Fisheries Legislation Amendment Bill (No. 1) 2012

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Law and Bills Digest Section

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Fisheries Legislation Amendment Bill (No. 1) 2012

Date introduced: 27 June 2012

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Sections 1-3 commence on the day of Royal Assent. Schedule 4 items 11 and 12 commence on the day after Royal Assent. Schedule 1, Parts 1 and 2, Schedules 2-3 and Schedule 4, items 1-10 commence on the 28th day after Royal Assent. Schedule 1 Part 3 commences when Schedule 1 Part 1 of this Act commences or immediately after Schedule 3 of the Agriculture, Fisheries and Forestry Legislation Amendment Act (No. 1) 2012 (the Agriculture Act), whichever is the later. However the provisions do not commence at all if Schedule 3 of the Agriculture Act does not commence.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Fisheries Legislation Amendment Bill (No. 1) 2012 (the Bill) is to amend the Fisheries Management Act 1991 and the Fisheries Administration Act 1991 to set up a system of electronic monitoring (e-monitoring) for fishing and fishing-related activities in Commonwealth fisheries. The Bill will:

- give the Australian Fisheries Management Authority (AFMA) the power to issue directions to holders of fishing concessions and scientific permits
- create offences for preventing or hindering the operation of e-monitoring equipment or destroying e-monitoring data
- allow AFMA to issue evidentiary certificates relating to the use of e-monitoring data in court proceedings and
- make minor amendments to:
  - improve the operation of provisions of the Act which make corporations and other principals liable for unlawful conduct of their directors, employees or agents and
  - enable AFMA to waive levies payable in respect of a statutory fishing right that is surrendered in defined circumstances.

Background

AFMA is the statutory authority responsible for management and sustainable exploitation of valuable Commonwealth fishery resources and detection and investigation of illegal activities by

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both domestic and foreign fishing vessels (in cooperation with other Australian Government agencies) on behalf of the Australian community.\textsuperscript{1}

AFMA manages fisheries on the high seas, within the 200 nautical mile Australian Fishing Zone (AFZ) and, in some cases, by agreement with the States to the low water mark. In doing so, AFMA provides management, advisory, compliance and licensing services and implements appropriate fisheries management arrangements.\textsuperscript{2}

Briefly the responsibilities of AFMA are as follows:

- process licensing and entitlement transactions for all Commonwealth fisheries
- collect licence fees and management levies from foreign and domestic fishers as a cost recovery measure for these services
- ensure each fishery is assessed and identified gaps in knowledge dealt with
- manage a substantial data collection program through the Logbook program. AFMA collects data on catch, effort and other information from operators in all Commonwealth managed and Torres Strait Protected Zone fisheries to understand the characteristics of each fishery
- provide professional observer services to domestic and foreign fishing vessels operating in the AFZ including sub-Antarctic territories and waters controlled under the Commission for the Conservation of Antarctic and Marine Living Resources (CCAMLR)
- detect and investigate illegal fishing activity by domestic and foreign fishing boats in the AFZ and Commonwealth fisheries and
- advise Australian delegations in international forums.\textsuperscript{3}

**The Australian Vessel Monitoring Program**

The Australian Vessel Monitoring System (AVM) is one of the compliance monitoring programs used to gather intelligence and conduct routine surveillance. It is comprised of both national and state programs. The national program is operated by AFMA.

Vessel Monitoring Systems (VMS) consist of three main components:

- the tracking unit on the vessel also known as the ‘Automatic Location Communicator’ (ALC)
- the transmission medium – Inmarsat C or D+ satellite and
- the base station.

The AFMA VMS is based on ALCS with a built-in Global Positioning System (GPS) fitted to each vessel nominated against a Commonwealth fishing concession. These ALCS transmit data on vessel

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position, course and speed via Inmarsat communications satellites to a land earth station (LES). The data is then transferred via a ‘virtual private network’ (VPN) Internet link to the AFMA head office in Canberra. AFMA can initiate reports from vessels at any time as required via remote access.

A personal computer (PC) or data terminal is required to be connected to the ALC. This allows for two-way communications between AFMA and the vessel. In addition it provides a vessel operator with secure communication to other similarly fitted vessels, or any fax, telex machine or email.

‘At AFMA, vessel tracks are displayed as plots on a digitised marine chart and can be automatically cross referenced against spatial rules set in fisheries management plans. The system can be used:

- in quota managed fisheries to enable compliance with different quotas in different zones;
- to assist in the monitoring of catches against competitive quotas and
- in the monitoring of closures in input managed fisheries.

