

Fisheries Legislation Amendment Declaration 2021

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Mark Furner MP, Minister for Agricultural Industry Development and Fisheries and Minister for Rural Communities, provide this human rights certificate with respect to the *Fisheries Legislation Amendment Declaration 2021* made under the *Fisheries Act 1994*.

In my opinion, the *Fisheries Legislation Amendment Declaration 2021*, as tabled in the Legislative Assembly, limits a human right, but overall is compatible with the human rights protected by the *Human Rights Act 2019*. The nature and extent of the limitation is outlined in this statement. In my further opinion, the remainder of the *Fisheries Legislation Amendment Declaration 2021* is compatible with the rights protected by the *Human Rights Act 2019* for the reasons outlined in this statement.

Overview of the Subordinate Legislation

Fisheries Queensland manages a number of commercial fisheries using quota-based management systems. In such fisheries, there are limits on the total allowable commercial catch for the fishery, part of a fishery, a species or group of species. This is achieved by either declaring a total quota entitlement for particular fisheries or parts of fisheries in the *Fisheries Quota Declaration 2019* (Quota Declaration), or by declaring how a fish is regulated in the *Fisheries Declaration 2019* (Fisheries Declaration), once the prescribed commercial catch reaches a certain amount for a species.

A total quota entitlement is declared for fisheries (or parts of fisheries) where participants in the fishery hold individual transferable quota authorities (units). Quota authorities entitle the holder to take a portion of the declared total quota entitlement for that species or group of species during the season that correlates to their individual holding. From season to season, the declared total quota entitlement may be increased or decreased depending upon the status of the fish stocks concerned. Consequently, the amount of catch (in kilograms) that a unit entitles the holder to take also increases and decreases.

This differs from a species of fish that is regulated when the prescribed commercial catch for that species reaches a certain limit (the ‘prescribed commercial catch limit’). Under this management system, participants in the fishery(s) compete to take the species on a first in, first served basis. All participants in the fishery(s) can fish for the species until the prescribed commercial catch limit is reached. Once the prescribed commercial catch reaches the limit, the species becomes regulated in a stated way for relevant fishers.

The entry(s) for such a species in the Fisheries Declaration state how the species is regulated once the prescribed commercial catch limit is reached. Typically, relevant licence holders cannot take or possess that species of fish for the remainder of the fishing season.

In one circumstance, the fish or species is regulated in such a way that, as the prescribed commercial catch limit is approached, different levels of restrictions are imposed. If the prescribed commercial catch for hammerhead shark reaches a certain tonnage amount, the Fisheries Declaration provides that the catch and possession limit for relevant licence holders for that species is 10. This is colloquially referred to as ‘trip limits’. However, once the prescribed commercial catch for hammerhead shark reaches a higher tonnage amount, the Fisheries Declaration provides that the catch and possession limit for relevant licence holders is reduced to 4.

Under the *Queensland Sustainable Fisheries Strategy 2017-2027* (the Strategy), all major fisheries will be managed using harvest strategies. Harvest strategies outline clear decision rules that increase and decrease the allowable harvest based on the health of the fishery. A change to the total quota entitlement or prescribed commercial catch limit will be consistent with the harvest strategy for the nominated fishery. In accordance with Part 2 of the *Fisheries Act 1994*, harvest strategies for the east coast inshore, commercial crab, sea cucumber, tropical rocklobster and coral fisheries were approved on 14 June 2021.

The *Fisheries Legislation Amendment Regulation 2020* (the FLAR) provided, among other things, for the issuing of quota authorities for the following existing commercial fisheries:

- Parts of the east coast inshore fishery (i.e. the commercial net fisheries) (ENL-ITQ units);
- Sea cucumber fishery (east coast) (hand-harvest ITQ units);
- Coral fishery (hand-harvest ITQ units);
- Shell grit fishery (hand-harvest ITQ units);
- Trochus fishery (hand-harvest ITQ units);
- Commercial crayfish and rocklobster fishery (tropical rocklobster only) (hand-harvest ITQ units); and
- Commercial crab fishery (C1-ITQ units).

These provisions commenced on 30 September 2020 and the new quota authorities issued under those provisions will have effect from 1 September 2021. Some of these fisheries were already managed using a total quota entitlement, however, the quota authority or entitlement was stated in licence conditions.

For a number of these fisheries, the FLAR also establishes ‘management regions’ which describe where the quota authorities can be used. For example, a person may hold effort units for the southern offshore management region which entitles him or her to fish using his or her effort units in that region only.

The Amendment Declaration declares the total quota entitlement for these fisheries, species or group of species, in accordance with the relevant harvest strategies.

To ensure the long-term sustainability of certain fisheries resources, a number of new prescribed commercial catch limits are being introduced based on the relevant harvest strategy for the east coast inshore fishery.

