



New South Wales

Fisheries Management Amendment Bill 2014

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Fisheries Management Act 1994* (*the Act*) as follows:

- (a) to allow possession limits for fish to be imposed by order of the Minister (as an addition to the current scheme which allows possession limits to be imposed by regulation),
- (b) to permit boat limits to be imposed (that is, restrictions on the number of fish that can be held on a boat),
- (c) to prohibit shark finning and related practices at sea,
- (d) to allow approvals for taking and possession of fish for research and other purposes to be given by order of the Minister (as an addition to the current scheme which allows approvals to be given by permit),
- (e) to permit determinations of total allowable fishing effort to be made (in addition to determinations of total allowable catch) and to make further provision for the allocation of total allowable catch and fishing effort,
- (f) to permit the redefinition of a share management fishery, and other changes to be made to a share management fishery, with the majority support of shareholders in the fishery,
- (g) to make further provision for the registration of dealings in shares in share management fisheries, including by providing for an online trading system,
- (h) to make further miscellaneous changes to share management fisheries,
- (i) to free-up the licensing scheme for fishing boats so that a fishing boat licence is only required for commercial fishing boat activities that are declared by the regulations to be activities for which a fishing boat licence is required,

- (j) to enable the regulations to require certain commercial fishers to make real time reports about their fishing activities,
- (k) to free-up the licensing scheme for charter fishing boats so that a charter fishing licence does not attach to a particular boat, but authorises the use of a single boat for any charter fishing activities, subject to any restrictions specified in the licence,
- (l) to make provision for the transfer of charter fishing licences and associated entitlements,
- (m) to establish a scientific observer program,
- (n) to enable the Minister to make orders that prohibit the entry into the State of anything that is or could be a declared disease, could be infected with a declared disease or could assist the spread of infection of a declared disease,
- (o) to enable the Minister to make orders requiring live abalone holders to implement specified measures to minimise the risk of transmission of a declared disease,
- (p) to make further provision for the protection of aquatic habitats,
- (q) to abolish the Management Advisory Committees for various fisheries and to instead permit the Secretary to establish advisory groups under the Act, and to permit advisory councils and groups established under the Act to be abolished by regulation,
- (r) to permit persons to appoint agents to use online facilities on their behalf under the Act and to permit service of notices electronically,
- (s) to make various other miscellaneous amendments.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Fisheries Management Act 1994 No 38

Possession limits

Schedule 1 [14] enables possession limits (also known as bag limits) for fish to be imposed by order of the Minister. At present, possession limits can only be imposed by regulation. Both methods of imposing a possession limit will now be permitted. In the event of inconsistency between a possession limit imposed by Ministerial order and a possession limit imposed by the regulations, the Ministerial order will prevail.

A Ministerial order that imposes a possession limit is to be notified by publication in the Gazette. However, if required urgently, a possession limit may be imposed by Ministerial order notified in one or both of the following ways:

- (a) by causing a copy of the order to be exhibited adjacent to waters to which the order applies,
- (b) by publishing notice of the order on the website of the Department of Trade and Investment, Regional Infrastructure and Services (the *Department*).

This scheme is similar to the scheme for notification of fishing closures.

A Ministerial order that imposes a possession limit will be a disallowable instrument, similar to a regulation.

Schedule 1 [15]–[18] are consequential amendments.

Boat limits

Schedule 1 [19] enables the regulations to specify a maximum quantity of fish of a specified species or class that may be held on a boat at any time (a *boat limit*). Fish are taken to be held on

a boat if they are on board the boat, if they are tethered to the boat or in a container tethered to the boat or in any other circumstances prescribed by the regulations.

A master of a boat will be guilty of an offence if the quantity of fish held on the boat exceeds the boat limit. The offence will apply whether or not the master was in possession of the fish and regardless of the period over which they were taken.

Schedule 1 [11], [12] and [105] are consequential amendments.

Schedule 1 [147] inserts a boat limit for gemfish. Gemfish is treated as a priority species of fish, so a higher penalty will apply to a contravention of the boat limit for that species of fish.

