BILLS DIGEST NO. 18, 2012–13

Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Bill 2012

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Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Bill 2012

Date introduced: 11 September 2012

House: House of Representatives

Portfolio: Department of Sustainability, Environment, Water, Population and Communities

Commencement: On Royal Assent

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 Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Bill 2012 (the Bill) creates a new chapter 5B in the Environment, Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act):

- to enable the Minister for Sustainability, Environment, Water, Population and Communities (with the agreement of the Commonwealth Fisheries Minister) to make an interim declaration that a fishing activity is a prohibited ‘declared commercial fishing activity’ while an expert panel assesses the potential environmental impacts of the activity
- to enable the Minister for Sustainability, Environment, Water, Population (with the agreement of the Commonwealth Fisheries Minister) to make a final declaration for a period no longer than 24 months, that a fishing activity is a prohibited ‘declared commercial fishing activity’
- to provide for the establishment of an expert panel in the case of the making of a final declaration and specify the terms of reference of the panel and its reporting date, with a requirement that a copy of the panel report be made publicly available
- to provide for appropriate procedural fairness protections for ‘declaration affected persons’ and
- to create civil penalty and offence provisions for engaging in a declared commercial fishing activity.

Background

The main Commonwealth environmental law is the EPBC Act. A person planning an activity, which is a controlled action\(^1\) — that is, an action that is likely to have significant impact on a matter of national environmental significance\(^2\) or Commonwealth land — may need to obtain approval from

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1. Controlled action is defined in section 67 of the EPBC Act.
2. Matters of national environmental significance are listed in Chapter 2, Part 3, Division 1, sections 12-24A EPBC Act.

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the Environment Minister under the EPBC Act before the activity begins. This requirement extends to any action by the Commonwealth (or one of its agencies).³

Under the EPBC Act, the Commonwealth is responsible for regulating matters of national environmental significance. These are:

1. declared world heritage properties
2. National Heritage places
3. declared wetlands of international importance (listed under the Ramsar Convention)
4. nationally-listed threatened species and ecological communities
5. nationally-listed migratory species
6. nuclear actions (including uranium mines)
7. the Commonwealth marine areas, and

A number of these ‘matters of national environmental significance’ give effect to Australia’s obligations under international environmental treaties.

Understanding what is likely to constitute a ‘significant impact’ is important as it tied to the issue of whether approval is required and what sort of conditions may attach to that approval. The EPBC Act does not elaborate on what is a significant impact although assistance gauging this is provided in its published significant impact guidelines 1.1 on Matters of National Environmental Significance. These guidelines state:

In order to decide whether an action is likely to have a significant impact, it is necessary to take into account the nature and magnitude of potential impacts. In determining the nature and magnitude of an action’s impacts, it is important to consider matters such as:

- the sensitivity of the environment which will be impacted
- the timing, duration and frequency of the action and its impacts
- all on-site and off-site impacts
- all direct and indirect impacts
- the total impact which can be attributed to the action over the entire geographic area affected, and over time
- existing levels of impact from other sources, and
- the degree of confidence with which the impacts of the action are known and understood.⁴

³ Sections 26 and 28 EPBC Act.

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Fisheries and the Environment

A Commonwealth publication titled *Guidelines for the Ecologically Sustainable Management of Fisheries 2007* states:

- Under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) the Australian Government, through the Minister for the Environment and Water Resources, holds a legislative responsibility to ensure that:

  1. all Commonwealth managed fisheries undergo strategic environmental impact assessment before new management arrangements are brought into effect; and

  2. all fisheries, from which product is exported, undergo assessment to determine the extent to which management arrangements will ensure the fishery is managed in an ecologically sustainable way.

- To assist in this assessment process the Australian Government developed, after extensive consultation with industry, governments and environmental groups, the *Guidelines for the Ecologically Sustainable Management of Fisheries* (the Guidelines). These Guidelines aid in ensuring rigorous and transparent assessments are conducted in close cooperation with fisheries agencies, the fishing industry and the wider community.

- Adequate performance of fishing in relation to the Guidelines will see that the management arrangements demonstrate a precautionary approach, particularly in the absence of information. A precautionary approach should be used in all stages of fishery management, from planning through to assessment, enforcement and then re-evaluation.

