



**Australian Government**

**Australian Fisheries Management Authority**

# **CONSULTATION DRAFT**

## **Guidelines for authorising cross- endorsement in areas of Australian jurisdiction of the Torres Strait Protected Zone**

Protected Zone Joint Authority [insert date of approval]



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# 1 Purpose

These Guidelines provide guidance on the Australian Fisheries Management Authority's (AFMA) consideration of nominations from the Papua New Guinea (PNG) Government for PNG boats to be authorised to fish in a Protected Zone commercial fishery<sup>1</sup> within areas of Australian jurisdiction. This activity is commonly referred to as 'cross-endorsement'.

Pursuant to Australia's obligation to co-operate with PNG on the issuing and endorsement of licences to permit commercial fishing in Protected Zone commercial fisheries, under Article 26(1) of the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters* (the Treaty), these Guidelines are also intended to assist the PNG Government and the fishing industry in the preparation of nominations for cross-endorsement.

These Guidelines outline the requirements and policies for applying for cross-endorsement and the minimum fisheries conditions that will apply. In addition to the fisheries management information contained in these Guidelines, nominees should ensure that they seek appropriate advice in relation to other applicable Australian laws when operating in the area of Australian jurisdiction.

These Guidelines do not apply to Australian boats licenced under section 19 of the *Torres Strait Fisheries Act 1984* (hereby referred to as 'the Act') seeking to fish under cross-endorsement arrangements in areas of PNG jurisdiction of the Torres Strait Protected Zone (the Protected Zone). These Guidelines also do not apply to proposals concerning the exploitation of Protected Zone commercial fisheries by a joint venture in which there is third-State equity participation, or by a vessel of third-State registration or with a crew substantially of the nationality of a third-State. Any such proposals will be subject to consultation and concurrence by both Parties in accordance with Article 27 of the Treaty.

## 2 Background

### 2.1 The Torres Strait Treaty

The Treaty was signed by both Parties at Sydney on 18 December 1978 and ratified by Australia on 15 February 1985. The Treaty defines the border between Australia and PNG and provides a management framework of the common border area. This area is defined by the Treaty and is known as 'the Protected Zone'. The specific geographical boundaries of the Protected Zone are set out in Annexure 9 to the Treaty. Australia and PNG established the Protected Zone with the principal purpose of acknowledging and protecting the traditional way of life and livelihood of the

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<sup>1</sup> For the purposes of the Treaty "Protected Zone commercial fisheries" means the fisheries resources of present or potential commercial significance within the Protected Zone and, where a stock of such resources belongs substantially to the Protected Zone but extends into an area outside but near it, the part of that stock found in that area within such limits as are agreed from time to time by the responsible authorities of the Parties (Article 1(h)).

traditional inhabitants of both Parties, including their traditional fishing and free movement (Article 10(3)). A further purpose is to protect and preserve the marine environment and indigenous fauna and flora in, and in the vicinity of, the Protected Zone (Article 10(4)). A range of subsidiary obligations and rights exist under the Treaty. Relevantly, Australia and PNG commit under the Treaty to co-operate in the conservation, management and optimum utilisation of Protected Zone commercial fisheries (Article 21) insofar as the achievement of the purposes for the establishment of the Protected Zone are not prejudiced in regard to traditional fishing (Article 20(1)).

The Treaty provides for the cooperative management and catch sharing of Protected Zone commercial fisheries in the provisions of Part 5 of the Treaty. Since the Treaty was ratified, Australia and PNG have entered into formal arrangements under Article 22 to cooperatively manage six fisheries, referred to as 'Article 22 fisheries'. These are the commercial fisheries for prawns, tropical rock lobster, Spanish mackerel, pearl shell, and the traditional fisheries for turtles and dugong.

