

[Act 1997 No 153]



New South Wales

Fisheries Management Amendment Bill 1997

Explanatory note

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

Overview of Bill

The objects of this Bill are:

- (a) to conserve threatened species, populations and ecological communities of fish and marine vegetation (along similar lines to the provisions applying to other animals and plants under the *Threatened Species Conservation Act 1995*), and
- (b) to make further provision with respect to commercial fisheries management, including to extend fisheries management planning to certain restricted fisheries that are not share management fisheries (to be called “commercial managed fisheries”), and
- (c) to provide for the payment of a fishing fee by recreational freshwater fishers, and

* Amended in committee—see table at end of volume.

- (d) to establish special fisheries trust funds with respect to fishing fees and other fees and charges collected by NSW Fisheries, and
- (e) to regulate charter boat fishing, and
- (f) to make other miscellaneous changes to the *Fisheries Management Act 1994* and certain other Acts.

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.

Clause 3 is a formal provision giving effect to the amendments to the *Fisheries Management Act 1994* set out in Schedules 1–6.

Clause 4 is a formal provision giving effect to the consequential amendments of other Acts set out in Schedule 7.

Schedule 1 Amendments relating to threatened species conservation

Schedule 1 [1] revises the objects of the Principal Act in light of the inclusion of measures to conserve threatened species. The principal objects will become the conservation of fish stocks and key fish habitats and of threatened species and the promotion of ecologically sustainable development. Consistently with those objects, the Principal Act is intended to promote commercially viable fishing and aquaculture industries, promote quality recreational fishing opportunities and appropriately share fishing resources between users.

Schedule 1 [2] inserts some relevant definitions for the purposes of the Principal Act.

Schedule 1 [3] extends the provisions for the issue of special permits to take fish for research or other authorised purposes to the taking of marine vegetation.

Schedule 1 [4] and **[5]** make consequential amendments.

Schedule 1 [6] ensures that the existing provisions of the Principal Act for habitat protection plans may be utilised for the purposes of protecting critical habitat of threatened species, populations and ecological communities declared under proposed Part 7A.

Schedule 1 [7] replaces the existing provisions relating to the protection of mangroves, seagrasses and other prescribed marine vegetation so as to enable marine vegetation that does not qualify for threatened species protection to be protected from any harm or from commercial harvesting or (as at present) to be protected by the need for a Ministerial permit before it is harmed. Other changes are made to the existing provisions (including an increase in the maximum penalty for an offence).

Schedule 1 [8] makes a consequential amendment.

Schedule 1 [9] inserts Part 7A into the Principal Act dealing with the conservation of threatened species, populations and ecological communities of fish or marine vegetation.

Division 1 of Part 7A (Preliminary) contains provisions that set out the particular objects of the Part and define terms used in the Part.

Division 2 of Part 7A (Listing) provides for the identification, and classification, of the species, populations and ecological communities of fish or marine vegetation with which the Part is concerned. It also provides for the identification of key threatening processes that are most likely to jeopardise the survival of those species, populations and ecological communities. To this end, Division 2 provides for the listing:

- in Schedule 4 to the Principal Act, of endangered species, endangered populations and endangered ecological communities and species that are presumed to be extinct, and
- in Schedule 5, of vulnerable species, and
- in Schedule 6, of key threatening processes.

Appropriate listings are to be made by the Governor by proclamation following a decision made by the Minister on recommended listings prepared by a Fisheries Scientific Committee after a process of public consultation.

Subdivision 1 of Division 2 makes provision with respect to the method of listing and eligibility for listing.

Subdivision 2 of Division 2 describes the process by which items may be added to or omitted from lists, and makes provision for public participation in that process.

Division 3 of Part 7A (Critical habitat) deals with the identification and declaration of the critical habitat of fish and marine vegetation. The Minister is responsible for identifying (where this is possible) habitat that is critical to

the survival of endangered species, populations and ecological communities. The Division provides for the process by which any such critical habitat is to be identified and declared, and makes provision for public participation in the process and the participation of the Fisheries Scientific Committee, relevant public authorities, landholders and others. The Division provides also for the preparation, publication and other dissemination of maps of critical habitat, and the maintenance of a register of critical habitat.

