

EXPLANATORY STATEMENT

Issued by the authority of the Protected Zone Joint Authority

Torres Strait Fisheries Act 1984

Torres Strait Fisheries (Bêche-de-mer) Management Instrument 2022

Purpose

The *Torres Strait Fisheries (Bêche-de-mer) Management Instrument 2022* (the Instrument) repeals and replaces the *Torres Strait Fisheries Management Instrument No. 15* (the Previous Instrument) to update the drafting style regulation, provide an exemption to the prohibitions for a person who holds a licence issued under section 19(4A) of the *Torres Strait Fisheries Act 1984* (the Act) that authorises the taking, processing or carrying of bêche-de-mer in the area of the bêche-de-mer fishery and to streamline rules relating to the use, possession and control of underwater breathing apparatus.

The Fishery

The Torres Strait Bêche-de-mer Fishery has a history dating back to at least the 19th century. The fishery is now accessed only by traditional inhabitants of the Torres Strait and Northern Peninsula communities and it forms an important source of income for those people.

The life-history of sea cucumbers and the fact that they are easily collected make them vulnerable to overfishing, which has occurred in the Torres Strait in the past. It is critical that commercial fishing for sea cucumbers is appropriately regulated to prevent overfishing. Sea cucumbers are mainly collected by hand by people free-diving from dinghies or walking along reefs at low tide.

Legislative Authority

Subsection 16(1) of the Act provides for the Minister to regulate fishing through a legislative instrument. Subsection 35(1) of the Act provides for the Protected Zone Joint Authority (PZJA) to exercise the powers of the Minister under subsection 16(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* dated 17 March 1999 (the PZJA Arrangement¹), made under Part V of the Act, provides that the PZJA is to have management of the fishery for the purposes of commercial fishing in the areas

¹ 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 be viewed on the website of the Federal Register of Legislation on 20 October 2021 at: <https://www.legislation.gov.au/Details/F2008B00750>.

described in section 4 of the Arrangement. The bêche-de-mer fishery, which is defined in section 4 of the Instrument by reference to the ‘area of the bêche-de-mer fishery’ described in item 1 of the table in Schedule 2 to the *Torres Strait Fisheries Regulations 1985* (the Regulations), is within the area described in section 4 of the PZJA Arrangement. It follows that commercial fishing for bêche-de-mer in the area of the bêche-de-mer fishery would come under the definition of being a ‘Protected Zone Joint Authority fishery’ for the purpose of subsection 28(1) of the Act and the PZJA can therefore exercise the power of the Minister under subsection 16(1) of the Act in relation to commercial fishing within the bêche-de-mer fishery.

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 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.

Details of the Instrument

The Instrument repeals and replaces the Previous Instrument. The key features of the Previous Instrument that are retained in the Instrument are:

- a general prohibition for the taking, processing or carrying of bêche-de-mer (subsection 6(1) of the Instrument, clause 5 of the Previous Instrument), subject to a series of exemptions:
 - for a person who holds a licence to take, process or carry bêche-de-mer under subsection 19(2), 19(3) or 19(4A) of the Act (subsection 6(2)(a) of the Instrument, subclause 8(2) of the Previous Instrument); and
 - for a person or persons fishing without the use of a boat, or with the use of a boat provided they are not taking or carrying beche-de-mer in excess of the specified quantities in the exemptions (subsection 6(2)(b), (c) and (d) of the Instrument, clause 8.1 of the Previous Instrument).
- prohibitions on the use of certain fishing methods other than collection by hand (see section 8 of the Instrument, clause 7 of the Previous Instrument) and prohibitions on the use of any equipment that provides for breathing underwater (see section 9 of the Instrument, clause 7 of the Previous Instrument).

The Instrument retains prohibitions on taking, processing or carrying undersize bêche-de-mer (see subsection 7(1) of the Instrument, clause 6 of the Previous Instrument), including the method for measuring bêche-de-mer for these purposes (subsection 7(2) of the Instrument, clause 6 of the Previous Instrument). The Instrument additionally provides for increases for some individual minimum size limits to align with the updated size limits set out in the *Torres Strait Bêche-de-mer Fishery Harvest Strategy*², agreed to by the PZJA in November 2019 and implemented from 1 January 2020 for the commencement of the 2020 fishing season.

² The *Torres Strait Bêche-de-mer Fishery Harvest Strategy* is subject to periodic review and is made publicly available on the PZJA website at <https://www.pzja.gov.au/the-fisheries/torres-strait-beche-de-mer-fishery>.

The Instrument also provides a section (see section 10) in relation to a prohibition on the use, possession or control of hookah gear (underwater breathing apparatus) on a boat, in the area of the bêche-de-mer fishery (see section 10 of the Instrument) where a person also carries bêche-de-mer on the boat, in the area of the bêche-de-mer fishery. This section intends to clarify any ambiguity that may arise in relation to whether bêche-de-mer was taken with the use of prohibited equipment. It is also intended to maintain the integrity of equipment prohibitions in the bêche-de-mer fishery under the Previous Instrument.