- A precautionary approach requires managers [to] utilise the best scientific evidence available when designing a management regime. It also requires that a minimum level of information be available before a fishery is established. Thus information collection and ongoing research is of significant importance and maybe inversely proportional to the level of precaution that a fishery takes in setting management measures. Sources of uncertainty within the data should be identified and where possible quantified. Until research on the specific stock provides information, a precautionary approach should set conservative limits to account for the unknown level of uncertainty.\(^5\)

According to the website for the Department of Sustainability, Environment, Water, Population and Communities:


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The Sustainable Fisheries Section (SFS) is responsible for the assessment of fisheries managed under Commonwealth legislation and state export fisheries in accordance with the Act. [Their] primary role is to evaluate the environmental performance of fisheries, including:

- the strategic assessment of fisheries under Part 10 of the EPBC Act;
- assessments relating to impacts on protected marine species under Part 13; and
- assessments for the purpose of export approval under Part 13A.

The assessments are conducted against the 2nd edition of the *Guidelines for the Ecologically Sustainable Management of Fisheries* (the Guidelines). The Guidelines outline specific principles and objectives designed to ensure a strategic and transparent way of evaluating the ecological sustainability of fishery management arrangements.

The assessment process is designed to incorporate a flow of communication between fishery managers and the SFS, in order to facilitate the best outcome for the fishery. Each fishery is unique, and assessment is based on the merits of the combination of management measures in place and fishery specific issues.\(^6\)

The Australian Fisheries Management Authority (AFMA) prepares assessment reports for each fishery in accordance with the *Guidelines for the Ecologically Sustainable Management of Fisheries* to address the EPBC Act requirements. Copies of assessment reports are available from AFMA’s website [www.afma.gov.au](http://www.afma.gov.au). The *Commonwealth Policy on Fisheries Bycatch* commits AFMA to review bycatch action plans every two years.


**Registration requirements**

In order for a foreign boat to fish Australian waters the vessel must be registered as an Australian flagged vessel so it can be declared an Australian vessel. It then needs appropriate fishing permits in the relevant fishery, in the present case, the Commonwealth SPF managed by AFMA. The Abel Tasman will have Brisbane as its home port and is ‘awaiting final registration with Maritime Safety

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Queensland and transfer of Seafish Tasmania’s fishing quota. In order to start fishing the Seafish Tasmania quota must be assigned to the vessel.

After the vessel is registered by AMSA under the Shipping Registration Act 1981 the applicant is able to nominate the boat to an existing AFMA issued fishing concession. The legislative requirements for nomination are outlined in Part 3A, Regulation 9B of the Fisheries Management Regulations 1992 which specify that the concession holder must nominate the boat to a fishing concession before going fishing for the first time.

In order to do this, the boat must:

- be able to safely carry an observer; and all the observer’s safety and monitoring equipment for the duration of a trip
- have a vessel monitoring system that is capable of being operational at all times.
- meet any safety standards required by AFMA.
- not be a nominated boat for another person under a fishing concession granted under the Fisheries Management Act 1991.
- be capable of meeting all other requirements imposed by or under the Fisheries Management Act 1991 and the Fisheries Management Regulations 1992 (we are not aware of any such requirement that would prevent the boat being nominated).

**Small Pelagic Fishery (SPF) management and quotas**

The SPF is managed through the allocation an annual quota of fish that can be caught by each boat in the fishery. Seafish Tasmania has a quota of 17 848 tonnes for 2012–13. This is comprised of 1930 tonnes of blue mackerel, 7885 tonnes of redbait and 8033 tonnes of jack mackerel. This is almost half of the total quota of 36 300 tonnes for the entire SPF in its two management zones (east and west).

