

# Fisheries Amendment Bill 2008

## Explanatory Notes

### Short Title of the Bill

The short title of the Bill is the *Fisheries Amendment Bill 2008* ('the Bill').

### Policy objectives of the Bill

The primary objective of the Bill is to ensure recognition of the traditional and customary fishing rights of Aborigines or Torres Strait Islanders within the framework of ecologically sustainable development (in accordance with the purpose of the *Fisheries Act 1994* – Fisheries Act).

The detailed objectives of the Bill are to:

- Clarify that the exercise of fishing activities under Aboriginal tradition and Torres Strait Island custom (hereinafter referred to as traditional fishing) in accordance with section 14 of the Fisheries Act may only be for the purpose of personal, domestic and non-commercial communal use;
- Specify that traditional fishing can only be undertaken while using recreational fishing apparatus defined under the Fisheries legislation;
- Ensure that traditional fishing does not take place in prescribed regulated waters that are closed to all fishing activity, subject to a discretion of the chief executive to issue a permit in these waters (hereinafter referred to as closed waters);
- Clarify the mechanism by which traditional fishing can be regulated;
- Remove the requirement for cooperation of all Aborigines or Torres Strait Islanders in Queensland when developing regulations regarding traditional fishing activity, noting that consultation requirements under the *Statutory Instruments Act 1992* concerning people affected by any restriction proposed under regulation would remain; and

- Put beyond doubt that section 14 is a defence provision.

### **Policy rationale**

In 2006 a Queensland Court of Appeal decision [*Stevenson v Yasso* [2006] QCA 40 (*Yasso* decision)], raised questions in relation to the scope of section 14 of the *Fisheries Act 1994* (the Fisheries Act).

In that matter, the Court of Appeal upheld the right of a traditional fisher to use commercial fishing nets under section 14 of the Fisheries Act.

The decision raised questions in relation to the scope of section 14 and prompted a review of the provisions to ascertain the correct balance between the desire to protect Aboriginal traditional and Torres Strait Island customary fishing and the need to promote ecologically sustainable use of fisheries resources across Queensland.

Accordingly, the current Bill is intended to resolve several policy issues to protect and promote the long term sustainability of Queensland's fisheries resources by:

- Addressing the practice by Indigenous fishers of fishing with types of apparatus that are capable of taking large quantities of fish, including juveniles. Depending on the tradition of a particular Indigenous group, such apparatus could be the same as commercial fishing apparatus. The practice has the potential to increase to unsustainable levels, which could threaten the long term viability of fish stocks.
- Removing any doubt that traditional fishing exercised in accordance with section 14 is only for personal, domestic and non-commercial communal use to ensure that section 14 is not used as an avenue for commercial fishing and commercial sale of fish.
- Addressing the increasing practice by some Indigenous people of fishing in closed waters. The concern about anyone fishing in these closed waters is that the waters have particular attributes, such as being spawning grounds, the preservation of which are essential to the long term sustainability of fish stocks. The Bill proposes to address these increasing human pressures on these vulnerable areas and ensure the closed waters achieve sustainability objectives.

The Bill is also intended to resolve a procedural matter concerning the use of management plans to further restrict the operation of section 14. To ensure consistency and certainty across Queensland, it is considered that the more appropriate mechanism for any capacity to regulate should be by way of regulation, which is still provided for under the proposed wording of section 14.

Further, the Bill is intended to address a practical issue concerning consultation. The current requirement to reach agreement through cooperation requires a reasonable attempt to achieve a meeting of minds which, in practical terms, is difficult to achieve through negotiation on a State-wide basis in any timely way, when taking into account the diversity of Indigenous groups and their needs. Consultation requirements under the *Statutory Instruments Act 1992* concerning people affected by any restriction proposed under regulation would remain.

The Bill also redrafts section 14 of the Act so that it is clear that it is intended by Parliament to operate as a defence provision. As with all defences, it is incumbent upon the defendant to establish the defence on the balance of probabilities, before the prosecution must negate the defence beyond reasonable doubt. This amendment is proposed to remove all doubt as to the requisite burdens of proof in a prosecution where section 14 is raised by the defendant.

The amendment Bill does not affect the opportunity for Indigenous people to apply for a General Fisheries Permit to engage in a fishing activity that would be otherwise unlawful under the Fisheries legislation, for example for the purpose of ceremonial and cultural events.

