

[Act 2000 No 86]



New South Wales

Fisheries Management and Environmental Assessment Legislation Amendment Bill 2000

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

- (a) to require the environmental assessment of designated fishing activities under Part 5 of the *Environmental Planning and Assessment Act 1979*,
- (b) to provide for 2 separate categories of commercial share management fisheries with different entitlements to compensation for shareholders on termination and with different obligations with respect to payment for access to the fisheries,
- (c) to convert existing commercial restricted fisheries into category 2 share management fisheries (with the lesser entitlements and obligations), but to

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

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- enable their future conversion to category 1 share management fisheries,
- (d) to extend the current requirement for payment of a fishing fee by recreational freshwater fishers to recreational saltwater fishers,
- (e) to provide an equitable mechanism for the reallocation of fisheries resources and for the payment of compensation to commercial fishers for the acquisition of their fishing entitlements,
- (f) to make further provision for the protection of fish habitat,
- (g) to make other miscellaneous changes to the *Fisheries Management Act 1994* (including in connection with the enforcement of the Act).

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 *Environmental Planning and Assessment Act 1979* set out in Schedules 1 and 6.

Clause 4 is a formal provision giving effect to the amendments to the *Fisheries Management Act 1994* set out in Schedules 2–7.

Clause 5 is a formal provision giving effect to the amendments to the *Native Title (New South Wales) Act 1994* set out in Schedule 8.

Schedule 1 Amendment of Environmental Planning and Assessment Act 1979 relating to assessment of fishing activities

New Division 5 of Part 5 makes provision for environmental assessment under that Part of fishing activities designated under proposed Schedule 1A to the *Fisheries Management Act 1994*. The provisions are consistent with the scheme of assessment that applies under Part 5, with the following general modifications:

- (a) The assessment is to be made of the fishing activity permitted under all of the relevant fishing regulatory controls instead of only those activities authorised by fisheries approvals (that is, activities authorised by the provisions of the *Fisheries Management Act 1994* and the regulations under that Act, fisheries approvals under that Act, management plans under that Act, fishing closures

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made by Ministerial notification, total allowable fish catch determinations and Ministerial administrative policies).

- (b) The assessment is to be made of the cumulative environmental impact of the activities permitted by all fisheries approvals and other regulatory controls instead of only the impact of the issue of single fisheries approvals.
- (c) The assessment is to be made in the context of a fishery management strategy prepared by the Fisheries Minister that indicates the proposed regulatory controls for the fishing activity and sets performance indicators to monitor whether the objectives of the strategy and ecologically sustainable development are being attained.

The new Division requires the Fisheries Minister to obtain an environmental impact statement in relation to designated fishing activities in accordance with the current requirements of Part 5 (whether or not those activities will have a significant impact on the environment). In particular, the Fisheries Minister is required to give public notice of the statement and any person is entitled to make representations to the Minister in respect of the statement.

In accordance with the current requirements of Part 5, the environmental impact statement must be prepared in consultation with the Director-General of the Department of Urban Affairs and Planning and the Director-General is to be given a copy of the environmental impact statement and any representations made to the Fisheries Minister in relation to the statement. The Minister administering the *Environmental Planning and Assessment Act 1979* may direct that an inquiry be held with respect to all or any of the environmental aspects of the fishing activity that is the subject of the statement, and forward to the Fisheries Minister the findings of the inquiry, together with any advice on whether the activity should be permitted, modified or not permitted.

When the environmental assessment process is completed, the Fisheries Minister is required to make a determination with respect to the fishing activity that is the subject of the statement for the purpose of attaining the objects of the *Environmental Planning and Assessment Act 1979* relating to the protection and the enhancement of the environment and the objects of the *Fisheries Management Act 1994*. The Fisheries Minister may determine to permit the fishing activity (with or without modifications to the fishing regulatory controls) or to prevent the carrying out of the fishing activity.

Where the Fisheries Minister is the proponent of the fishing activity (for example, fish stocking), the determination of the Fisheries Minister will (consistently with the current requirements of Division 4 of Part 5) require the approval of the Minister administering the *Environmental Planning and Assessment Act 1979*. In addition

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(consistently with section 110B of that Act), the Minister administering that Act may determine that the Fisheries Minister is the proponent of any other designated fishing activity subject to assessment, in which case the determination of the assessment by the Fisheries Minister will require the approval of the Minister administering the *Environmental Planning and Assessment Act 1979* under Division 4 of Part 5.