Shark finning

Schedule 1 [20] prohibits a person from removing a fin from a shark while on board a boat in any waters or being in possession of a shark fin not attached to a shark, or any other part of a shark, while on board a boat in any waters.

Permitting research and other matters

Schedule 1 [23] enables the Minister to approve the taking or possession of fish or marine vegetation for research, aquaculture, aquarium collection, Aboriginal cultural fishing or other purposes by making an order that authorises the taking or possession concerned. At present, the Minister can only grant such an approval by issuing a permit that authorises the taking or possession concerned. As a result of the amendments, the Minister will be able to grant an approval by either making an order or by issuing a permit.

Schedule 1 [108], [112] and [141] are consequential amendments.

Fishing limits and quotas

Schedule 1 [24] contains new provisions for the setting of general fishing restrictions and their allocation.

At present, the Act permits the Total Allowable Catch Setting and Review Committee (the *Committee*) to determine the total allowable catch for any fishery in the commercial fishing sector. That determination is a *TAC determination*. The TAC determination is then allocated amongst commercial fishers in each affected sector by the imposition of quotas for the taking of fish.

The proposed amendments enable a second type of determination to be made (in addition to total allowable catch). The new determination is a determination of total allowable fishing effort (a *TAE determination*). A TAE determination:

- (a) may be made in relation to one or more methods of fishing, and
- (b) may relate to one or more specified species of fish, or any specified fishery, class of shares in a share management fishery, fishing method, class of persons, area or time period.

TAC determinations and TAE determinations are both types of *fishing determinations*. Under the proposed amendments, a fishing determination may be made by either the Committee or the Secretary of the Department. If the determination is required by the regulations, it is generally made by the Committee (which is not subject to Ministerial control). However, the Minister may direct the Secretary to make the relevant determination if:

- (a) there is in existence a scientific assessment of the species of fish, fishery or fishing method concerned that, in the opinion of the Minister, is relevant, robust and sufficiently recent to allow a determination to be made, and
- (b) to require the Committee to make the fishing determination would involve an unnecessary duplication of that assessment.

The method by which the Committee makes a fishing determination is not changed. That is, the Committee is required to call for public submissions on any determination that it makes.

The Secretary may, but need not, conduct public consultation in relation to a fishing determination made by the Secretary. In addition, the Secretary may, but need not, consult the Committee about the determination.

The proposed amendments permit any fishing determination that relates to commercial fishing to be allocated by the Secretary amongst commercial fishing authority holders. The regulations may make further provision for the allocation of fishing determinations.

A commercial fishing authority holder's allocation of a fishing determination is the commercial fishing authority holder's *quota*. It will be an offence for a commercial fishing authority holder to contravene the authority holder's quota.

Quota will be transferable in accordance with the regulations.

The Minister may direct that the quota or part of the quota of a commercial fishing authority holder is forfeited if the commercial fishing authority holder has failed to pay in full any fisheries management charge payable by the commercial fishing authority holder.

Schedule 1 [151] re-enacts an existing provision that provides for the composition of the Committee. The Committee is renamed the Total Allowable Fishing Committee because its functions will now extend to the making of TAE determinations.

Schedule 1 [7], [21], [56], [106], [137], [140], [148]–[150], [152] and [153] are consequential amendments.

Schedule 1 [158] is a saving provision.

Redefinition proposals

Schedule 1 [28] enables the Minister to put a redefinition proposal to shareholders in one or more share management fisheries. A redefinition proposal is a proposal to do any or all of the following:

- (a) to change the description of one or more share management fisheries,
- (b) to amalgamate 2 or more classes of shares in one or more share management fisheries,
- (c) to replace one or more classes of shares in one or more share management fisheries with one or more other classes of shares.

The purpose of the provisions is to enable changes to be made to the description of a fishery, or to the entitlements of shareholders in a fishery, without invoking the provisions of the Act that require shares in a fishery to be cancelled, and shareholders compensated, if changes are made to a share management fishery.

A redefinition proposal can be implemented by the Minister only if the proposal has the majority support of shareholders in the fishery.

