

## **EXPLANATORY STATEMENT**

Issued by the authority of the Protected Zone Joint Authority

*Torres Strait Fisheries Act 1984*

### ***Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar)) Management Plan Amendment 2020***

The purpose of the *Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar)) Management Plan Amendment 2020* (the Plan Amendment) is to amend the *Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar)) Management Plan 2018* (the Management Plan) to provide for a further period of two years (in total 4 years) in section 17 of the Management Plan for the Authority to review the allocation of quota to the traditional inhabitant sector under paragraph 15(1)(a) of the Management Plan. Further, the amendment will provide that the review must ‘commence’ within this period.

### **The Legislative Framework**

The Management Plan was the first plan of management made in respect of commercial fishing for tropical rock lobster (TRL) in the area of the Torres Strait and came into force on 1 December 2018.

Under subsection 15A(1) of the *Torres Strait Fisheries Act 1984* (the Act) the Minister may, by legislative instrument, determine a plan of management for a fishery in an area of Australian jurisdiction. Under section 33(3) of the *Acts Interpretation Act 1901* 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.

Subsection 35(1) of the Act provides for the PZJA to exercise the powers of the Minister under subsection 15A(1) of the Act in respect of a ‘Protected Zone Joint Authority fishery’. Subsection 28(1) of the Act provides that a ‘Protected Zone Joint Authority fishery’ is a fishery in respect of which an arrangement under Part V of the Act is in place. The *Arrangement between the Commonwealth and the State of Queensland under section 31 of the Torres Strait Fisheries Act 1984* (the PZJA Arrangement<sup>1</sup>), made under Part V of the Act, provides that the PZJA is to have management of commercial fishing in the areas described in subsection 4(2) of the PZJA Arrangement. The TRL fishery, described in item 9 of Schedule 2 to the *Torres Strait Fisheries Regulations 1985* (the Regulations), is within the area described in subsection 4(2) of the PZJA Arrangement. It follows that commercial fishing for TRL in the area of the fishery is a ‘Protected Zone Joint Authority fishery’ for the purpose of subsection 28(1) of the Act and that, by way of subsection 35(1) of the Act, the PZJA can exercise the power of the Minister under subsection 15A(1) of the Act in relation to the fishery.

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<sup>1</sup> **PZJA Arrangement** means the document titled “*Arrangement between the Commonwealth and the State of Queensland under section 31 of the Torres Strait Fisheries Act 1984*” dated 17 March 1999 and published on the Federal Register of Legislation, as that document exists at the commencement of this instrument.

Note: The PZJA Arrangement could in 2020 be viewed on the website of the Federal Register of Legislation (<https://www.legislation.gov.au/Details/F2008B00750>).

The PZJA is established under section 30 of the Act and consists of the Minister administering the Act, the Queensland Minister administering the laws of Queensland relating to marine fishing in the Protected Zone, currently the Queensland Minister for Agricultural Industry Development and Fisheries, and the Chairperson of the Torres Strait Regional Authority (TSRA), which is the Commonwealth agency established under the *Aboriginal and Torres Strait Islander Act 2005* that represents the interests of Torres Strait Islanders. The PZJA is responsible for management of commercial fishing in the Australian area of the Torres Strait Protected Zone (TSPZ) and designated adjacent Torres Strait waters.

The PZJA is responsible for monitoring the condition of the designated fisheries and for the formulation of policies and plans for their management through support from four government agencies - the Australian Fisheries Management Authority (AFMA), the Commonwealth Department of Agriculture, Water and the Environment, the Queensland Department of Agriculture and Fisheries and the TSRA.

In exercising its functions, the PZJA has regard to the rights and obligations conferred on Australia by the *Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as the Torres Strait, and related matters* (the Torres Strait Treaty), in particular the protection of the traditional way of life and livelihood of the traditional inhabitants, including the capacity to engage in traditional fishing.<sup>2</sup> The Act provides for fisheries in the area of the Torres Strait to be managed under either the laws of the Commonwealth or Queensland. In October 1996, the PZJA agreed that all commercial fishing activity in the Torres Strait would be managed under the laws of the Commonwealth.

The Plan Amendment is a legislative instrument for the purpose of the *Legislation Act 2003* (the Legislation Act) and is:

- not subject to disallowance by way of parliamentary scrutiny, by application of subsection 44(1) of the Legislation Act, as the PZJA in making this instrument is an intergovernmental body involving Commonwealth and the State of Queensland; and
- not subject to sunseting by application of subsection 54(1) and paragraph 54(2)(b) of the Legislation Act, read together with item 63AB of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

## **The Fishery**

The TRL fishery is a highly valuable commercial fishery in the Torres Strait and holds very important significance to many Torres Strait Islanders.