Division 4 of Part 7A (Offences) creates offences of harming (or buying, selling or possessing) threatened species, populations or ecological communities or of damaging their critical or other habitat. The offences are similar to those in the *National Parks and Wildlife Act 1974* with respect to threatened species, populations or ecological communities of animals or plants. The offences carry significant maximum penalties (of up to 2,000 penalty units or 2 years imprisonment, or both, in the case of endangered species). The Division contains relevant defences (including those referred to in the following note on Division 6 in relation to licensing). The defences are similar to those applying to similar offences under the *National Parks and Wildlife Act 1974*.

Division 5 of Part 7A (Recovery and threat abatement plans) is the first of 3 Divisions that address responses to threats to the survival of threatened species, populations and ecological communities, and their habitats. This Division deals with the preparation, approval and implementation of recovery plans for threatened species, populations and ecological communities and threat abatement plans to manage key threatening processes. The Director must prepare recovery plans and threat abatement plans. The object of a recovery plan is to promote the recovery of the threatened species, population or ecological community to which it relates to a position of viability in nature. The object of a threat abatement plan is to manage a key threatening process with a view to its abatement, amelioration or elimination. The process for preparation of plans makes provision for public participation in that process and the setting of deadlines and priorities for their preparation. The Division deals with the implementation of plans, and includes procedures for public authorities to report on their implementation of, or on proposed departures from, measures specified to be taken in the plans.

In accordance with the *Environmental Planning and Assessment Act 1979*, the terms of plans are to be taken into account by consent authorities and determining authorities when they are considering development applications under Part 4 of that Act, or carrying out, or considering applications for approval for the carrying out, of activities under Part 5 of that Act.

Division 6 of Part 7A (Licensing) deals with the licensing by the Director of actions that are likely:

- to harm threatened species, populations or ecological communities, or
- to damage critical habitat or other habitat of those species, populations or ecological communities.

A person does not commit an offence under Division 4 of harming threatened species, populations or ecological communities, or damaging the critical habitat or other habitat of threatened species, populations or ecological communities if (among other things) the action taken by the person is essential for the carrying out of:

- (a) development in accordance with a development consent within the meaning of the *Environmental Planning and Assessment Act 1979*, or
- (b) an activity, whether by a determining authority or pursuant to an approval of a determining authority, within the meaning of Part 5 of that Act if the determining authority has complied with that Part.

Accordingly, a licence under this Division is not required for the taking of action that is so authorised under the *Environmental Planning and Assessment Act 1979*. However, the same tests are applied (with the involvement of the Minister for Fisheries or the Director of NSW Fisheries) to assess the consequences of a development or an activity under that Act before a decision is made concerning it as are applied by the Director in determining whether a licence should be granted under this Division.

The Division also contains provisions about species impact Statements. These statements are employed to measure the significance of the effect of actions on threatened species, populations or ecological communities, or their habitats. A species impact statement must be lodged with an application for a licence under this Division if the Director determines that the action proposed is likely to significantly affect threatened species, populations or ecological communities, or their habitats. A similar requirement applies when a development application is lodged, or an activity proposed, under the *Environmental Planning and Assessment Act 1979* over critical habitat or when the development or activity is likely to significantly affect threatened species, populations or ecological communities, or their habitats.

Subdivision 1 of the Division deals with the grant of licences, including the making of applications, fees, determinations as to whether actions proposed will significantly affect threatened species, populations or ecological

communities, publication of applications and the making of submissions concerning them, and matters that the Director must take into account before granting licences and appeals.

Subdivision 2 of the Division deals with the form and content of species impact statements and the notification of the Director's requirements as to their preparation. It also makes provision for the accreditation of persons to prepare assessments of species impact statements.

Division 7 of Part 7A (Stop work orders) deals with the making of stop work orders by the Director to enable measures to be taken to conserve threatened species, populations and ecological communities, and their habitats. The Division contains provisions for appeals, consultations about modification of detrimental action and recommendations for the taking of further protective action.

Division 8 of Part 7A (Joint management agreements) deals with joint management agreements between the Director and other public authorities to manage or regulate actions on land that may jeopardise the survival of threatened species, populations or ecological communities, or their habitats. The Division contains provisions for the preparation, content and publication of joint management agreements, and provides for the review of those agreements, and the performance of parties to them, by the Fisheries Scientific Committee.

Division 9 of Part 7A and Schedule 6A (Fisheries Scientific Committee) establishes, and describes the functions, membership and procedure of, the Fisheries Scientific Committee. The Division provides that the Committee is not subject to Ministerial control or direction.

Schedule 1 [10]–[18] make consequential, savings, transitional and other minor amendments.