There are 31 quota holders in the fishery. However, since 2003, only between three and 12 vessels have caught fish in any one year. The actual SPF catch has been a small proportion of the annual quota since the introduction of the SPF Management Plan in 2009 (2317 tonnes in 2009–10 and 120

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7. R Puddy and S Martin, ‘MPs told myths around trawler’, The Australian, 12 September 2012, p. 8, viewed 13 September 2012, [http://parlinfo.parlinfo/download/media/pressclp/1907798/upload_binary/1907798.pdf;fileType=application%2Fpdf#search=%22fishing%20industry%20seeks%20to%20debunk%20myths%22](http://parlinfo.parlinfo/download/media/pressclp/1907798/upload_binary/1907798.pdf;fileType=application%2Fpdf#search=%22fishing%20industry%20seeks%20to%20debunk%20myths%22)


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tonnes in 2011–12) compared to the annual quotas of 27 300 tonnes to 29 300 tonnes. The highest catch levels in the past ten years were just over 12 000 tonnes in 2005–06.¹⁰

There was a large increase in the 2012–13 quotas for jack mackerel in the eastern zone from 5000 tonnes to 10 000 tonnes on the recommendation of the SPF Resource Assessment Group (SPFRAG).¹¹ This decision has been questioned.¹² It was based on biomass estimates from data collected in 2002, the analysis of which was published in 2011. One member of the SPFRAG strongly opposed this increase of jack mackerel east harvest unless it was a part of a research project.¹³

The increased catch would be approximately 7.5 per cent of the updated mean biomass estimate of jack mackerel of 141 500 tonnes as provided for in the SPF Harvesting Strategy (which limits the maximum harvest rate to 20 per cent of the spawning biomass).

The SPF Harvest Strategy uses a tiered approach that recognises the ecological importance of the small pelagic species and takes an explicitly conservative approach to setting harvest levels (i.e. proportion of spawning biomass) and hence TACs. The tiered approach recognises that harvest rates must be low when there is limited information available on the status of the stocks but can be increased as improved information becomes available.¹⁴

AFMA has been criticised for using the spawning biomass analysis as a basis for estimating the population of jack mackerel, with critics saying that the results cannot be reproduced.¹⁵ However, the analysis was reviewed by the Institute of Marine and Antarctic Studies which supported the analysis and found it to be repeatable.¹⁶

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16. Australian Fisheries Management Authority (AFMA), ‘Report by the Institute of Marine and Antarctic Studies: Reproducing the mortality model in Neira 2011’, AFMA website, viewed 13 September 2012,
The proposed SPF research program 2012–13 stated that the significant scaling up of fishing effort and catches from the fishery by introduction of a freezer trawler:

provides an opportunity to increase knowledge of the distribution, spawning behaviours and size of the main SPF stocks with the intent of increasing confidence in the sustainability of catch levels.\(^{17}\)

The vessel will be used for the opportunistic sampling of adult fish and plankton in areas with previously limited fishing of small pelagic species, such as the far west of the Great Australian Bight and the west coast of Tasmania, will be used to get information on the distribution of fish stocks and location of spawning grounds.

**Protecting the marine ecosystem**

By-catch of other marine species is an important issue for the management of SPF. The 2012 assessment of the SPF found the most prevalent interactions (by-catch) are with seals in the mid-water trawl off the coast of Tasmania. It is reported that ‘since 2005, no dolphin interactions and ten seal interactions have been recorded in the SPF’.\(^{18}\) There have been no recent seabird interactions recorded. AFMA recognised that the target species in the SPF are key prey species in the pelagic food web:

Understanding and reporting the protected species interactions for this fishery is therefore considered critical, particularly in light of the possible introduction of the FV Margiris.\(^{19}\)

Concerns have been raised that heavy fishing by the Abel Tasman in small areas will deplete these prey species and impact on the ecosystem in that area. It has been argued that such local depletion is highly unlikely because these fish species are highly mobile and vary with the ocean fronts and currents. However, there is no specific research on fish stock movements of the SPF species. AFMA is reported to have said that factory freezer ships may be less likely to cause local depletion of fish

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stocks because they could travel further to fish without the need to return to offload catch for local processing.  

Colin Buxton of the Institute of Marine and Antarctic Studies argued that fishing by ten small trawlers would have a much, much higher chance of localised depletion than the super trawler, because its large freezer capacity means that it would not be tied to ports.  

