

State Development and Regional Industries Committee

Report No. 9, 57th Parliament

Subordinate legislation tabled between 24 February 2021 and 20 April 2021

1 Aim of this report

This report summarises the committee's findings following its examination of the subordinate legislation within its portfolio areas tabled between 24 February 2021 and 20 April 2021. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs) and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA)¹ and discusses the committee's consideration of compliance with the *Human Rights Act 2019* (HRA) and the human rights certificates tabled with the subordinate legislation.²

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
29	Fisheries Legislation Amendment Regulation 2021	20 April 2021	1 September 2021

3 Committee consideration of the subordinate legislation

The committee identified no issues regarding the policy to be given effect by the subordinate legislation.

The committee notes that a number of provisions in the regulation may breach fundamental legislative principles, specifically limit an individual's ordinary activities and right to conduct business. The committee was satisfied that potential breaches are reasonable and sufficiently justified.

The committee found that the explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the *Legislative Standards Act 1992*.

The committee raised one human rights issue relating to the cultural rights of Aboriginal and Torres Strait Islander peoples. The committee was satisfied that any potential impacts on this right are reasonable and demonstrably justified.

The committee was satisfied that the human rights certificate tabled with the subordinate legislation provided a sufficient level of understanding to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.¹

These matters are discussed in further detail below.

4 Fisheries Legislation Amendment Regulation 2021 (SL No. 29)

The Queensland Sustainable Fisheries Strategy 2017 – 2027 (the Strategy) committed to the implementation of reforms in a number of Queensland's fisheries, and the implementation of best practice management principles more generally for managing Queensland's fisheries resources. A

¹ *Human Rights Act 2019*, s 41.

number of regulatory changes, predominantly for commercial fisheries, were established through the *Fisheries Legislation Amendment Regulation 2020* (FLAR).²

The objective of the Fisheries Legislation Amendment Regulation 2021 (SL 29) is to correct a number of minor, technical or administrative errors in the FLAR. SL29 also makes a number of other ‘minor, routine, and non-significant changes to fisheries subordinate legislation.’³

Amendments in SL 29 include:

- correcting the net fishery ply ratings and mesh size in the commercial net fisheries, to provide for consistency across all net apparatus in all commercial fisheries
- correcting the form requirements for Spanish mackerel in the Spanish mackerel commercial fishery, to address increased compliance risks associated with identifying filleted product
- clarifying the effort unit conversion factor (EUCF) for particular vessels within the east coast trawl fishery, to maintain the EUCF that currently applies to those vessels
- removing redundant references to ‘assistant fishers’ throughout the commercial hand-harvest fisheries, where only one fisher is permitted to take fish
- removing provisions that incorrectly allow for the movement of product between commercial vessels in certain Queensland waters without a carrier boat licence or where transshipment is not permitted
- correcting the ‘catch eligibility date’ within the quota allocation provisions for the commercial net fisheries and commercial crab fisheries, to ensure there is sufficient time for affected licence holders to be able to ‘substitute’ catch years to create a better catch history
- inserting an ‘eligible person date’ within the quota allocation process for parts of the east coast trawl fishery and establishing a T1 and T2 (trawl fishery) effort unit transfer freeze, to ensure quota is reallocated to the correct persons
- correcting the allocation of extra fishing days within the quota allocation process to ensure that extra fishing days are allocated based on the number of eligible licences held
- correcting to whom the adjustment of effort units applies as part of the quota allocation process, where a person is issued more effort units than his or her original T1 holding
- correcting the ‘Hervey Bay crab area’ to accurately reflect the intended fishery area
- clarifying the commercial fishing reporting requirements, for better alignment with future electronic reporting options
- excluding the aquarium fish fisher from the ‘net free zone’ provisions to allow for the continued collection of fish using small barrier nets below the surface
- clarifying that licences with only harvest fishery symbols are unable to take fish to use as bait within the N11 fishery, to reflect historical fishery management arrangements
- clarifying how escape vents in crab pots can be installed to ensure escape vents operate as intended
- clarifying when a fishing trip starts and ends for the commercial worm and marine yabby fisheries, to reflect historical fishing practices, whereby a single boat is used to transport multiple worm and yabby fisher licence holders to and from local fishing grounds

² Explanatory notes, p 1.