Schedule 7 (Consequential amendment of other Acts) contains amendments to the *Environmental Planning and Assessment Act 1979* that will be integrated with, and complement, the above provisions. Those amendments require (among other things) that:

- (a) critical habitat be identified in environmental planning instruments, and
- (b) consent authorities and determining authorities must, when considering proposed development or an activity (within the meaning of that Act) assess whether it is likely to significantly affect threatened species, populations and ecological communities, or their habitat, and if a significant effect is likely, to require the preparation of a species impact statement in accordance with the above requirements, and

- (c) consent authorities and determining authorities must, when considering proposed development or an activity, have regard to a relevant recovery plan or threat abatement plan, and
- (d) a regime for concurrence and consultation between consent authorities and determining authorities and the Minister administering the *Fisheries Management Act 1994* or the Director of NSW Fisheries be instituted to aid the assessment process.

The Schedule also contains amendments to the *Threatened Species Conservation Act 1995* to include in the provisions relating to biodiversity strategy the Minister administering the *Fisheries Management Act 1994* and the Director of NSW Fisheries and to reconstitute the Biological Diversity Advisory Council so as to include members with expertise in fish and marine vegetation.

Schedule 2 Amendments relating to commercial fisheries management

Schedule 2 [1]–[7] make consequential amendments.

Schedule 2 [8] allows the regulations to exclude the making of an appeal to the Share Appeal Panel in respect of a determination of catch history in a share management fishery that was a commercial managed fishery or restricted fishery. At present, the regulations under the Principal Act provide for the review of catch history determinations in those fisheries.

Schedule 2 [9] inserts Part 3A into the Principal Act to provide for certain limited access or restricted fisheries to become commercial managed fisheries. The Part extends to this new category of fishery the fisheries management planning provisions applying to share management fisheries. Access to a commercial managed fishery is limited to persons who have an endorsement on their commercial fishing licence, or their commercial fishing boat licence, that authorises them to take fish for sale in the fishery. If a fishery is declared to be a commercial managed fishery, the Minister must, as soon as practicable, arrange for the preparation of a management plan for the fishery. The Minister is required to consult the public and industry before making the plan. The plan prevails over other regulations and closures relating to the fishery. The existing restricted fisheries that become commercial managed fisheries on the commencement of Part 3A are as follows:

- (a) ocean prawn trawl restricted fishery,
- (b) ocean fish trawl restricted fishery,

- (c) ocean trap and line restricted fishery,
- (d) estuary general restricted fishery,
- (e) estuary prawn trawl restricted fishery,
- (f) ocean hauling restricted fishery.

Schedule 2 [10]–[13] make consequential amendments. In particular they ensure that Management Advisory Committees may be established for commercial managed fisheries and they enable fisheries management plans to make requirements relating to the registration of the crew of vessels that are separate from the current general requirements.

Schedule 3 Amendments relating to recreational freshwater fishing fee

Schedule 3 [1] inserts definitions of *freshwater* and *recreational freshwater fisher* into the Principal Act.

Schedule 3 [2] inserts proposed Division 4A into Part 2 of the Principal Act (proposed sections 34A–34I) to provide for the payment of a fishing fee by recreational freshwater fishers.

Proposed section 34A defines relevant expressions.

Proposed section 34B imposes the fishing fee.

Proposed section 34C provides that all recreational freshwater fishers are liable to pay the fishing fee, other than specified classes of persons such as:

- (a) fishers under 18 years of age, or
- (b) fishers using fish-out ponds operating under aquaculture permits, or
- (c) aboriginal fishers, or
- (d) fishers excluded by regulation or fishing from waters so excluded.

Proposed section 34D sets the relevant periods for which fishing fees may be paid at 28 days, 12 months and 3 years (or such other periods as are prescribed by the regulations).

Proposed section 34E provides for the amount of the fishing fee, being \$10 for a 28 day period, \$25 for a 12 month period and \$70 for a 3 year period (or such other amount as is prescribed by the regulations).

Proposed section 34F provides for reductions in the fishing fee as may be authorised by the regulations.

Proposed section 34G provides for the issue of official receipts to persons who pay fishing fees.

Proposed section 34H provides for arrangements to be made for authorised agents to receive payments of fishing fees and issue official receipts. Such agents may be paid a commission for doing so.

