

## EXPLANATORY STATEMENT

(Issued by the Authority of the Minister for Sustainability, Environment, Water, Population and Communities)

*Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

### ***Interim (Small Pelagic Fishery) Declaration (No.2) 2013***

The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) provides for the protection of the environment and the conservation of biodiversity, including the protection of the environment in Commonwealth waters.

#### ***Legislative background***

Sections 390SA and 390SB of the EPBC Act prohibit a person from engaging in a declared commercial fishing activity in a Commonwealth marine area.

Section 390SD of the EPBC Act enables the Minister, with the agreement of the Minister administering the *Fisheries Management Act 1991 (Cth)* (**Fisheries Minister**), to declare a commercial fishing activity, to be a 'declared commercial fishing activity' on an interim basis (**interim declaration**) while the Minister consults with affected fishing concession holders about a longer-term prohibition for the same specified activity (during which an independent expert panel will conduct an assessment of the impacts of the activity).

Subsection 390SD(2) of the EPBC Act provides that when making an interim declaration, the Minister can characterise the commercial fishing activity by reference to one or more factors including a type of vessel, a method of fishing, processing carrying or transshipping of fish or an area of waters or of seabed.

#### ***Effect of the Declaration***

The *Interim (Small Pelagic Fishery) Declaration (No.2) 2013* (the **Declaration**) provides that the following commercial fishing activities are declared commercial fishing activities (**Declared Commercial Fishing Activities**) for the purposes of Chapter 5B of the EPBC Act:

##### Mid water trawl activity

- a) a commercial fishing activity that:
  - i) is in the Small Pelagic Fishery;
  - ii) uses the mid-water trawl method; and
  - iii) uses a vessel which has storage capacity for fish or fish products of 1,600 tonnes or greater.

##### Fish processing activity

- b) a commercial fishing activity that:
  - i) is in the Small Pelagic Fishery;
  - ii) uses a vessel which has storage capacity for fish or fish products of 1,600 tonnes or greater; and
  - iii) consists of receiving or processing fish or fish products that are quota species of, and that have been taken in the area of, the Small Pelagic Fishery.

The objective of the Declaration is to prohibit vessels with storage capacity for fish or fish products of 1,600 tonnes or greater that are in the area of the Small Pelagic Fishery from:

- a) fishing using the mid-water trawl method; or
- b) receiving or processing fish or fish products that are quota species of, and that have been taken in the area of, the Small Pelagic Fishery,

for a period of 60 days while the Minister consults with affected fishing concession holders about the making of a longer-term declaration.

### ***Consultation with the Fisheries Minister***

Subsection 390SD(3) provides that the Minister cannot make an interim declaration unless the Minister and the Fisheries Minister agree that:

- a) there is uncertainty about the environmental impacts of the commercial fishing activity; and
- b) it is appropriate that the commercial fishing activity should be prohibited while consultation occurs with fishing concession holders who consider themselves to be detrimentally affected by the making of a final declaration for the same fishing activity.

Before making the Declaration, the Minister consulted with the Fisheries Minister for the purpose of seeking his agreement to these matters.

The Fisheries Minister agreed that:

- a) there is uncertainty about the environmental impact of the Declared Commercial Fishing Activities; and
- b) it is appropriate to prohibit the Declared Commercial Fishing Activities while consultation occurs with affected fishing concession holders in respect of a final declaration.

The Declaration is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth).

The Declaration commenced at the end of the day it was registered on the Federal Register of Legislative Instruments.

Details of the Declaration are set out in the Attachment.

## ***Statement of Compatibility with Human Rights***

### **Interim (Small Pelagic Fishery) Declaration (No. 2) 2013**

The Interim (Small Pelagic Fishery) Declaration (No. 2) 2013 (the **Declaration**) does not engage any of the applicable rights or freedoms. The Declaration is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

#### **Overview of the Legislative Instrument**

Sections 390SA and 390SB of the EPBC Act prohibit a person from engaging in a declared commercial fishing activity in a Commonwealth marine area.

Section 390SD of the EPBC Act enables the Minister, with the agreement of the Minister administering the *Fisheries Management Act 1991* (Cth) (**Fisheries Minister**), to declare a commercial fishing activity, to be a 'declared commercial fishing activity' on an interim basis (**interim declaration**) while the Minister consults with affected fishing concession holders about a longer-term prohibition for the same specified activity (during which an independent expert panel will conduct an assessment of the impacts of the activity).

Subsection 390SD(2) of the EPBC Act provides that when making an interim declaration, the Minister can characterise the commercial fishing activity by reference to one or more factors including a type of vessel, a method of fishing, processing carrying or transshipping of fish or an area of waters or of seabed.

The Declaration provides that the following commercial fishing activities are declared commercial fishing activities for the purposes of Chapter 5B of the EPBC Act:

#### Mid water trawl activity

- a) a commercial fishing activity that:
  - i) is in the Small Pelagic Fishery;
  - ii) uses the mid-water trawl method; and
  - iii) uses a vessel which has storage capacity for fish or fish products of 1,600 tonnes or greater.

#### Fish processing activity

- b) a commercial fishing activity that:
  - i) is in the Small Pelagic Fishery;
  - ii) uses a vessel which has storage capacity for fish or fish products of 1,600 tonnes or greater; and
  - iii) consists of receiving or processing fish or fish products that are quota species of, and that have been taken in the area of, the Small Pelagic Fishery.