Through the use of sophisticated base station software, any fishing vessel activity of interest can trigger a variety of pre-programmed alerts to instigate a Short Message Service (SMS) to Compliance Officers in real time.  

Notwithstanding the benefits of a VMS, there are limits to its capacities.

AFMA intends to use e-monitoring to complement existing data collection programs from observers, logbooks and vessel monitoring systems (VMS).

**Electronic Monitoring**

The Explanatory Memorandum gives a succinct background to the purpose and importance of e-monitoring:

E-monitoring involves the electronic recording of fishing and related activities for data collection and compliance purposes, through the use of specialised equipment installed on boats. E-monitoring equipment can include cameras, global positioning systems or sensors, and vessel monitoring systems, and can therefore generate a range of visual and non-visual e-monitoring data. Types of data that will be generated by e-monitoring include video footage of fishing and fishing-related activities on the deck of boats, in processing areas on boats, or in the water; data showing the location and identity of boats and the time that fishing activities take place; and data that indicates whether pieces of e-monitoring equipment are functioning. E-monitoring will

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therefore complement other monitoring techniques, such as logbooks and observers and, over time, is expected to largely replace the use of observers.  

The notion of implementing improved monitoring strategies for Commonwealth fisheries is not new but has been progressed over a number of years.

In 2005, the then Australian Government announced the largest structural adjustment package ever offered to the Australian fishing industry. The Minister for Fisheries, Forestry and Conservation, Senator Ian Macdonald said at the time:

It is critical that decisive action is taken to ensure the sustainability of Commonwealth fish stocks, and to secure the fishing industry’s future. By issuing a direction to AFMA, the Australian Government has made it very clear that it wishes AFMA to accelerate its current programmes to prevent overfishing, rebuild overfished stocks, and to take a more strategic approach to setting catch limits in future.

The Government’s direction to AFMA at that time included, amongst others, ‘enhanced monitoring of fishing activity, for example, through the use of observers and, increasingly, electronic means (such as vessel monitoring systems and on-board cameras).”

**Basis of policy commitment**

In December 2007, a discussion document was prepared for AFMA by GSGislason & Associates Ltd in Vancouver entitled *Benefits and Costs of E-Monitoring Video Technologies for Commonwealth Fisheries*. Prior to the discussion document in 2007, AFMA had undertaken preliminary work and trials of electronic monitoring technology for the previous three years. The document noted that e-monitoring trials had been successful and that ‘increased monitoring requirements are in line with global standards and increasing trends for fisheries data validation. The demand for accurate, timely and relevant catch monitoring data is increasing’.

The study assessed nine case study Commonwealth fisheries particularly the feasibility and practicality of introducing e-monitoring and the potential costs and benefits of introducing

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7. Explanatory Memorandum, Fisheries Legislation Amendment Bill (No. 1) 2012, p. 3.
8. I Macdonald (Former Minister for Fisheries, Forestry and Conservation), *$220m to secure Australia’s fishing future*, media release, 23 November 2005, viewed 2 August 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FOS1I6%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FOS1I6%22)
10. Ibid.

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e-monitoring to the candidate fisheries. One of the conclusions reached in the document considers that the analysis suggests that e-monitoring ‘shows significant economic and other net benefits’. The document further notes that:

Monitoring requirements in the future likely will be greater as Commonwealth fisheries come under greater scrutiny, as pressure increases on industry and government to prove that fishing operations are conducted in a sustainable manner, and as competing uses of the ocean environment such as Marine Protected Areas gain prominence...

In conclusion, the EM (e-monitoring) opportunity appears promising. EM can deliver cost savings as well as broad public benefits. AFMA and industry should work together on realizing this potential.

**E-Monitoring Trials**

E-monitoring is currently being trialled and implemented by AFMA in three fisheries. E-monitoring has been implemented in the Gillnet, Hook and Trap (GHAT) sector of the Southern and Eastern Scalefish and Shark Fishery in response to temporary orders placed on the fishery on 1 May 2011 (Protection of Australian Sea Lions) and 23 September 2011 (Protection for Dolphins). The temporary order for the protection of sea lions in the fishery was ‘designed to offer better protection to non-target species in the fishery, particularly Australian Sea Lions and to improve data collection on interactions with threatened, endangered and protected species’.