Proposed section 34I makes it an offence for a recreational freshwater fisher to take fish without paying the relevant fishing fee or to take fish without being in possession of the official receipt for the payment of that fee.

Schedule 3 [3] enables a fisheries officer to demand the production of an official receipt for payment of a fishing fee by a recreational freshwater fisher who is required to pay that fee.

Schedule 4 Amendment relating to special fisheries trust funds

Schedule 4 inserts proposed Division 3 into Part 8 of the Principal Act (proposed sections 232–239A) to establish special fisheries trust funds. Money that would otherwise be payable to the Consolidated Fund will be payable into the relevant special fund and will be available to be applied only for the purposes authorised for the fund by this Division.

Proposed section 232 inserts a relevant definition.

Proposed section 233 establishes the following special trust funds under the control of the Minister:

- (a) a Recreational Fishing (Freshwater) Trust Fund,
- (b) a Recreational Fishing (Estuarine and Marine) Trust Fund,
- (c) a Commercial Fishing Trust Fund,
- (d) a Fish Conservation Trust Fund,
- (e) an Aquaculture Trust Fund.

Proposed section 234 relates to payments into and out of the Recreational Fishing (Freshwater) Trust Fund. Generally speaking recreational freshwater fishing fees will be paid into the Fund and the Fund will be used to enhance recreational freshwater fishing and other relevant management and research costs.

Proposed section 235 relates to payments into and out of the Recreational Fishing (Estuarine and Marine) Trust Fund. Generally speaking fees obtained from recreational estuarine and marine fishers will be paid into the Fund and the Fund will be used to enhance their fishing opportunities and other relevant management, compliance and research costs.

Proposed section 236 relates to payments into and out of the Commercial Fishing Trust Fund. Generally speaking fees obtained from commercial fishers will be paid into the Fund and the Fund will be used for relevant management, compliance and research costs.

Proposed section 237 relates to payments into and out of the Fish Conservation Trust Fund. Generally speaking fees obtained in connection with the exercise of conservation functions under the Principal Act will be paid into the Fund and the Fund will be used to enhance fish habitat and for relevant management, compliance and research costs.

Proposed section 238 relates to payments into and out of the Aquaculture Trust Fund. Generally speaking fees obtained from persons engaged in aquaculture (including rental from aquaculture leases) will be paid into the Fund and the Fund will be used for relevant management, compliance and research costs.

Proposed section 239 requires an annual report to Parliament on the application of money in the special fisheries trust funds.

Proposed section 239A provides for the investment of money in the special fisheries trust funds.

Schedule 5 Amendments relating to charter fishing boats

Schedule 5 [1] inserts a relevant definition of *charter fishing boat licence*.

Schedule 5 [2] inserts proposed Part 4A into the Principal Act (proposed sections 127A–127F) with respect to charter fishing management and, in particular, the licensing of charter fishing boats.

Proposed section 127A defines *charter fishing boat*.

Proposed section 127B provides that the regulations may declare that all or any particular class of charter fishing boats are required to be licensed. The proposed section makes it an offence for a person to be the master of an unlicensed charter fishing boat that is required to be licensed or for the owner of such an unlicensed boat to permit it to be so used.

Proposed section 127C makes provision with respect to charter fishing boat licences. The proposed section will enable the Minister to give effect to restrictions on licences imposed by a prescribed management plan for the industry.

Proposed section 127D allows (subject to conditions) a licensed commercial fishing boat also to be licensed as a charter fishing boat.

Proposed section 127E makes provision for masters of licensed and other charter fishing boats to keep records of fish taken by recreational fishers on the boat.

Proposed section 127F confers the same rights of appeal with respect to charter fishing boat licences as are conferred with respect to commercial fishing boat licences.

Schedule 6 Miscellaneous amendments

Schedule 6 [1] inserts a definition for the purposes of the proposed amendments relating to noxious marine vegetation (Schedule 6 [24]–[37]).

Schedule 6 [2] inserts a definition of *process* for the purposes of the Principal Act.

Schedule 6 [3] corrects a ranging error in the text of the definition of *take*.

Schedule 6 [4] ensures that restrictions on the taking of fish to sale extend to the taking of fish for use as bait in taking fish for sale.

Schedule 6 [5] excludes, from the definition of *fish* in the Principal Act, freshwater as well as marine mammals (such as platypuses). As a consequence such mammals will be subject to control under the *National Parks and Wildlife Act 1974*.

Schedule 6 [6] and **[7]** enable bag limits to be set by reference to a class of fish as well as a specific species of fish.

