

FISHERIES AMENDMENT BILL 2001

EXPLANATORY NOTES

GENERAL OUTLINE

Short Title

The short title of the Bill is the *Fisheries Amendment Bill 2001*.

Objectives of the Legislation

The objectives of the legislation are to amend:

- sections 36, 67 and 68 of the *Fisheries Act 1994* to facilitate a proposed amendment to the *Fisheries (East Coast Trawl) Management Plan 1999* (ECTMP) and broaden the measures available in respect of structural adjustments to other fisheries managed under management plans;
- certain provisions of the *Fisheries Act 1994* that have been identified as necessary or desirable by the Queensland Fisheries Service; and
- the *Fisheries (Spanner Crab) Management Plan 1999* to remedy an unintended anomaly in the allocation of Individual Transferable Quota units.

Reasons for the Bill

- 1. To enhance the management of fisheries by allowing for management plans to provide for a reduction in the number of authorities that may exist.**

The *Fisheries (East Coast Trawl) Amendment Management Plan (No. 1) 2000* effected significant amendments to the ECTMP which implemented the key recommendations of a stakeholders' working group report on the future management of Queensland's trawl fishery, particularly concerning the critical issues of economic viability and ecological sustainability.

A fundamental component of the amendments was the introduction of a new system of authorities (effort units) that represent the entitlement of the holder to expend effort in the fishery.

A maximum number of fishing days are available for allocation across the fishery. It is possible that the number of fishing days to which entitlement could be demonstrated under the allocation processes could exceed the maximum available. Currently, the ECTMP simply limits the number, so that once the limit is reached, no further effort units may be issued to those who could otherwise demonstrate an entitlement to them.

The preferred approach is a proposed amendment to the ECTMP, which will provide an alternative basis for the cancellation of effort units by way of a rateable reduction across the fishery based on the number of effort units that have been, or would otherwise have been allocated. This reduction would arise through the operation of the ECTMP itself rather than an administrative decision making process. This is considered the most equitable means of enforcing the overall limit on effort unit numbers.

The *Fisheries Act 1994* currently invests the chief executive of the Department of Primary Industries with discretion to cancel or suspend an authority in certain circumstances and by following a certain process. There is an inconsistency with the proposed amendment because the cancellation would be effected by operation of law rather than administrative decision.

To remove the potential for inconsistency, enable the proposed amendments to the ECTMP to be made and facilitate any future structural adjustments in the management of other fisheries, the *Fisheries Act 1994* is to be amended by:

- (i) extending the matters that may be dealt with by a management plan to include the management of a fishery by a system of authorities, including their issue, conditions, amendment, renewal, transfer, cancellation and suspension; and
- (ii) providing that the provisions relating to the suspension or cancellation of authorities upon the decision of the chief executive do not affect the operation of a provision in a regulation or management plan that provides for the suspension or cancellation of an authority.

2. To facilitate the amendment of the Fisheries (Spanner Crab) Management Plan 1999.

It is required to facilitate the retrospective amendment of the *Fisheries (Spanner Crab) Management Plan 1999* (SCMP) to:

- allow the adjustment under section 94 of the SCMP to apply to the allocation of Individual Transferable Quota (ITQ) units where further licence transfers have occurred; and
- ensure that the allocation of ITQ units occurs in accordance with the intended government policy position.

The amendments will effectively allow for an adjustment of reported spanner crab catch history where further licence transfers of eligible licences have occurred. Section 94 of the SCMP provides for an adjustment in certain circumstances and adjusts the reported catch under the licence. Reported catch for a licence is a component in the formula which is critical in allocation of ITQ units.

The adjustment is required to apply to two licences where the former Queensland Fisheries Management Authority (QFMA) considered a change in ownership had been effected, but where special circumstances and conditions existed such that it is considered that the adjustment under section 94 should apply.

Under the current provisions and constraints of section 94, the QFMA considered that two licences were unable to be adjusted. Whilst licence transfers had been executed, these licences are considered to have been held in substantially the same name.