E-monitoring has been trialled in the East Coast Tuna and Billfish Fishery and the Northern Prawn Fishery. These trials have now been completed. The aim of the trials was to establish:

- the effectiveness of e-monitoring as a tool for quantifying interactions with TEP (threatened, endangered and protected) species
- the effectiveness of e-monitoring as a tool for collecting data currently collected by observers
- the costs and benefits of e-monitoring.

15. Ibid.
Committee consideration

Senate Selection of Bills Committee

At its meeting on 15 August, the Senate Selection of Bills Committee decided that the Fisheries Legislation Amendment Bill (No. 1) 2012 would not be referred to Committee.20

Financial implications

The Explanatory Memorandum states that ‘the amendments have no financial impact on the Australian Government. It is expected that the costs of purchasing and installing e-monitoring systems will be met by fishing concession or scientific permit holders. Administrative arrangements to implement the amendments in the Bill are expected to be funded under AFMA’s operating budget and through fishing industry levies and fees’.21

Statement of Compatibility with Human Rights

The Explanatory Memorandum states that the ‘Bill 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. The Bill places limitations on the prohibition on interference with privacy and the right to work; however, those limitations are reasonable, necessary and proportionate’.22

Key provisions

Schedule 1—E-Monitoring

Fisheries Management Act 1991

Items 1-4 insert into existing subsection 4(1) of the Act, definitions which are fundamental to the introduction and use of e-monitoring. The terms are:

- **e-monitoring**: means electronic monitoring
- **e-monitoring data**: any data (whether or not that data is also personal information, within the meaning of the Privacy Act 1988) that is or was generated, transmitted or stored by e-monitoring equipment installed, carried or used in compliance with any conditions of fishing concessions and scientific permits under proposed section 40C.

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22. Ibid., p. 5.

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e-monitoring equipment: means a thing used or capable of being used for generating, transmitting or storing data; or a thing that makes or is capable of making a thing to be used for generating, transmitting or storing data.

fishing-related activity: means any of the following:

- searching for, or taking, fish
- attempting to search for, or take, fish
- engaging in any other activities that can reasonably be expected to result in the locating, or taking, of fish
- placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons
- the processing, carrying or transshipping of fish that have been taken
- the discarding from a boat of fish, marine mammals, marine reptiles or seabirds
- any other activity prescribed by the regulations for the purposes of this definition
- any operations on a boat directly in support of, or in preparation for, any activity covered by another paragraph of this definition
- any other encounters with fish, marine mammals, marine reptiles or seabirds while engaging in any activity or operation covered by another paragraph of this definition and
- any other encounters with the marine environment while engaging in any activity or operation covered by another paragraph of this definition.

Existing Part 3 of the Act deals with the regulation of fishing. Item 5 inserts proposed Division 9A into Part 3 of the Act. Division 9A contains provisions concerning E-monitoring of fishing-related activity, comprising proposed clauses 40A, 40B and 40C.

Proposed clause 40A deals with directions to classes of concession and permit holders.
Proposed clause 40B deals with directions to specific concession and permit holders.
Proposed clause 40C deals with conditions of fishing concessions and scientific permits.

40A Directions to classes of concession and permit holders

Proposed paragraph 40A(1)(a) and (b), together provide that AFMA may make written directions to require any person with a fishing concession or a scientific permit of a prescribed class to comply with obligations relating to the e-monitoring of fishing-related activity; or prescribed restrictions on fishing if obligations in the direction have not been complied with.

Proposed subsection 40A(2) provides a non-exhaustive list of examples of obligations that may be prescribed in a direction made under paragraph 40A(1)(a), and include the circumstances, times, places or methods for the following:

- installing, carrying, using, handling, maintaining or monitoring the use of, prescribed e-monitoring equipment
- giving e-monitoring data to AFMA
- giving e-monitoring equipment containing e-monitoring data to AFMA and

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• giving statements to AFMA relating to e-monitoring data and equipment.

A direction made under subsection 40A(1) must prescribe a reasonable period in which to comply with the obligation or restriction (proposed subsection 40A(3)).

Consultation and notification requirements for making directions

Proposed subsection 40A(4) provides that before directions are made under proposed subsection 40A(1), AFMA must consult with the:

• management committee for the fishery or
• the holders of fishing concessions or scientific permits if there is no committee.