Schedule 6 [8]–[10] remove one of the defences to the offence of possessing protected fish or of selling fish protected from commercial fishing, namely, the defence that the fish were taken lawfully from waters to which the Act does not apply. The amendments also make it clear that those offences extend to fish taken from Commonwealth waters and other waters outside New South Wales.

Schedule 6 [11] and **[12]** amend the offence of having possession of fish taken in contravention of the Act to extend the offence to fish taken in contravention of a law of the Commonwealth or of another State or Territory.

Schedule 6 [13]–[16] extend from 1 year to 5 years the period that the seller of a large quantity of fish (currently between 2kg and 10kg depending on the type of fish) must retain prescribed records relating to the sale of the fish.

Schedule 6 [17] and **[19]** make it clear that the offence of not keeping the requisite record about the sale or possession of those large quantities of fish (or not producing the record to a fisheries officer) applies whether or not the fish were taken from New South Wales waters.

Schedule 6 [18] makes it clear that the offence of not keeping the requisite record about the possession of those large quantities of fish (or not producing the record to a fisheries officer) applies to a person who is transporting fish for reward.

Schedule 6 [20] inserts provisions that will enable the Minister to enter into agreements with other States (in accordance with similar arrangements under the Principal Act with respect to the Commonwealth) for the purpose of co-operation in the carrying out of the objects of the Principal Act.

Schedule 6 [21] makes it an offence to obstruct a person carrying out a survey of an aquaculture leased area.

Schedule 6 [22] enables the Minister to declare a disease of fish, which enables quarantine and other measures to be imposed, in urgent cases by publication in the media instead of only by regulation.

Schedule 6 [23] extends the power of the Minister, or a court convicting a person of an offence, to order remedial work to rectify damage from illegal dredging or reclamation work under Part 7 to order remedial work to rectify damage from other contraventions of that Part relating to the protection of mangroves, seagrasses and other marine vegetation and spawning beds.

Schedule 6 [24]–[37] extend the provisions of the Principal Act relating to the declaration and control of noxious fish to noxious marine vegetation.

Schedule 6 [38] makes it clear that the provisions of section 218 of the Principal Act relating to the provision of fishways or by-passes extend to floodgates and to intermittent watercourses.

Schedule 6 [39] enables bonds or other financial guarantees to be required as a condition of permits required under the fish habitat protection provisions of Part 7 of the Principal Act.

Schedule 6 [40] authorises and requires the Roads and Traffic Authority to provide information relating to vehicles to fisheries officers investigating offences under the Principal Act.

Schedule 6 [41] enables a fisheries officer to seize a motor vehicle in the same situations that the officer may currently seize a vessel.

Schedule 6 [42] enables a fisheries officer to return live fish that the officer has seized to the water.

Schedule 6 [43] enables the making of savings and transitional regulations as a consequence of the enactment of the proposed Act.

Schedule 7 Consequential amendment of other Acts

Schedule 7.1 Amendment of Environmental Planning and Assessment Act 1979

The Act is amended to extend the threatened species conservation provisions to fish and marine vegetation. The amendments are explained at the end of the above explanatory note relating to proposed Part 7A of the *Fisheries Management Act 1994*.

Schedule 7.2 Amendment of Fisheries Act 1935

The Act is amended to restore provisions of the Act relating to penalties and delegations that were omitted (along with most of its other provisions) by the *Fisheries Management Act 1994* but that are still required for the remaining provisions of the Act.

Schedule 7.3 Amendment of Land and Environment Court Act 1979

The Act is amended to make a consequential change.

Schedule 7.4 Amendment of Soil Conservation Act 1938

The Act is amended to make a consequential change.

Schedule 7.5 Amendment of Subordinate Legislation Act 1989

The Act is amended to exempt management plans for share management fisheries and commercial managed fisheries adopted by the regulations from the requirement under the Act to prepare a regulatory impact statement and consult in connection with the regulation adopting the plan. The provisions of the *Fisheries Management Act 1994* make special provision with respect to the preparation and making of plans (including public consultation).

Schedule 7.6 Amendment of Threatened Species Conservation Act 1995

The Act is amended to include, in the provisions relating to biodiversity strategy, the Minister administering the *Fisheries Management Act 1994* and the Director of NSW Fisheries. The Biological Diversity Advisory Council is also reconstituted to include members with expertise in fish and marine vegetation.