THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT (DECLARED COMMERCIAL FISHING ACTIVITIES) BILL 2012

REVISED EXPLANATORY MEMORANDUM

THIS EXPLANATORY MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

(Circulated by authority of the Minister for Sustainability, Environment, Water, Population and Communities, the Honourable Tony Burke, MP)
Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Bill 2012

OUTLINE

This Bill amends the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) to provide for the Minister to establish an independent expert panel (expert panel) to conduct an assessment into the potential environmental impacts of a declared commercial fishing activity and to prohibit the declared commercial fishing activity while the assessment is undertaken.

The amendments create a new Chapter 5B of the EPBC Act to:

- enable the Minister, with the agreement of the Minister administering the Fisheries Management Act 1991 (Cth) (Fisheries Minister), to declare a commercial fishing activity, to be a ‘declared commercial fishing activity’ on an interim basis (interim declaration) if both Ministers agree that:
  - there is uncertainty about the environmental impacts of the commercial fishing activity;
  - it is appropriate to consult with fishing concession holders who consider themselves to be detrimentally affected by the making of a final declaration for the same fishing activity (declaration affected person); and
  - the declared commercial fishing activity should be prohibited while consultation occurs,

- enable the Minister, with the agreement of the Fisheries Minister, to declare a commercial fishing activity to be a declared commercial fishing activity for a period of no longer than 24 months (final declaration) if both Ministers agree that:
  - there is uncertainty about the environmental impacts of the commercial fishing activity;
  - it is appropriate to establish an expert panel to conduct an assessment of the commercial fishing activity; and
  - the declared commercial fishing activity should be prohibited while the expert panel conducts its assessment of the commercial fishing activity,

- ensure procedural fairness by requiring that the Minister must consider the written submissions of declaration affected persons before making a final declaration. Further, the Minister cannot make a final declaration for a commercial fishing activity that has not been the subject of an interim declaration;

- clarify that the declaration provisions will only be operative for a period of 12 months from the date of commencement of the amendments;

- create civil penalty and offence provisions for engaging in a declared commercial fishing activity;
• provide for the establishment of an expert panel to conduct an assessment of the potential environmental impacts of the declared commercial fishing activity, as specified in its terms of reference, and report to the Minister; and
• provide for the publication of the report of the expert panel and the tabling of the report in Parliament.

FINANCIAL IMPACT STATEMENT

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

REGULATORY IMPACT STATEMENT

The Prime Minister has granted an exemption from the regulatory impact statement requirements. However, a post-implementation review will commence within one to two years from the date the Bill is implemented.
Statement of Compatibility with Human Rights

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

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

This 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.

Overview of the Bill

This Bill amends the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) to provide for the Minister to establish an independent expert panel (expert panel) to conduct an assessment into the potential environmental impacts of a declared commercial fishing activity and to prohibit the declared commercial fishing activity while the assessment is undertaken.

Human rights implications

The Bill engages the human right of the presumption of innocence.

The Bill will create a new criminal offence in respect of people who engage in ‘declared commercial fishing activities’ in the Commonwealth marine area. Strict liability applies to the circumstance that an action is taken in a Commonwealth marine area which is consistent with similar offence provisions in the EPBC Act dealing with the Commonwealth marine area (see for example in Part 3 and Part 13).

It is appropriate that strict liability apply to the Commonwealth marine area element of the offence as it may be difficult to prove that a person knew they were in a Commonwealth marine area (or were reckless to that fact) making the offence difficult to prosecute and accordingly undermining the deterrent effect of the provisions. The application of strict liability is also justifiable on the basis that a defendant can reasonably be expected, because of his or her professional involvement in the fishing industry, to know the requirements of the law. Although the penalty for the offence is higher than those applicable to most other offences in the EPBC Act, it is identical to the offences in Part 3 of the EPBC Act and is at an appropriate level to deter people from engaging in declared commercial fishing activities.

The imposition of strict liability still allows a defendant to raise a defence of honest and reasonable mistake. This ensures that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations. Although it is possible that this defence may not cover a situation where a person is on a prescribed vessel which for some reason such as engine failure, for example, enters a Commonwealth marine area, a ministerial declaration will generally specify the commercial fishing activity by reference to a number of criteria (such as the type of vessel and the method of processing, carrying or transhipping fish), rather than a single characteristic. This will mitigate the possibility of a declaration applying arbitrarily to a particular operator who is not intended to be caught by a declaration.
The application of strict liability is a proportionate limitation on the right to the presumption of innocence because of the public interest in ensuring the sustainable use of resources in the Commonwealth marine area.