The proposed amendments provide for the following:

- (a) the Minister is to give notice of a redefinition proposal to shareholders affected by the redefinition proposal,
- (b) the Secretary is to arrange for the conduct of a poll of shareholders affected by the redefinition proposal,
- (c) after the poll is conducted, the Secretary is to certify the results of the poll,
- (d) if the redefinition proposal has majority support, the Minister may implement the redefinition proposal.

The question of whether a redefinition proposal has majority support is to be determined in accordance with the regulations. Although each shareholder is entitled to only one vote in a poll, the regulations may provide for the weighting of votes on the basis of the number of shares held by a shareholder. The regulations may also provide that shareholders who fail to vote in a poll are to be disregarded when determining whether a proposal has majority support.

Schedule 1 [27] is a consequential amendment.

Registration of share dealings

Schedule 1 [58] provides for the online registration of dealings in shares, as an alternative to the current paper-based system. The amendment permits share dealings to be registered via an online trading system or facility approved by the Secretary.

The proposed amendment also makes it an offence to use the online trading system for the purpose of registering a dealing in shares that is prohibited (because the dealing would result in the shareholder acquiring more shares than is permitted or is otherwise prohibited by or under the Act).

Schedule 1 [63] permits the Secretary to take any steps necessary to rectify the Share Register and restore the integrity of the Share Register if a prohibited dealing in shares is registered. This can include cancelling the registration of a dealing. The Secretary is authorised to pay compensation to any person who is unfairly disadvantaged by such an action.

Schedule 1 [57], [59], [60] and [62] are related or consequential amendments.

Schedule 1 [61] permits the regulations to specify the types of information that are not to be made publicly available on the Share Register.

Other changes to share management fisheries

Schedule 1 [26] and [55] remove provision for category 2 share management fisheries. There are no category 2 share management fisheries. **Schedule 1 [49], [145] and [146]** are consequential amendments.

Schedule 1 [29] removes any doubt that a share management plan (which is made by regulation under the Act) can make provision for any matter for which regulations can be made under the Act.

Schedule 1 [31] provides that the Minister is not required to conduct public consultation in relation to an amendment to a share management plan or a supporting plan. **Schedule 1 [136]** is a consequential amendment.

Schedule 1 [32] provides that a management plan for a share management fishery does not prevail over a fishing closure. **Schedule 1 [33] and [34]** are consequential amendments.

Schedule 1 [36] and [37] make it optional for a management plan for a share management fishery to specify a minimum shareholding required to take fish in the fishery. **Schedule 1 [38]–[41]** are consequential amendments.

Schedule 1 [42] enables the regulations to make provision for the form and manner in which shareholders nominate a commercial fisher to take fish in a share management fishery.

Schedule 1 [44] enables the management plan for a share management fishery to make provision for the criteria for the issue of special endorsements in the fishery.

Schedule 1 [45] removes the maximum period for which a special endorsement may be issued.

Schedule 1 [46] removes provisions that require catch history for particular periods and businesses to be considered when issuing further classes of shares in a share management fishery. The criteria for the issue of further classes of shares in a share management fishery (if any) will be the criteria provided for by the management plan.

Schedule 1 [47] makes it clear that Division 3 of Part 3 of the Act does not apply to the issue of further classes of shares in a share management fishery. That Division requires the Minister to invite applications for shares and to issue shares initially on a provisional basis.

Schedule 1 [48] makes it optional for a management plan for a share management fishery to fix a maximum shareholding.

Schedule 1 [50] enables the Minister to retain or reissue shares that are surrendered by a shareholder (as an additional option to selling or cancelling the shares). The proposed amendment also removes the requirement that the Minister pay a percentage of the proceeds of sale of surrendered shares to the person who surrendered the shares.

Schedule 1 [51] makes it clear that the Minister can direct the forfeiture of shares by order made under a power conferred by the regulations.