The QFMA issued ITQ units under the SCMP in May 1999. Because of a perceived ambiguity surrounding the application of section 94 to the two relevant licences, it was decided not to apply the adjustment to these licences until further clarification was received. However, the QFMA inadvertently factored in the adjustment for a component of the allocation formula in section 91 of the SCMP.

The Fisheries Tribunal in its decision in appeal number FT 113 considered the QFMA's allocation of ITQ units. The Tribunal concluded that the QFMA failed to comply with section 91 of the SCMP in applying the adjustment to one of the licenses concerned.

This retrospective amendment to the SCMP ensures that the QFMA allocation of ITQ units is valid. The amendment will ensure that intended policy required by the SCMP is achieved and that the technical inadvertence realised by the QFMA's application of the formula is overcome.

3. To make amendments which have been identified as necessary or desirable.

A number of proposed amendments have been identified as necessary or desirable for the optimum operation of the *Fisheries Act 1994*. These include:—

- (i) extending the range of matters which may be the subject of a management plan, so that they include a fishery, a fish habitat or declared fish habitat area, a fish way, fisheries resources and aquaculture;
- (ii) making provision to allow the lease of an authority under a regulation or management plan;
- (iii) clarifying the obligations of a person who takes or possesses noxious or non-indigenous fisheries resources;
- (iv) remedying the perceived deficiencies in section 124 of the *Fisheries Act 1994*, which empowers the chief executive to rehabilitate or restore land, waters, marine plants or a declared fish habitat area which has been removed, damaged or destroyed; and
- (v) stipulating expressly that an individual may not appeal from a decision of the Fisheries Tribunal to the Fisheries Tribunal.

Estimated costs for government implementation

There is no immediate or foreseeable increase in the cost to government in implementing the proposed amendments.

Consistency with fundamental legislative principles

Clause 19

Clause 19 inserts a new section 223A into the SCMP. This section will provide that section 94 of the SCMP will be taken to have always applied to the two eligible licences. Further, this provision will expire the day after it commences.

The amendment to the SCMP effectively provides for the correction of an unintended anomaly in the allocation of ITQ units and is an infringement of the fundamental legislative principle that legislation should not adversely affect the rights and liberties or impose obligations on individuals retrospectively. However it is considered that the imposition of the retrospective amendment in this instance is warranted.

The amendment ensures that two licences were eligible for an adjustment under section 94 of the SCMP. This policy position was inadvertently factored into the allocation of ITQ units. As a result, each licence in the fishery received a slight reduction in the allocation of ITQ units that they would have received but for the technical inadvertence of the QFMA in its application of the statutory formula under the SCMP.

The difference that has been factored in by the technical inadvertence of the QFMA is such that the correction, as is envisaged by the amendment, will represent 0.7 per cent of the presently allocated total annual allowable catch for the fishery. The retrospective operation of the amendment ensures that the intended policy required by the SCMP is achieved and that the technical inadvertence realised by the QFMA's application of the formula is overcome. Further, the retrospective amendment facilitates a continuum of management and administration for the spanner crab fishery. The amendment will endorse and correct the allocation of ITQ units which was made in accordance with the government's intended policy as evidenced by the making of the SCMP as subordinate legislation after consideration and approval by Cabinet.

Consultation

Government

The Department of the Premier and Cabinet, Queensland Treasury, the Department of State Development and the Department of Employment, Training and Industrial Relations were consulted in the preparation of this Bill.

The Office of the Parliamentary Counsel prepared this Bill.

Industry

A process of extensive consultation with industry and stakeholders has been undertaken with respect to the amendments to the ECTMP, to which the proposed amendments to the *Fisheries Act 1994* relate.

Industry was not consulted with respect to the proposed amendments which have been identified as necessary or desirable for the optimum operation of the *Fisheries Act 1994*, the majority of which are relatively minor amendments.