The strict liability offence in the Bill has been drafted consistently with the principles set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* developed by the Criminal Justice Division of the Attorney-General’s Department.

**Conclusion**

The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the objective of preventing people from engaging in declared commercial fishing activities that may have uncertain environmental impacts until those impacts are assessed.

**Minister for Sustainability, Environment, Water, Population and Communities**

the Hon Tony Burke MP
NOTES ON CLAUSES

Clause 1: Short Title

1. This clause provides that the Act may be cited as the Environment Protection and Biodiversity Conservation Amendment (Declared Commercial Fishing Activities) Act 2012 (the Amendment Act).

Clause 2: Commencement

2. The Amendment Act will commence on the day it receives Royal Assent.

Clause 3: Schedules

3. This clause provides for amendments to the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) specified in the Schedule.

Schedule 1 – Declared commercial fishing activities

Item 1 – Chapter 5B

Prohibition on declared commercial fishing activities in a Commonwealth marine area

4. New sections 390SA and 390SB prohibit people from engaging in a ‘declared commercial fishing activity’ in a Commonwealth marine area. The Commonwealth marine area is defined in section 24A of the EPBC Act. Both civil penalty and criminal offence provisions are included. A declared commercial fishing activity for the purposes of Chapter 5B is a commercial fishing activity (as defined in subsection 390SC(1A)) specified in either an interim declaration in force under new section 390SD, or a final declaration in force under new section 390SF. Division 2 of Chapter 5B sets out the process for the making of interim and final declarations.

5. Subsection 390SB(2) provides for strict liability to apply in relation to the circumstance that an action is taken in a Commonwealth marine area (paragraph 390SB(1)(b)). The intent of this provision is to make it clear that the prosecution does not have to show a person knew or was reckless as to the fact that the action occurred in a Commonwealth marine area. This is consistent with the approach taken for other offences in the EPBC Act which are committed in the Commonwealth marine area or a Commonwealth area.

6. Both an interim declaration and final declaration are legislative instruments for the purposes of the Legislative Instruments Act 2003 (Cth) (Legislative Instruments Act). As the Legislative Instruments Act requires the publication of legislative instruments, people will be alerted to the fact that certain actions are an offence if taken in a Commonwealth marine area and cannot claim ignorance of the law as an excuse for criminal behaviour.
7. The penalty units specified for the civil penalty provision and the penalties for the criminal offence provisions are consistent with other provisions in the EPBC Act (see for example Part 3). An executive officer of a body corporate may be liable for such a contravention if the person knew or was reckless as to whether the contravention occurred, was in a position to influence the conduct of the company and failed to take all reasonable steps to prevent the contravention (see sections 494 and 495 of the EPBC Act).

Defining a declared commercial fishing activity and commercial fishing activity

8. Section 390SC defines both a ‘declared commercial fishing activity’ (being an activity declared under an interim or final declaration) and ‘commercial fishing activity’.

9. A ‘commercial fishing activity’ is defined to be a fishing activity that is engaged in for a commercial purpose, and, to avoid doubt, does not include an activity that constitutes recreational fishing (within the meaning of subsection 212(2)) of the EPBC Act (subsection 390SC(1A)).

10. Subsection 212(2) of the EPBC Act defines ‘recreational fishing’ to include the following types of fishing:
   a. fishing from a charter boat (within the meaning of the Fisheries Management Act 1991), including fishing by the person in charge of the boat, the crew of the boat or any other person on the boat;
   b. fishing in a fishing competition (whether or not in a professional capacity); and
   c. fishing that is undertaken primarily for:
      i. inclusion on a website, or in a film, video, television program or radio program; or
      ii. description or representation in a magazine, newspaper, book or other such document.

11. The definition of ‘commercial fishing activity’ clarifies that the Minister will not be able to make an interim or final declaration in respect of recreational fishers or charter boat operators.

12. The definition of ‘fishing’ is defined in section 528 and is the same definition that is used in the Fisheries Management Act 1991 (Cth) (the FM Act).

Declaring commercial fishing activities – interim declaration

13. Under section 390SD, the Minister may make an interim declaration specifying a commercial fishing activity but only if the Fisheries Minister agrees that:
   a. there is uncertainty about the environmental impacts of the commercial fishing activity;
   b. it is appropriate to consult with fishing concession holders (and any other persons prescribed by the regulations) who consider themselves to be
detrimentally affected by the making of a final declaration for the same commercial fishing activity (being a declaration affected person); and

c. the declared commercial fishing activity should be prohibited while consultation occurs.

14. In making a declaration for a specified commercial fishing activity, the Minister can characterise that commercial fishing activity by reference to one or more factors including a type of vessel, a method of fishing, processing carrying or transhipping of fish or an area of waters or of seabed (see subsection 390SD(2)). This provides the Minister with the ability to declare a commercial fishing activity that is quite narrow in scope, by specifying numerous factors that must be met to constitute the ‘declared commercial fishing activity’ (for example by prescribing the fishing activity as being undertaken through a combination of a vessel type and a gear type and in a particular area of waters). The intention is that by selecting a combination of identifying factors that narrowly scope the commercial fishing activity of concern, fishing concession holders who may have a type of vessel or use a method of fishing that is described in the declaration will not otherwise be caught by an interim or final declaration unless the fishing concession holder meets all the specified factors for the commercial fishing activity. The consultation process with all declaration affected persons will also minimise the risk of a final declaration inadvertently capturing fishing operations that are not intended to be the subject of a declared commercial fishing activity.

15. The Minister will not be able to make an interim declaration in respect of a commercial fishing activity if the activity has been engaged in before 11 September 2012 in a Commonwealth marine area (subsection 390SD(2A)). This will also have the effect of limiting the Minister’s power to make a final declaration because the Minister can only make a final declaration in respect of the same activity which was the subject of an interim declaration.

16. The objective of the interim declaration process is to enable a cautious approach to be adopted by promptly prohibiting a commercial fishing activity where there is uncertainty about the potential impacts of the commercial fishing activity, while the Minister consults with affected fishing concession holders about a longer-term prohibition for the same specified activity (during which an assessment of the impacts would be conducted). Accordingly an interim declaration is only a short-term measure and can be in force for no longer than 60 days (see subsection 390SD(5)).

17. An interim declaration is a legislative instrument for the purposes of the Legislative Instruments Act (see subsection 390SD(1)).

Consultation

18. The Minister must, as soon as possible following the making of an interim declaration, publish a notice on the Department’s website. The notice must invite all declaration affected persons to make written submissions (subsections 390SE (1) and (2)).
19. A ‘declaration affected person’ is a person who holds a fishing concession (or otherwise meets some other characteristic prescribed by the regulations) and considers that they would be detrimentally affected by the making of a final declaration under section 390SF in relation to the commercial fishing activity (subsection 390SE(3)).

20. The intention of this section is to ensure that any fishing concession holders who may be adversely impacted by a final declaration decision (for example, because they would be prohibited from fishing under a final declaration) have an opportunity to make submissions to the Minister about how their rights or interests would be affected under a final declaration. This is so that the Minister can take those submissions into account before making a final declaration. This process ensures that all affected fishing concession holders are accorded procedural fairness. The term ‘fishing concession’ is defined in section 528 to have the same meaning as in the FM Act. Fishing concessions are a statutory fishing right, a fishing permit or a foreign fishing licence. These terms are also defined in the FM Act.

21. Declaration affected persons must be provided with at least 11 business days to submit comments (subsection 390SE(4)). This is considered to be a minimum reasonable period for consultation. This is in line with the Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 which agreed with Recommendation 45(1)(c) to ensure that no public consultation process is shorter than 11 business days.

Declaring commercial fishing activities – final declaration

22. The Minister may under section 390SF, declare a commercial fishing activity to be a declared commercial fishing activity for a period of no longer than 24 months (final declaration) but only if consultation has occurred in accordance with section 390SE, the Minister has considered the written submissions of declaration affected persons, and if the Minister and the Fisheries Minister agree that:
   a. there is uncertainty about the environmental impacts of the commercial fishing activity;
   b. it is appropriate to establish an expert panel to conduct an assessment of the commercial fishing activity; and
   c. the declared commercial fishing activity should be prohibited while the expert panel conducts its assessment of the commercial fishing activity.

