

## **EXPLANATORY STATEMENT**

Issued by the Authority of the Australian Fisheries Management Authority

*Fisheries Management Act 1991*

### ***Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction (No. 2) 2019***

#### **Authority**

Subsection 41A(2) of the *Fisheries Management Act 1991* (the Management Act) provides that the Australian Fisheries Management Authority (AFMA) may, after meeting consultation requirements as set out in subsection 41A(2), direct that fishing is not to be engaged in in the fishery, or a particular part of the fishery, during a particular period or periods. A copy of a direction made by AFMA under subsection 41A(2) must be sent to each holder of a fishing concession, scientific permit or foreign master fishing licence to which the direction relates (see subsection 41A(2A) of the Management Act).

Subsection 41A(3) of the Management Act provides that AFMA may, at any time, by a further direction in writing, vary or revoke a direction given under subsection 41A(2). A direction given under subsection 41A(3) of the Management Act is not subject to the requirements for consultation set out in subsection 41A(2) and notification set out in subsection 41A(2A). Directions made under section 41A, and directions varying or revoking them, are legislative instruments (subsection 41A(5)).

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. It is necessary to rely on this power to support the repeal of the *Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019* (the Variation Direction). The *Southern and Eastern Scalefish and Shark Fishery (Closures) Direction No. 2 2015* (the Closures Direction) was made on 6 May 2015 under subsection 41A(2) of the Management Act. The Variation Direction varied the Closures Direction under subsection 41A(3) of the Management Act. The *Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction (No. 2) 2019* (the Repeal Direction) repeals the Variation Direction and revives clause 7 as it applied before the Variation Direction was made (i.e. reinstates the affected clause of the Closures Direction). The Repeal Direction is a legislative instrument for the purposes of the *Legislation Act 2003*.

#### **The Fishery**

The Southern and Eastern Scalefish and Shark Fishery (the fishery) covers the area of waters from approximately 80 nautical miles off the coast near Fraser Island in Queensland, south around Tasmania and west to Cape Leeuwin in Western Australia. The area of the fishery encompasses almost half of the waters within the Australian Fishing Zone. The fishery operates in both Commonwealth and state waters under complex jurisdictional arrangements, as a number of arrangements under Part 5 of the Management Act have been made to provide for the Commonwealth to exercise jurisdiction in State waters.

The fishery is primarily managed under the *Southern and Eastern Scalefish and Shark Fishery Management Plan 2003* (the Plan), in force under section 17 of the Management Act, which establishes output controls in the form of Total Allowable Catch (TAC) limits. Input controls used include a limit on the number of boats

that operate in each sector, as well as gear restrictions such as limits on mesh size and the amount of fishing gear that may be used.

Certain areas of the fishery are closed to fishing under the Closures Direction and other instruments made under subsection 41A(2) of the Management Act to place restrictions on effort to protect spawning grounds, minimise impact on deepwater species, facilitate the recovery of certain species and protect threatened and endangered species.

### **Background to the Closures Direction**

Pink ling (*Genypterus blacodes*) is a quota species under the Plan which is assessed as two separate stocks; east of longitude 147° East (eastern zone pink ling) and west of longitude 147° East (western zone pink ling). Although they are assessed as separate stocks, the species is currently managed under a single TAC.

AFMA manages eastern zone pink ling by applying regional limits for the eastern zone of the fishery. The aim of these restrictions is to constrain total fishing mortality of pink ling in the eastern zone. In order to further constrain catches in the eastern zone, during 2014 AFMA implemented the *Fisheries Management (Southern and Eastern Scalefish and Shark Fishery, Pink Ling) Temporary Order 2015 No. 1* (Temporary Order). The Temporary Order closed fishing grounds at Maria Island, Seiner's Horseshoe and Everard Horseshoe.

Maria Island, Seiner's Horseshoe and Everard Horseshoe have been identified by industry as being areas containing high numbers of pink ling. The closures were part of a suite of arrangements to constrain pink ling catches in the eastern zone. The Temporary Order expired on 1 May 2015 and was subsequently replaced by the Closures Direction.

The Closures Direction was previously varied in 2016 (see the *Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction No. 1 2016*) to:

- (a) make an exception to the closures at Maria Island, Seiner's Horseshoe and Everard Horseshoe, that applies where a concession holder is subject to an existing concession condition restricting total pink ling catches in the eastern zone of the fishery to no more than 25 per cent of their total pink ling quota holdings.
- (b) remove the daily catch limits.

