

Fisheries Amendment Bill 2008

Explanatory Notes for Amendments to be moved during consideration in detail by the Honourable Tim Mulherin, MP

Title of the Bill

Fisheries Amendment Bill 2008

Objectives of the Amendments

The objective of the amendment is to include a head of power in the *Fisheries Act 1994* for traditional fishing apparatus to be prescribed by regulation. The purpose of this amendment is to ensure that the Act appropriately recognises traditional and customary fishing activities of Aborigines and Torres Strait Islanders.

This amendment will enable traditional fishers to use non-commercial traditional fishing apparatus, and for this to be part of a defence against offences under the Act. Specifically prescribed traditional fishing apparatus, along with prescribed recreational fishing apparatus, will be a valid means of non-commercial fishing.

Achievement of the Objectives

The policy objective will be achieved by amending section 14 of the Act to include a head of power for traditional fishing apparatus to be prescribed by regulation. A regulation will be subsequently made to include reference to traditional fishing apparatus following consultation with Aborigines and Torres Strait Islanders.

Alternative Ways of Achieving Policy Objectives

Alternative means of achieving the policy objective considered were:

- to prescribe traditional fishing apparatus as 'recreational fishing apparatus' in the Fisheries Regulation

- to allow General Fisheries Permits (GFP) to be used to allow holders to use specific traditional apparatus on the grounds that it is part of their tradition.

The first option was not accepted as it would enable non-Indigenous users to use such apparatus - a situation not considered appropriate. The second option was not accepted as it would make it difficult for traditional fishers to use traditional apparatus as access to the permit application process would be problematic and may disadvantage some Indigenous people.

Estimated Cost for Government Implementation

No additional significant administrative cost is expected to be incurred by Government in implementing this proposed amendment.

Consistency with Fundamental Legislative Principles

Fundamental legislative principles require that legislation has sufficient regard to 'rights and liberties of individuals' (Section 4(2)(a) of the *Legislative Standards Act 1992*) and 'Aboriginal tradition and Island custom' (Section 4(3)(j) of the *Legislative Standards Act 1992*).

As with all of the proposed amendments to section 14 of the Act, this proposed amendment is intended to support traditional and customary fishing while ensuring that important sustainability issues are addressed. Indigenous fishers will be able to continue to fish for personal, domestic and non-commercial communal purposes, using recreational apparatus and/or prescribed traditional apparatus. The exception to this is that traditional fishing will not occur in specific closed waters. In respect of large cultural and ceremonial fishing purposes, permits may be issued.

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 recognition 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.

For these reasons, it is considered that the amendment has sufficient regard for Aboriginal tradition and Islander custom and does not abrogate established rights and liberties without adequate justification.

Consultation

The amendment is proposed as a result of feedback from traditional owners and Aboriginal land councils regarding the *Fisheries Amendment Bill 2008*. Aboriginal land councils have expressed concern about the effect that the *Fisheries Amendment Bill 2008* would have on their ability to use certain traditional fishing apparatus. This proposed amendment therefore seeks to enable traditional land owners to use prescribed traditional fishing apparatus. Further consultation will take place to determine which traditional fishing apparatus should be prescribed under the *Fisheries Regulation 2008*, pursuant to the proposed head of power.

Notes On Provisions

Amendment 1 amends Clause 4 of the Bill to replace reference to ‘recreational’ fishing apparatus with ‘prescribed’ fishing apparatus. The clause will consequently provide that as part of the defence for an offence against fisheries legislation for taking, using or keeping fisheries resources or using fish habitat, an Aboriginal or Torres Strait Islander person must prove either:

- (a) the taking or using of the fisheries resources, or the using of the fish habitats, was carried out using prescribed fishing apparatus; or
- (b) the fisheries resources kept were taken using prescribed fishing apparatus.

Amendment 2 amends Clause 4 of the Bill to insert a definition of ‘prescribed fishing apparatus’. Prescribed fishing apparatus is subsequently defined as fishing apparatus that is recreational fishing apparatus under a regulation under the *Fisheries Act 1994*, or fishing apparatus that is used under Aboriginal tradition or Island custom, and prescribed specifically under a regulation for the purpose of this section.

These amendments mean that a defence is available to an offence under fisheries legislation if all of the following criteria are met:

- (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:
- the taking or using of the fisheries resources, or the using of the fish habitats, was carried out using prescribed recreational fishing apparatus or specifically prescribed traditional fishing apparatus; or
 - the fisheries resources kept were taken using recreational fishing apparatus or specifically prescribed traditional 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.

Amendment 3 is a consequential amendment to Clause 4 as a result of the reordering of the definitions being inserted by the Bill.

Amendment 4 amends Clause 4 to remove the definition of recreational fishing apparatus. This definition is no longer required as it has been encompassed by Amendment 2 which introduces the new definition of 'prescribed fishing apparatus'. 'Recreational fishing apparatus' are defined under this new definition.