The role of small pelagic fish in the food chain is an issue of concern for recreational fishers who argue that fishing, at what AFMA calls sustainable levels, will impact on the top predators, for example, tuna and billfish. AFMA indicated that the top predator fish are not as dependent on the fish species targeted by the SPF as they are on similar fish in other areas of the world as there are a wider variety of prey species in Australian waters. The 2011 paper *Impacts of Fishing Low-Trophic Level Species on Marine Ecosystems* studied several marine ecosystems in the California current, northern Humboldt current, North Sea, southern Benguela current and southeast Australia and found the impacts of fishing sardines (one of the SPF species) were low in the southeast Australian marine ecosystem.  

**Basis of policy commitment**  

On 11 September 2012, Environment Minister, Tony Burke, announced plans to legislate to extend his legal powers over the super trawler FV Abel Tasman, (formerly FV Margiris), to prevent the vessel fishing in Australian waters. Mr Burke explained that he had postponed pursuing legislative change until he knew how far he could go under the current law.

The amendment will prohibit the super trawler engaging in a declared fishing activity in Commonwealth waters [for a period of up to 24 months] while a further assessment is undertaken by an expert panel that will report directly to the Minister.

The major issues with the vessel are its large size and fishing capability, which far exceeds any other fishing vessel in Australian waters, and possible impacts on protected species.

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24. Ibid.

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The 142 metre long, 9500 tonnes (t) mid-water trawler with freezer capacity of 6200 t, previously registered as the Margiris in Lithuania, has been brought to Australia by Seafish Tasmania to fish in the SPF. It has now being registered as an Australian vessel in order to fish in Australian waters. It was expected to carry out fishing trips of six to eight weeks duration. Recreational fishers, environment groups and some commercial fishers were concerned that the trawler’s size and ability to stay fishing for months at a time could have a significant impact on both target fish stocks and the marine ecosystem.

A similar event occurred in 2004 when concerns were raised over the Irish owners of the Veronica (a 106m trawler) who were reported to be planning to fish in Australian waters. At that time, AFMA decided to freeze any applications for new entrants to the SPF and restricted existing licences to prevent expansion of the fishery pending development of the SPF Management Plan. No formal applications for fishing were ever received.

Adopting a precautionary principle approach, the Australian Greens expressed serious concern over the decision by AFMA to allow the FV Margiris super trawler (as the trawler was then called) to operate under the current AFMA quota system and licensing arrangements, stating that, until the risks are fully assessed, the decision was ‘unacceptable’. On 22 August 2012, Australian Greens Senator Whish-Wilson issued a media release stating that the Greens would move a motion to disallow the fishing quota granted by the Government to the FV Margiris:

Stakeholders across Australia have demanded legislated, transparent safeguards we can all see and trust to protect our fisheries and ecosystems now and into the future.

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28. Ibid.

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Senator Waters responded to the permission for the MV Margaris to fish, subject to conditions, by stating that the Australia Government need to strengthen the relevant legislation, though did not elaborate on what this would involve by way of proposed amendments to the EPBC Act.\(^{33}\)

### Powers under the EPBC Act

On 4 September 2012, using his powers under the EPBC Act, Minister Burke imposed new conditions on the management regime for the SPF to ensure that the Abel Tasman would have no more impact than a smaller vessel with the same size of fishing quota. This would:

- require the super trawler to adopt worlds-best practice methods to avoid listed species, particularly seals, dolphins and sea birds being killed or injured during its trawling operations.\(^{34}\)

The conditions were stated to be ‘based on a rigorous assessment’ by the Department of the potential environmental impact of a large mid-water trawl freezer vessel, such as the super trawler, entering the fishery.\(^{35}\)

AFMA was reported as earlier stating ‘there is no evidence to suggest that larger boats pose any greater risk to either the target species or the ecosystem’.\(^{36}\)

However, Independent Member for Dennison, Andrew Wilkie expressed concerns that the condition for an independent ‘onboard observer at all times’ was misleading as

- the Federal Government is moving to replace fishing observers with electronic monitoring to save money with the Fisheries Legislation Amendment Bill (No. 1) 2012.\(^{37}\)

Minister Burke was still convinced there was significant uncertainty regarding the impact of such a large fishing vessel on the marine environment. He was concerned about the length of time the vessel could fish in the same area potentially creating a ‘localised major bycatch issue’.\(^{38}\) He said:

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35. Ibid.


If you have a large number of vessels taking different parts of the quota from different areas then you’re not going to have any risk of a localised major by–catch issue. But when you have a vessel with a large freezer capacity that therefore is able to remain for extended periods of time in the same part of our oceans there are a different set of environmental considerations and that’s the difference. 39

As the Minister was advised that the EPBC Act could not be used to prevent new vessels from fishing while further scientific assessments were undertaken, he decided to introduce amendments to the EPBC Act. 40 These would allow a full assessment of the impacts to take place before such a vessel is permitted to start fishing. The assessment will be carried out by an expert panel.

On 11 September 2012, Senator Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, announced a major review of Commonwealth fisheries policy and legislation. Terms of reference are to be released soon. The review will examine legislation, penalties, ministerial oversight, socio-economic and environmental considerations as well as how management systems are operated and science applied. 41 However, Senator Ludwig said the review would not change scientific assessments:

There has been no problem with the science in this instance, there is no deficiency in that regard ... AFMA continues to have my confidence for the way it manages and assesses fisheries. 42

Policy position of non-government parties/independents

National Party member, George Christensen stated that while he did not support the super trawler operating in Australian waters, he was concerned that the proposed amendments gave the Government far reaching powers to ban any fishing activities in any Commonwealth waters for up to two years. He proposed instead, a targeted amendment to the EPBC Act that would deal exclusively with the issue of a super trawler. 43 Similar concerns were echoed by other Coalition members regarding the breadth of the power given to the Environment Minister to prohibit fishing activities in

http://parlinfo/parlInfo/download/media/pressclp/1909543/upload_binary/1909543.pdf;fileType=application%2Fpdf
#search%22Mr%20Burke%20said%20his%20concern%20centred%20on%20the%20fact%22
39. Ibid.

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Commonwealth marine areas based on uncertainty about the environmental, social or economic impacts of the fishing activity. Greg Hunt raised concerns that the drafting of the power made it potentially arbitrary and unfettered.\(^4^4\) Also, drawing on information from AFMA’s website, challenged the Government’s claim as to the uncertainty about the risk posed by larger vessels. Senator Colbeck.\(^4^5\)

The Australian Greens generally welcomed the amendments designed to strengthen the operation of the EPBC Act in relation to this issue, although they have proposed further amendments.

On 12 September 2012, Adam Bandt proposed an amendment to the Government’s Bill that more specifically dealt with the issue of fishing activity using an oversized fishing vessel in a Commonwealth marine area. Mr Bandt’s amendment would prohibit people from engaging in a fishing activity using an oversized fishing vessel, which is a vessel capable of processing and storing more than 2000 tonnes of biomass.\(^4^6\) However, this amendment seems to be based on a rather narrow assumption about the nature and breadth of the environmental problem.

**Position of major interest groups**

The Australian Recreational Fishing Foundation (ARFF) has stated that amendments should be made to the proposed legislation so as to exclude recreational fishing activities.

ARFF Director, Allan Hansard expressed support for the legislation and called on the Coalition to support it, stating that:

> this legislation should be about stopping industrial fishing activities, where there is uncertainty about the sustainability or the environmental, social and economic impacts, particularly where it is not underpinned by appropriate science.\(^4^7\)

The amendments suggested by the ARFF have now been incorporated into the Bill.

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45. Senator Colbeck, ‘Questions Without Notice’, Senate, Debates, 12 September 2012, p. 38, viewed 14 September 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansards%2Ff502bdf4-d8d6-47d0-9876-bc76488b1b81%2F0036;orderBy=fragment_number.doc_date;rev:page=0;query=Dataset%3Ahansards,hansards80%20Date%3A12%2F9%2F2012;rec=0;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansards%2Ff502bdf4-d8d6-47d0-9876-bc76488b1b81%2F0036;orderBy=fragment_number.doc_date;rev:page=0;query=Dataset%3Ahansards,hansards80%20Date%3A12%2F9%2F2012;rec=0;resCount=Default)


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Financial implications

The Explanatory Memorandum states that:

> The financial implications of this Bill are likely to include costs in engaging and supporting the expert panel (which would be met within the portfolio resources).\(^{48}\)

The generality of this statement makes it difficult to assess the adequacy of the resources that will be devoted to ensuring the optimal operation of this expert panel, and also whether the allocation of resources to this expert panel will involve the loss of resources from another important environmental regulatory function.