The allowable catch for a Protected Zone commercial fishery must be determined jointly by the Parties (Article 23(2)). Australia and PNG agree to share the allowable catch for Article 22 fisheries in accordance with the formula provided under Article 23(4), or as otherwise agreed under other provisions of the Treaty. Article 23(4) provides that each Party is generally entitled to 25 per cent of the catch share in the other Party's jurisdiction<sup>2</sup>, which may be accessed by each respective Party through an arrangement under Article 26, commonly referred to as 'cross-endorsement'.

In support of these arrangements, Australia and PNG commit under the Treaty to co-operate with each other to prevent violations of the Protected Zone commercial fisheries arrangements, and consult each other to ensure that legislation and regulations adopted by each Party are as far as practicable consistent with the legislation and regulations of the other Party (Article 28).

Agreements between PNG and Australia on catch sharing arrangements usually take place at annual fishery bilateral meetings and meetings of the Torres Strait Joint Advisory Council (JAC) established under Article 19 of the Treaty.

## 2.2 The Protected Zone Joint Authority

The management of Protected Zone commercial fisheries in areas of Australian jurisdiction is subject to the Act. To the extent provided in the Act, the Act gives effect, in Australian law, to Australia's obligations under the Treaty as they relate to fisheries. Section 30 of the Act establishes the Protected Zone Joint Authority (PZJA), which consists of the Commonwealth Minister administering the Act (the Minister); the Queensland Minister<sup>3</sup> administering the laws of Queensland relating to marine fishing in the Protected Zone; and the Chairperson of the Torres Strait Regional Authority (TSRA). The TSRA is the Commonwealth agency established under the

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<sup>2</sup> With the exception of catches caught within the territorial seas of Anchor Cay, Black Rocks, Bramble Cay, Deliverance Island, East Cay, Kerr Islet, Pearce Cay and Turu Cay whereby each party is entitled to 50 per cent (Article 23(4)(b)).

<sup>3</sup> Please note that under section 28 of the Act, the Queensland Minister can be the Minister appointed by the Governor in Council of Queensland for the purposes of the Act.



*Aboriginal and Torres Strait Islander Act 2005* that represents the interests of Torres Strait Islanders.

The PZJA Arrangement<sup>4</sup>, made under Part V of the Act, provides that the PZJA is responsible for management of commercial fishing in areas of Australian jurisdiction of the Protected Zone and designated adjacent waters.<sup>5</sup>

In exercising its functions, the PZJA has regard to the rights and obligations conferred on Australia by the Treaty (section 8 of the Act). This includes Australia's obligation to co-operate with PNG in the issue and endorsement of licences (i.e. 'cross-endorsement').

The PZJA is supported by four government agencies (known as 'PZJA agencies'): AFMA, the Commonwealth Department of Agriculture, Water and the Environment (DAWE), the Queensland Department of Agriculture and Fisheries and the TSRA. AFMA is responsible for providing day to day fisheries management services for the PZJA including compliance and licencing. Accordingly, the PZJA has delegated to AFMA its powers and functions in relation to the granting of Treaty endorsement licences. AFMA undertakes its delegated functions in consultation with PZJA agencies.

## 3 Assessment of nominations

### 3.1 Australia's obligations under the Treaty

Australia's obligations under the Treaty are considered when assessing nominations for cross-endorsement. These include:

- a) Ensuring arrangements<sup>6</sup> do not prejudice the achievement of the purposes of establishing the Protected Zone to:
  - acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants of both Parties including their traditional fishing and free movement (Article 10(3)); and
  - protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone (Article 10(4)).

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<sup>4</sup> "PZJA Arrangement" means the "[\*Arrangement between the Commonwealth and the State of Queensland under section 31 of the Torres Strait Fisheries Act 1984\*](#)" and in 2021 can be viewed on the website of the Federal Register of Legislation at <https://www.legislation.gov.au/Details/F2008B00750>.

<sup>5</sup> The PZJA Arrangement excludes commercial fishing for sedentary organisms in the area within which Australia has fisheries jurisdiction, but in which PNG has seabed jurisdiction. Commercial aquaculture and fishing in areas within the limits of Queensland are also excluded under the PZJA Arrangement.