TRL are taken either by hand or a short hand spear by divers working from small boats. The majority of divers free dive the shallow reef tops, whereas others use hookah (which involves surface supplied air) to dive the areas of the TRL fishery. Generally, fishing occurs during neap tides where the tidal flow is generally weaker and water visibility is clear.

## **Regulation of the TRL Fishery**

The TRL fishery is currently regulated through the Act, the Regulations and the *Torres Strait Fisheries (Tropical Rock Lobster) Management Instrument 2018* (the Instrument) as well as through the imposition of conditions on licences under section 22 of the Act.

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<sup>2</sup> The Torres Strait Treaty is included in Schedule 2 to the Act.

## Details of the Plan Amendment

The Plan amendment will:

- Amend the time frame section 7, item 3 of the table entitled “Assessing objectives of the Management Plan” in the column “Time frame” from “within 2 years of the day this instrument commences” to “within 4 years of the day this instrument commences”, consistent with section 17; and
- Amend the period in section 17 of the Management Plan from “within 2 years” to “within 4 years” of the day the Management Plan commences, for the Authority to review the allocation of quota units to the traditional inhabitant sector under paragraph 15(1)(a)”; and
- Amend section 17 of the Management Plan to provide that the review must ‘commence’ within this period; and
- Amend the note in section 24 of the Management Plan, consistent with section 17, that the allocation of quota units to the traditional inhabitant sector is to be commenced by the Authority within 4 years of the day the instrument commences.

## Reason for the Amendment

The Management Plan requires the PZJA to review the allocation of quota units to the Traditional Inhabitant (TIB) sector within two years of the Management Plan commencement (30 November 2020).

At the commencement of the quota system on 1 December 2019, the TSRA held quota units on behalf of the Traditional Inhabitant sector. Separate to the allocation review to be undertaken by the PZJA, the TSRA is working with stakeholders to establish an independent, non-profit entity to manage community-owned commercial fishery assets under the Fisheries Regional Ownership Framework project (FROF project). TSRA was working to have the entity established by 1 July 2020. Without excluding other options, in undertaking the review the PZJA may consider the following options in accordance with subsection 17(2) of the Management Plan: a. allocating quota units to a non-government legal entity that represents Traditional Inhabitants; b. allocating quota units to individual Traditional Inhabitants directly; and c. a combination of the options above.

The PZJA agreed in November 2019 in principle, that the review of allocation be undertaken by an Independent Allocation Advisory Panel (IAAP). This approach was selected based on AFMA’s experience that suggests operators have a greater confidence in allocation outcomes where they result from an independent assessment of the fishery and individual circumstances, and aligns with current PZJA policy Fisheries Management Paper 2 (PZJA FMP2) on “*Guidelines for the formation of allocation advisory panels for the allocation of fishing concessions in Torres Strait Protected Zone Joint Authority fisheries where fisheries management arrangements change significantly*”. The PZJA also agreed to commence the allocation review following the completion of the TSRA’s FROF project.

Central to determining the most appropriate allocation system in a particular fishery are the consultative processes which are undertaken with operators, traditional inhabitants and others with an interest in the fishery. For the TRL Fishery in the Torres Strait, this would involve face to face consultation through visits to remote communities to consult with relevant parties and persons or organisations with appropriate knowledge, experience or expertise as appropriate.

The Australian and State Government response to COVID-19 risks redirected the focus of state and Commonwealth public services on preparedness and assisting impacted industry and stakeholders. It also impacted the way the Government could conduct business with stakeholders, including face to face meetings as a result of travel restrictions. As such, AFMA considered that a review process could not be properly resourced or effectively conducted before the end of the review period specified in section 17 of the Plan. For the same reasons, the TRSA's FROF project was unavoidably delayed and will require additional time to conclude now that face-to-face consultation have safely resumed in the Torres Strait Region.

The objective of the amendment is to accommodate a longer review period whilst meeting the PZJA's commitment to stakeholders to review the Management Plan to allow for changes to improve performance including a possible allocation to individuals or companies within the traditional inhabitant sector.

### **Commencement**

The Plan Amendment will commence on the day after registration (see section 2 of the Plan Amendment).

### **Consultation**

Agreement for the Plan Amendment to extend the period for the allocation review was sought out-of-session from the PZJA Standing Committee in July 2020.