During the 2016-17 fishing year, AFMA and the South East Trawl Fishing Industry Association (SETFIA) trialled an alternative management arrangement for eastern pink ling that involved managing catches at the vessel level. SETFIA negotiated individual catch limits with operators who chose to opt in to this agreement. This agreement caps their combined eastern pink ling catches at or below a specified tonnage.

The SETFIA catch arrangements have successfully restricted the catches of vessels under the arrangement since the 2016-17 year and have been continued for the 2019-20 fishing year.

The Variation Direction was made in 2019 to include a new exception to the closure that applies where a concession holder has agreed, under management arrangements administered by SETFIA, to take a specified amount of pink ling and SETFIA has notified AFMA of that agreement.

This new exception was made because AFMA had agreed to enter into co-management arrangements with SETFIA for the purpose of managing catches of eastern pink ling in the fishery. Since making the Variation Direction, AFMA and SETFIA have entered into formal co-management arrangements

Upon further consideration of the Variation Direction, it appears that the Variation Direction might have involved an invalid sub-delegation to SETFIA of AFMA's legislative power under subsection 41A(2) of the

Management Act. Accordingly, the instrument repeals the Variation Direction and revives clause 7 as it applied before the Variation Direction was made.

### **Purpose**

The purpose of the Repeal Direction is to repeal the Variation Direction and revive clause 7 as it applied before the Variation Direction was made.

### **Consultation**

The Repeal Direction is made under subsection 41A(3) of the Management Act and subsection 33(3) of the *Acts Interpretation Act 1901*. The consultation requirements outlined in subsection 41A(2) and the notification requirements outlined in subsection 41A(2A) of the Management Act do not need to be met prior to making the Repeal Direction. Further to this, the practical effect of this instrument is to restore the principal direction to its former state immediately before the Variation Direction was made. AFMA will be consulting with stakeholders through the South East Management Advisory Committee and concession holders in relation to the ongoing application of the Closures Direction. In those circumstances, pursuant to section 17 of the *Legislation Act 2003*, AFMA considers it is appropriate and reasonably practicable not to undertake consultation in relation to this instrument.

### **Regulation Impact Statement**

The Office of Best Practice Regulation (OBPR) has previously advised that AFMA is not required to complete a regulatory impact statement for matters of a minor or machinery nature, including directing that fishing is not to be engaged in in part of a fishery (OBPR ID: 14421).

### **Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

This legislative instrument does not infringe any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Accordingly, in AFMA's assessment, this legislative instrument is compatible with human rights and a declaration is included at Attachment B.

### Details of the Repeal Direction

- Section 1** Provides that the name of the instrument is the *Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction (No. 2) 2019*.
- Section 2** Provides that the instrument commences on 16 September 2019.
- Section 3** Provides that the instrument is made under subsection 41A(3) of the *Fisheries Management Act 1991* and subsection 33(3) of the *Acts Interpretation Act 1901*.
- Section 4** Gives effect to Schedule 1 of the instrument.
- Schedule 1**
- Clause 1** Repeals the *Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction 2019* (the Variation Direction) with the provisions repealed by the Variation Direction being revived on 16 September 2019 as if the repealing provisions had not been made (i.e. it revives clause 7 of the *Southern and Eastern Scalefish and Shark Fishery (Closures) Direction No. 2 2015*).

## Statement of Compatibility with Human Rights

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

### *Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction (No. 2) 2019*

This legislative instrument 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*.

#### Overview of the legislative instrument

Subsection 41A(2) of the *Fisheries Management Act 1991* (the Management Act) provides that the Australian Fisheries Management Authority (AFMA) may, after such consultation as set out in subsection 41A(2), direct that fishing is not to be engaged in the fishery, or a particular part of the fishery, during a particular period or periods. Subsection 41A(3) of the Management Act provides that AFMA may, at any time, by a further direction in writing, vary or revoke a direction given under subsection (2). A direction given under subsection 41A(3) of the Management Act is not subject to the notification requirements under subsection 41A(2). Pursuant to subsection 41A(4) of the Management Act, if AFMA varies a direction given under subsection 41A(2) it must ensure a copy of the direction given under subsection (3) is sent to the holder of a fishing concession in respect of the fishery as soon as practicable.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The *Southern and Eastern Scalefish and Shark Fishery (Closures Variation) Direction (No. 2) 2019* (the Repeal Direction) repeals the Variation Direction, and revives clause 7 as it applied before the Variation Direction was made (i.e. reinstates the affected clause of the Closures Direction). The Repeal Direction is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Repeal Direction removes the exceptions.

#### Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues. AFMA is satisfied that the instrument is consistent with AFMA's obligation to pursue its statutory objectives.