



26 October 2012

Mr David Borthwick AO PSM  
Review of Commonwealth fisheries management legislation

Dept. Agriculture Forestry and Fisheries  
Canberra

Dear Mr Borthwick

**SSIA submission to Review of Commonwealth fisheries management legislation**

The Southern Shark Industry Alliance (SSIA) represents its members, who rely on the sustainable harvesting of the Southern Shark Fishery resource, through ethical and professional representation to the community and all levels of fisheries management agencies. SSIA members hold over 70 % of the quota in the fishery, and in many cases are holders of multiple types of Australian Commonwealth Statutory Fishing Rights (SFR's). The SSIA is a member of the Commonwealth Fisheries Association and makes this submission in addition to (and without any prejudice) to the CFA submission.

In principle the SSIA supports the CFA submission.

Furthermore, in principle the SSIA is of the view that the current version of the Fisheries Management Act 1991 (Cth) (FM Act) does not require wholesale changes. In fact, any changes to the FM Act, should be made to protect the fishers and the security characteristics of the implied property of the Statutory Fishing Right (SFR) owners access rights. We would respectfully submit that the Fisheries Minister and the Environment Minister currently have plenary powers with respect to the Commonwealth Fishery and its management agency, the Australian Fisheries Management Authority. In fact we would argue that their power is unfettered.

The current *Magiris* issue should not be allowed to place in doubt the ample power that the Fisheries Minister and the Environment Minister have, in conjunction, over Australian Commonwealth fisheries and its management.

The SSIA is of the view that the Commonwealth Government's ad hoc tampering with the existing structures and systems, has created an uncertain environment to fishing businesses and to the sources of capital that this industry is so heavily reliant on. We believe, as part of the terms of reference, that your committee will need to resolve how Commonwealth Fisheries are expected to operate in an environment where there is no certainty in the right to fish, which in essence exists in absolute terms outside the Australian EEZ on the High Seas, basically eroding equity on which capital is supposedly secured by our Fisheries Management Plans. The FM Act is constructed to add value inside our EEZ, as fishers pay for this exclusivity, not add political and business risk.



Given current Ministerial actions, There is now no certainty in the legislation and management that in the past has been regarded as one of the best management systems in the world, , and in fact suggests that the political processes’ deployed to date may in fact have imploded the good work This has reduced confidence in the independent body (AFMA), who has the task of ensuring that “the exploitation of fisheries resources ...are conducted in a manner consistent with the principles of ecologically sustainable development”...and concurrently “maximising ... the net economic returns to the Australian community...”.<sup>1</sup>

The uncertainty pervading the industry has vacuumed confidence in businesses and hence all investment decisions suddenly carry a heightened level of risk over and beyond what was in the market place previously. Doing business with Governments should carry more certainty under legislative instruments, and therefore afford a level of security that allows capital restructuring in an orderly manner. No industry should be asked to operate with the extreme political risk that has surfaced as a result of the recent Ministerial interventions and regulatory authority confusion. The SSF is only a dolphin away or a seal away from the next social media assassination of a fishery which supposedly already has best practice principles in place for science and economic considerations in the decision making process. The industry needs to have confidence that SFR’s are indefeasible, or if defeasible they are compensable.

That way, the industry can be assured that there is a Constitutional Guarantee attached to the rights and capital investment decisions can be made with some degree of confidence that in fact allows industry to have assessable risk evaluation criteria. As it stands today, in this political landscape, if r SFR’s are not strengthened, the Industry will not be able to recapitalize and attract investment.

I have taken the liberty to summarise some of the key parts of the FM Act that illustrate the Ministers power through AFMA and more importantly some parts of the legislation that we believe need strengthening. The regime of “statutory fishing rights” established by the FM Act is best described as one of statutory rights created for the purpose of controlling access to a public resource.<sup>2</sup> The FM Act itself speaks of the exploitation of fisheries resources and the need for efficient and “ecologically sustainable” fisheries. In order to achieve these objectives the Fishing Industry must have an indefeasible access right to the fishery. It is only with a strong access right that the Fishery will ensure that the objectives of the FM Act are met.

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<sup>1</sup> FM Act, s3.

<sup>2</sup> ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 at 202 [149] (Hayne, Kiefel and Bell J); Minister for Primary Industry v Davey (1993) 47 FCR 151; Bienke v Minister for Primary Industries (1996) 63 FCR 567.