It was not considered appropriate to consult with industry with respect to the technical deficiencies with the allocation of ITQ units under the SCMP as the effect of the amendment relates to 0.7 per cent of the presently allocated total allowable catch for this fishery. Further, this amendment simply clarifies the policy intent of the SCMP, the making of which has previously been the subject of extensive consultation.

Results of consultation

There is agreement between government agencies regarding the proposals in the Bill.

NOTES ON PROVISIONS

Short title

Clause 1 provides that the short title of the Act will be the *Fisheries Amendment Act 2001*.

Act amended

Clause 2 provides that the Act amends the *Fisheries Act 1994* (the Act).

Insertion of new pt 1, div 3, sdiv1, hdg

Clause 3 inserts, at Part 1, division 3, a new subheading as follows:

‘Subdivision 1—Dictionary’

Amendment of s 4 (Definitions)

Clause 4 provides that the dictionary in the schedule (which is inserted by virtue of Clause 20) defines particular words used in the Act, and relocates definitions to the schedule.

Insertion of new pt 1, div 3, sdiv 2, hdg

Clause 5 inserts, after section 4 of the Act, a new heading as follows:

‘Subdivision 2—Key Definitions’**Amendment of s 32 (Making Management Plans)**

Clause 6 amends section 32 to extend the range of matters which may be the subject of a management plan so that they include a fishery, a fish habitat or declared fish habitat area, a fish way, fisheries resources and aquaculture.

The benefit of making management plans for these matters are that the plans:

- (i) provide broad recognition of the values of fisheries, fish habitat areas, declared fish habitat areas, fish ways, fisheries resources and aquaculture;
- (ii) raise key operational issues with respect to the management of these matters;
- (iii) become part of the Integrated Development Assessment System process under the *Integrated Planning Act 1997*, especially for local government planning schemes, which assists developers in awareness of relevant fisheries issues at the earliest possible stage; and
- (iv) ensure Statewide consistency of delivery of management through the definition of issues and appropriate responses.

Amendment of s 33 (Procedure to make management plan)

Clause 7 omits the words ‘for a fishery’ from section 33 of the Act, so that the provision has general application to the extended range of matters which may be the subject of a management plan, in accordance with amended section 32.

What management plan must deal with

Clause 8 omits section 35 that provides that a management plan must deal with certain prescribed matters. It inserts a new section 35 that provides that a management plan must state its objectives and how those objectives are to be achieved.

It will no longer be obligatory for a management plan to include a description of the fishery and a statement as to the known status of the fishery. These matters are considered non-legislative and inappropriate for inclusion in subordinate legislation.

It is intended to insert a provision into the *Fisheries Regulation 1995* that will require this information to be included in the explanatory notes prepared when a management plan is made.

The requirement for a management plan to state how it may be amended or repealed, including the consultation and other processes that must be followed has been omitted.

The amendments to section 39 (Amendment or repeal of management plan) now address specifically the manner and processes that must be followed to amend or repeal a management plan.

What management plan may deal with

Clause 9 amends section 36 by inserting a new example of the type of matters that the chief executive may consider appropriate to deal with in a management plan. This will allow a management plan to provide for the management of a fishery by a system of authorities including:

- the issue of authorities;
- the conditions attached to authorities;
- whether authorities can be amended, renewed or transferred and if so, the conditions attached; and
- the cancellation or suspension of authorities or how the chief executive may cancel or suspend them.

New examples are added to the list of examples in section 36 to reflect the extended range of matters which may be the subject of a management plan, in accordance with amended section 32.

Replacement of ss 38 and 39

Clause 10 amends section 38 of the Act (**Management Plan may provide for quota**) so that a management plan may prescribe, or authorise the issue of a quota generally, rather than with respect to a fishery only.

Clause 10 also replaces the existing section 39 (**Amendment of management plan**).