Following out-of-session PZJA Standing Committee in principle agreement on extending the review period and undertaking an amendment of the Plan, the PZJA agreed on 27 August 2020 to release an Exposure Draft for public comment for a period of six weeks from 4 September to 15 October 2020. Comments were sought from licence holders, native title bodies and registered claimants and the Torres Strait Tropical Rock Lobster Resource Assessment Group (TRLRAG) and Torres Strait Tropical Rock Lobster Working Group (TRLWG). The TSTRWG is the main PZJA advisory body on management issues in the TRL Fishery, established under subsection 40(7) of the Act. The TSTRWG consists of an independent Chair, Traditional Inhabitant fishing industry and non-Traditional Inhabitant fishing industry, scientific experts, an economist and representatives from the government (State, Commonwealth and PNG as observers).

The Exposure Draft was made available to stakeholders via a letter, email and publicly available on the PZJA website. Only one submission to the draft Plan Amendment was received which made generic comments about ownership and responsibility, which are relevant to the management of the fishery, but not directly relevant to the proposed amendment. The submission did not oppose or suggest further changes to the draft Plan Amendment. The PZJA agreed to the final draft Plan Amendment on 23 November 2020.

### **Native Title**

The amendment of the Management Plan by the PZJA is a future act for the purposes of the *Native Title Act 1993* (the Native Title Act). Section 24HA of the Native Title Act relevantly provides that the making of legislation in relation to the management or regulation of living aquatic resources is a valid future act, insofar as the Management Plan amendment is validly made.

As the Plan Amendment is not a future act consisting of "the grant of a lease, licence, permit or authority under legislation", subsection 24HA(2) of the Native Title Act does not apply, and native title notification is not required under subsection 24HA(7). Notwithstanding this, AFMA considers it valuable to notify native title bodies and claimant's bodies concerning the management of the TRL Fishery. Accordingly, AFMA wrote

to relevant native title bodies and claimants on 10 September 2020 seeking comment on the Plan Amendment. No responses were received.

### **Regulation Impact Statement**

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement was not required for this instrument as they consider that the proposal is unlikely to have a regulatory impact on business, individuals or community organisations. (OBPR ID: 42616).

### **Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

As the Management Plan is exempt from disallowance through the process of parliamentary scrutiny, by application of subsection 44(1) of the Legislation Act, a statement of compatibility with human rights does not have to be prepared for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Details of the Plan Amendment are set out in **Attachment A**.

## **ATTACHMENT A**

### Details on provisions

#### ***Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar)) Management Plan Amendment 2020***

##### ***Section 1      Name***

Provides that the name of the Plan Amendment is the *Torres Strait Fisheries (Quotas for Tropical Rock Lobster (Kaiar)) Management Plan Amendment 2020*.

##### ***Section 2      Commencement***

Provides that the Management Plan will commence on the day after it is registered on the Federal Register of Legislation.

##### ***Section 3      Authority***

Provides that the Plan Amendment is made under section 15A of the *Torres Strait Fisheries Act 1984* and subsection 33(3) of the *Acts Interpretation Act 1901*, noting that the PZJA has capacity to make the Plan Amendment by operation of paragraph 35(1)(a) of the Act. This is because the TRL fishery (as defined by the Management Plan) is a ‘Protected Zone Joint Authority fishery’ within the meaning given by subsection 28(1) of the Act.

##### ***Section 4      Schedules***

Provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

##### ***Schedule 1      Amendments***

- Item 1 – This item amends section 7, Item 3 of the Table entitled “Assessing objectives of the Management Plan” by omitting the words “within 2 years of the day this instrument commences”, and substituting it with “within 4 years of the day this instrument commences”.
- Item 2 – This item amends subsection 17(1) of the Management Plan by omitting the words “within 2 years of the day this instrument commences, the Authority must review the allocation of quota units to the traditional inhabitant sector under paragraph 15(1)(a)”, and substituting it with “within 4 years of the day this instrument commences, the Authority must commence a review of the allocation of quota units to the traditional inhabitant sector under paragraph 15(1)(a)”. The amendment provides the Authority with additional time in which to commence a review of the allocation of quota units to the traditional inhabitant sector.
- Item 3 – This item amends the note to section 24 of the Management Plan by omitting the words “Note: The TSRA is not able to apply under this section to have quota units it holds permanently transferred to another person. The allocation of quota units to the traditional inhabitant sector is to be reviewed by the Authority within 2 years of the day this instrument commences: see section 17”, and substituting it with “The TSRA is not able to apply under this section to have quota units it holds permanently transferred to another person. A review of

the allocation of quota units to the traditional inhabitant sector is to be commenced by the Authority within 4 years of the day this instrument commences: see section 17”. This item provides consistency with the amendments to section 7 and subsection 17(1) of the Management Plan.