## **REGULATION OF COMMONWEALTH FISHERIES**

1. The Alliance represents persons engaged in fishing and, relevantly, persons who fish in the Southern and Eastern Scalefish and Shark Fishery (the Fishery). The area of the Fishery is defined in the Southern and Eastern Scalefish and Shark Fishery Management Plan 2003 (Cth) (the Management Plan), which was made under the FM Act.<sup>1</sup>
2. There is a scheme in the FM Act and the Management Plan for the grant of statutory fishing rights.
  - 2.1 Persons may fish in the Fishery if they hold a statutory fishing right.<sup>3</sup>
  - 2.2 A statutory fishing right is a right in respect of fishing in a managed fishery.<sup>4</sup> 8 kinds of statutory fishing right are expressly identified in the FM Act, including a right to take a particular quantity of fish, a right to use particular fishing equipment in a managed fishery and a right to use a boat in a managed fishery.
  - 2.3 The holder of a statutory fishing right must comply with the FM Act, the regulations, the Management Plan<sup>5</sup> and any directions given by the Australian Fisheries Management Authority (AFMA).<sup>6</sup> Again, the powers are wide and there is no matter that the Management Plan can or can't cover with respect to Fishing. So there is in effect an unfettered right to regulate fishing activities pursuant to the Act.
  - 2.4 The Management Plan regulates amongst other matters allowable catches, by-catch limits, methods of fishing etc. Further, AFMA may direct that specified kinds of fishing not be engaged in during a specified period.<sup>7</sup> AFMA may also direct the closure or partial closure of a fishery during a specified period.<sup>8</sup>
  - 2.5 The Management Plan may be amended from time to time.<sup>9</sup> The Management Plan may also be revoked.<sup>10</sup> (The consequences of revocation are addressed below.) As you can see, the ability of AFMA to have full control of the Commonwealth Fishery and its management is not constrained.
  - 2.6 Once AFMA has determined a plan of management for a fishery it must submit the plan to the Minister.<sup>11</sup> This is where the Minister can accept the Management Plan or it can refer it back to AFMA and inform it as to why the Management Plan was not accepted. AFMA must then make the necessary amendments requested by the

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<sup>3</sup> Management Plan, s 20.

<sup>4</sup> FM Act, s21.

<sup>5</sup> Management Plan, s46 (2).

<sup>6</sup> Management Plan, s46 (2)(b).

<sup>7</sup> Management Plan, s 56. There may be some doubt about whether AFMA may give an indefinite direction or a direction for the life of the Management Plan because of the reference to a "specified" period.

<sup>8</sup> FM Act, s41A.

<sup>9</sup> FM Act, s20(1).

<sup>10</sup> FM Act, s20(3)

<sup>11</sup> FM Act, s18.



Minister or withdraw the Management Plan. If AFMA make all of the Ministers suggested amendments and the Minister is satisfied, then the Minister must accept the plan. Again, the Minister can make whatever amendments he wants to the Management Plan and AFMA must comply with his or her requests.

2.7 As you can see, the Ministers powers are wide. Arguably, the Minister may want his powers with respect to Management Plans extended further. As a general rule, we would agree to the Minister having the power to seek amendments of any Management Plan at any time as long as the Minister is subject to the objectives of the FM Act.<sup>12</sup> In the event that the Minister requests an amendment to a Management Plan, AFMA are required to execute the amendment, unless the amendment will be in contravention of the FM Act objectives. This will create certainty in decision making for all involved.

2.8. There is an important group of sub-sections in s 22 of the FM Act that deal with the conditions to which the granting of a statutory fishing right is subjected.

(3) A fishing right is granted subject to the following conditions:

(a) the holder of the fishing right must comply with any obligations imposed by, or imposed by AFMA under, the relevant plan of management on the holder of such a fishing right;

(b) the fishing right will cease to have effect if the plan of management for the fishery to which the fishing right relates is revoked under subsection 20(3);

(c) the fishing right may, under subsection 75(7) cease to have effect or, under subsection 79(3), cease to apply to a fishery;

(d) the fishing right may be cancelled under section 39;

(e) no compensation is payable because the fishing right is cancelled, ceases to have effect or ceases to apply to a fishery.

2.9 This is a form of a “model provision” used by Parliamentary Counsel to demonstrate that the statutory right is defeasible – that is, that the right is subject to future modification or extinguishment under provisions that existed at the time the right was created.<sup>13</sup>

We believe that s 22(3) should be amended to state that the statutory rights are only defeasible if the revocation of the management plan occurs only when the objectives of the FM Act as stipulated in s 3 are not being met. For any other reasons, a revocation should create a situation that is analogous to a compulsory acquisition of real property. This will create certainty in our rights.