³ Explanatory notes, p 2.

- removing redundant references to tender boat lengths in the sea cucumber and trochus fisheries, where the general tender boat size limit applies
- clarifying the conditions of the juvenile eel fishery to align the conditions with historical and long-standing licence conditions about to whom product can be sold.⁴

According to the explanatory notes, the Department of Agriculture and Fisheries has undertaken extensive consultation with stakeholders affected by the reforms since 2017. Further targeted consultation on the Spanish mackerel form requirements was also undertaken with commercial fisheries in 2021, and ‘clarifications were generally supported’. The explanatory notes also advise that commercial fishers were advised of the changes affecting the commercial fishing sector in 2020 and SL 29 is consistent with those notifications.⁵

The explanatory notes state that these proposals were exempted from regulatory impact analysis as they correct technical errors, are machinery in nature, or do not add to the burden of regulation and are unlikely to result in significant adverse impacts.⁶

4.1 Issues of fundamental legislative principle

4.1.1 *Legislative Standards Act 1992*, section 4(2)(a) – rights and liberties of individuals

Legislation should not unduly restrict ordinary activities without sufficient justification.⁷ Legislation should also not unduly limit the right to conduct business without interference.⁸

A number of provisions limit an individual’s general rights and liberties by limiting ordinary activities or the ability to operate a business without restriction. Each of these provisions is set out below, together with the justification provided in the explanatory notes.

4.1.1.1 *General possession limit*

Section 15 sets the general possession limit for species not already mentioned in Part 2 of Schedule 2 of the Fisheries Declaration 2019 (Fisheries Declaration). The limit is a maximum of 20 for a recreational fisher. Restricting their catch of certain species in to 20 could be seen as restricting a person’s ordinary activities.

The explanatory notes provide this justification:

... on the basis that, to protect the long-term sustainability of Queensland’s fisheries resources, it is essential that restrictions about the number of fish that can be taken are imposed.⁹

4.1.1.2 *Taking empty mollusc shells*

Section 13 amends section 121 of the Fisheries Declaration, which provides that a person can take or possess empty mollusc shells, other than an empty helmet shell or trumpet shell. Preventing them from taking certain types of shells restricts a person’s ordinary activities.

The explanatory notes state that helmet shells and trumpet shells are high-value, popular species and are susceptible to black marketing and are also listed as no-take species elsewhere in the Fisheries Declaration.¹⁰

The explanatory notes provide this justification:

⁴ See generally, explanatory notes, pp 2-9.

⁵ Explanatory notes, pp 17-18.

⁶ Explanatory notes, pp 17-18.

⁷ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 118.

⁸ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 118.

⁹ Explanatory notes, p 15.

¹⁰ Explanatory notes, p 15.

... on the basis that section 13 merely corrects an existing restriction on the taking of mollusc shells and goes towards preventing a black-market for helmet shells and trumpet shells.¹¹

4.1.1.3 Form requirements for Spanish mackerel

Section 15 makes changes to the table in Schedule 2 of Part 2 of the Fisheries Declaration. It requires that Spanish mackerel caught in the commercial fishery be kept in whole or gilled and gutted form. This restricts the way these fish, if caught in a commercial fishery, are kept.

The explanatory notes provide this justification:

... on the basis that without such restrictions, the likelihood of black-marketing high value product is increased. It is significantly easier to identify a species of fish if the fish is kept in whole form or merely gilled and gutted.¹²

4.1.1.4 Restriction on the transfer of T1 and T2 effort units

T1 and T2 are types of fishing licences and effort units are entitlements to fish for particular periods. Section 5 amends the Fisheries (Commercial Fisheries) Regulation 2019 (Commercial Fisheries Regulation) and provides that during the period of 22 April 2021 to 31 August 2021, a person cannot transfer T1 or T2 effort units. This provision places restrictions on a person's ability to permanently transfer effort units.