Exemptions to persons engaged in traditional fishing (see subclause 8.3 of the Previous Instrument) have been removed. The PZJA does not have jurisdiction in relation to ‘traditional fishing’ conducted by ‘traditional inhabitants’ (as defined in section 3 of the Act by reference to the Torres Strait Treaty³). This is because subsection 4(1) of the PZJA Arrangement specifies that the PZJA is to have jurisdiction over the management of commercial fishing in the Torres Strait. A note to the prohibitions is provided in the Instrument.

Subclauses 9.1 and 9.2 of the Previous Instrument have been removed, as the Instrument is repealing and replacing the Previous Instrument.

Details on the provisions of the Instrument are included at **Attachment A**.

Publication and Commencement

Subsection 16(9) of the Act provides that the PZJA, by way of section 35, must publish or broadcast the contents of an instrument made under section 16 a manner prescribed by sections 3 or 4 of the Regulations. Section 3 of the Regulations states that, for the purpose of subsection 16(9) of the Act, the manner of publication is by publication in such a newspaper as in the opinion of the PZJA is appropriate having regard to the nature of the contents of the notice.

In making the decision to make the Instrument, the PZJA has considered the nature and the contents of the Instrument and have determined that it would be appropriate for the Instrument to be published in the *Torres News*, which is the local newspaper in circulation across the islands of the Torres Strait and Cape York. The *Torres News* also has some circulation in Cairns where some licence holders are based. The PZJA also authorised staff members of the Australian Fisheries Management Authority (AFMA) to register the Instrument on the Federal Register of Legislation.

Subsection 16(4) of the Act provides that a prohibition in an instrument made under section 16(1) comes into force on the day it is published under subsection 16(9), or a later day as specified in the instrument. It follows that the Instrument will come into force on the day specified in section 2 of the Instrument.

Consultation

The PZJA and AFMA, which is delegated responsibility for the day-to-day management of Torres Strait fisheries under paragraph 38(1)(b) of the Act, take advice through a number of advisory

³ The Torres Strait Treaty is 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 Torres Strait, and Related Matters, signed at Sydney on 18 December 1978 and ratified by Australia on 15 February 1985.

committees established under subsection 40(7) of the Act, that include traditional inhabitants of the Torres Strait. The PZJA committees generally consist of an independent Chair and representatives from the government (Fisheries Queensland, AFMA and TSRA), scientific experts, economists, traditional inhabitant fishing industry and, where applicable, non-traditional inhabitant fishing industry. In addition, the Chairperson of the *Malu Lamar (Torres Strait Islander) Corporation RNTBC* (Malu Lamar), which is a Registered Native Title Body Corporate (RNTBC) and representatives from the Papua New Guinea National Fisheries Authority also have standing invitation to attend meetings as an observer.

The Hand Collectables Working Group (HCWG) is an advisory committee to the PZJA. At their meeting on 28-29 October 2021 the HCWG considered the draft Instrument and provided its advice. AFMA has also written to Malu Lamar outlining the need to remake the instrument and provided a copy of the draft instrument. Having regard to HCWG advice, the PZJA agreed to make the Instrument at its meeting on 11 February 2022.

Disallowance and sunseting

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

- not subject to disallowance, by application of subsection 44(1) of the Legislation Act, as the PZJA in making this Instrument is an intergovernmental body involving the 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*.

Native Title

The making of the Instrument is a future act for the purposes of the *Native Title Act 1993* (the Native Title Act). In particular, sections 24HA and 24OA of the Native Title Act relevantly provides that the making of legislation in relation the management or regulation of living aquatic resources, such as the Instrument, is a valid future act insofar as it impacts upon native title rights and interests.

Statement of compatibility with human rights

As the Instrument 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*.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement was not required for the Instrument (OBPR ID 44181).

Attachment A

Details of the *Torres Strait Fisheries (Bêche-de-mer) Management Instrument 2022*

Section 1 - Name

This section provides that this instrument is the *Torres Strait Fisheries (Bêche-de-mer) Management Instrument 2022* (the Instrument).

Section 2 – Commencement

This section provides for the commencement of the Instrument. As outlined above, subsection 16(4) of the Act provides that any prohibition contained within an instrument made under subsection 16(1) of the Act does not take effect *inter alia* until the instrument is published in accordance with subsection 16(9) of the Act and section 3 of the Regulations. The PZJA authorised AFMA to publish the Instrument in the *Torres News* and register it on the Federal Register of Legislation. It follows that the commencement of the Instrument is the day specified in section 2.

Section 3 – Authority

Provides that the Instrument is made under section 16 of the Act.

Section 4 – Definitions

This section outlines relevant definitions for the purpose of the Instrument, which provide as follows:

Act means the *Torres Strait Fisheries Act 1984*.

bêche-de-mer means fish of the families Holothuriidae and Stichopodidae

bêche-de-mer fishery means the ‘area of the bêche-de-mer fishery’ prescribed in item 1 of Schedule 2 to the Regulations.

bêche-de-mer licensed person means a person who has been granted a licence under subsection 19(2), 19(3) or 19(4A) of the Act that authorises the taking, processing or carrying of bêche-de-mer. This definition is included for the purposes of the exemption in subparagraph 6(2) of the Instrument.

