

## **FISH RESOURCES MANAGEMENT AMENDMENT BILL 2009**

### **EXPLANATORY MEMORANDUM**

#### **Overview of the Bill**

The purpose of this Bill is to amend the *Fish Resources Management Act 1994* (**the Act**).

The amendments contained in this Bill will implement nationally agreed changes to the Offshore Constitutional Settlement (OCS) fisheries arrangements, repeal provisions in the Act relating to the establishment and functions of the three statutory advisory, and modify the application of section 224 of the Act relating to convictions for three serious offences against the Act within a 10-year period.

With respect to the OCS, the amendments to Part 3 of the Act (Commonwealth – State management of fisheries) are complementary to the provisions of the Commonwealth's *Fisheries Legislation Amendment (Cooperative Fisheries Arrangements and Other Matters) Act 2006* made in accordance with a resolution of the Natural Resources Management Ministerial Council in December 2004.

These changes allow fisheries arrangements between the Australian Government, the States and the Northern Territory to operate with more flexibility and efficiency, including the introduction of a new option for the management of fisheries by Commonwealth and State/Territory jurisdictions by way of regional fisheries arrangements.

The amendments to Part 4 of the Act – Advisory Committees – delete provisions relating to the establishment and functions of the Rock Lobster Industry Advisory Committee, the Recreational Fishing Advisory Committee and the Aquaculture Development Council. Other amendments will provide the Minister for Fisheries and the Chief Executive Officer of the Department of Fisheries with greater flexibility in the establishing and determining the functions of advisory committees under the Act.

These amendments do not mean that there will be less consultation with the commercial fishing, aquaculture and recreational fishing sectors. Rather they reflect my view, as Minister, that the Department of Fisheries should be my principal source of advice – after it has consulted with all relevant stakeholders - on all matters coming before me for decision.

The amendments to section 224 provide for a one-year mandatory suspension of an authorisation, instead of complete cancellation, once convictions for three serious offences have been recorded against the authorisation in a 10-year period.

As the Act currently stands, an authorisation is automatically cancelled in such circumstances, with little prospect of the authorisation being reinstated. I am advised that while this is the effect of the current provision, it was not the intent. It was the long-standing practice of successive heads of the Department of Fisheries to reinstate a “cancelled” authorisation following an appropriate period of exclusion from the fishery. However, since the commencement of the Act, greater regard has been given to the distinction drawn by the Act between powers to “suspend” and “cancel” licences, and legal advice has clarified the limitations on the power to reinstate a licence after it has been cancelled.

This fact, and previously established precedents under the repealed *Fisheries Act 1905*, have resulted in exemptions being granted under the Act by successive Ministers to enable the previous authorisation holder to resume fishing after an appropriate period of time, but without any capacity to charge the exemption holder the managed fishery fees payable by authorisation holders operating in the fishery.

The amendments will provide a mechanism to issue new licences in the fishery - and restore equity with respect to other authorisation holders in the fishery - by providing for the payment of fees that would have been payable had the former authorisation holder been fishing under a managed fishery authorisation and not an exemption.

Outlined below is an examination of the contents of the Bill on a clause-by-clause basis.

#### **Clause 1     Short title**

Clause 1 provides that the title of this Act is the *Fish Resources Management Amendment Act 2009*

#### **Clause 2     Commencement**

This clause sets out the commencement provisions.

Subclause (a) provides that sections 1 and 2 of the Act will come into force on the day on which the Act receives the Royal Assent.

Subclause (b) provides that the rest of the Act will come into force on a day fixed by proclamation and that different days may be fixed for different provisions.

#### **Clause 3     Act amended**

This clause provides that this Act amends the *Fish Resources Management Act 1994*.

#### **Clause 4      Section 15 amended**

Part 3 (Commonwealth – State management of fisheries) provides for the making of arrangements for the management of fisheries in Commonwealth waters adjacent to the limit of State waters under the OCS. The OCS arrangements for the management of fisheries enable fisheries undertaken in waters adjacent to Western Australian waters to be managed solely by Western Australia in accordance with Western Australian law, managed solely by the Commonwealth under Commonwealth law, or managed by a Commonwealth/Western Australian joint authority either under Commonwealth law or Western Australian law.

The amendments contained in this Part implement a resolution of the Natural Resources Management Ministerial Council in December 2004. The intent of the resolution was to provide the option of managing fisheries on a regional basis and to overcome limitations that had been identified under the OCS framework.