Main issues

Apart from the issues raised elsewhere in this digest, an article published in *Crikey* by Andrew McIntosh, associate director of the ANU Centre for Climate Law and Policy, makes some additional and useful reflections. McIntosh states:

> Sitting above the fisheries regime are environmental protection laws. Under federal environmental law, all Commonwealth-managed fisheries are strategically assessed on a rolling basis. These assessments look at the environmental impacts of the management arrangements for each fishery and determine whether they are sustainable. After the completion of the assessment, if the environment minister is satisfied with the arrangements, the fishery is approved for the purpose of export and an exemption is granted to ensure individual fishers do not have to comply with project-based environmental approval requirements.

> Despite the noise in the media, the proposed operations of the *Abel Tasman* tick all the boxes of the fisheries and environmental regime. The fishing will occur within the quota set for the Small Pelagic Fishery. The fisheries management arrangements for this fishery have been strategically assessed by the Environment Department on four occasions: 2003, 2007, 2009 and 2012. Moreover, the introduction of the larger vessel is in keeping with the desire to improve efficiency as it will lower unit costs, and Environment Minister Tony Burke had set stringent bycatch conditions on the operation of the vessel.

> This is not to say that the general management arrangements for the Small Pelagics Fishery or any other Commonwealth-managed fishery are sustainable. Several of them are overfished and subject to serious bycatch and environmental degradation issues (noting that the Small Pelagics Fishery is probably among the better-managed Commonwealth fisheries). However, the operator of the *Abel Tasman*, Seafish, has done everything according to the book. Its only crime was to run into a government in a tight

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political spot that is looking to attract votes on the back of a populist environmental campaign.

[...]

There are provisions in the Environment Protection and Biodiversity Conservation Act that allow Burke to call in the Abel Tasman’s proposed activities and subject them to the project-based environmental assessment and approval process. It is unclear why the government thinks it needs to duplicate these existing powers.

[...] this incident shines a light toward more serious policy questions, particularly the sustainability of the current fisheries management arrangements and efficacy of the Commonwealth’s strategic assessment process.

To date, there has been only one independent analysis of the fisheries strategic assessment process. It found that the strategic assessments rarely led to material changes in fisheries practices and that its environmental achievements were modest. If there is a need for change, it is in the way these assessments are conducted and the level of transparency in environmental and fisheries regulation. 49

Key provisions

The Bill has been amended by the Government in the HoR, including by changing its name. The information below relates to the amended version of the Bill. The main changes to the Bill are a clarification that its application is confined to commercial fishing activities and removal of consideration of social or economic factors by the Minister and the Fisheries Minister in deciding whether to issue an interim declaration or a final declaration in relation to a fishing activity.

Schedule 1—declared commercial fishing activities

Division 1 - Prohibition

Proposed section 390SB makes it an offence for a person to engage in a declared commercial fishing activity50 in a Commonwealth marine area and provides a maximum penalty of seven years imprisonment or 420 penalty units ($46 200) or both. Proposed section 390SA provides for a maximum civil penalty of 5000 penalty units ($550 000) for an individual and 50 000 ($5500 000) for a body corporate.

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50. Items 9 and 10 of the Bill insert definitions of ‘fishing’ and ‘fishing activity’ into section 528 of the EPBC Act. The terms are defined to have the same meaning as given in the Fisheries Management Act 1991 (Cth). ‘Commercial fishing activity’ is defined at proposed subsection 390SC(1A).

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Division 2 – Declaring a commercial fishing activity

Subdivision A—What is a declared commercial fishing activity

There are two types of declarations that may be made under proposed new chapter 5B of the EPBC in relation to commercial fishing activity: an interim declaration and a final declaration (proposed section 390SC).