The new Division makes it clear that designated fishing activities will not be subject to any requirement for development consent under Part 4, but makes it clear that with the approval of the Fisheries Minister, local, regional or State planning instruments may prohibit or regulate designated fishing activities in addition to (or as an alternative to) controls imposed under the *Fisheries Management Act 1994* (any such planning instruments will become a fishing regulatory control that will be part of the environmental assessment under the new Division).

The new Division continues the effect of an existing regulation that has suspended the operation of the current provisions of Part 5 with respect to the issue of individual fishing approvals until 1 July 2003 to enable environmental assessments to be completed for existing fishing activities.

Schedule 2 Amendment of Fisheries Management Act 1994 relating to environmental assessment

New Part 1A and Schedule 1A make the requisite provisions contemplated by the new fisheries environmental assessment requirements described above. Provision is made for the designation of fishing activities that will be subject to assessment (including all the significant commercial fisheries, the recreational fishery, the charter boat fishery, fish stocking, shark beach meshing and other activities prescribed by proclamation). For the purposes of assessment the Minister is to arrange for the preparation of a fisheries management strategy for each designated activity (incorporating any relevant management plan) and describing the applicable regulatory controls.

A fishery management strategy is to set performance indicators to monitor whether the objectives of the strategy and ecologically sustainable development are being attained. The strategy is to specify the point at which a review of the strategy is required when performance indicators are not being satisfied.

Following environmental assessment, the Minister is required to revise the draft strategy so as to reflect the result of the determination of the assessment.

The first management plan for a share management fishery (which triggers rights to fully tradeable shares in the fishery and to compensation for the closure of the fishery) will not be able to be made until the completion of the environmental assessment.

If fishing controls have been imposed or are proposed in order to protect a fishery by prohibiting or restricting fishing activities, the Schedule prevents the fishing controls from being declared invalid or delayed because of any failure to comply with the procedural and other requirements for environmental assessment without a reasonable opportunity being given by the court to enable those requirements to be complied with.

Schedule 3 Amendment of Fisheries Management Act 1994 relating to commercial fisheries

Share management fisheries

The amendments create a new category of share management fishery. At present, there is only one category of share management fishery (to be called a category 1 share management fishery). Shares in a category 1 share management fishery are issued for a 10-year period and are automatically renewed. If the fishery is terminated, the shares are cancelled and compensation is payable to the shareholders. Shareholders in the fishery must pay a community contribution for their right of access to the fishery.

The new category of share management fishery (category 2) will have shares that are issued initially for a 15-year period. If the fishery is terminated (by its omission from Schedule 1) during the currency of those shares, compensation is payable. Compensation is not payable if the Minister terminates the fishery (by order), with effect at the end of the current term of the shares in the fishery (provided the Minister gives at least 5 years' notice of that termination). Shareholders in the fishery will not be liable for a community contribution, but must pay a rental charge for their right of access to the fishery. The maximum rental charge will be \$100 for a 12-month period (adjustable in accordance with the consumer price index).

A category 2 share management fishery may be converted to a category 1 share management fishery. The Minister may, at the request of the Management Advisory Committee for a category 2 share management fishery, direct that a poll be taken of shareholders in the fishery to determine whether conversion of the fishery to a category 1 share management fishery is supported. If conversion is

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supported at the poll, the Minister must take steps to bring about that conversion of the fishery.

The following restricted fisheries will become category 2 share management fisheries on the commencement of the relevant amendments:

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

Since some of the fisheries cover more than one species of fish, provision is made to allow the management plan for the fishery to restrict the allocation of any total allowable catch for one of those species among those shareholders who are or were engaged in taking that species of fish.

TAC Committee

The *Fisheries Management Act 1994* currently authorises the Total Allowable Catch Setting and Review Committee to determine the total allowable catch of fish for a share management fishery, if the management plan for the fishery so requires. The amendments will allow the Committee to make other determinations requested by the Minister with respect to fishing effort in a share management fishery (for example, determinations as to the size of boats that may be used in the fishery).

Management advisory committees

The *Fisheries Management Act 1994* provides for the establishment of management advisory committees for each share management fishery and each restricted fishery. The amendments provide for the appointment of members of the management advisory committees by the Minister, rather than by the Director of NSW Fisheries. They also require the chairperson of a committee to be a person who is neither engaged in the administration of the Act nor engaged in commercial fishing in the fishery.