Clause 4 amends section 15 – Terms used in this Part - by inserting a definition for the term “**corresponding law**”, which can be a law of another State, Territory or the Commonwealth that is declared by regulation made under this Act to be a law corresponding to this Act. This definition is necessary to support amendments to this Part that will enable the making of arrangements between Western Australia and one or more States (including the Northern Territory) and the Commonwealth for the management of a fishery on a regional basis and determining jurisdictional responsibility for the management of the fishery. See also clause 9.

#### **Clause 5      Section 23 amended**

This clause amends section 23 of the Act.

Section 23 of the Act provides that where an arrangement provides for the management of a fishery under Western Australian law, the provisions of this Act apply in relation to the management of the fishery.

The amendment to section 23 contemplates that, under a regional arrangement for the management of a fishery, the fisheries laws of more than jurisdiction may apply. This will provide for greater flexibility in the cooperative management of OCS fisheries.

#### **Clause 6      Section 24A inserted**

This inserted section provides that where an OCS arrangement provides for a fishery to be managed under Commonwealth law, the law of the Commonwealth applies to the limits of the State.

## **Clause 7      Section 24 amended**

Section 24 specifies the functions of a Joint Authority where a Joint Authority manages a fishery under Western Australian law.

The amendment to section 24(1) contemplates that, under a regional arrangement for the management of a fishery, the laws of different jurisdictions may apply in those parts of the fishery undertaken in waters outside of WA waters (which for the purposes of this Part of the Act include Commonwealth waters of the Australian Fishing Zone adjacent to Western Australia).

The amendment to section 24(2) inserts a new paragraph (c) that requires a Joint Authority to pursue the objective of generally acting consistently with, and in furtherance of, the objects of the Act, in addition to the objectives listed in paragraphs (a) and (b).

## **Clause 8      Section 25 amended**

Clause 8 amends section 25 of the Act. This amendment contemplates the possibility of the laws of more than one jurisdiction applying in respect to the management of a Joint Authority fishery. This will provide for greater flexibility in the cooperative management of OCS fisheries.

## **Clause 9      Part 3 Division 4 inserted**

Clause 9 inserts **Division 4 – Arrangements with other States and Territories.**

In this Division, section 29A – Arrangements with other States or Territories - provides that the Minister may enter into an agreement with another Minister in another jurisdiction, or an authority in another jurisdiction, for the purpose of furthering the objects of the Act. It is this clause that provides the capacity for Western Australia to enter into agreements with other jurisdictions for the management of fisheries on a regional basis, providing greater flexibility in the cooperative management of OCS fisheries.

Section 29B(1) provides that the Western Australian Minister may exercise the same powers and functions with respect to regional fisheries management agreements, as can be exercised with respect to Joint Authority fisheries.

Section 29B(2) provides that where there is a regional fisheries management agreement, the provisions applying under Divisions 2 and 3 to Joint Authorities apply in respect of the regional fisheries management agreement.

#### **Clause 10    Divisions 1 to 3 deleted**

This clause deletes the first three Divisions of Part 4 relating to the establishment and functions of the Rock Lobster Industry Advisory Committee, the Recreational Fishing Advisory Committee and the Aquaculture Development Council respectively.

#### **Clause 11    Section 41 amended**

Division 4 of Part 4 provides for the establishment and functions of Fishery Management Advisory Committees.

As section 41 stands, the Minister only may establish Fishery Management Advisory Committees to provide advice on matters relating to the protection and management of a fishery. Any committees established are required to report to the Minister.

The amendments to section 41 will make it possible for the Minister to establish a Fishery Management Advisory Committees that reports to either the Minister or the CEO of the Department of Fisheries – one or the other, in accordance with the instrument of appointment.

The amendments also make it possible for the CEO to establish a Fishery Management Advisory Committee to report to the CEO. It is likely that for the foreseeable future all Fishery Management Advisory Committees, whether created by the Minister or not, will report to the CEO.

There will only be one Fishery Management Advisory Committee established in respect to any one fishery.

#### **Clause 12    Section 42 amended**

As section 42 stands, the Minister only may establish other committees to provide advice to the Minister on the administration of the Act. Any committees established are required to report to the Minister.

The amendments to section 42 will make it possible for the Minister to establish committees that report to either the Minister or the CEO of the Department of Fisheries – one or the other, in accordance with the instrument of appointment.

The amendments also make it possible for the CEO to establish committee to report to the CEO. It is likely that for the foreseeable future all committees established under this Division, whether established by the Minister or not, will report to the CEO.