The purpose of the amendment is to clarify the processes that must be followed to amend (or repeal) a management plan. The new section 39 adopts section 42 of the *Legislative Standards Act 1992*, providing that unless the amendment is one that would not require the preparation of a regulatory impact statement, a management plan must be amended by either:

- the preparation of a draft of the amendments and the taking of reasonable steps to engage in consultation about the draft; or
- conducting a review of the plan, or the relevant part of it, where the result of the review included a proposal to make the amendment.

This amendment obviates the need to prepare draft amendments or conduct a formal review where the amendment would not require the preparation and public release of a regulatory impact statement. This will facilitate a quicker and simplified process for making urgent and non-significant amendments.

Section 39 also provides that a management plan may provide for how the required consultation or review will occur.

Clause 10 also inserts a new section 39A (**Effect of repeal of management plan on authorities**) that provides for the cessation of authorities issued in relation to the management plan upon the repeal of the management plan, unless specifically provided otherwise.

Insertion of new pt 5, div 3, sdiv 5A

Clause 11 inserts, in part 5, division 3, a new subdivision as follows:

‘Subdivision 5A—Leases’

Clause 11 inserts a new section 66A into the Act (**Lease of authority (other than permit)**) which states that a regulation or management plan may provide for the lease of an authority or the transfer of a lease of an authority, other than a permit.

This amendment was proposed as a response to issues raised regarding the temporary transfer of Individual Transferable Quota Units (ITQ units) during the public consultation process with respect to the *Fisheries (Spanner Crab) Management Plan 1999*. The ability to temporarily transfer or lease ITQ units was considered desirable. The proposed new

part 5, division 3, subdivision 5A provides a clear head of power in the Act to enable the regulation of leases of quota, once provided for in a management plan or regulation.

New section 66A provides section 65(2) to (7) apply to a lease or transfer of a lease as if the references in the section were a reference to the lease or lease transfer. Section 65(2) to (7) of the Act provides, amongst other things, that applications for transfers must be made to the chief executive.

New section 66A further provides that an authority may not be leased, or a lease of an authority may not be transferred, other than under this section. Clause 11 also inserts new section 66B, which provides that where an authority holder leases an authority under new section 66A and the lease continues to be in force, the things authorised by the authority can not be done by the holder, but may be done by the lessee under the lease as if the lessee were the holder. It also provides that, apart from specified sections, a reference in the Act, regulation, management plan or authority to the holder of the authority is, if the context permits, taken to include the lessee.

Suspension or cancellation of authorities

Clause 12 amends section 67 which provides that the chief executive may suspend or cancel an authority issued by the chief executive in certain circumstances. Clause 13 inserts a new subsection that provides that section 67 does not affect the suspension or cancellation of an authority under a regulation or management plan.

The intent of the amendment is for the suspension or cancellation of an authority through the operation of the provisions of a management plan to be an alternative basis to the suspension or cancellation through a decision of the chief executive under section 67.

Procedure for cancellation or suspension

Clause 13 amends section 68 which prescribes the procedure that must be followed by the chief executive to suspend or cancel an authority under section 67. Clause 13 inserts a new subsection that provides that the procedure required to be followed under section 68 does not affect the suspension or cancellation of an authority under a regulation or management plan.

Amendment of s 73 (Registers of authorities)

Clause 14 amends section 73(6) to exclude a lease from the interests which a holder of an authority may apply to have noted on the register. New section 66A provides that an authority may only be leased in accordance with the requirements of that section. If the chief executive approves a lease of an authority or a transfer of a lease, he or she may note this interest on the register in accordance with section 73(2).

Amendment of section 92 (Duty of person who takes or possesses noxious or nonindigenous fisheries resources)

Clause 15 amends section 92 of the Act so that there is no longer a requirement to notify an inspector with respect to taking or possessing noxious or nonindigenous fisheries resources. This requirement has often proved to be impractical, and, at times, without reasonable purpose. The new section provides that a person who unlawfully takes or possesses noxious or nonindigenous fisheries resources must immediately:

- (i) if the fisheries resource is a fish – kill it; or
- (ii) if the fisheries resource is a plant – destroy it.