Schedule 4 Amendment of Fisheries Management Act 1994 relating to recreational fishing fee

At present the *Fisheries Management Act 1994* requires a recreational fisher to pay a fishing fee for any period during which the recreational fisher takes fish from freshwater. The amendments extend that requirement to recreational saltwater fishers. In order to achieve this, the recreational freshwater fishing fee is replaced with a general recreational fishing fee.

The amendments also allow the Minister to issue a fishing fee exemption certificate in respect of particular recreational fishing activities, for example, fishing activities that are conducted on a charter fishing boat. The regulations may require a fee to be paid in respect of such a certificate.

Recreational freshwater fishing fees are currently paid into a trust account that is used for purposes connected with recreational freshwater fishing. As the recreational fishing fee will now be paid by saltwater fishers, as well as freshwater fishers, the fees that are collected will now be divided between the Recreational Fishing (Freshwater) Trust Fund and the Recreational Fishing (Estuarine and Marine) Trust Fund (which is to be re-named the Recreational Fishing (Saltwater) Trust Fund).

The amendments also create a separate trust fund in respect of the charter fishing boat sector. All fees collected under Part 4A of the Act (which relates to the licensing of charter fishing boats) will be paid into that fund. The fund will be called the Charter Fishing Trust Fund.

Schedule 5 Amendment of Fisheries Management Act 1994 relating to acquisition of commercial fishing entitlements

Schedule 5 provides an equitable mechanism for the reallocation of fishing resources, by allowing the Minister to “buy-out” the commercial fishing entitlements of fishers in a particular fishery.

Under the amendments, the Minister may, by order published in the Gazette, declare any fishery to be a fishery to which the buy-out arrangements apply, and specify the relevant commercial fishing entitlements that will be the subject of the buy-out. Such an order may be made only after consultation with the persons whose entitlements are to be acquired and other relevant persons and bodies.

After making the order, the Minister is to cancel the relevant commercial fishing entitlements. A person who holds a commercial fishing entitlement that is cancelled will be entitled to compensation for the market value of the entitlement as at 19 January 2000 or another date specified in the Minister's order.

Schedule 6 Amendments to fisheries management and environmental assessment legislation relating to habitat protection

Schedule 6 makes a number of miscellaneous changes to Part 7 of the *Fisheries Management Act 1994* and to the *Environmental Planning and Assessment Act 1979* for the protection of aquatic habitats.

Aquatic reserves

The amendments expand and clarify the purpose for declaring an aquatic reserve under the *Fisheries Management Act 1994*. The obligation to obtain the consent of the owner of land submerged by tidal waters before declaring an aquatic reserve is to be removed. Where the consent of a landholder is required, special provision is made with respect to the notification of and the consent of landholders in line with similar provision applying in connection with the issue of mining authorities. The amendments also authorise the making of management plans for each aquatic reserve by regulation. The management plan may impose higher penalties for offences created by the plan than other regulations under the Act (up to 1,000 penalty units).

Dredging and reclamation

The amendments revise the provisions regulating dredging and reclamation work in the *Fisheries Management Act 1994* to make clear the purpose of the provisions and to define more precisely the activities covered.

The purpose of the restrictions on dredging work and reclamation work is to conserve the biodiversity of fish and aquatic vegetation and to protect fish habitat.

Dredging work is defined to mean any work that involves excavating water land, and any other work involving the removal of material from water land that is prescribed by the regulations. Reclamation work is defined to mean using any material to fill in or reclaim water land, or depositing any material on water land for the purpose of constructing something over it (for example, a bridge), or draining water from water land for the purpose of its reclamation.

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At present, exemptions apply to certain mining works, public works and works carried out by the Waterways Authority. Those exemptions are removed. However, new exemptions are provided, including exemptions for work carried out in respect of certain artificial bodies of water and farm dams.

Protection of mangroves and other marine vegetation

The amendments enhance the protection of marine vegetation under Division 4 of Part 7 of the *Fisheries Management Act 1994*:

- (a) by making it clear that a protected area extends to the whole of a foreshore area of public water land or an aquaculture lease up to the mean high water mark of the waters concerned, and
- (b) by allowing the Minister, by order published in the Gazette, to extend the protected area to any other land adjacent to the public water land or leased area that is below the highest astronomical level of the waters concerned, and
- (c) by making it clear that the provisions extend to the taking of dead marine vegetation as well as living marine vegetation.