AFMA must ensure that at least seven days before a direction takes effect, a copy of the direction is sent to each holder of a fishing concession or scientific permit to which that direction relates (proposed subsection 40A(5)). In the event of an emergency, a direction can be made without consultation and the normal minimum notice period under subsection 40A(5) does not apply. However, AFMA must ensure a copy of the direction is sent a soon as possible to each holder of a fishing concession or a scientific permit (proposed subsection 40A(6)).

Variation and revocation of a direction

A direction made under subsection 40A(1) may be varied or revoked at any time by issuing a further direction in writing (proposed subsection 40A(7)). In this case, the requirement to consult or notify holders of fishing concessions or scientific permits does not apply. However AFMA must ensure that a copy of a direction that varies or revokes an earlier direction is sent to a holder of a fishing concession or a scientific permit as soon as possible (proposed subsection 40A(8)).

Directions are legislative instruments

Proposed subsection 40A(9) provides that a direction made under subsection 40A(1), or a variation or revocation of a direction, are legislative instruments and as such, they are subject to parliamentary scrutiny and disallowance procedures.

40B Directions to specific concession and permit holders

Proposed paragraph 40B(1)(a) provides that AFMA may, by written notice given to a holder of a fishing concession or scientific permit, direct the holder to comply with obligations prescribed in a direction relating to e-monitoring of fishing-related activity. Such directions are given to individual concession or scientific permit holders if different or additional obligations are required so as to tailor for their circumstances. Where such obligations are imposed, there is a requirement that they are not inconsistent with an obligation prescribed in a direction made under proposed section 40A (proposed paragraph 40B(1)(a)). Non-compliance with the obligations under paragraph 40B(1)(a) may result in prescribed restrictions on fishing.

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 Proposed subsection 40B(2) provides a non-exhaustive list of examples of obligations that may be prescribed in a direction under proposed paragraph 40B(1)(a). The examples of obligations are the same as those prescribed for proposed subsection 40A(2).

Directions are not legislative instruments

Directions made under proposed subsection 40B(1) are not legislative instruments and therefore not subject to parliamentary scrutiny (proposed subsection 40B(4)).

Conditions of fishing concessions and scientific permits

Proposed section 40C provides that it is a condition of a fishing concession or a scientific permit that any obligation or restriction that is prescribed in a direction in force under proposed Division 9A be adhered to. Section 95 of the Act provides that it is an offence to contravene a condition of a fishing concession or scientific permit.

E-monitoring equipment and data offences

Existing Part 6 of the Fisheries Management Act is concerned with surveillance and enforcement. Item 7 inserts into part 6 of the Act proposed section 97A, which deals with e-monitoring equipment and e-monitoring data offences. Proposed subsection 97A(1) creates the offence of engaging in conduct which prevents or hinders the operation of e-monitoring equipment that is installed and used in compliance with a condition of a fishing concession or scientific permit. The maximum penalty is imprisonment for two years or 250 penalty units or both ($27 500). Proposed subsection 97A(2) creates the offence of engaging in conduct, without written authority from AFMA, that modifies, damages or destroys e-monitoring data. The maximum penalty is imprisonment for two years or 250 penalty units.

Section 166 of the Act is concerned with evidence in proceedings for an offence against the Act. Existing subsection 166(2) deals with the situations where AFMA may issue a certificate in relation to proceedings for an offence. Item 8 inserts proposed paragraphs 166(2)(l)-(o), which add to the list of matters where AFMA may issue a certificate which states that at a time or during a period specified in the certificate:

- a person was subject to a direction under proposed section 40A or 40B at a time or during a period specified in the certificate
- AFMA received e-monitoring data specified in the certificate
- AFMA received equipment on which e-monitoring data was stored and
- AFMA received a statement in compliance with a condition of a fishing concession or a scientific permit.

Penalty unit is defined in section 4AA of the Crimes Act 1914. Penalty unit means $110.

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Schedule 2—Closure of a fishery

Existing section 41A of the Act provides that AFMA may give directions in relation to the closure or partial closure of a fishery. This section applies to a fishery where fishing concessions, scientific permits or foreign master fishing licences are in force. Item 1 inserts proposed subsection 41A(2AA) which provides that a direction may identify the part of the fishery in any way or ways.