Schedule 1 [53] re-enacts, with some changes, provisions that require a shareholder in a share management fishery who contravenes the shareholder's quota to pay to the Secretary the value of the fish taken in contravention of quota. If the amount payable is not paid within the time required, the Minister may direct the forfeiture of shares that are equivalent to the amount payable. The

proposed amendment allows forfeited shares to be retained, cancelled, reissued or sold by the Minister. At present, forfeited shares must be sold. **Schedule 1 [52]** is a consequential amendment.

Fishing boat licences

Schedule 1 [65] removes the requirement that all fishing boats used for commercial fishing must be licensed under the Act.

Instead, a fishing boat licence will be required only for declared commercial fishing boat activities. A declared commercial fishing boat activity is a commercial fishing boat activity declared by the regulations to be a commercial fishing boat activity for which a fishing boat licence is required.

A fishing boat licence will now authorise the use of a single fishing boat for all declared commercial fishing boat activities. The licence will not be specific to a particular identified boat. However, the holder of a licence must not use a boat or permit a boat to be used for a declared commercial fishing boat activity unless identification details for the boat have been provided to the Secretary.

Schedule 1 [64] replaces a provision (removed by **Schedule 1 [65]**) that requires crew members of commercial fishing boats to be registered. Under the new provision, the holder of a commercial fishing licence must not take fish for sale with the assistance of another person unless the use of a crew member to assist in taking fish is authorised by the commercial fisher's licence.

Schedule 1 [6], [128] and [130] are consequential amendments.

Fishing reports and records

Schedule 1 [74] permits the regulations to require commercial fishers or classes of commercial fishers to report to the Secretary about commercial fishing activities or proposed commercial fishing activities. The reports are different from the records and returns that fishers are already required to make because they are to be made using a real time reporting system. The real time reporting system is a system or facility approved by the Secretary that enables the making of reports by oral communication or electronic communication. It will be an offence to fail to make a report as required, or to make a false report.

Schedule 1 [69]–[73] require certain records that commercial fishers are required to keep or send to the Secretary under the Act to be kept or sent in a form and manner prescribed by the regulations or, subject to the regulations, approved by the Minister. It is envisaged that the regulations may require records to be kept or sent in an electronic form.

Regulation of charter fishing activities

Schedule 1 [80] removes the requirement that all charter fishing boats of a kind declared by the regulations must be licensed under the Act.

Instead, a charter fishing licence will be required only for declared charter fishing activities. A declared charter fishing activity is any charter fishing activity declared by the regulations to be a charter fishing activity for which a charter fishing licence is required.

A charter fishing activity is an activity that involves the use of a boat for recreational fishing activities on a commercial basis (see **Schedule 1 [76]**).

A charter fishing licence will now authorise the use of any one boat at any given time for the charter fishing activity specified in the licence. It will not be specific to a particular identified boat. However, the boat must comply with any requirements specified in the licence.

Special provision is made for ecotourism activities. An ecotourism activity is defined in **Schedule 1 [78]** as a charter fishing activity in which one or more manually operated boats are used by one or more persons, in the presence of an employed guide, for recreational fishing activities. The manually operated boat could be a kayak or a canoe. This activity differs from traditional charter fishing, in which only one boat is used for the activity. A charter fishing licence that authorises an ecotourism activity authorises the use of a specified number of boats for the ecotourism activity.

New provisions in **Schedule 1 [80]** require the responsible person for a charter fishing activity to ensure that the boat or, in the case of an ecotourism activity, boats used for the activity are used only as authorised by a charter fishing licence. The responsible person for a charter fishing activity is the master of the boat or, in the case of an ecotourism activity, the employed guide for the activity.

Schedule 1 [78] also creates a concept of seats (or positions) that can be used by clients in a charter fishing activity. This will allow restrictions to be imposed on the number and class of seats used for charter fishing activities.

Schedule 1 [94] facilitates the transfer of charter fishing businesses and their components. Components include charter fishing licences and seats.

The proposed amendments permit the Secretary to determine that a business is a charter fishing business, and to determine the components of the business. A charter fishing business that is the subject of such a determination is a recognised charter fishing business. Determinations are to be registered.