The amendments also permit exemptions from the provisions by regulation.

Importation of live fish

At present live fish of a species not taken from NSW waters cannot be imported into the State without the authority of a permit issued by the Minister under the *Fisheries Management Act 1994*. The prohibition is to be applied to fish of any species other than those species indigenous to the waters of the State or the coastal sea adjacent to the State or those species exempted by regulation.

Fishways

At present, the Minister may require fishways to be provided in the construction of dams, weirs, reservoirs or floodgates on a waterway under the *Fisheries Management Act 1994*. The amendments ensure that the provision applies to lagoons or other bodies of water that are subject intermittently to tidal influence or that intermittently flow into other waterways. The penalty for a failure to comply with a requirement of the Minister is increased.

Obstruction of passage of live fish

At present, it is an offence under the *Fisheries Management Act 1994* to obstruct the passage of fish by nets, material or other obstruction, except as authorised by or under the Act. The amendments make it clear that the offence applies to the construction of dams, weirs, causeways and floodgates. An exemption is provided

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to exclude activities authorised by an Act or by a permit from the Minister. The regulations may provide for other exemptions. The penalty for the offence is increased.

The *Environmental Planning and Assessment Act 1979* is amended so that the integrated development assessment provisions of that Act will apply to a permit issued under the *Fisheries Management Act 1994* provisions.

Schedule 7 Miscellaneous amendments to Fisheries Management Act 1994

Regulation-making powers

A power is inserted to make regulations with respect to:

- (a) regulating recreational fishing competitions, and
- (b) prohibiting the possession or receipt of fish illegally taken, processed or dealt with in any place outside the State.

Charter fishing

The amendments:

- (a) extend the definition of *charter fishing boat*, so that it is not limited to boats that are used principally for recreational fishing activities, and
- (b) allow the regulations to prohibit or restrict the use of a licensed charter fishing boat as both a charter fishing boat and a commercial fishing boat.

Noxious or diseased fish

The amendments allow any class of fish that is declared to be a noxious fish to be designated as a pest species or a controlled species or by any other name.

The amendments also allow a quarantine order with respect to diseased fish to modify, in a particular case, provisions relating to the destruction, sale etc of diseased fish.

Seizure of motor vehicles

Amendments are made so that a motor vehicle that is alleged to have been used in connection with an offence may be seized by an enforcement officer, and forfeited to the State, in the same circumstances as a boat that is alleged to have been used in connection with an offence.

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Compliance audits

Provision is made for compliance audits along the lines of mandatory environmental audits under Part 6.2 of the *Protection of the Environment Operations Act 1997*. A compliance audit is a periodic or particular documented evaluation of the fishing activity to which a fishing authority relates for either or both of the following purposes:

- (a) to provide information to the persons carrying out or managing the fishing activity and to the persons administering the Act on compliance with legal requirements and relevant policies under the Act relating to the fishing activity,
- (b) to enable those persons to determine whether the way the activity is carried on can be improved in order to promote the objects of the Act.

Compliance audits may be required under conditions of fishing authorities and are to be carried out by the holder of the authority or by a compliance auditor accredited in accordance with the regulations (or both). A report is required for any compliance audit and any false or misleading report is subject to criminal sanction.

Information must be supplied by a person for a compliance audit even if it might incriminate the person. The information supplied may be used for compliance purposes (including being admissible in evidence in criminal proceedings against the holder of the fishing authority).

The compliance audit provisions extend to aquaculture activities or other activities regulated under Part 7 of the *Fisheries Management Act 1994* (habitat protection).

Prohibition orders

The amendments allow a court that convicts a repeat offender of a fisheries offence to make an order prohibiting the repeat offender from:

- (a) engaging in specified commercial fishing activities, and
- (b) being on any boat, or in any premises, of a kind specified in the order that are associated with those commercial fishing activities.

The order remains in force for no more than 5 years.

The amendments make other provisions with respect to prohibition orders, including by providing for appeals against prohibition orders.

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Schedule 8 Amendment of Native Title (New South Wales) Act 1994

The amendment preserves native title rights and interests in respect of an area declared to be an aquatic reserve under the *Fisheries Management Act 1994*.