Item 2 repeals and replaces subsections 41A(2A) and (2B). Proposed subsection 41A(2A) provides that AFMA must ensure that a copy of a direction for closure or part-closure of a fishery is sent to each holder of a fishing concession, scientific permit or foreign master fishing licence in relation to the fishery to which the direction relates at least seven days before the direction takes effect. Proposed subsection 41A(2B) provides that if there is an emergency a direction may be issued without consultation and subsection 41A(2A) does not apply. AFMA must also ensure that a copy of the direction is sent to each holder of a fishing concession, scientific permit or foreign master fishing licence as soon as possible. The primary differences between the old and new sections are that an actual copy of the direction is now required to be sent to relevant concession, permit or licence holders, and in the case of an emergency, no consultation is required in relation to the direction and a copy of the direction must be sent to relevant stakeholders as soon as possible (compared with as soon as practicable under the existing provisions).

Schedule 3—Waiver of levy

Existing Part 7, Division 1 of the Fisheries Management Act deals with the collection of levies imposed by the Fishing Levy Act 1991. Existing section 113 deals with the recovery of the levy and other amounts which are debts due to the Commonwealth. Item 1 proposed subsection 113(1A) provides that a levy under a statutory fishing right may be waived by AFMA by written notice if a statutory fishing right is surrendered before any fishing activities are undertaken under the right during the period. Any amount payable under section 112 (penalty for non-payment) may also be waived.

Schedule 4—Conduct of directors

Existing Division 2 of Part 9 of the Fisheries Management Act contains miscellaneous provisions. Existing section 164 is concerned with the conduct of directors, their employees or agents. Existing subsection 164(2) provides that any conduct engaged in by a director, servant or agent of a body corporate, on behalf of a body corporate and within the scope of that director, servant or agent’s authority is taken, for the purposes of a prosecution under the Act, to have been engaged in by the body corporate unless the body corporate can establish that it took reasonable precautions and exercised due diligence to avoid the conduct. Item 6 repeals subsection 164(2) and inserts proposed subsections 164(2) and (2A). Proposed subsection 164(2) provides that conduct engaged in by a director, employee or agent of a body corporate is taken, for the purposes of prosecuting an offence under the Act, to have been engaged in by the body corporate unless it can establish it took
reasonable precautions and exercised due diligence to prevent the conduct concerned. The new provisions:

remove the requirement on the prosecution to prove that conduct engaged in by the director, employee or agent of a body corporate was engaged in on behalf of the body corporate and within the scope of the director, employee or agent’s actual or apparent authority. These requirements are difficult to establish and are inconsistent with the purpose of the provisions.  

Proposed subsection 164(2A) sets out matters required to be taken into account in determining whether a body corporate took reasonable precautions or exercised due diligence to prevent conduct occurring. Regard must be had to the following matters:

- any action taken by the body corporate to inform the director, employee or agent of the legal obligations in relation to the conduct
- any action taken by the body corporate to ensure that the obligations were understood and complied with by the director, employee or agent
- when the action was taken and
- whether other actions could have been taken to prevent the conduct.

Item 10 repeals subsection 164(4) and substitutes proposed subsections 164(4) and (4A). Existing subsection 164(4) provides that any conduct engaged in, on behalf of a person other than a body corporate, by an agent or servant of a person in the course of their actual or apparent authority for the purposes of prosecuting an offence, that person will be taken to have engaged in that conduct unless he or she can establish that reasonable precautions were taken and that due diligence was exercised to prevent the conduct happening. Proposed subsection 164(4) sets out similar provisions to proposed subsection 164(2) in relation to a person instead of a body corporate. Proposed subsection 164(4A) provides similar considerations to subsection 164(2A) in determining whether a person took reasonable precautions and exercised due diligence to prevent the conduct.

Concluding comments

The primary aim of e-monitoring is ‘to provide better, cheaper data’.  

The Parliamentary Secretary notes that:

It is vital that AFMA has access to accurate, comprehensive and timely data on the state of fish stocks, and on the impacts of fishing on both fish stocks and the marine environment, to manage


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fisheries. AFMA also needs to have accurate data to monitor whether fishing activities meet legal requirements.\footnote{26}

Trials have been run now for several years and decisions have been made about the quality of the information retrieved. According to the Explanatory Memorandum e-monitoring itself is a cost effective monitoring tool\footnote{27} substantiated not only by trials in AFMA fisheries but by successful trials carried out in Europe, Canada, New Zealand and the United States.\footnote{28} The decision to implement e-monitoring will be made on a fishery by fishery basis, with regard to the monitoring requirements, as well as the cost and benefits to each fishery concerned.

\footnote{26. Ibid.}{Ibid.}
\footnote{27. Explanatory Memorandum, op. cit., p. 3.}{Explanatory Memorandum, op. cit., p. 3.}

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