23. The commercial fishing activity that is the subject of a final declaration must be the same commercial fishing activity that was the subject of an interim declaration (subparagraph 390SF(2)(a)). This would ensure that all potentially affected fishing concession holders have the opportunity to provide submissions before a final declaration is made. In the event that it is considered appropriate to amend the nature of the declared commercial fishing activity following a consultation process, a further interim declaration process must take place to ensure all potentially affected operators are given an opportunity to be heard prior to the making of a final declaration that may detrimentally affect their
rights or interests. This process ensures that all affected fishing concession holders are accorded procedural fairness.

24. A final declaration is a legislative instrument for the purposes of the Legislative Instruments Act (see subsection 390SF(1)).

Revoke declartions

25. The Minister may revoke either an interim or final declaration (subsection 390SG(1)).

26. A revocation instrument is a legislative instrument for the purposes of the Legislative Instruments Act (subsection 390SG(1)).

Expert panel assessment of declared commercial fishing activity

27. Section 390SH provides for the Minister to, as soon as practicable after making a final declaration, establish an expert panel to conduct an assessment and prepare a report about the commercial fishing activity. The panel must consist of one or more members appointed by the Minister.

28. In doing so, the Minister and the Fisheries Minister must agree on the terms of reference for the assessment and the date on which the expert panel must report to the Minister. The terms of reference would set out the matters relating to the commercial fishing activity to be the subject of the assessment by the panel including matters such as the potential environmental impacts of the activity. The terms of reference can only be amended or revoked with the agreement of the Fisheries Minister (subsection 390SH(3)).

29. It is open to the Minister to specify in the terms of reference, the manner in which the panel is to carry out the assessment (subsection 390SH(2)).

30. The terms of reference (including any amendments) must be published on the Department’s website and laid before Parliament (subsection 390SH(4)).

31. In establishing the expert panel, the Minister must determine the terms and conditions of the appointment of members to the expert panel, including term of office, remuneration, allowances and procedures for dealing with conflicts of interest (section 390SI).

32. The expert panel must comply with the terms of reference (including the due date for the delivery of the report (section 390SK)) but may otherwise determine the day to day procedures to be followed in conducting the assessment (section 390SJ). The expert panel is required to provide the report on a specified date to ensure certainty around the timing of the assessment process.

Publication of expert panel report

33. Once the Minister receives a copy of the report from the expert panel, the Minister must cause the report to be published on the Department’s website within 20 business days and laid before Parliament within 15 sitting days. The
Minister must also comply with any other publication requirements specified in the regulations.

34. Following receipt of the report from the expert panel, the Minister will determine what, if any, further actions needs to be undertaken. To the extent the report reveals that the commercial fishing activity has, will have, or is likely to have, a significant impact on a matter of national environmental significance, the relevant provisions of the EPBC Act will apply.

35. The final declaration comes to an end at the end of the day on which the report is published (unless it has otherwise expired or been revoked) (subsection 390SF(3)).

**Sunsetting**

36. Section 390SM provides that no new declarations can be made under Chapter 5B from the date 12 months after the day of commencement of the Amendment Act.

37. Section 390SM will not affect any existing declarations or assessments. Existing declarations will remain in force until they expire or are revoked in accordance with the provisions of Chapter 5B and any assessments underway in respect of the impacts of a declared commercial fishing will continue. The Minister will also be able to assemble an expert panel to assess the impacts of a commercial fishing activity that was the subject of a final declaration made before the sunsetting date.

**Item 2 – Section 494**

38. Item 2 of Schedule 1 amends section 494 of the EPBC Act. The effect of this amendment will be to make an executive officer of a body corporate liable in the event there is a contravention of the civil penalty provision in section 390SA by their company and the executive officer knew or was reckless as to whether the contravention occurred, was in a position to influence the conduct of the company and failed to take all reasonable steps to prevent the contravention.

**Item 3 – Section 495**

39. Item 3 of Schedule 1 amends section 495 of the EPBC Act. The effect of this amendment will be to make an executive officer of a body corporate liable in the event there is a contravention of the criminal offence provision in section 390SB by their company and the executive officer knew or was reckless as to whether the contravention occurred, was in a position to influence the conduct of the company and failed to take all reasonable steps to prevent the contravention.

**Items 3A – 12**

40. These items insert new definitions relevant to Chapter 5B into section 528 of the EPBC Act. The definitions of ‘fish’, ‘fishing’ and ‘fishing concession’ employ the same definitions as those used in the FM Act, to promote consistency.