provides for registration of dealings in statutory fishing rights by AFMA. This item omits in subsection 46(4) the words “subsection 46(4C)” and
substitutes the words “subsections (4C) and (4D)”. This means that AFMA’s obligation under subsection 46(4) to register a dealing will be subject to both subsection 46(C) and subsection 46(D). Subsection 46(4D) is consequential upon the repeal of section 49. Refer to item 19.

**Item 18: After subsection 46(4C)**

The transfer or lease of a statutory fishing right is a dealing in the fishing right to which section 46 applies. As such, the transfer or lease takes effect upon registration under section 46.

Subsection 46(4D) requires AFMA to register a lease, or transfer, of a statutory fishing right unless a circumstance specified in paragraphs 46(4D)(a) to (d) applies. It effectively replaces section 49, under which the transfer of a statutory fishing right was subject to AFMA approval. The circumstances in which AFMA may refuse to register a lease or transfer of a fishing right as the same as those in section 32A regarding the registration of a transfer of a fishing permit.

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 exists.

Subsection 46(4E) requires AFMA to register a transfer in accordance with subsection 46(4D) even if a requirement of a plan of management made under section 17 of the FM Act is not satisfied. This makes it clear that subsection 46(4D) overrides all of the requirements in plans of management concerned with the approval of transfers of statutory fishing rights, which will no longer apply.

Subsection 46(4D) refers to the ‘lease’ of fishing rights as the term has become accepted industry usage to describe the circumstances in which the original holder of a statutory fishing right assigns that right to another person for a temporary period. Therefore ‘lease’ of a statutory fishing right, is defined in subsection 4(1) as a temporary assignment of the right. See item 9.

**Item 19: Section 49**

This item repeals section 49, and therefore removes AFMA’s function of approving the transfer of statutory fishing rights. This supports the electronic decision making framework and is consequential upon the amendments made by subsections 46(4D) and (4E). See item 18.

**Item 20: After section 89**

This item inserts a new section 89A about defensive equipment.

While it was implicit in the FM Act that AFMA has the power to issue such equipment, this provision now expressly provides that the Chief Executive Officer (CEO) of AFMA may authorise an officer (being an officer appointed under section 83 of the FM Act) to be issued with, carry, use and store the types of defensive equipment specified in paragraphs 89A(2)(a), (b) or (c), or prescribed by regulations made for the purposes of paragraph 89A(2)(d).
It is necessary to provide for additional equipment to be prescribed by regulation, in view of the possibly that circumstances might change, in particular there could be a change in the assessment of the risk faced by officers, which requires the CEO to authorise the use of additional equipment in a timely manner.

The CEO may give such authorisation only if satisfied as to the matters specified in subsection 89A(3).

The authorisation is subject to conditions (section 89A(4)).

Subsection 84A(5) defines the rules of engagement in relation to the use of defensive equipment such that the use is subject to conditions in the CEO’s authorisation and the requirements in relation to reasonableness under the FM Act section 87J.

Subsection 89A(6) provides that it is an offence if a person has been issued with defensive equipment, the person stops being an officer and the person does not, as soon as practicable, return the defensive equipment to the CEO. The offence is worth two penalty units.

Subsection 89A(8) provides that an offence against subsection 89A(6) is an offence of strict liability. This is consistent with other offences of this nature, and complies with the recommendations of the Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation. It is also consistent with the guidelines approved by the then Minister for Home Affairs in December 2007 titled, A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers. The offence in subsection 89A(6) carries a small penalty of 2 penalty units, its purpose being to ensure that defensive equipment that has been issued to an officer is returned as soon as practicable if an officer ceases to be an officer. If strict liability did not apply, it could be difficult for the prosecution to prove the fault element (knowledge) of the offence, and it is appropriate instead that an officer charged with an offence under subsection 89A(6) has available the defence of reasonable mistake of fact (section 89A(7)).

Item 21: Before section 163

This item inserts Division 1, comprising of sections 163A to 163E, into Part 9 of the FM Act, regarding electronic decision making. The existing provisions of Part 9 (sections 163 to 168) now form Division 2 of Part 9 of the FM Act.

Section 163A explains that Division 1 is about AFMA using a computer program to make certain decisions.

Subsection 163B(1) provides that AFMA may approve that a computer program, which is under AFMA’s control, be used to make a decision under sections 32, 32A, 46 or 91 of the FM Act, a plan of management determined under section 17 of the FM Act, or another provision of the fisheries legislation that is prescribed under the regulations (see item 5 for the definition of ‘fisheries legislation’). This means that where an approval is in force, a computer program can make decisions under those provisions, or a provision of a plan of management, without the involvement of the
Commission, the CEO, an AFMA employee, or any other person in the making of the decisions, other than in the prior construction of the computer program.

Subsection 163B(2) provides that while an approval is in place, a decision made by the computer program (an ‘electronic decision’) is taken to be (a) a decision, and (b) a decision made by AFMA.

Subsection 163B(3) provides that an approval under subsection 163B(1) must be in writing.

Subsection 163B(4) provides that an approval made under section 163B is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. This provision is merely declaratory of the law, and is included to assist readers of this part of the FM Act.

Subsections 163C(1) provides that AFMA may revoke an electronic decision and replace it with a new decision if at any time the decision was made when the computer program was not functioning correctly.

Subsection 163C(2) provides that a computer program is not functioning correctly if the electronic decision that was made by the computer program is not the same as the decision that AFMA would have made if an employee of AFMA had made the decision.