The Amendment Declaration regulates the following species to reduce or restrict the take, once the new prescribed commercial catch limits are reached:

- School mackerel
- Yellowfin bream
- Dusky flathead
- Sea mullet
- Spotted mackerel
- Tailor
- Black jewfish
- Shark and ray (complex)
- Hammerhead shark (complex).

Each of these species is targeted in the east coast inshore fishery. For some of these species, multiple prescribed commercial catch limits apply because different prescribed commercial catch limits apply to different waters. In each case, the waters to which the prescribed commercial catch limits apply correlate directly to one of the ‘prescribed ENL management regions’ that are relevant to the use of quota authorities in the east coast inshore fishery.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Section 24 Property rights

Part 3 of the Amendment Declaration, which sets total quota entitlements for a number of fisheries or parts of fisheries, may interact with a person’s right to own property and not be arbitrarily deprived of his or her property (section 24) because individual transferable quota authorities (units), which entitle the holder to take a portion of the declared total quota entitlement for that species or group of species during the season that correlates to their individual holding, have property-like characteristics.

Although the Amendment Declaration may interact with a person’s property rights, it does not limit a person’s property rights because setting a total quota entitlement for species has the effect of placing value on each unit held by a person. Without doing so, the units that have been allocated to a holder are essentially worthless and do not become valuable until a total quota entitlement is declared for the fishery or part of the fishery. Consequently, no further analysis for compatibility with human rights is required.

Part 2 of the Amendment Declaration, which imposes new regulations on a number of species based on the prescribed commercial catch reaching a certain limit, may also interact with a person’s right to own property and not be arbitrarily deprived of his or her property (section 24) because primary commercial fishing licences (PCFLs), which entitle the holder to participate in the commercial fisheries for which the relevant fishery symbols are written on his or her licence, have property-like characteristics. The Amendment Declaration may impact on a person’s property rights because regulating a species by limiting or preventing the take of that species based on the prescribed commercial catch reaching a certain limit effectively means that the amount of that species that may be taken under the PCFL is reduced.

Section 28 – Cultural rights-Aboriginal peoples and Torres Strait Islander peoples

Parts 2 and 3 of the Amendment Declaration, which use a number of management tools to impose restrictions on the commercial take of fisheries resources, may interact with Aboriginal peoples' ability to maintain and strengthen their distinctive spiritual, material and economic relationships with waters and coastal seas with which they have a connection under Aboriginal tradition (subsection 28(2)(d)), and to conserve and protect the environment and productive capacity of their waters and coastal seas (subsection 28(2)(e)). The Amendment Declaration may impact on Aboriginal persons and Torres Strait Islander persons because it may impact the availability of this fishery resource to traditional owners.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

Section 24 Property rights

(a) the nature of the right

Section 24 provides for property rights. This section is modelled on article 17 of the Universal Declaration of Human Rights (UDHR). The right essentially protects a person from having his or her property unlawfully removed. Subsection (1) provides that all persons have the right to own property alone or with others. Subsection (2) provides that a person must not be arbitrarily deprived of his or her property. This section does not provide a right to compensation. The protection against being deprived of property is internally limited to arbitrary deprivation of property.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The limitation on property rights relates to a reduction in how much product fishers can take because the Amendment Declaration places restrictions on the take of certain species once the prescribed commercial catch for that species reaches a certain amount. The purpose of the limitation is to continue to ensure the long-term sustainability of the fishery resource. The Amendment Declaration sets out what the commercial fishing sector can harvest. It restricts the ability for overfishing to occur, which would deplete fish stocks. The purpose of the limitation recognises that natural resources are limited and must be managed, which is a relevant consideration in modern society. The limitations on this right are, therefore, consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Limiting the property rights of PCFL holders through a reduction in the availability of certain species is directly linked to the purpose of ensuring the long-term sustainability of the fishery resource as the restrictions help to reduce the potential for overfishing to occur.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

The limitation on the right is the least restrictive way to address the long term, sustainability of the fishery resource. While the property rights of PCFL holders will be impacted by restricting or limiting the take of certain species once the prescribed commercial catch reaches a certain amount, because it means there are less fish that can be taken commercially, the Amendment Declaration does not limit or deprive the person of his or her licence in any other way or in relation to other participants in the fishery.

Although there are alternative ways to manage commercial catch, limiting or restricting the take of certain species when the prescribed commercial catch reaches a certain limit is the most efficient and low risk way to ensure the long-term sustainability of the fishery.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Regulating certain species by limiting or restricting the take of those species once the prescribed commercial catch reaches a certain amount may limit the property rights of PCFL holders by reducing the availability of this fishery resource for commercial fishers. Balanced against this limitation is the importance of preserving Queensland's fisheries resources from overfishing. Therefore, the rights are only limited in a broad-scale commercial fishing context, where a lack of limitation could result in depletion of fish stocks and, therefore, impact on achieving the purpose of ensuring the long-term sustainability of fish stocks in Queensland.