The amendment Bill also does not affect opportunities for Indigenous people to obtain a commercial fishing licence from the open market to undertake commercial fishing activities in accordance with fisheries legislation. Nor does it prevent Indigenous people from applying for Indigenous Fishing Permits (IFP) outside closed waters. IFPs are not a substitute for permanent commercial fishing licences but are used as an interim measure to assist Indigenous involvement in commercial fishing and to assist the development of properly constructed economic and business development projects.

Section 14 was and is intended by Parliament to be a “special measure” within the meaning of section 8 of the *Racial Discrimination Act 1975* (Cth) (RDA). Section 14 confers a legislative benefit on Aboriginal and Torres Strait Islanders to engage in traditional fishing, subject to a

regulation. The benefit was legislatively conferred by Parliament in order to secure the adequate advancement of Aboriginal and Torres Strait Islanders, through ensuring the protection and preservation of traditional fishing practices. The amendment of section 14 is considered necessary to ensure an appropriate balance between the long term sustainability of fish stocks and the benefit to Aboriginal and Torres Strait Islanders to engage in traditional fishing. However, it still confers significant protection of traditional fishing.

### **How the policy objectives will be achieved**

The policy objectives will be achieved by:

- Amending subsection 14(1) to provide that traditional fishing may only be exercised for personal, domestic and non-commercial communal use;
- Amending subsection 14(1) to provide that the traditional fishing may only be exercised while using the same fishing apparatus as recreational fishers (recreational apparatus is defined in the Bill). This makes it clear that section 14 does not enable Aborigines and Torres Strait Islanders to use commercial apparatus or any other apparatus that is not prescribed as recreational apparatus under the Regulation. This will also reduce the likelihood of taking commercial quantities of fish under traditional fishing activities;
- Amending section 14 to ensure that it does not apply to closed waters (prescribed waters are defined in the Bill);
- Amending subsection 14(2) to remove reference to ‘management plan’ so that subsection 14(1) is subject to a provision of a regulation that expressly applies to acts done under Aboriginal tradition or Island custom;
- Omitting subsection 14(3) to remove the requirement that a regulation can only be developed after cooperation with Indigenous persons; and
- Redrafting section 14 to make it clear that section 14 is a defence provision so that the ordinary rules relating to the burden of proof for a defence apply.

## **Alternative method of achieving the policy objectives**

An alternative method of achieving the policy objectives is to repeal section 14 in its entirety. In practice, this option would remove the special status currently enjoyed by traditional fishers and could have a significant affect on these fishers. This outcome is contrary to the recognition of traditional rights in general, and traditional fishing rights in particular, and is not considered to be within the spirit of Aboriginal reconciliation.

The option of repealing section 14 is not preferred because it remains Parliament's intention to secure the adequate advancement of Aboriginal and Torres Strait Islanders, through ensuring the protection and preservation of traditional fishing practices in a sustainable way. The restrictions on section 14 that are proposed in this Bill are intended to help achieve this sustainability objective.

## **Estimated cost for Government implementation**

S24HA of the *Native Title Act 1993 (Cth)* [NTA] provides that native title holders are entitled to compensation from the State for affecting the exercise or enjoyment of their native title in accordance with Part 2 Division 5 of the NTA. A claim for compensation under that Division must be made to the Federal Court and it would be necessary for the person making the claim to prove they are native title holders. There have not yet been any relevant decisions in relation to the payment of compensation for affecting native title.

## **Consistency with the Fundamental Legislative Principles**

### **Does the Bill have sufficient regard to Aboriginal tradition and Islander custom?**

It is a fundamental legislative principle that a Bill should have sufficient regard to Aboriginal tradition and Island custom (section 4(3)(j) of the *Legislative Standards Act 1992*).

The proposed changes to section 14 of the Act will allow certain tradition and custom to continue while ensuring that important sustainability issues are addressed. Indigenous fishers will be able to continue to fish for personal, personal, domestic and non-commercial communal purposes, using recreational apparatus. The exception to this is that traditional fishing will not occur in specific closed waters. In respect of cultural and ceremonial fishing purposes, permits may be issued.

### **Does the Bill reverse the onus of proof in criminal proceedings?**

It is a fundamental legislative principle that a Bill should not reverse the onus of proof in criminal proceedings without adequate justification (section 4(3)(d) of the *Legislative Standards Act 1992*).

The Bill redrafts section 14 of the Act so that it is clear that it is intended by Parliament to operate as a defence provision. As with all defences, it is incumbent upon the defendant to establish the defence on the balance of probabilities, before the prosecution must negate the defence beyond reasonable doubt.