<sup>6</sup> Part 5, Article 20 of the Treaty states, in relation to the priority of traditional fishing and application of measures to traditional fishing, that the provisions of this Part shall be administered so as not to prejudice the achievement of the purposes of Part 4 of this Treaty in regard to traditional fishing. A Party may adopt a conservation measure consistent with the provision of this Part which, if necessary for the conservation of a species, may be applied to traditional fishing, provided that that Party shall use its best endeavours to minimise any restrictive effects of that measure on traditional fishing.

- b) The need to consult and co-operate with PNG on the issue and endorsement of licences (Article 26(1)).
- c) Having regard to the desirability of promoting economic development in the Torres Strait area and employment opportunities for the traditional inhabitants (Article 26(3)).
- d) The need to ensure that the traditional inhabitants are consulted from time to time on the licensing arrangements (Article 26(4)).
- e) The need to co-operate, including by exchange of personnel, in inspection and enforcement to prevent violations of the Protected Zone commercial fisheries arrangements and in taking appropriate enforcement measures in the event of such violations (Article 28(1)).

## 3.2 Eligible nominations

In accordance with the Treaty and pursuant to the relevant provisions of the Act, cross-endorsement nominations will be considered where:

- a) nominations are made by the PNG Minister<sup>7</sup> as the responsible authority for PNG for the purposes of Article 26(1) (subsection 20(1) of the Act);
- b) nominations are relevant to fishing in a Protected Zone commercial fishery that is subject to formal subsidiary conservation and management arrangements agreed under Article 22;
- c) nominations are consistent with relevant catch sharing arrangements (e.g. catch or effort entitlements) as agreed under Article 23 and Article 25;
- d) a PNG licence<sup>8</sup> is in force and held by the person and vessels being nominated, in the relevant Protected Zone commercial fishery in areas of PNG jurisdiction (Article 26(1)(c)) of the Treaty and subsection 20(1) of the Act).

## 3.3 Information to be provided in a nomination

### 3.3.1 Details of the nomination: fishery, person and vessels

When assessing nominations for cross-endorsement, AFMA will ask to be provided with the following information for nominated person(s) and boat(s)<sup>9</sup> to determine if the cross-endorsement of a licence is appropriate:

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<sup>7</sup> "PNG Minister" means the Minister of the Government of PNG for the time being administering the laws of PNG relating to fishing in and in the vicinity of the Protected Zone, and includes a delegate of that Minister (as defined in section 3 of the Act).

<sup>8</sup> "Papua New Guinea licence" means a licence in force under the laws of Papua New Guinea in respect of a boat, being a licence granted pursuant to the Torres Strait Treaty that authorises the use of the boat for commercial fishing in an area of Papua New Guinea jurisdiction (whether or not the licence also authorises the use of the boat for fishing in any other area), as defined in section 3 of the Act).

<sup>9</sup> The word "Boat" has a specific definition under section 3 of the Act which is consistent with the definition of "Vessel" under the *Navigation Act 2012*. However, it is important to note that the word "Vessel" has slightly varying definitions in different areas of Australian domestic maritime legislation. (For example, section 8 of

- a) Details of the proposed fishing activities, including:
  - (i) the relevant Protected Zone commercial fishery the person and vessels are being nominated to fish within; and
  - (ii) if there are multiple persons and vessels being nominated for a Protected Zone commercial fishery, advice on how the agreed allowable catch or effort will be shared between licence holders and/or vessels.
- b) Details of the PNG licenced boats, including:
  - (i) boat particulars (e.g. overall length, capacity);
  - (ii) copies of PNG licences in force for each boat; and
  - (iii) photos of each boat.
- c) Details of the nominated persons proposed to hold the Treaty endorsement and fishing crew, including:
  - (i) The full name and contact details of the owner/s and operator/s of each vessel; and
  - (ii) The full names of all crew members.
- d) A signed declaration by each nominated person proposed to hold the cross-endorsement licence that they have not been involved in any illegal, unreported, unregulated (IUU) fishing.