Subdivision B—Interim declaration

Taken together, proposed subsections 390SD(1) and (2) provide that the Minister for Sustainability, Environment, Water, Population and Communities (‘the Minister’) may make a declaration by legislative instrument\(^{51}\) that a specified activity is a ‘declared commercial fishing activity’ for a maximum period of 60 days\(^ {52}\) (an interim declaration) having regard to one or all of the following factors:

- method of fishing
- type of vessel
- method of processing, carrying or transplanting of fish that have been taken and
- an area of waters or seabed.

However, the Minister must not make an interim declaration unless the Minister and the Minister for Fisheries agree that:

- there is uncertainty about the environmental impacts of the fishing activity and
- it is appropriate that the fishing activity be prohibited in a Commonwealth marine area while consultation occurs with ‘declaration affected persons’ (proposed section 390SE) about whether to make a final declaration in relation to that fishing activity.

Importantly, proposed subsection 390SD(2A) (inserted by a Government amendment introduced in the House of Representatives) provides that an interim declaration may only be made in relation to a commercial fishing activity that had not been engaged in before 11 September 2012 in a Commonwealth marine areas. That is, the Minister would not be able to use the powers proposed by the Bill to suspend a fishing activity that had occurred prior to that date, even in situations when that activity would otherwise be capable of being suspended under the proposed new arrangements.

Consultation

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\(^{51}\) Being a legislative instrument, which is not subject to exemption, the declaration is subject to parliamentary scrutiny and disallowance procedures.

\(^{52}\) Proposed subsection 390SD(5).

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Proposed section 390SE, which deals with consultation requirements, is a procedural fairness provision. As soon as practicable after making an interim declaration under proposed section 390SD, the Minister must publish a notice on the Department’s website which:

- invites each declaration affected person to make a written submission about the impact on the person’s rights or interests in relation to fishing if a final declaration under proposed section 390SF were made in relation to the fishing activity and
- specifies the deadline for making written submissions and the manner in which the written submissions are to be lodged.

A declaration affected person is a person who holds a fishing concession53 or any other person prescribed by the regulations, who considers that they would be detrimentally affected by the making of a final declaration under proposed section 390SF.

A declaration affected person must be given a minimum of 11 business days, from the date that the interim declaration notice is published, to respond. The Minister must consider submissions made by declaration affected persons before making a final declaration (proposed paragraph 390SF(2)(c)).

Comment

In order to reasonably enable a declaration affected person to be aware of the interim declaration and to have an opportunity to make submissions, it would seem appropriate to require that the notice regarding the interim declaration also be published on the Department of Fisheries website.

Furthermore, it seems reasonable that the interim declaration notice should state the basis upon which a decision to make an interim declaration is being made.

In addition, the definition of a ‘declaration affected person’ appears to be unnecessarily restrictive. Under the proposed provisions a person holding a fishing concession would only come within the definition of ‘declaration affected person’ if they consider that they ‘would be detrimentally affected by the making of a final declaration’ (proposed subsection 390SE(3)). However, situations may exist where a person holding a fishing concession may feel that they would be detrimentally affected if a final declaration was not made. This might be the case, for example, where the holder of a fishing concession operates a small or medium sized vessel, and feels that their long-term ability to continue to benefit from that concession would be compromised if a final declaration suspending the operations of a ‘super trawler’ was not made. Under the current Bill, it appears that such a person could make a submission, but, as they would not be a declaration affected person, the Minister would not be obliged to consider it.

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53. Item 11 of the Bill inserts a definition of ‘fishing concession’ into section 528 of the EPBC Act. It is defined to have the same meaning as given in the Fisheries Management Act 1991 (Cth). It refers to a statutory fishing right, a fishing permit, or a foreign fishing licence.