Only certain types of decisions under the provisions specified in subsection 163B(1) will be made electronically. Those decisions are ones where all considerations relevant to the making of the decisions can be identified in advance (and built into the computer program), and there is no room for the exercise of discretion. 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.

For example, in making a decision as to whether to grant a fishing permit under section 32 of the FM Act upon the expiry of a previous permit, the only relevant considerations might be that the applicant held the same type of fishing permit in the previous licensing period, had paid any levies that were due in respect of the permit, and is not being investigated for an offence in connection with the permit. The computer program will identify whether each of those considerations are satisfied, and if they are, will issue the permit. If any one of those conditions is not satisfied, the computer program will not make the decision. Instead, the decision will be referred to and made by a delegate, who will exercise their discretion as to whether to grant the permit.

In contrast, a decision on an application for the grant of a permit under section 32 where the applicant has not previously held a permit of that type will in all cases be made manually, as the decision will necessarily require the exercise of discretion.

Subsection 163C(2) recognises the possibility of an error occurring in the computer program, or of a malfunction of the program, and that the computer program could make an incorrect decision (i.e. not the decision that an AFMA employee would have made). Such an error could occur, for example, if the program is developed on the
basis of incomplete or incorrect data, or if there is an error in the computer processing algorithms, or if a computer virus interferes with the operation of the computer program.

Subsection 163C(3) gives AFMA an express power to revoke an electronic decision if it is satisfied that the computer program was not functioning correctly when the electronic decision was made, and to replace that decision with the decision that would have been made if an employee of AFMA had made the decision.

Where other circumstances exist in which an electronic decision could be replaced, being circumstances which could apply equally to a decision made by an AFMA employee, AFMA would be able to revoke and replace the decision in the same way that it could take such action if the decision had been made by an AFMA employee. For example, if the decision was obtained by fraud or misrepresentation, or was made on the basis of incorrect information. It is therefore unnecessary to include in the Bill a power to revoke and replace an electronic decision in these other circumstances.

Subsection 163C(5) requires AFMA, as soon as is practicable after an electronic decision is revoked, to give the person who had sought the electronic decision a written notice that states the matters specified in paragraphs 163C(5)(a), (b) and (c).

Section 163D(1) provides for AFMA to issue a computer function notice in any proceedings. The notice is prima facie evidence of the matters stated in the notice.

Subsection 163D(2) provides that a ‘computer function notice’ is a document that is, or is purported to be signed, by the CEO (which includes a delegate of the CEO) and states whether or not a specified computer program was functioning correctly in relation to a specified electronic decision (or decisions), and at a specified time or during a specified period.

It is appropriate for the CEO of AFMA to be able to issue a computer function notice in these circumstances because a computer program would only fail to make the correct decision —being the decision an AFMA employee would have made—for technical reasons. That is, the data on which the computer program is based is incorrect or incomplete; ‘input’ data is correct but there is an error in the computer processing algorithms; or there is a computer malfunction, for example, because of a virus that interferes with the operation of the computer program.

Because a computer function notice will be confined to such technical matters, it is also appropriate that a notice be prima facie evidence of the matters stated in the notice. Making the notice prima facie evidence of those matters would also result in more efficient court proceedings where evidence of such matters is required, and would save time and costs. The fact that a computer function notice is only prima facie evidence means that AFMA would still be required to strictly prove each of the matters of fact asserted in the certificate where a party to the proceedings adduces evidence that puts those matters in doubt.

Subsection 163D(3) states when a computer program is functioning correctly. This is consistent with subsection 163C(2).
Section 163E provides that all requirements in plans of management in force under section 17 of the FM Act that require the holder of a fishing concession to return the fishing concession certificate for the concession to AFMA, no longer apply. The ‘fishing concession certificate’ is the certificate that AFMA issued to the holder of the fishing concession as evidence of the grant of the fishing concession. With the introduction of the electronic licensing system (known as GOFish) and developments in electronic record keeping, these requirements are redundant.

**Item 22: Subsection 165(1) (definition of relevant decision)**

This item omits the reference to section 49 of the FM Act, which is consequent upon the repeal of that provision. See item 19.

**Schedule 2—Amendment of the Torres Strait Fisheries Act 1984**

**Item 1: Subsection 3(1)**

This item inserts the definition of a ‘commercial fisher’.

**Item 2: Subsection 3(1)**

This item inserts the definition of a ‘commercial fishing licence’ to be a licence under subsection 19(2) or (4) of the *Torres Strait Fisheries Act 1984* (TSF Act).

**Item 3: Subsection 3(1)**

This item inserts the definition of a ‘fish receiver licence’ to be a licence under subsection 19(4B) of the TSF Act.

**Item 4: Section 46AA**

This item replaces the existing section 46AA with a new one to ensure that only the first receiver of fish, caught in the Torres Strait Protected Zone or an area of water under subsection 15(1), is required to hold a fish receiver licence.

This item creates two offences. Subsection 2 provides for an offence if a person does not hold a fish receiver licence (or a licence that enables the person to receive fish) but receives fish directly and the other requirements of the subsection are met. Subsection 4 prescribes it an offence if a person holds a fish receiver licence but they receive fish from a person who is not a commercial fisher and the other requirements of the subsection are met. The penalty for each offence is 50 penalty units.

It is permissible for a person to not hold a fish receiver licence if they intend to process the fish for personal consumption or use.

This item will address an unintended error in the current legislation whereby all individuals in the supply chain are required to hold a licence.