Section 28 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

(a) the nature of the right

Section 28 provides for the distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples as Australia's first peoples. This clause is modelled on article 27 of the International Covenant on Civil and Political Rights (ICCPR), but also articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). These articles recognise that Indigenous peoples and individuals have the right: not to be subjected to forced assimilation or destruction of their culture (article 8); to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas (article 25); to conserve and protect the environment and the productive capacity of their lands, territories and waters (article 29); and to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (article 31).

Subsection (1) recognises that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.

Subsection (2) recognises the rights of Aboriginal peoples and Torres Strait Islander peoples to live life as an Aboriginal or Torres Strait Islander person who is free to practise his or her culture. The practice of culture includes, for example: the right to enjoy and maintain identity and culture; to maintain and use Indigenous languages; to maintain kinship ties; a freedom to teach cultural practices and education to their children; the right to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Subsection (3) provides that Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation of their culture.

This section is intended to be read with section 107 of the *Human Rights Act 2019* which provides that the Act does not affect native title rights and interests.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The limitation on the cultural rights of Aboriginal and Torres Strait Islander peoples arises due to restrictions placed on the commercial take of certain fisheries resources. The limitation impacts on the availability of this fishery resource to traditional owners. This may, for example, reduce the ability of Aboriginal and Torres Strait Islander people to maintain their distinctive spiritual, material and economic relationship to these waters as there will be a reduction in fisheries resources available to them.

The purpose of the limitation is to continue to ensure the long-term, commercial sustainability of the fishery resource. The Amendment Declaration sets out what the commercial fishing sector can harvest. It restricts the ability for overfishing to occur, specifically from commercial harvest, which would deplete fish stocks. This restriction on commercial catch, in turn, helps to ensure that Aboriginal peoples and Torres Strait Islander peoples can continue to enjoy their traditional relationship with waters and coastal seas through traditional fishing methods.

The purpose of the limitation, to ensure the long-term, sustainability of a natural resource, is recognition that natural resources are limited and must be managed, which is a relevant consideration in modern society. The limitations on this right are, therefore, consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Limiting the cultural rights of Aboriginal and Torres Strait Islander peoples through a reduction in the availability of certain fisheries resources for commercial purposes is directly linked to the purpose of ensuring the long-term, sustainability of the fishery resource as the restrictions help to reduce the potential for overfishing to occur.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

The limitation on the right is the least restrictive way to address the long term, commercial viability of the fishery resource. While the cultural rights of Aboriginal peoples and Torres Strait Islander peoples may be impacted by the operation of the commercial sector, Aboriginal and Torres Strait Islander peoples will still be able to maintain their distinctive relationship with waters and coastal seas under Aboriginal tradition or Island custom through traditional fishing methods. The Amendment Declaration only applies to commercial fishing and will reduce the impact on cultural fishing from the commercial fishing sector. Any alternative way to restrict commercial catch will impact on the cultural rights of Aboriginal peoples and Torres Strait Island peoples in a similar way.

In addition, limiting this right through restricting commercial catch potentially serves to preserve the distinctive spiritual, material and economic relationship of Aboriginal peoples and Torres Strait Islander peoples with the land and waters more generally, which could otherwise be limited in these waters if there were no limitations on how much product commercial fishers could take and, consequently, over-fishing occurred.

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Setting limits on how much product commercial fishers can take may limit the cultural rights of Aboriginal and Torres Strait Islander peoples by reducing the availability of this fishery resource to traditional owners. This, among other outcomes, may affect their right to maintain their distinctive spiritual, material and economic relationship with the land and waters.

Balanced against this limitation is the importance of preserving Queensland's fisheries resources from overfishing for all fishing sectors, which also, importantly, helps to protect Aboriginal peoples' and Torres Strait Islander peoples' traditional cultural rights and connection to these waters. Therefore, the rights are only limited in a broad-scale commercial fishing context, where a lack of limitation could result in depletion of fish stocks and, therefore, impact on achieving the purpose of ensuring the long-term sustainability of fish stocks in Queensland.

- (f) any other relevant factors

The Amendment Declaration only relates to commercial harvest and will not restrict Aboriginal and Torres Strait Islander peoples from undertaking cultural harvest. The Queensland Government uses other policies and tools to ensure Aboriginal and Torres Strait Islander peoples are able to maintain and strengthen their distinctive spiritual, material and economic relationships with waters and coastal seas with which they have a connection under Aboriginal tradition (subsection 28(2)(d)) and to conserve and protect the environment and productive capacity of their waters and coastal seas (subsection 28(2)(e)).

Further, the Amendment Declaration does not restrict the locations, or times, that Aboriginal and Torres Strait Islander peoples can fish, or restrict the amount they can catch.

Conclusion

I consider that the *Fisheries Legislation Amendment Declaration 2021* is compatible with the *Human Rights Act 2019* because it may limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom, to the extent outlined in this statement. I further consider that the remainder of the *Fisheries Legislation Amendment Declaration 2021* is compatible with the *Human Rights Act 2019* because it does not raise a human rights issue.

Mark Furner MP
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