The regulations may set out rules for the transfer of recognised charter fishing businesses and their components, including by requiring the whole of a business (and its components) to be transferred to the same person.

The provisions are similar to existing provisions relating to commercial fishing businesses.

Schedule 1 [4], [75], [77], [79], [81]–[93], [121]–[126], [135] and [139] are related and consequential amendments.

Scientific observer program

Schedule 1 [130] enables the Minister to establish a scientific observer program to assist in the administration of the Act.

The Minister may appoint scientific observers under the program. The Minister may issue an observation authority to a scientific observer that authorises the scientific observer to observe the fishing activities of a specified regulated person during a specified period.

Each of the following persons is a *regulated person*:

- (a) a commercial fisher,
- (b) a person who holds a fishing boat licence,
- (c) a person who holds a charter fishing licence,
- (d) the master of a boat that is at any time used for commercial fishing or charter fishing activities,
- (e) an employed guide in relation to a charter fishing activity.

An observation authority confers power on a scientific observer to observe the fishing activities of the regulated person during the specified period, including to obtain, collect and record information that may be collected under the program.

The fishing activities that the scientific observer is authorised to observe include:

- (a) any fishing activities that take place under the guidance of, supervision of or with the assistance of the person, and
- (b) any fishing activities that take place on a boat while the person is master of the boat or on board the boat (whether or not the person is involved in the activities).

The scientific observer will have power to board and remain on a boat being used for the fishing activities, examine fishing gear or other equipment, examine fish taken during the fishing activities, and to require the assistance of persons engaged in those fishing activities to exercise his or her functions.

The scientific observer will be required to exercise his or her functions in a manner that does not unreasonably interfere with the fishing activities that he or she is authorised to observe.

It will be an offence to fail to comply with a requirement made by a scientific observer in the exercise of his or her functions or to obstruct a scientific observer.

However, information provided to a scientific observer in compliance with a requirement made by the scientific observer will be protected information. Protected information is not admissible in criminal proceedings to prove that the person who provided the information, or any other relevant person, committed an offence (other than an offence of providing false information or an offence of obstructing the scientific observer).

Declared diseases and related matters

Schedule 1 [95] enables the Minister, if he or she reasonably suspects that a declared disease is present in any premises, place, waters or area outside the State, to make an order that absolutely or conditionally prohibits the entry or importation into the State of any thing specified in the order that, in the opinion of the Minister:

- (a) is or could be a declared disease, or
- (b) is or could be infected with a declared disease, or
- (c) could assist the spread of infection of a declared disease.

The proposed amendments also permit the Minister to order a live abalone holder to implement specified measures in relation to waste water or other waste products of a live abalone holding facility to minimise the risk of transmission of a declared disease.

Dredging and reclamation work

Schedule 1 [97] makes it an offence for a local government authority or other person to fail to comply with an order of the Minister that requires the local government authority or other person to carry out work to rectify damage caused by the local government authority or other person in carrying out unauthorised dredging or reclamation work.

Schedule 1 [98] also enables a court that makes a finding of guilt against a person for unauthorised dredging or reclamation work to make an order requiring the person to rectify the damage caused by the work.

Noxious fish and marine vegetation

Schedule 1 [100] enables a fisheries officer to seize, or seize and destroy, any fish or marine vegetation that the officer suspects are noxious to determine whether they are noxious (rather than just take possession of the fish or marine vegetation). Under **Schedule 1 [104]** compensation will be payable for the seizure and destruction of live fish or live marine vegetation if, after the seizure and destruction, it is determined that the fish or marine vegetation were not noxious.

Schedule 1 [101] makes it an offence for an owner or occupier of premises at which noxious fish or noxious marine vegetation are located to fail to comply with a notice to destroy the fish or marine vegetation. **Schedule 1 [102] and [103]** are consequential amendments.

Management Advisory Committees and other advisory groups

Schedule 1 [116] and [157] abolish any Management Advisory Committees established by the Minister under the Act. New provisions will enable the Secretary to establish advisory groups under the Act.