This amendment is proposed to remove all doubt that may have been raised by the *Yasso* decision as to the requisite burdens of proof in a prosecution where section 14 is raised by the defendant. Two of the three Court of Appeal Judges in the *Yasso* decision believed that the defendant bore the onus of proving all the elements of section 14 on the balance of probabilities. Accordingly, it is believed that the amendments to section 14 do not reverse the onus of proof.

However, if the view of the remaining Court of Appeal Judge is correct that it was sufficient for the defendant to raise only some evidence of the pertinent matters in section 14, then the existing burdens of proof will be altered by the proposed amendment. In this regard, it is considered that the amendment is justified on the basis that it is normal practice for a defendant, in raising a defence, to be required to do more than simply raise some evidence of the pertinent matters but to establish the defence on the balance of probabilities.

### **Does the Bill have sufficient regard for the rights and liberties of individuals?**

It is a fundamental legislative principle that a Bill should have sufficient regard for the rights and liberties of individuals (section 4(2)(a) of the *Legislative Standards Act 1992*).

As mentioned above, section 14 is a special measure enacted by Parliament in order to secure the adequate advancement of Aboriginal and Torres Strait Islander people, through ensuring the protection and preservation of traditional fishing practices.

To the extent that the amendment lessens the statutory benefit(s) conferred by Parliament under section 14, this is considered wholly justified on the grounds of protecting and promoting the ecologically sustainable use of fisheries resources.

It is considered that the Bill has sufficient regard for Aboriginal tradition and Islander custom, does not abrogate established rights and liberties without adequate justification, and appropriately deals with onus and standard of proof issues. No other considerations regarding the rights and liberties of individuals have been identified as arising from the Bill.

For these reasons, it is considered that the Bill has sufficient regard to the rights and liberties of individuals.

**Does the Bill authorise amendment of an Act by means other than another Act?**

It is a fundamental legislative principle that a Bill should authorise the amendment of an Act only by another Act (section 4(4)(c) of the *Legislative Standards Act 1992*). Authorising amendment by means other than another Act (a Henry VIII clause) would offend this fundamental legislative principle.

The Bill refers to ‘recreational fishing apparatus’ and ‘prescribed waters’. Both the types of apparatus that are recreational fishing apparatus and the prescribed waters could be altered by amendment of the Regulation. On this basis, it could be argued that clause 4(2) of the Bill is a Henry VIII clause.

However, in the Scrutiny of Legislation Committee’s Report on ‘*The Use of “Henry VIII Clauses in Queensland Legislation”*’ of January 1997, the Committee noted (at page 23 of the report) that it is appropriate that Parliament consider a general principle and that matters of detail may be left to subordinate legislation. Also, the Committee concluded (at page 24 of its report) that a Henry VIII clause is a clause that enables a subordinate instrument to have ‘*the same effect on an Act as an amendment to that Act (in that the relevant section of the Act would have to be read as if it contained different words)*’.

Given the Committee’s conclusion regarding Henry VIII clauses, it is considered that clause 4(2) does not constitute a Henry VIII clause.

**Does the Bill delegate legislative power in an inappropriate circumstance, or to inappropriate persons?**

It is a fundamental legislative principle that delegation of legislative power should occur only in appropriate cases and to appropriate persons (section 4(4)(a) of the *Legislative Standards Act 1992*).

Section 223 of the Act provides that the Governor in Council may make regulations under the Act. Such regulations may currently relate to matters

including regulated fishing apparatus declarations and regulated water declarations (see sections 37(3), 37(5) and 42 of the Fisheries Act).

It is considered that it is appropriate to delegate the power to prescribe regulated waters for the purpose of section 14, rather than requiring Parliament to exercise legislative power. Parliament will, by clause 4(2), specify the principle regarding regulated waters within stated parameters in clause 4(3), and delegate the power to prescribe the detail regarding that principle. In this regard, it is noted that the waters that may be prescribed pursuant to section 14(1) must already be closed waters.

Consideration at the highest executive level is considered fitting, given that Indigenous fishing rights may be affected regarding such proposed prescribed regulated waters. Accordingly, the Governor in Council is considered to be an appropriate delegate for the power to prescribe regulated waters for the purpose of section 14.

### **Does the Bill have sufficient regard to the institution of Parliament?**

It is a fundamental legislative principle that a Bill should have sufficient regard for the institution of Parliament (section 4(2)(b) of the *Legislative Standards Act 1992*).

As set out above, it is considered that the Bill does not enable amendment of the Act by means other than another Act, and does not delegate legislative power inappropriately. No other considerations regarding the institution of Parliament have been identified as arising from the Bill.