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Subdivision C—Final declaration

Proposed section 390SF enables the Minister to make a final declaration by legislative instrument\textsuperscript{54} that a specified activity is a declared commercial fishing activity for a maximum period of 24 months (a final declaration). However, the Minister must not make the final declaration unless:

- the fishing activity is the same as that specified in the interim declaration
- there was consultation under proposed section 390SE
- the Minister considered any written submission that was made under the consultation process in proposed section 390SE
- the Minister and the Fisheries Minister agree that there is uncertainty about the environmental impacts of the fishing activity and
- the Minister and the Fisheries Minister agree that
  - it is appropriate that an expert panel be established (proposed section 390SH) to conduct an assessment of the fishing activity and report on the matter and
  - the fishing activity be prohibited in a Commonwealth marine area while the expert panel conducts the assessment.

Following the consultation process laid out in proposed section 390SE, if it is considered appropriate to make any amendment to the declared fishing activity, then this will be done and the same steps will be followed as outlined in proposed sections 390SD and 390SE for a new interim declaration to be made and consultation to occur with declaration affected persons.\textsuperscript{55}

Subdivision D—Revoking declarations

The Minister may revoke either an interim or final declaration (proposed subsection 390SG(1)). A revocation instrument is a legislative instrument for the purposes of the Legislative Instruments Act 2003 (Cth) and is thus subject to parliamentary scrutiny and disallowance procedures.

Division 3 – Expert panel assessment of declared commercial fishing activity

Proposed 390SH provides for the establishment of an expert panel.

As soon as practicable after making a final declaration that a specified fishing activity is a declared activity, the Minister must:

- appoint one or more persons (the members) as an expert panel to conduct an assessment and report to the Minister about the fishing activity and
- with the agreement of the Fisheries Minister, specify the terms of reference for the expert panel, being:

\textsuperscript{54} Being a legislative instrument, which is not subject to exemption, the declaration is subject to parliamentary scrutiny and disallowance procedures.

\textsuperscript{55} Explanatory Memorandum, op. cit., p. 9.

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- matters relating to the fishing activity that are to be the subject of the assessment and report and
- the date by which the panel must report to the Minister, which the expert panel must comply with (proposed section 390SK).

The Minister may specify in the terms of reference, the manner in which the expert panel is to carry out the assessment.

The Minister may vary or revoke the terms of reference with the agreement of the Fisheries Minister.

The expert panel may determine the procedure to be followed in conducting its assessment, so long as it remains in compliance with the terms of reference (proposed section 390SI).

The Minister must publish a copy of the terms of reference on the Department’s website as soon as practicable after specifying or varying those terms of reference and table a copy before each House of the Parliament within 15 days sitting days after the day the Minister specifies or varies the terms of reference.

Comment

It would be useful from a public access perspective if the terms of reference were also made available on the Department of Fisheries’ website.

It is interesting and perhaps even problematic that although the panel is referred to as an expert panel, it not expressly stated that it is to be an independent expert panel. Furthermore, in theory, the panel may consist of only one person conducting the inquiry and there is no mention of the basis upon which an expert panel member is to be appointed, in terms of relevant experience and qualifications. When compared with the usual minimal detail that is included in other pieces of legislation for the establishment of a board or panel for a specific purpose, the absence of such significant detail in this Bill may be of concern in terms of the potential for inconsistency in the quality of assessment that is undertaken.

Terms and conditions of expert panel appointment

Proposed 390SI provides that the Minister must determine in writing, the terms and conditions applicable to members of the expert panel, including terms and conditions relating to:

- term of office
- remuneration
- allowances and
- disclosure of interests.
Comment

When compared with usual minimal detail that is included in other pieces of legislation for the establishment of a board or panel for a specific purpose, the absence of detail in this legislation in relation to the term of office of panel members, disclosure of interests, consequences of failure to disclose interests and termination of a panel member, combined with no requirement to make public this potentially important information, is remarkable.

Publication of the expert panel’s report

The Minister must publish a copy of the expert panel’s report on the Department’s website within 20 business days after the day the Minister receives the report and also table a copy of the report before each House of the Parliament within 15 days sitting days after the day the Minister receives the report. The Minister must also comply with any other publication requirement prescribed by the regulations (proposed 390SL).

Comment

It would be useful from a public access perspective if the expert panel’s report were also made available on the Department of Fisheries’ website.