This definition has been expanded to include persons who have been granted a licence that authorises the taking of bêche-de-mer without the use of a boat under subsection 19(4A) of the Act.

It is intended that this definition cover all operators in the bêche-de-mer fishery, including people originally granted a licence under subsections 19(2) or 19(3). Although there are currently no licences granted under subsection 19(4A) of the Act, this definition will cover any future scenarios in which such licences are granted.

hookah gear means equipment to enable a person to breathe underwater where the air is supplied from either an air compressor or one or more air cylinders above the surface of the water, and includes equipment which may be described as surface supplied breathing equipment or surface supplied breathing apparatus.

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 (ref: F2008B00750), as that document exists at the commencement of this Instrument.

Regulations means the *Torres Strait Fisheries Regulations 1985*.

underwater breathing apparatus includes **hookah gear** and self-contained underwater breathing apparatus (known as SCUBA).

Section 5 – Schedules

This section provides authority for Schedule 1 to the Instrument, which repeals the *Torres Strait Fisheries Management Notice No. 15*.

Section 6 – Prohibition on taking, processing or carrying bêche-de-mer

Paragraph 16(1)(a) of the Act relevantly provides that the PZJA may, by legislative instrument, prohibit the taking, processing or carrying of a class of fish specified in the instrument. Section 6 of the Instrument is made for this purpose.

Subsection 6(1) provides that the taking, processing or carrying of bêche-de-mer, in the area of the bêche-de-mer fishery is prohibited. This general prohibition restricts persons, other than the persons that fall within the exception listed in subsection (2) of this section, from engaging in commercial fishing for bêche-de-mer in the area of the bêche-de-mer fishery.

Subsection 6(2) outlines four exemptions from the prohibition in subsection (1). Those exceptions apply where the person is a bêche-de-mer licenced person (as defined in section 4 above). The exemptions also apply where the person is taking or carrying beche-de-mer without the use of a boat, or with the use of a boat either alone or with at least one other person in the boat, and they are not taking or carrying beche-de-mer in excess of the specified quantities prescribed in the exemptions.

Section 7 - Prohibition on taking, processing or carrying of undersize bêche-de-mer.

Subparagraphs 16(1)(b)(ii) and (v) of the Act relevantly provide that the PZJA may, by legislative instrument, prohibit the taking, processing or carrying of fish included in a specified class that have a dimension less or greater than a dimension specified in the instrument respectively. Section 7 of the Instrument is made for this purpose. The minimum lengths specified in this section have been implemented consistent with recommendations made from the PZJA Hand Collectables Working Group.

Under subsection 7, it is prohibited for a person in the bêche-de-mer fishery to take, carry or process bêche-de-mer that are less than the dimensions specified in the Instrument.

Section 7 specifies these dimensions and the way in which bêche-de-mer are to be measured.

It is noted at this section that the prohibition in section 7 does not apply to traditional inhabitants engaged in traditional fishing. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement.

Section 8 – Prohibition on the use of certain methods

Paragraph 16(1)(c) of the Act relevantly provides that the PZJA may, by legislative instrument, prohibit the taking, processing or carrying of fish included in a class of fish by a method specified in the instrument. Section 8 of the Instrument is made for this purpose, by providing that the taking, processing or carrying of bêche-de-mer by a person in the bêche-de-mer fishery by all methods other than collection by hand is prohibited.

It is noted at this section that the prohibition in section 8 does not apply to traditional inhabitants engaged in traditional fishing. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement.

Section 9 – Prohibition on the use of certain equipment

Paragraph 16(1)(c) of the Act relevantly provides that the PZJA may, by legislative instrument, prohibit the taking, processing or carrying of fish included in a class of fish with the use of equipment specified in the instrument. Section 9 of the Instrument is made for this purpose, by providing that the taking of bêche-de-mer by a person in the bêche-de-mer fishery using any kind of equipment that provides for mechanical propulsion or any kind of underwater breathing apparatus is prohibited.

It is noted at this section that the prohibition in section 9 does not apply to traditional inhabitants engaged in traditional fishing. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement.

Section 10 – Prohibition on the use, possession or control of underwater breathing apparatus

This section provides a person is prohibited from having bêche-de-mer as well as having in his or her possession, or under his or her control, on a boat, any quantity of underwater breathing apparatus. This section is made under subparagraph 16(1)(f) of the Act and intends to clarify any ambiguity that may arise in relation to whether bêche-de-mer was taken with the use of prohibited equipment. It is also intended to maintain the integrity of existing equipment prohibitions in the bêche-de-mer fishery.

It is noted at this section that the prohibition in section 10 does not apply to traditional inhabitants engaged in traditional fishing. This is because the PZJA, the body making the Instrument, does not have jurisdiction to regulate traditional fishing under the PZJA Arrangement.