For these reasons, it is considered that the Bill has sufficient regard to the institution of Parliament.

## **Consultation**

### **Community**

The Department of Primary Industries and Fisheries has undertaken preliminary consultation with one of Queensland's Indigenous communities that will be affected by the proposed amendments – the Darumbal community in Rockhampton. The Community expressed its preference for finding a local solution rather than making an Act amendment to address current issues arising from traditional fishing. While the Darumbal indicated that they would support the exclusion of all fishing activity (including by Aboriginal people) downstream from the Fitzroy River barrage (a prescribed water), they would not support any restrictions



at all on their traditional way of fishing, in particular the limitations to recreational fishing apparatus proposed in the Bill.

Other communities have not been consulted and their views on the proposed amendments are unknown. However, Government proposes to commence targeted consultation with Indigenous communities prior to Parliament's debate of the Bill.

### **Government**

The following government agencies were consulted on this Bill - Department of Natural Resources and Water (Native Title Services); Department of the Premier and Cabinet; Department of Communities (Office of Aboriginal and Torres Strait Islander Partnerships); Department of Justice and Attorney-General; Environmental Protection Agency; and Queensland Treasury.

All agencies support the proposed amendments.

## **Notes on Provisions**

**Clause 1** provides that this Act may be cited as the *Fisheries Amendment Act 2008*.

**Clause 2** provides that this Act commences on a day to be fixed by proclamation.

**Clause 3** provides that this Act amends the *Fisheries Act 1994*.

**Clause 4(1)** replaces the heading to clarify that section 14 is a defence for Aborigines and Torres Strait Islanders for particular offences under the Fisheries Act.

**Clause 4(2)** replaces the current section 14(1) and provides that section 14 is available to an Aboriginal and Torres Strait Islander person as a defence for an offence against the Fisheries legislation for taking, using or keeping fisheries resources or using fish habitat only if the person proves:

- (a) the person is an Aborigine who at the time of the offence was acting under Aboriginal tradition, or the person is a Torres Strait Islander, who at the time of the offence was acting under Islander custom; and

- (b) the taking, using or keeping of the fisheries resources, or the using of the fish habitats was for the purpose of satisfying a personal, domestic or non-commercial communal need of the Aborigine or Torres Strait Islander; and
- (c) either:
  - a. the taking or using of the fisheries resources, or the using of the fish habitats, was carried out using recreational fishing apparatus; or
  - b. the fisheries resources kept were taken using recreational fishing apparatus; and
- (d) the taking or using or keeping of fisheries resources or using of fish habitats was not carried out in any prescribed waters, and, if the keeping of the fisheries resources was not occurring in any prescribed waters, the fish were not taken from prescribed waters.

Clause 4(2) means that an Aborigine or Torres Strait Islander will not have a defence under fisheries legislation to undertake any traditional fishing activities that are carried out for a purpose other than for personal, domestic or non-commercial communal needs. The clause is intended to make clear that section 14 does not allow Aboriginal or Torres Strait Islander persons to exploit the resource in a commercial manner without compliance in all respects with the Fisheries legislation.

Section 14 is not available to an Aborigine or Torres Strait Islander if the person has: a) taken or used fisheries resources in any of the prescribed waters; b) kept fish in the prescribed waters, regardless of where the taking of the fish occurred; or c) kept fish outside the prescribed waters that were taken inside the prescribed waters.

Outside of prescribed waters, an Aborigine or Torres Strait Islander will not have a defence under fisheries legislation to undertake traditional fishing activities using any apparatus that is not prescribed as recreational fishing apparatus.

As the clause is framed as a defence it is intended that the standard of proof for the defendant would be on the balance of probabilities, and beyond reasonable doubt for the prosecution.

**Clause 4(3)** removes the use of a management plan to regulate traditional fishing so that clause 4(2) is subject to a provision of a regulation that expressly applies to acts done under Aboriginal tradition or Island custom.

**Clause 4(4)** omits requirements for cooperation in reaching agreement with Aborigines and Torres Strait Islanders in developing a regulation under clause 4(3) and inserts definitions for clause 4(2).

For the purposes of section 14, prescribed waters are only those waters that are:

- (a) regulated waters under a regulation under the Fisheries Act; and
- (b) prescribed specifically under a regulation for the purposes of section 14; and
- (c) regulated waters where the taking of any fish, or the possession of any fish taken, by any person is prohibited, subject to a discretion of the chief executive to issue a permit in these waters.

For the purposes of section 14, recreational fishing apparatus means fishing apparatus that is recreational fishing apparatus under a regulation under the Fisheries Act.