### **3.3.2 Effective monitoring of allowable catches**

PNG boats will generally not be permitted under the endorsement to unload catch to any port or vessel (transshipment) within areas of Australian jurisdiction. To ensure the integrity of the agreed catch sharing arrangements, details are to be provided on how catches taken by cross-endorsed PNG boats in areas of Australian jurisdiction, and landed in areas of PNG jurisdiction, will be monitored and verified by PNG authorities.

### **3.3.3 Illegal, unreported and unregulated (IUU) fishing**

Australia takes a strong stance against IUU fishing and has effective legislation in place that allows for action to be taken against foreign fishing boats fishing illegally in the Australian jurisdiction of the Protected Zone. Australia and PNG work closely in relation to responses to IUU fishing both in the Torres Strait and broader Indo-Pacific region. Illegal fishing may result in boats and catch being seized. Australia and PNG have adopted National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (NPOA-IUU). As part of the NPOA-IUU, both states have committed to collaborate to ensure that fishing vessels entitled to fly their respective flags do not engage in or support IUU fishing and that they can exercise their responsibility to ensure that vessels do not engage in IUU fishing.

AFMA will review each vessel nominated and will undertake an assessment to determine a vessel's risk status.

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the *Maritime Powers Act 2013* and Schedule 1, clause 8 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*.)

### 3.3.4 Safe operation

The safe operation of fishing boats, including safe working conditions of crew and, if required, AFMA observers, is paramount for all boats fishing in the areas of Australian jurisdiction of the Protected Zone. Nominations must demonstrate that fishing boats comply with or demonstrate compatible vessel safety standards as administered by the Australian Maritime Safety Authority (AMSA).<sup>10</sup>

## 3.4 Requirements under the *Native Title Act 1993*

In considering nominations AFMA will undertake and consider outcomes of native title notification. The grant of cross-endorsement licence is a future act for the purposes of the *Native Title Act 1993* ('the Native Title Act'). Subsection 24HA(2) of the Native Title Act relevantly provides that the grant of a licence that relates to the management or regulation of living aquatic resources is a valid future act, insofar as that the grant is validly made. Therefore for a cross-endorsement of a license to be valid, AFMA will undertake native title notification in accordance with subsection 24HA(7) of the Native Title Act when deciding whether to endorse a PNG licence under section 20 of the Act. This involves notifying all representative Aboriginal and Torres Strait Islander bodies, registered native title body corporates and registered native title claimants in relation to the areas of Australian jurisdiction of the proposed nominations and providing these bodies an opportunity to comment on the proposed future act. The standard notification period for comment is 28 days. All notifications are made publicly available on the PZJA website, at [www.pzja.gov.au](http://www.pzja.gov.au).

## 3.5 Other requirements

Consistent with Article 16(3)(c) of the Treaty, AFMA will seek advice from responsible Government agencies on any measures that might apply from time to time, temporary or otherwise, in relation to immigration, customs, health and quarantine that may be relevant to the approval of a cross-endorsement application.

# 4 Conditions to be imposed

## 4.1 Compliance with Australian Fisheries laws and regulations

Consistent with Article 26(2) of the Treaty and section 5 of the Act, all PNG boats cross-endorsed to fish in areas of Australian jurisdiction of the Protected Zone must operate within and comply with Australia's relevant fisheries laws and regulations.<sup>11</sup> The onus is on the licence holder to ensure all

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<sup>10</sup> For further information in relation to vessel safety standards, as administered by the Australian Maritime Safety Authority (AMSA), please see the AMSA Website at: [www.amsa.gov.au](http://www.amsa.gov.au) or contact AMSA directly.

<sup>11</sup> See Part 5 below in relation to the exemption for licence fees, levies and other charges.



crew understand these laws and regulations. Nominated persons and vessel operators are encouraged to review information on the PZJA website and contact AFMA's Thursday Island office on +61 7 4069 1990 or at [FisheriesTI@afma.gov.au](mailto:FisheriesTI@afma.gov.au) for further details on Australia's relevant fishery management rules and arrangements.