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<sup>12</sup> FM Act, s3.

<sup>13</sup> Parliamentary Counsel, Drafting Direction No 3.1: Constitutional law issues (2011) at [16].



- 3.0 Notwithstanding s 22(3) of the FM Act, Div 4A of Pt 3 of the FM Act makes provision for the grant of “statutory fishing rights options” to persons who formerly held fishing rights if a management plan for a fishery is revoked.<sup>14</sup> This provision should remain. That is, if the management plan is revoked (because the objectives of the FM Act were not being met) then all the SFR holders are not entitled to compensation, but they can get options in a future fishery. Again, this creates certainty. It means that your asset (your access right) is always protected. The SFR owner either gets compensated immediately or the SFR owner receives options to receive SFR’s in a future fishery.
- 3.1 The Common Law has accepted that our statutory fishing rights are property. Property rights are typically definable, identifiable by third parties, capable in their nature of assumption by third parties and have some degree of permanence or stability.<sup>15</sup> Rights created by statute are capable of being recognised as “property”.<sup>16</sup>

The provisions in the FM Act concerning the creation of “statutory fishing rights”, together with the provisions about the creation of a register of the rights and the creation of interests in those rights could sufficiently lead to the conclusion that the rights are capable of being characterised as proprietary.

It would be appropriate that the Act should specifically state that the SFR’s are property rights. This would codify a large body of common law, and it would create a greater level of certainty to all the holders of the SFR’s. More importantly it will create a greater level of certainty to financiers, that these SFR’s can be used as security. As the Act stands right now, the ability of the Fishing Industry to attract capital is almost impossible. If the very asset can be “revoked” with no compensation, what is the value of the security?

The Fishing Industry certainly faces a very uncertain future as a result of the recent decisions. The strengthening of our rights would go a long way to allaying Industry’s concerns and assist the Industry to attract capital for investment. The GFC has created a situation where banks cannot and will not provide loans using our SFR’s as security (banks are requesting first ranking mortgages on real property). The fact that the Act stipulates that no compensation is payable with the revocation of our SFR’s pretty much means that the security class as an asset is lost.

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<sup>14</sup> FM Act, s 31A.

<sup>15</sup> National Provincial Bank Ltd v Ainsworth [1965] AC 1175 at 1247-1248 (Lord Wilberforce); Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 at 165 (Brennan J).

<sup>16</sup> Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513; Attorney-General (NT) v Chaffey (2007) 231 CLR 651 at [24] (Gleeson CJ, Gummow, Hayne and Crennan JJ).



Whilst this submission is in the context of SFR's and the inherent value that they must carry in order to secure capital, other issues in relation to productivity and competition remain as equally important issues that should be addressed in order to properly understand the working nature of profit expansion in this labor intensive industry.

Of particular note, which is addressed in the CFA submission, is the existence and application of the OCS agreement. This agreement has become an unworkable backstop for both the States and the Commonwealth in any argument that relates to resource access. As a result the industry is continuously put into a holding pattern whilst management agencies appear unable to resolve what in most people's eyes seems simple common sense. It is pathetic that an industry must follow EPBC Act and Fisheries Act regulation in its activities, only to have to go against its own 'stewardship responsibilities' because of State and Commonwealth arguments. It is not right that fishers can legally target one species of fish on one side of a line, but must discard a by-catch of a species which can be targeted on the other side of a line. Often this occurs and in many different forms due to the OCS arrangements. This is unproductive and a sheer waste of resource. This situation requires more detailed explanation.

The OCS arrangements are in dire need of review in themselves, and I hope that this review could be some sort of a catalyst to that change process beginning.

Other issues that the SSIA would like to see addressed in this review include:

- Proper definition of the precautionary principle to ensure fisheries are treated the same as other users of the marine environment that operate under the EPBC Act
- Costs of management
- The size, composition and terms of the AFMA commission
- Duplication of the SEWPac and AFMA roles under the EPBC Act
- Recommendations for the Productivity Commission to review the duplication of fisheries management, research, compliance, licensing and vessel monitoring on an Australia wide basis

I would be happy to meet with the panel at any time to expand on the SSIA submission. For any clarification of this submission I can be contacted by email at \_\_\_\_\_ or by phone on \_\_\_\_\_

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Southern Shark Industry Alliance