During the period the Declaration is in force, the declared commercial fishing activities are prohibited.

#### **Human rights implications**

Sections 390SA and 390SB prohibit declared commercial fishing activities and impose civil and criminal penalties, respectively. The Declaration does not create any new offences,

impose any new penalties or vary any existing penalties. Rather, it specifies an activity to which the existing offence and civil penalty provisions in sections 390SA and 390SB apply.

The first issue to consider is whether the Declaration is consistent with article 14(2) of the *International Covenant on Civil and Political Rights (ICCPR)*, which provides for the presumption of innocence. As a practical matter, the issue of consistency with article 14(2) of the ICCPR will not arise in relation to prosecutions for an activity covered by the Declaration. It specifies certain fishing activities in the Small Pelagic Fishery, which is located in a defined area within the Australian Fishing Zone (**AFZ**). The waters of the AFZ, as defined in section 4 of the *Fisheries Management Act 1991* (Cth) are all within a Commonwealth marine area, as defined in section 24 of the EPBC Act. Therefore any activity in the Small Pelagic Fishery is also within a Commonwealth marine area. Strict liability does not apply to the physical element of the offence under section 390SB of the EPBC Act that the activity is a 'declared commercial fishing activity', and therefore does not apply to the requirement that the activity was carried out in the area of the Small Pelagic Fishery. The prosecution must prove intention, knowledge or recklessness in relation to the activity occurring within that Fishery, which will also be within a Commonwealth marine area.

There is nothing in the nature or scope of the commercial fishing activities specified in the Declaration that engages human rights and freedoms. The Declaration applies only to commercial fishing activities that:

- a) are engaged in by vessels with a storage capacity for fish or fish products of 1,600 tonnes or greater; and
- b) use a particular fishing method (mid-water trawl), or consist of receiving or processing particular fish or fish products that are quota species of, and that have been taken in the area of, the Small Pelagic Fishery; and
- c) were not engaged in within a Commonwealth marine area before 11 September 2012.

Further, it will only apply to a commercial fishing activity about which the Ministers agree there is uncertainty as to its environmental impacts and will only be in force for 60 days.

The Declaration does not, on its face, discriminate against a particular group on a prohibited ground. Neither will it have a disproportionate impact on persons of particular groups that would result in discrimination on a prohibited ground (e.g. race or national origin). It will not affect traditional fishing practices engaged in by Indigenous Australians, because the prohibition does not apply to activities engaged in before 11 September 2012 and also, most probably, because it applies only to commercial fishing from vessels with a large fish storage capacity (of 1,600 tonnes or greater). The Declaration therefore does not engage the right to enjoy and benefit from culture (article 27 of the ICCPR and art 15 of the *International Covenant on Economic, Social and Cultural Rights*).

Accordingly, the Declaration does not engage any human rights.

## **Conclusion**

The Declaration is compatible with human rights as it does not raise any human rights issues.

**The Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP**

## **ATTACHMENT**

### **Details of the *Interim (Small Pelagic Fishery) Declaration (No. 2) 2013***

#### **Section 1 – Name of declaration**

This section provides that the title of the Declaration is the *Interim (Small Pelagic Fishery) Declaration (No. 2) 2013*.

#### **Section 2 – Interpretation**

This section defines terms used in the Declaration.

‘mid-water trawl method’ is defined as a method of fishing which involves towing a net behind a boat or boats through the water at a depth below the ocean surface, but higher in the water column than the bottom of the ocean.

‘processing’ is defined to include the work of cutting up, dismembering, cleaning, sorting, packing, or freezing.

‘quota species’ is defined by reference to the definition of quota species in the *Small Pelagic Fishery Management Plan 2009*.

‘Small Pelagic Fishery’ is defined by reference to the definition of the fishery in the *Small Pelagic Fishery Management Plan 2009*.

‘specified vessel’ is defined as type of vessel means a type of vessel which has storage capacity for fish or fish products of 1,600 tonnes or greater.

‘taken’ is defined to mean caught, captured, taken or harvested.

The definitions of ‘taken’ and ‘processing’ reflect the definitions of ‘take’ and ‘process’ in the *Fisheries Management Act 1991* (Cth)

#### **Section 3 – Period for which this declaration is in force**

This section provides that the Declaration is in force for 60 days. Subsection 390SD(4) of the EPBC Act stipulates that an interim declaration can be in force for no longer than 60 days.

#### **Section 4 – Declaration of commercial fishing activities**

This section provides that the following commercial fishing activities are declared commercial fishing activities:

##### **Mid water trawl activity**

- a) a commercial fishing activity that:
  - i) is in the Small Pelagic Fishery;
  - ii) uses the mid-water trawl method; and
  - iii) uses a vessel which has storage capacity for fish or fish products of 1,600 tonnes or greater.

##### **Fish processing activity**

- b. a commercial fishing activity that:
  - i) is in the Small Pelagic Fishery;

- ii) uses a vessel which has storage capacity for fish or fish products of 1,600 tonnes or greater; and
- iii) consists of receiving or processing fish or fish products that are quota species of, and that have been taken in the area of, the Small Pelagic Fishery.