## 4.2 Access to areas of Australian jurisdiction of the Protected Zone

Except for circumstances involving *force majeure*<sup>12</sup> and other humanitarian emergencies involving the health or safety of crew members or the safety of the boats, or unless otherwise directed by Australian authorities or allowed in accordance with the Act, PNG boats authorised to fish under cross-endorsement arrangements will not be permitted under the endorsement to make landfall in any Australian territory. This includes activities to unload product, source provisions or refuel.

AFMA may exclude a PNG boat from certain areas of Australian jurisdiction through the implementation of closed areas. Further, access to areas of Australian jurisdiction under cross-endorsement arrangements will be limited to within the Protected Zone only and will not extend to areas proclaimed by Australia to be an area outside but near the Protected Zone (as defined in section 15 of the Act).

## 4.3 General licence conditions

Treaty endorsements will be subject to specific licence conditions (section 22 of the Act). Conditions will vary between Protected Zone commercial fisheries. Below is a minimum set of licence conditions that are likely to apply to cross-endorsements across all Protected Zone commercial fisheries. These minimum conditions will be updated as required from time to time.

- 1) mandatory carriage and operation of a Vessel Monitoring System on all licenced boats and where applicable, tender boats;
- 2) the completion and submission of relevant Daily Fishing Logbooks<sup>13</sup>;
- 3) catch and/or effort limits;
- 4) prohibition on the landing or transshipment of catches in areas of Australian jurisdiction (unless allowed by AFMA, in its discretion, in accordance with the Act);
- 5) a requirement to land all catches in areas of PNG jurisdiction (e.g. Daru) (unless AFMA determines otherwise);
- 6) a requirement for prior reporting on entry and exit of areas of Australian jurisdiction;
- 7) specific boat identification markings; and

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<sup>12</sup> An emergency situation or event that developed suddenly, was not reasonably foreseeable and which is beyond reasonable human control. An example of a force majeure situation may include a storm or a cyclone.

<sup>13</sup> Obligations with respect to log-books also arise under regulation 10 of the *Torres Strait Fisheries Regulations 1985* and, in respect of certain fisheries, the *Torres Strait Fisheries (Furnishing of Logbooks) Instrument 2020*.

- 8) an obligation to carry an observer if required by AFMA.

## 4.4 Measures to protect the traditional way of life and livelihood of traditional inhabitants

Further measures may be considered to protect the traditional way of life and livelihood of traditional inhabitants regarding traditional fishing.

## 4.5 Inspection by an authorised maritime officer

Boats will be required to be available at any point during operations for inspection by AFMA (or another authorised officer under the Act) for fisheries management purposes<sup>14</sup>. The operator and crew must also make the vessel available as required by other Australian authorities where they are empowered or required by relevant legislation to inspect vessels for authorised purposes. These may include (but are not limited to) for the purposes such as:

- ensuring/determining seaworthiness and vessel safety;
- ensuring/determining fair working conditions for crew;
- assessing biosecurity risks; and
- ensuring compliance with customs and immigration requirements.

## 4.6 Additional operating requirements

PNG cross-endorsed boats operating in the Australian jurisdiction of the Protected Zone may also be subject to other regulations outside of the Act including, but not limited to, biosecurity, health, quarantine, environmental conditions, customs and immigration, and the obligations on each party that are set out in Article 16 of the Treaty.<sup>15</sup>

# 5 Licence fees, levies and other charges

Pursuant to Article 26(2) of the Treaty, PNG licence holders shall be exempt from licensing fees, levies and other charges that may be imposed by Australia.

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<sup>14</sup> Under Pt VI of the Act, 'officers' have a range of enforcement powers, including (but not limited to) powers to require the master of a boat in respect of which a Treaty endorsement is required to be in force to give information concerning the boat, the crew, or any person on board (section 46(j)). Under the Act, 'officer' is defined to include a range of persons (see section 3 and 3(4)).

## 6 Review

These Guidelines will be reviewed periodically as required.

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