Schedule 1 [9], [25], [30], [35], [43], [54] and [117] are consequential amendments.

Schedule 1 [118] makes it clear that the regulations can abolish or provide for the abolition of advisory councils or advisory groups established under the Act.

Schedule 1 [13], [22] and [120] enable any relevant advisory council or advisory group to be consulted on bag limit changes and other policy decisions made under the Act (rather than particular advisory councils). **Schedule 1 [138]** is a consequential amendment.

Agents and online facilities

Schedule 1 [143] enables any person affected by the Act to appoint a natural person as his or her agent for the purposes of the Act. The appointed agent is then permitted to access and use, on

behalf of the person for whom he or she is appointed agent, online facilities approved for use under the Act.

Schedule 1 [142] permits notices or other instruments under the Act to be served on a person by electronic delivery to an address or location nominated by the person for electronic service of notices or other instruments.

Miscellaneous amendments

Schedule 1 [1], [5], [107], [109], [111] and [113]–[115] update references to Government Departments and employees.

Schedule 1 [8] provides that references in the Act to the scientific name of a species prevail (in the event of any inconsistency) over references to the common name of a species.

Schedule 1 [10] enables fishing closures to be published, in urgent cases, on the Department's website (replacing a provision that enables fishing closures to be published, in urgent cases, in newspapers or by radio or television broadcast). The Minister may take any other steps the Minister considers reasonable to publicly notify a fishing closure.

Schedule 1 [66]–[68] provide that the annual contribution payable by participants in a restricted fishery is to be determined by the Minister, instead of as provided by the regulations. However, the contribution is not to exceed the amount prescribed by the regulations. The contribution may, but need not, be charged annually. The proposed amendments make the relevant provisions more consistent with the management charge provisions relating to share management fisheries.

Schedule 1 [96] requires a public authority to give the Minister at least 21 days (instead of the existing 28 days) to respond to a proposal to carry out dredging or reclamation work.

Schedule 1 [99] provides that the *protected area* (in relation to provisions that protect marine vegetation from harvesting or other harm) includes the whole of the foreshore (within the meaning of those provisions). The provisions are no longer limited to parts of the foreshore.

Schedule 1 [109] also makes it clear that a certificate issued by the Secretary to the effect that a proposed action is not likely to significantly affect threatened species, populations or communities, or their habitats, and that a licence is not required for the action, is a defence to the prosecution for an offence relating to harm to threatened species, populations or communities, or their habitats.

Schedule 1 [110] makes it clear that the Secretary may prepare a recovery plan in relation to any critically endangered ecological community (not just endangered ecological communities).

Schedule 1 [127] provides for the establishment of an Aboriginal Fishing Trust Fund, which is to be dedicated to the funding of measures to enhance, maintain and protect Aboriginal cultural fishing. **Schedule 1 [119]** is a consequential amendment.

Schedule 1 [129] makes it clear that a power conferred by the Act to search for a record, or require a record to be produced, includes a power to search for an electronic recording device (such as a computer) or require an electronic recording device to be produced.

Schedule 1 [134] requires the Secretary to keep a record of the publication of instruments published on the website of the Department the contravention of which is an offence. The purpose of the provision is to facilitate proof of the publication of the instrument, in the event of prosecution.

Schedule 1 [144] enables fees, charges and other amounts payable under the Act to be recovered by the Secretary as a debt due to the Crown.

Schedule 1 [144] also inserts a new general offence of knowingly providing any false or misleading information in connection with a requirement made under the Act. **Schedule 1 [132]** removes an offence that is made redundant by the new offence. **Schedule 1 [131]** is a consequential amendment.

Schedule 1 [154]–[156] provide for savings and transitional matters.

Schedule 1 [2] inserts definitions of new expressions used in the proposed amendments.

Schedule 1 [3] repeals definitions that will be made redundant by the proposed amendments.

**Schedule 2 Amendments to Fisheries Management Act 1994
No 38 relating to fish names**

Schedule 2 updates various references to fish names in the Act to reflect new naming conventions, changes to scientific names and changes to the status of some species under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth.