

## Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

### Introduction

- 7.1 The main purpose of the *Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* ('the Convention') is to establish a Commission to manage and conserve highly migratory fish stocks in the western and central Pacific Ocean and to promote their optimum utilisation and sustainable use. Parties to the Convention will become members of the Commission. Obligations under the Convention are consistent with Australia's obligations under the *United Nations Fish Stocks Agreement* ('Fish Stocks Agreement')<sup>1</sup> and the *United Nations Convention on the Law of the Sea* (UNCLOS). The Convention applies to all highly migratory fish stocks except sauries.<sup>2</sup>

### Background

- 7.2 The Western and Central Pacific Ocean is the location of the largest and most valuable fishing resource in the world, and includes a

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1 For the Committee's views on this treaty see the Joint Standing Committee on Treaties (JSCOT) *Report 28: Fourteen Treaties Tabled on 12 October 1999*, pp. 5-15.

2 National Interest Analysis (NIA), para. 9.

number of coastal states (including Australia). This area is fished by several distant water fishing nations (DWFNs).<sup>3</sup>

- 7.3 In 1994 the South Pacific Forum Fisheries Agency convened the first of seven multilateral high-level conferences to promote responsible fishing in the region. The adoption of the *United Nations Fish Stocks Agreement* ('Fish Stocks Agreement') required both coastal states and DWFNs to cooperate on the establishment of regional management arrangements for straddling or highly migratory fish stocks.<sup>4</sup> The Convention was one of the first regional fisheries management organisations (RFMOs) to be negotiated under the auspices of the Fish Stocks Agreement.
- 7.4 The Convention was developed by delegates of Pacific Island countries and DWFNs during a series of conferences. Australia has been active in the negotiation of the Convention text and in the Preparatory Conferences to establish the Commission.
- 7.5 Greenpeace also observed that Australia had played an important role in the development of the Convention and had been a 'strong driver of many of the important management precedents that exist within the Convention.'<sup>5</sup>

## Relationship with other conventions

- 7.6 The present convention lies within a framework of existing international agreements regulating the conservation and management of highly migratory fish stocks. At the most fundamental level, UNCLOS, which is called the 'constitution of the sea', establishes the fundamental principle that States should cooperate to ensure conservation and promote the objective of the optimum utilisation of fisheries resources both within and beyond the exclusive economic zone (EEZ).<sup>6</sup> The Fish Stocks Agreement provides a framework that elaborates on the obligation to cooperate, by setting out principles for the conservation and management of fish stocks that migrate between the high seas and EEZs and establishes that

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3 James Lee, *Transcript of Evidence*, 23 June 2003, p. 52.

4 The Committee reviewed the Fish Stocks Agreement see JSCOT, *Report 28: Fourteen Treaties Tabled on 12 October 1999*, pp. 5-15.

5 Greenpeace, *Submission 18*, p. 1.

6 The EEZ established by UNCLOS provides for sovereign rights over the living and non-living resources of the oceans – including fish stocks – within 200 nautical miles of the baseline of coastal states. The oceans beyond the EEZ are designated as the high seas, where no coastal state has sovereign rights with respect to these resources.

such management must be based on the precautionary approach and the best available scientific information.<sup>7</sup>

- 7.7 DFAT also advised that article 22 dealt with cooperation with other RFMOs, such as the Commission for the Conservation of Southern Bluefin Tuna.

Port Lincoln specifically fishes for southern bluefin tuna. During the preparatory conference processes it was recognised within this that, although southern bluefin tuna occur within this convention area, the parties to the Western and Central Pacific Ocean Tuna Commission recognise that the Commission for the Conservation of Southern Bluefin Tuna is the primary and responsible organisation for dealing with southern bluefin tuna.<sup>8</sup>

## Establishment of the Commission

- 7.8 The principal feature of this Convention is that it establishes the 'Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean'.<sup>9</sup>

## Functions

- 7.9 Functions of the Commission include:
- determining the total allowable catch or total level of fishing effort within the Convention Area and other conservation and management measures, as well as development of criteria to determine these where necessary;
  - adopting standards for collection, verification and timely exchange and data reporting as per Annex I of the Fish Stocks Agreement;
  - compiling and disseminating accurate and complete statistical data to ensure the 'best scientific information' is available; and

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7 See URL:  
[http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_fish\\_stocks.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm).

8 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 62.

9 Article 9(1).

- establishing appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement, including a vessel monitoring system.<sup>10</sup>
- 7.10 The Commission will meet annually, or as necessary in accordance with the principle of cost-effectiveness. The location of its headquarters shall be determined by the Contracting Parties, who will also appoint its Executive Director.<sup>11</sup>
- 7.11 By ratifying the Convention, Australia would become a member of this commission. The Committee was advised that 'Australia needs to be part of the new commission, as continued access to the high seas and allocation of high seas resources will be dependent upon Australia being a member of the commission'.<sup>12</sup> It has also been put to the Committee that this was even more critical, as 'there has been a move of fishing capacity by distant water fishing nations from the Northern Hemisphere into the western and central part of the Pacific Ocean'.<sup>13</sup>

## Financial Arrangements

- 7.12 According to Article 18, which deals with the financial arrangements for the Commission, the Commission's budget will be drafted by the Executive Director and must be adopted by consensus. The scheme of contributions to the budget are to be based on an equal basic fee, a fee based on national wealth, and a variable fee that takes into account total catch in the Convention Area, with a discount for developing States or territories fishing their own exclusive economic zones. Any contributor in arrears cannot participate in decision-making by the Commission, unless the Commission is satisfied that 'failure to pay is due to conditions beyond the control of the member'.<sup>14</sup>
- 7.13 Article 19 provides that the records, books and accounts of the Commission, including its annual financial statement must be audited annually by an independent auditor appointed by the Commission.

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10 Article 10.

11 Article 9.

12 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

13 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

14 Article 18(3).

## Decision-making

- 7.14 The decision-making process of the Commission is treated in Article 20 of the Convention. As a general rule, decision-making in the Commission shall be by consensus, which means ‘the absence of any formal objection made at the time the decision was taken’.<sup>15</sup>
- 7.15 In the absence of express provision for decision by consensus, two methods can apply where consensus is not possible. For questions of procedure, a decision requires a majority of those present and voting. Questions of substance shall be decided by a three-fourths majority of those present and voting, provided that such a majority includes:
- A three-fourths majority of the members of the South Pacific Forum Fisheries Agency present and voting; and
  - A three-fourths majority of non-members of the South Pacific Forum Fisheries Agency present and voting; and
  - Providing further that in no circumstances shall a proposal be defeated by two or fewer votes in either chamber.
- 7.16 A question shall be treated as one of substance unless otherwise decided by the Commission by consensus or by the majority required for decisions on questions of substance.

## Advisory bodies

- 7.17 The Convention establishes two subsidiary bodies to provide advice and recommendations to the Commission: the ‘Scientific Committee’ and the ‘Technical and Compliance Committee’. The Scientific Committee is established to provide the ‘best scientific information available’.<sup>16</sup> The Technical and Compliance Committee shall:
- Provide information, technical advice and recommendations relating to implementation and compliance;
  - Monitor and review compliance and make necessary recommendations; and

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15 Article 20(1).

16 Article 12(1).

- Review and make recommendations regarding the implementation of cooperative measures for monitoring, control, surveillance and enforcement.<sup>17</sup>
- 7.18 The Commission may also establish a Secretariat consisting of an Executive Director and other staff.<sup>18</sup>
- 7.19 The Committee understands that the Commission will make decisions based on scientific and technical advice from the advisory bodies.

## Participation in the Commission

- 7.20 The Committee considers the ability of Australia to participate in the work of the Commission to be an important consideration in deciding whether or not to recommend ratification.
- 7.21 According to the NIA, 'Parties to the Convention will be members of the Commission and thus able to influence the regional management strategies which are implemented under this framework.'<sup>19</sup> The Committee agrees with the contention that it is in the national interest for Australia to be able to 'participate in the management of fisheries resources important to the Australian fishing industry' and to 'ensure that consistent fisheries strategies are utilised across the Pacific'.<sup>20</sup>
- 7.22 In his evidence before the Committee, Mr Lee argued that Australia should ratify, and thereby become a member of the new Commission:
- By being engaged we are in the best position to influence, push for and contribute to responsible fishing practices that would benefit the east coast fishing industry.<sup>21</sup>
- 7.23 Because of the entry into force mechanism, Australia would not necessarily prevent the entry into force of the Convention by refusing to become a party. The Department of Agriculture, Fisheries and Forestry Australia (AFFA) advised the Committee that:
- If the convention is ratified and the commission is created and we are not a signatory, then we have obviously missed the boat. Until such time as we are a party we will not be able

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17 Article 14.

18 Article 15(1).

19 NIA, para. 6.

20 NIA, para. 7.

21 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

to influence the management, or even leading towards the allocation, of resources if particular stocks are found to be at maximum sustainable yield. By being a party, obviously, we are able to influence that significantly.<sup>22</sup>

7.24 Should the Convention enter into force, AFFA raised the possibility of a Pacific grouping exercising influence within the Commission:

As a party within just a Pacific grouping—if the convention is ratified by the Pacific grouping—then certainly the Pacific can aim to establish arrangements that best suit them. That has actually come up in discussion in the margins of the preparatory conferences, where some parties have said, ‘Why should we be bashing our heads against a brick wall on this particular issue when all we’ve got to do is sit back, achieve 13 ratifications, and then we can do whatever we want?’<sup>23</sup>

7.25 However, Australia has attempted to facilitate a more cooperative approach:

The convention actually says that we need to do this in good faith. We keep pointing out that we really do need to be trying to do this to cater for all parties involved, and certainly we would like to be there.<sup>24</sup>

7.26 The Committee has also heard that Australia has been involved in the process from the beginning and that Australia’s ratification ‘would be seen as evidence of Australia’s commitment as one of the original members of the commission’.<sup>25</sup>

## Access to the Convention Area

7.27 In addition to the benefits of participating in the work of the Commission, the Committee is concerned that the Australian fishing industry could lose access to the fisheries of the western and central Pacific Ocean if Australia does not ratify the Convention prior to its entry into force. The Committee notes that Australia has a substantial

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22 James Lee, *Transcript of Evidence*, 23 June 2003, p. 66.

23 James Lee, *Transcript of Evidence*, 23 June 2003, pp. 66-67

24 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

25 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

commercial fishing industry in the Western and Central Pacific Ocean.

- 7.28 The Committee has been advised that if the Convention came into force while Australia had not become a party, then the Australian fishing industry would be denied access to the high seas fisheries within the Convention Area because Australia had ratified the Fish Stocks Agreement:

Further, as a party to the United Nations Fish Stocks Agreement, Australia needs to be a member of the commission if it is to be allowed to fish on the high seas in the convention area.<sup>26</sup>

- 7.29 Therefore, in order to secure access to the Convention Area for the Australian fishing industry, Australia would need to ratify the Convention before it enters into force, notwithstanding the various other concerns that the Committee has in relation to this Convention.

## Prospects for entry into force

- 7.30 Given that participation and access rights depend on the entry into force of the Convention, the Committee was interested in the prospects of the Convention entering into force in the near future.

## Two-path entry in force mechanism

- 7.31 There are two ways in which the Convention can enter into force. Firstly, the Convention will enter into force 30 days after three States north, and seven States south, of the 20° parallel north latitude deposit their instrument of ratification, acceptance, approval or accession. Alternatively, after 5 September 2003, the Convention will enter into force six months after the deposit of the thirteenth instrument of ratification, acceptance approval or accession (regardless of the States location) or as above, whichever is the earlier.<sup>27</sup>
- 7.32 When the Committee inquired into the rationale for the 'north-south' mechanism, AFFA advised that:

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26 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

27 NIA, para. 4.



...that facility recognises that there are two components to this: the distant water fishing side and the side of the Pacific areas that have the resource in their EEZs.<sup>28</sup>

- 7.33 The Committee notes that DFAT also referred to the reflection of this 'north-south' dimension in the chamber decision-making procedure of the Commission,<sup>29</sup> outlined at paragraphs 1.14 to 1.16 above.

## Progress of ratifications

- 7.34 The Committee sought information on the current progress of ratifications in light of the entry into force requirements. AFFA advised that seven nations had ratified the Convention.<sup>30</sup> Mr Lee added that:

The Philippines and another three Pacific coastal states, including Australia, are advanced in the ratification process. It now looks increasingly likely that the convention will come into force some time in the middle of 2004, based on 13 ratifications.<sup>31</sup>

- 7.35 When asked by the Committee which other nations were likely to ratify in addition to these four, Mr Lee replied:

We are not sure of the status of Tonga. They have just recently had a change, at the bureaucratic level, within their fisheries department and they are just getting a handle on what this means for them. From the meetings that we have had with delegates from Tonga, they are certainly aware of the benefits to them of joining. They have not actually said that they have started the process.<sup>32</sup>

- 7.36 As for the thirteenth country there were three other possibilities:

Niue have some concerns which they would like to have addressed relating to the cost of joining the commission. There is the Republic of Palau and the Republic of Nauru. These are all Pacific parties. They are the ones that have the fish resource either in their EEZs or in the adjacent high seas

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28 James Lee, *Transcript of Evidence*, 23 June 2003, p. 66.

29 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 66.

30 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

31 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

32 James Lee, *Transcript of Evidence*, 23 June 2003, p. 56.

area. They recognise the benefits from sustainably managing this resource. That is why it looks likely that it will be ratified based on interest from the Pacific region.<sup>33</sup>

- 7.37 Notwithstanding that Tonga has not started the ratification process and other countries have not proceeded very far, significant regional solidarity through the Forum Fisheries Committee makes ratification a realistic proposition:

At the most recent preparatory conference in Fiji, the attitude taken by the members of the Forum Fisheries Committee on how to approach negotiations on the Western and Central Pacific Fisheries Convention was quite enlightening. They stood as a group and pushed issues as a group, and we see no reason why they will not all want to be parties to this and why they will not, if not currently actively working on ratification, shortly begin.<sup>34</sup>

- 7.38 Of the seven ratifications, none of these were by the recognised major DWFNs; Japan, Korea, China, Taiwan, the United States and the European Union had all not ratified.<sup>35</sup> However, the Committee was advised that the United States had flagged with Congress 'that it is something that needs to be addressed in the near future'.<sup>36</sup> AFFA described the situation as:

...very much a crystal ball situation. Thirteen ratifications are required for the convention to come into force. The European Union is an observer and Taiwan has special standing within the process at the moment. The European Union and Taiwan will most certainly ratify, as well, as soon as the commission comes into being. Once they have ratified, it is highly likely that China will follow suit, bearing in mind that Taiwan has joined.<sup>37</sup>

## Delay in Australia's proposal to ratify

- 7.39 The Committee noted the delay between the signing of the Convention on 30 October 2000 and proposed ratification and was advised that the history of negotiation of the Convention involved

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33 James Lee, *Transcript of Evidence*, 23 June 2003, p. 56.

34 James Lee, *Transcript of Evidence*, 23 June 2003, p. 56.

35 James Lee, *Transcript of Evidence*, 23 June 2003, p. 55.

36 James Lee, *Transcript of Evidence*, 23 June 2003, p. 55.

37 James Lee, *Transcript of Evidence*, 23 June 2003, p. 55.

significant compromising between the DWFNs and the Pacific parties who effectively own the resource:

We have known there was going to be a preparatory conference process continuing the work towards establishing the commission and, along with a number of other parties, we wanted to see the direction which the operational aspects of the convention were going to take and see how others were going to react. Certainly Japan, who are not signatories, did not want to be part of the preparatory conference process for the first two meetings. They then realised that it was probably to their detriment that they did not participate, and they have subsequently re-engaged.<sup>38</sup>

7.40 Greenpeace submitted that: 'Australia should send a strong signal of support by ratifying the Convention prior to September 2003 when the default mechanisms for ratification come into force'.<sup>39</sup>

7.41 The two-path nature of the entry into force mechanism has enabled Australia to wait and observe the process of the preparatory conferences:

We never thought that there was any need to hurry into the ratification process, because the interest from the distant water fishing nations was such that they were treading lightly—they were concerned about what this might mean for them. I think they are becoming more and more comfortable as the process goes on, and I guess that is where other countries are coming from too—they are comfortable with the convention text, what it means, and the preparatory conference work that has gone on since then. Certainly that is Australia's position—from a fisheries agency aspect we are very comfortable with the progress that has been achieved.<sup>40</sup>

7.42 While entry into force seems likely, the Committee is concerned at the reluctance of DWFNs not expressing an interest in participating in the Commission through ratifying the Convention. In particular, the Committee remains unconvinced at this stage that major DWFNs such as Japan and South Korea have shown a substantial interest in ratification. However, the Committee recognises that the Commission

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38 James Lee, *Transcript of Evidence*, 23 June 2003, p. 65.

39 Greenpeace, *Submission 18*, p. 1.

40 James Lee, *Transcript of Evidence*, 23 June 2003, p. 66.

needs to operate on the basis of consensus and Australia's ratification without consensus having been achieved could result in Australia bearing costs under the Convention without any guarantee of the effectiveness of the Commission.

## Effectiveness of the Commission

### Participation of distant water fishing nations

7.43 The Committee believes that the Commission would be ineffective without the participation of all relevant parties and supports Ms Kerslake's comments:

You obviously want everybody fishing in the area to be a member, but ... to monitor and control all the vessels you obviously need those most active within the area to participate.<sup>41</sup>

7.44 It is a matter of considerable concern that no DWFN has ratified at the present time, with the United States the only DWFN to have signed the Convention.

7.45 The Committee was advised that although China was the deputy chair of the preparatory conference to the Convention, it was difficult to ascertain whether China would ratify in the near future as the Chinese were not allowed to travel to the most recent meeting in Fiji due to the Severe Acute Respiratory Syndrome (SARS) epidemic.<sup>42</sup>

### Obligations of non-parties

7.46 The Committee sought advice as to the effect of the convention obligations for non-signatory fishing nations. DFAT indicated that the effect of the convention on a particular party would depend on what other agreements the relevant party had signed, including the Fish Stocks Agreement:

The United Nations Fish Stocks Agreement does develop a scheme of regional fisheries management organisations and commits signatories to that agreement to create and participate in regional management organisations. There will

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41 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 58.

42 James Lee, *Transcript of Evidence*, 23 June 2003, p. 63.

be the relationship as provided in the treaty between members of the commission and another member of the commission and there will be a relationship between members of the commission and UN Fish Stocks Agreement signatories, who have certain obligations under that agreement. Then there will be the relationship between members of the commission and non-parties to any international instruments.<sup>43</sup>

- 7.47 In terms of securing the compliance of non-parties to the Convention, DFAT advised that while there may be some remedies against members of the Fish Stocks Agreement in terms of rights to arrest, board and inspect vessels on the high seas, these rights would be limited in relation to vessels of non-parties to the Fish Stocks Agreement:

If they are a member of the UN Fish Stocks Agreement, they are treated identically to members of the RFMO in certain situations. There is a lot that can be said about that. Unfortunately, if they are a non-party and if they are fishing on the high seas, there is not a lot you can do. If they are fishing within an EEZ, where most of the fish are, they are obviously in breach, and it is within that party or coastal state's sovereignty to act independently on that. Under UNCLOS [United Nations Convention on the Law of the Sea], the only right you have to arrest, board and inspect a vessel on the high seas is if its nationality is in dispute or it is not flying a flag.<sup>44</sup>

- 7.48 In particular, the Committee was advised that China was not a signatory to the Fish Stocks Agreement:

The Department of Agriculture, Fisheries and Forestry has, at this stage, been unable to ascertain whether or not China is in the process of ratifying the United Nations Fish Stocks Agreement. The Department is pursuing avenues to determine China's position with regard to ratification of the United Nations Fish Stocks Agreement and will advise the JSCOT [Joint Standing Committee on Treaties] once we have confirmation of that position.<sup>45</sup>

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43 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 62.

44 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 62.

45 Agriculture Fisheries Forestry Australia (AFFA), *Submission 27*, p. 2.

- 7.49 While China was cited by AFFA as an example, the Committee also notes that there are other DWFNs in this situation, including the European Community, Japan, Korea and China (all of whom have signed but not ratified the Fish Stocks Agreement as at 11 April 2003) and Taiwan. The United States, like Australia, has ratified the Fish Stocks Agreement.
- 7.50 DFAT advised that the difference would be in the high seas areas known as the 'doughnut holes':
- A large amount of the Pacific ... consists of multiple EEZs with just small amounts between them. Those people that are not signatories to the treaty will still be able to fish on the high seas. Parties to the convention, or members of the commission and other members of the commission, will have some sort of reciprocal boarding and inspection of one another's vessels on the high seas. However, under UNCLOS, the only right, if they are not a party to UN [United Nations] fish stocks or a party to this commission, is if you cannot determine the identity of that vessel in those small high-sea areas.<sup>46</sup>
- 7.51 The only other way to board would be 'if you seek the authority from the state flying the flag and they give you the authority, as the flag state of that vessel, to board the vessel for fisheries inspection purposes'.<sup>47</sup>

## **Systems for the monitoring, control and surveillance of vessels**

- 7.52 In relation to the application of systems for the monitoring, control and surveillance (MCS) to vessels in the Convention area, AFFA advised that:
- The commission recognises that there is already established within the region a vessel monitoring system operated by the Forum Fisheries Agency, that there are vessel registries and the like also operated by the Forum Fisheries Agency and that it would be appropriate for the commission to investigate the Forum Fisheries Agency as service providers for these particular services rather than developing them themselves at, one assumes, great cost and over a long time.<sup>48</sup>

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46 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

47 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

48 James Lee, *Transcript of Evidence*, 23 June 2003, pp. 58-59.

- 7.53 The Committee supports the utilisation of existing surveillance capacity, especially in light of advice from Greenpeace that an absence of surveillance capacity and resources of Pacific island states was ‘an impediment in the policing of EEZs and adjacent waters’.<sup>49</sup>
- 7.54 In relation to Article 26 of the Convention, the Committee sought advice on what Australia was doing to ensure that an agreement with regard to boarding and inspection of fishing vessels was reached within a two-year period.
- 7.55 AFFA advised that the preparatory conferences were looking at the issue boarding and inspection, vessel monitoring systems (VMS) and observer coverage through one of its working groups:

That preparatory conference process is to take us from the time the treaty was signed, to keep moving forward and to prepare the groundwork for setting up the commission... The first stage of negotiations on monitoring, control and surveillance is on the boarding and inspection scheme—that is, to begin the development of such a boarding and inspection scheme as referred to in article 26(1) and (3) about the right to board and inspect vessels on the high seas and to try to have, as closely as possible, the same sort of scheme operating with EEZs as on the high seas.<sup>50</sup>

- 7.56 The Committee was also advised that the definition of what would constitute a boarding party was still being considered:

The definition of what those parties will consist of is still being worked on at this stage—whether it will include any vessel Australia wishes to register, be it a customs vessel or a naval vessel or one of the other vessels operated by the Australian Fisheries Management Authority, and whether the Australian Fisheries Management Authority uses its officers as inspectors.<sup>51</sup>

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49 Greenpeace, *Submission 18*, p. 1.