The amendments to Part 4 do not mean that there will be any more advisory committees established under the Act than there would have been had these amendments not been made. In fact, it is likely that there will be fewer committees established.

The amendments do not create any additional financial impost on the Government by way of appropriation. The amendments are likely to result in savings to Government because less committees are likely to be established, and none of the committees established in the future will have the status of statutory advisory committees or are likely to attract the level of remuneration payable to members of statutory advisory committees.

#### **Clause 13     Part 4 Division 6 inserted**

Clause 13 inserts Division 6 – Operation of Committees into Part 4 of the Act.

Section 43A enables the making of regulations to provide for any matter necessary for the operation of a Fishery Management Advisory Committee established under Division 4 or another committee established under Division 5.

#### **Clause 14     Section 62 amended**

The amendment to section 62(t) replaces the reference to “a natural person” with a reference to “an individual” for consistency with the *Interpretation Act 1984*.

#### **Clause 15     Section 78A inserted**

Section 78A(1) provides that in this section a reference to section 224 is a reference to section 224 as it stood immediately before the commencement of this section.

Immediately before the commencement of this section, section 224 provided for the automatic cancellation of an authorisation if the holder of an authorisation, or a person acting on behalf of that person, was convicted of three or more prescribed offences against the Act within a 10-year period.

As stated earlier, there was little prospect of the authorisation being reinstated in such circumstances.

As noted earlier, precedent has resulted in exemptions being granted by successive Ministers to enable the previous authorisation holder to resume fishing after an appropriate period of time, but without any capacity to charge the exemption holder the managed fishery fees payable by authorisation holders operating in the fishery.

The provisions contained in section 78A provide for the making of regulations for the granting of a replacement authorisation where an authorisation was previously cancelled under the old section 224, and provide for fees payable in such circumstances, including fees that would have been payable had the former authorisation holder been fishing under a managed fishery authorisation and not an exemption, and provide for the Minister to make amendments to a management plan to facilitate the granting of a replacement authorisation.

## **Clause 16     Section 140 amended**

Clause 16 amends section 140(2) of the Act.

The amendments to section 140(2) will close an existing loophole that enabled authorisation holders, at risk of incurring the penalty contained in section 224, to permanently remove entitlements from an authorisation prior to a court conviction – thereby avoiding the full intended impact of section 224.

The amendments provide for two additional grounds for refusing to permanently transfer an authorisation or entitlement – those being if the applicant, or a person acting for or on behalf of the applicant, may be liable for prosecution for an offence prescribed in the regulations for the purposes of section 224, or if the authorisation has been suspended under section 224.

Nothing would prevent the temporary transfer of any entitlement under an authorisation, pending the outcome of an investigation into the alleged offence, or pending the outcome of a prosecution relating to the alleged offence.

The effect of this provision is that authorisation holders will no longer be able to avoid the imposition of sanctions for serious breaches of the Act by simply transferring all entitlements from an authorisation at risk of suspension for one year, to another authorisation.

## **Clause 17     Section 202A amended**

The amendment to section 202A replaces the reference to “a natural person” with a reference to “an individual” for consistency with the *Interpretation Act 1984*.

## **Clause 18     Section 224 amended**

Section 224 provides for the automatic cancellation of an authorisation if the holder of an authorisation, or a person acting on behalf of that person, is convicted of three or more prescribed offences against the Act within a 10-year period.

The amendment to section 224 will remove the reference to cancellation in sections 224(2) and 224(3)(a) in favour of a penalty requiring suspension of the authorisation for one year.

Section 224(4) is deleted because of the problems alluded to earlier in terms of reinstating authorisations cancelled under the old section 224, and replaced with a new section 224(4) that provides the CEO with the power to keep suspended an authorisation that has been suspended under section 224, for a period longer than one year, pending the payment of any outstanding fines for offences against the Act.

**Clause 19     Section 245 deleted**

Clause 19 deletes section 245 that relates to the remuneration of members of the deleted Aquaculture Development Council, the Recreational Fishing Advisory Committee and the Rock Lobster Industry Advisory Committee.

**Clause 20     Schedule 1 deleted**

Clause 20 deletes Schedule 1 that provides for constitution and proceedings of the deleted Aquaculture Development Council, the Recreational Fishing Advisory Committee and the Rock Lobster Industry Advisory Committee.

**Clause 21     Schedule 3 amended**

This clause deletes clause 6 of Schedule 3. This clause is a savings and transitional provision, relating to the Rock Lobster Industry Advisory Committee that was necessary on the commencement of the Act, but is no longer necessary as a result of the amendments contained in clause 10.