

EXPLANATORY STATEMENT

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

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Final (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. The term 'Commonwealth marine area' is defined in section 24 of the EPBC Act.

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 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).

The *Interim (Small Pelagic Fishery) Declaration (No.2) 2013* (the **Interim Declaration**) was made on 27 February 2013. The Interim Declaration provided 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. This is a commercial fishing activity that:
 - i. is in the area of the Small Pelagic Fishery; and
 - 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. This is a commercial fishing activity that:
 - i. is in the area of the Small Pelagic Fishery; and
 - 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 and that have been taken in the Small Pelagic Fishery.

Pursuant to section 390SE of the EPBC Act, the Minister sought written submissions from 'declaration affected persons' about the impact on their rights or interests in relation to fishing, if a final declaration were to be made for the Mid water trawl activity and the Fish processing activity. A notice was published on the Department's website on 14 March 2013. In response to the request for submissions the Department received one submission. The Minister considered this submission in accordance with section 390SF(2)(c) of the EPBC Act in making the Final Declaration.

Section 390SF of the EPBC Act enables the Minister to declare a specified commercial fishing activity to be a 'declared commercial fishing activity' through a final declaration. The final declaration must be made about the same declared fishing activity (or activities) as specified in the Interim Declaration.

Effect of the Final Declaration

The *Final (Small Pelagic Fishery) Declaration (No.2) 2013* (the **Final Declaration**) provides that the Mid water trawl activity and the Fish processing activity are declared commercial fishing activities for the purposes of Chapter 5B of the EPBC Act. The objective of the Final Declaration is to prohibit the Mid water trawl activity and the Fish processing activity for a period of up to 24 months while an expert panel assesses the environmental impacts of those activities.

Consultation with the Fisheries Minister

Section 390SF of the EPBC Act provides that the Minister cannot make a final 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 an expert panel be established to conduct an assessment of the commercial fishing activity and report on the matter and that the commercial fishing activity be prohibited in a Commonwealth marine area while the expert panel conducts the assessment.

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

The Fisheries Minister agreed that:

- a) there is uncertainty about the environmental impact of the Mid water trawl and Fish processing activities; and
- b) it is appropriate that an expert panel be established to conduct an assessment of the Mid water trawl and Fish processing activities and report on the matter; and
- c) it is appropriate that the Mid water trawl and Fish processing activities be prohibited in a Commonwealth marine area while the expert panel conducts its assessment.

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

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

Details of the Final Declaration are set out in the [Attachment](#).

Statement of Compatibility with Human Rights

Prepared in accordance with section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)

Final (Small Pelagic Fishery) Declaration (No.2) 2013

1. The *Final (Small Pelagic Fishery) Declaration (No.2) 2013* (the **Final Declaration**) does not engage any of the applicable rights or freedoms. The Final 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

2. Sections 390SA and 390SB of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) prohibit a person from engaging in a 'declared commercial fishing activity' in a Commonwealth marine area. Section 390SF of the EPBC Act enables the Minister to make a declaration (a **final declaration**) that a specified commercial fishing activity is a 'declared commercial fishing activity'. A final declaration is in force for a period specified by the Minister in the declaration, but the period must not be longer than 24 months (section 390SF(4)).
3. The EPBC Act sets out the requirements that must be met before the Minister is able to make a final declaration (section 390SF). These are that:
 - a) the commercial fishing activity is or has been subject to an interim declaration under section 390SD;
 - b) the Minister has sought and considered written submissions from declaration affected persons in relation to the commercial fishing activity; and
 - c) the Minister and the Minister administering the *Fisheries Management Act 1991* (Cth) (**FM Act**) agree that:
 - i. there is uncertainty about the environmental impacts of the commercial fishing activity;
 - ii. it is appropriate that an expert panel should be established to conduct an assessment of the commercial fishing activity and report on the matter; and
 - iii. it is appropriate that the commercial fishing activity be prohibited in a Commonwealth marine area while the expert panel conducts the assessment (section 390SF(2)(e)).
4. The provisions mentioned above were added by the *Environment Protection and Biodiversity Conservation Amendment (Declared Fishing Activities) Act 2012* (the **amending Act**).

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

Mid water trawl activity

- a) This is a commercial fishing activity that:
 - i. is in the area of the Small Pelagic Fishery; and
 - 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) This is a commercial fishing activity that:

- i. is in the area of the Small Pelagic Fishery; and
- 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 and that have been taken in the Small Pelagic Fishery.

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

Human rights implications

6. Sections 390SA and 390SB of the EPBC Act prohibit declared commercial fishing activities and impose civil and criminal penalties, respectively. The Final 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.
7. Strict liability applies to one physical element of the offence in section 390SB of the EPBC Act - that the action is taken in a Commonwealth marine area. This means that the prosecution does not need to prove a fault element, such as that a defendant knew they were, intended to be, or were reckless as to whether they were, in a Commonwealth marine area when carrying out declared commercial fishing activities. The statement of compatibility for the Bill that became the amending Act addressed the question of whether this is consistent with article 14(2) of the *International Covenant on Civil and Political Rights (ICCPR)*, which provides for the presumption of innocence. The issue was considered by the Parliamentary Joint Committee on Human Rights in its consideration of that Bill. The Final Declaration does not alter this aspect of section 390SB of the EPBC Act.
8. In any case, 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 Final Declaration. It specifies certain fishing activities in the area of 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 FM Act, and are all within a Commonwealth marine area, as defined in section 24 of the EPBC Act. Therefore any activity in the area of 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 the area of that Fishery, which will also be within a Commonwealth marine area.
9. There is nothing in the nature or scope of the commercial fishing activities specified in the Final Declaration that engages human rights and freedoms. It applies only to commercial fishing activities that were not engaged in within a Commonwealth marine area before 11 September 2012. Further, it will only apply to commercial fishing activities about which the Minister and the Fisheries Minister agree there is uncertainty as to its environmental impacts.

10. The Final 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 activity occurring more than three nautical miles from the coast. The Final Declaration therefore does not engage the right to enjoy and benefit from culture (article 27 of the ICCPR and article 15 of the *International Covenant on Economic, Social and Cultural Rights*).
11. Accordingly, the Final Declaration does not engage any human rights.

Conclusion

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

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

ATTACHMENT

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

Section 1 – Name of declaration

This section provides that the title of the Declaration is the *Final (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 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 the period from the end of the day on which the instrument is registered in the Federal Register of Legislative Instruments until the earliest of the following:

- a) the end of the day on which the report of the expert panel is published;
- b) the end of the period specified in the declaration, being midnight of 24 April 2015; or
- c) the day a revocation of the declaration comes into force.

Subsection 390SF(4) of the EPBC Act provides the period specified in a final declaration can be no longer than 24 months. As such, if the report of the expert panel is published on a day before the end of the specified period, then the declaration may end prior to the 24 month period.

Subsection 390SG(1) of the EPBC Act provides that the Minister may revoke a final declaration.

Section 4 – Declaration of commercial fishing activity

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

Mid water trawl activity

- a) This is a commercial fishing activity that:
- i. is in the area of the Small Pelagic Fishery; and
 - 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) This is a commercial fishing activity that:
- i. is in the area of the Small Pelagic Fishery; and
 - 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 and that have been taken in the Small Pelagic Fishery.

The Declaration is made about the same declared commercial fishing activities as specified in the *Interim (Small Pelagic Fishery) Declaration (No.2) 2013*, which was made on 27 February 2013.