Omission of s 121

Clause 16 omits section 121 of the Act which provides that a declared fish habitat area may be managed under a management plan. This is due to the fact that Clause 6 amends section 32 to extend the range of matters which may be the subject of a management plan so that they include a fishery, a fish habitat or declared fish habitat area, a fish way, fisheries resources and aquaculture.

Amendment of s 124 (Chief Executive may rehabilitate or restore land etc.)

Clause 17 amends section 124 of the Act to remove the preliminary requirement that a person contravene a section of part 6 of the Act before the chief executive may take action reasonably necessary to rehabilitate or restore land, waters, marine plants or a declared fish habitat area.

Currently, section 124 is difficult to apply in a practical sense and, as a result, has been unhelpful to the Queensland Fisheries Service (QFS) and its predecessors in seeking to carry out rehabilitation and restoration. The

section states that the chief executive may take action reasonably necessary to rehabilitate or restore land, waters, marine plants or a declared fish habitat area if a person either contravenes a provision of part 6 of the Act, or does not comply with a condition of an authority under the Act to rehabilitate or restore.

The problem with the application of this section lies in the need to show definitively that there has been a contravention by a person. This is often difficult to establish, particularly in the case of acts which have been committed a number of years before they are detected for example, unlawful construction of works in a declared fish habitat area). QFS may only prosecute offences within a maximum of two years after the offence is committed (section 220 of the Act). There is some argument that a 'contravention' means a prosecutable offence: therefore, if time has run out to prosecute an offence, there is no contravention, and the chief executive cannot take any action under section 124.

These difficulties have resulted in QFS rarely employing the powers under section 124. There is, however, a real need for the chief executive to be empowered to take action, where land, waters, marine plants or a declared fish habitat area have been removed, damaged or destroyed, in order to rehabilitate or restore the same. For this reason, the section is being amended to permit the chief executive to take action if:

- (i) the land, waters, marine plants or declared fish habitat area has been removed, destroyed or damaged; and
- (ii) the chief executive reasonably believes that the removal, destruction or damage was caused by an act or omission that constituted a failure to comply with the Act, a former Act, the repealed *Fisheries Act 1957*, or a condition of an authority.

The current section 124(1)(a) refers to a contravention of a provision of part 6 of the Act as grounds for taking action to rehabilitate or restore land, waters, marine plants or a declared fish habitat area. The proposed amended section 124(1)(b) refers to an act or omission which constitutes a failure to comply with the Act. This will enable the chief executive to take action to rehabilitate or restore with respect to matters outside part 6 of the Act, for instance, with respect to matters in part 5, division 8, regarding the building of fishways.

Amendment of s 199 (Powers of tribunal on appeal)

Clause 18 amends section 199(3) so that a person who has appealed to the Fisheries Tribunal under section 196 of the Act may not appeal against the Tribunal's decision to the Fisheries Tribunal once again. The amendment ensures that the Tribunal's decisions are final, and prevents circular appeals.

Insertion of new s 223A

Clause 19 inserts a new section 223A in the *Fisheries (Spanner Crab) Management Plan 1999*. The inserted provision provides that section 94 of the *Fisheries (Spanner Crab) Management Plan 1999*, which provides for an adjustment of reported catch in special circumstances, is taken to have always applied to two particular eligible licences under the *Fisheries (Spanner Crab) Management Plan 1999*. The provision, by retrospective operation, corrects technical inadvertence by the QFMA in its allocation of Spanner Crab Units and ensures that the allocation occurred in accordance with the intended government policy.

Section 223A, as inserted into the *Fisheries (Spanner Crab) Management Plan 1999*, will expire the day after it commences..

Insertion of schedule

Clause 20 inserts after section 238 of the Act, a schedule which will contain the Act's dictionary.

Amendment to omit headings following cross references

Clause 21 amends the Act by providing for the removal of the reference to a heading in words where this follows a cross reference to a particular provision.