The explanatory notes provide further clarification:

The purpose of this section is to ensure that during the period that effort units are reallocated to trawl regions within the east coast trawl fishery, there is a freeze on the transfer of effort units, to decrease the risk that effort units are allocated to the wrong person.¹³

The explanatory notes state the provision is justified:

... on the basis that it is crucial to have certainty during the period of reallocation and to prevent an error from occurring. Further, the transfer of T1 and T2 effort units are permitted at all other times, and licence holders can continue to lease their effort units to other licence holders during the period from 22 April 2021 to 31 August 2021.¹⁴

4.1.1.5 Restriction on the use of trawl nets in the southern offshore trawl region

Section 12 amends section 86AA of the Fisheries Declaration and provides that a person must not use a trawl net in the southern offshore trawl region in a regulated period, other than in waters south of the eastern tip of Point Cartwright. This provision places restrictions upon when trawl nets can be used in the southern offshore trawl region. The explanatory notes state the purpose of the section is to protect vulnerable scallop populations and the long-term sustainability of the species, by preventing the use of trawl nets between 8am–6pm in the regulated period.¹⁵

The explanatory notes provide this justification:

... this amendment goes towards minimising the impact of the restriction on the use of trawl nets in the southern offshore trawl region and does not unduly restrict the right to conduct business without interference.¹⁶

¹¹ Explanatory notes, p 15.

¹² Explanatory notes, p 15.

¹³ Explanatory notes, p 16.

¹⁴ Explanatory notes, p 16.

¹⁵ Explanatory notes, p 16.

¹⁶ Explanatory notes, p 16.

4.1.1.6 Cover nets for trawl cod end

Section 31 amends section 159 of the FLAR, which amends schedule 2 sections 14, 27, 40, 62, 81 and 91 of the Commercial Fisheries Regulation to remove the maximum size limit of 60mm for cover nets for trawl cod ends. A cod end is the end of a trawl net which retains the catch. These provisions impose requirements on the gear or equipment used, which would affect the manner in which a business is conducted.

The explanatory notes state:

... these amendments remove the maximum size limit for cover nets for trawl cod ends, to enable industry to self-regulate this aspect of their gear, and therefore do not unduly restrict the right to conduct business without interference.¹⁷

4.1.1.7 Escape vents for crab apparatus

Section 35 amends section 168 of the FLAR, which will in turn amend the Commercial Fisheries Regulation. It will include the requirement that crab apparatus used to catch mud crabs must have an escape vent(s), which meets certain requirements such as shape and how it is constructed and operates. This affects the manner in which a person conducts their business as it will require specific equipment.

The explanatory notes provide this justification:

Escape vents in crab apparatus are essential to reduce the amount of bycatch and consequently protect vulnerable species such as turtles. By imposing requirements about how escape vents can be constructed, it ensures that escape vents are effective in reducing bycatch and consequently justifies the potential breach of the fundamental legislative principle.¹⁸

4.1.1.8 Sale of juvenile eels

Section 36 amends section 169 of the FLAR, to insert Schedule 7A section 85(2) into the Commercial Fisheries Regulation which provides that an approved aquaculture facility includes a facility used for aquaculture in another State. The effect of this will be that a person who commercially takes juvenile eel may sell the eel only for aquaculture in an approved aquaculture facility. This provision affects the manner in which a person may operate their business as it places restrictions on to whom juvenile eels may be sold.

The explanatory notes state that juvenile eel have historically been able to be sold for aquaculture in an approved aquaculture facility in any State of Australia, and the FLAR has inadvertently restricted it. The explanatory notes state:

Section 36 therefore goes towards loosening the restrictions imposed on the sale of juvenile eel and does not unduly restrict the right to conduct business without interference.¹⁹

Committee comment

The committee notes provisions discussed above which may potentially limit an individual's ordinary activities and/or right to conduct business. The committee is satisfied that potential breaches are reasonable and sufficiently justified.

4.2 Explanatory notes

The explanatory notes tabled with SL 29 comply with part 4 of the *Legislative Standards Act 1992*.

4.3 Human rights considerations

In the human rights certificate accompanying the regulation, the Minister states that the regulation is compatible:

¹⁷ Explanatory notes, p 16.

¹⁸ Explanatory notes, p 17.

¹⁹ Explanatory notes, p 17.

- with the human rights protected by the HRA20, and
- with the HRA, because it may limit, restrict or interfere with human rights, but the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.²¹

The committee raises one human rights issue.

4.3.1 Cultural rights – Aboriginal and Torres Strait Islander peoples (S28 HRA)

Section 28 of the HRA recognises that Aboriginal and Torres Strait Islander peoples hold distinct cultural rights.

Section 15 of the regulation makes numerous amendments to schedule 2 in the Fisheries Declaration 2019. As a result of those amendments:

- a person cannot take or possess bivalve mollusc or gastropod, other than pipi, unless the person is taking or possessing the fish commercially under an A1 licence.
- the maximum number of fish (other than various specified species²², or species that are already regulated elsewhere in the regulation) that a recreational fisher can take or possess is 20.

The certificate states that these provisions may impact on the human rights of some Aboriginal and Torres Strait Islander peoples under sections 28(2)(d) and (e) of the HRA, by reducing the availability of the fisheries resource to traditional owners, and restricting or preventing them from taking and possessing certain fish.²³

In relation to the reduction in the availability of the fishery resource, the Minister describes the purpose of these limitations as being:

... to continue to ensure the long-term sustainability of the fishery resources. The amendments ... set out limitations on who can take fish, and how many fish of a certain type can be taken, and in doing so, [restrict] the ability for overfishing to occur which would deplete fish stocks.²⁴

In relation to restricting or preventing Aboriginal and Torres Strait Islander peoples from taking or possessing certain fish, the Minister describes the purpose of the limitation in similar terms:

The purpose of the limitation, to ensure the long-term, commercial sustainability of a natural resource, is recognition that natural resources are limited and must be managed, which is a relevant consideration in modern society.²⁵

Aboriginal or Torres Strait Islander peoples are not restricted from using traditional fishing methods, provided any catch is not sold commercially. The Minister concluded in the certificate:

Balanced against this limitation [on these human rights] is the importance of preserving Queensland's fisheries resources from overfishing for all fishing sectors, which also, importantly, helps to protect Aboriginal peoples' and Torres Strait Islander peoples' traditional cultural rights and connection to these waters. Therefore, the rights are only limited in a broad-scale context, where a lack of limitation could

²⁰ Human rights certificate, p 1.

²¹ Human rights certificate, p 5.

²² Australian anchovy and sardine, common hardyhead, freshwater prawn, herring, marine yabby, silver biddy, soldier crabs or worms.

²³ Human rights certificate, pp 3-4.

²⁴ Human rights certificate, p 4.

²⁵ Human rights certificate, p 4.

result in depletion of fish stocks and, therefore, impact on achieving the purpose of ensuring the long-term sustainability of fish stocks in Queensland.²⁶

Committee comment

The committee acknowledges the potential impact of the regulation on the cultural rights of some Aboriginal and Torres Strait Islander peoples. Based on the explanations provided by the Minister, the committee is satisfied that any impact is reasonable and demonstrably justified.

4.4 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the legislation.

The human rights certificate tabled with SL 29 provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

5 Recommendation

The committee recommends that the House notes this report.



Chris Whiting MP

Chair

May 2021

State Development and Regional Industries Committee

Chair	Mr Chris Whiting MP, Member for Bancroft
Deputy Chair	Mr Jim McDonald MP, Member for Lockyer
Members	Mr Michael Hart MP, Member for Burleigh
	Mr Robbie Katter MP, Member for Traeger
	Mr Jim Madden MP, Member for Ipswich West
	Mr Tom Smith MP, Member for Bundaberg

²⁶ Human rights certificate, p 5.