50 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

51 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 64.

## Flags of convenience ships

7.57 Further to the issue of securing the compliance of non-parties, the Committee was concerned about the issue of jurisdiction and the flags of convenience ships.

7.58 The Committee understands that the Commission would have significant limitations in this regard. As a AFFA representative conceded, the Commission would not have the powers to force 'rogue states' in the fishing sense to participate; however, he did refer to the possibility of exercising bilateral pressure, as is done in the Indian Ocean Tuna Commission:

So work is done to get countries to either become members of the commission or at least to observe the rules and regulations and management arrangements that are put in place by the commission.<sup>52</sup>

7.59 The Committee is pleased by further developments in this area including work being undertaken by the Japanese and RFMOs worldwide in relation to the 'white listing' of vessels:

Rather than blacklisting a vessel so it just changes its name, you register the well-behaved vessels... The forum's fisheries agency itself in the Pacific area has a vessel register which lists vessels which adhere to the terms and conditions and what are known as the MTCs – minimum terms and conditions – for the Pacific area.<sup>53</sup>

7.60 DFAT also advised that there will be 'a conference early next year again looking at the worldwide issue of IUU [illegal, unreported and unregulated] fishing and the cooperation that can be undertaken between one regional organisation and another to try to eliminate these vessels altogether.'<sup>54</sup>

## Monitoring of stock levels

7.61 The Committee recognises that the monitoring the state of fish stocks will involve cooperation at the national level. This will require information about the available stocks, their distribution and their breeding habits. AFFA advised that in relation to the state of the scientific work being done:

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52 James Lee, *Transcript of Evidence*, 23 June 2003, p. 63.

53 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 69.

54 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 69.



There are already extensive scientific arrangements in place for the central and western Pacific fish stocks. There is an informal body under the auspices of the Secretariat of the Pacific Community, called the Standing Committee on Tuna and Billfish, constituted by the majority of Pacific Island countries and including all of the Forum Fisheries Agency members. In many cases their participation is subsidised by a range of distant water fishing nations and, of course, Australia and New Zealand. This body has been very effective. It has operated for 15 years—in fact the 16<sup>th</sup> meeting is taking place in Mooloolaba in July—and has been very successful in providing information on stock status and ensuring that cooperative research takes place throughout the central and western Pacific region.<sup>55</sup>

- 7.62 The Committee was advised of the work of the preparatory conference for the commission to establish scientific arrangements for the commission and for the central and western Pacific region in the long-term:

The design of the scientific processes is actually fairly complex and somewhat controversial due to the need to ensure that scientific advice is independently derived and objective but at the same time allows participation by national entities. One of the main issues under discussion now is the relative importance of input from national scientists as opposed to independent scientists operating on a purely objective basis. Other arrangements are well under way, and we hope to have a process in place similar to that currently existing under the Standing Committee on Tuna and Billfish.<sup>56</sup>

### **Integrating national programs**

- 7.63 AFFA advised that extensive cooperative research was already being carried out throughout the central and western Pacific region, predominantly under the auspices of the Secretariat of the Pacific Community and the Pelagic Fisheries Research Program.

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55 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 59.

56 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 59.

7.64 The Oceanic Fisheries Programme of the Secretariat of the Pacific Community, which has a wide-ranging membership, was established in 1980 'to provide member countries with the scientific information and advice necessary to rationally manage fisheries exploiting the region's resources of tuna, billfish and related species'. The ongoing expenses of the Programme are currently funded by extra budgetary contributions from Australia, France and New Zealand, and a contribution from the core budget of the Secretariat. AusAID also provides funds for specific projects.<sup>57</sup>

7.65 The Pelagic Fisheries Research Program (PFRP) was established in 1992 to provide scientific information on pelagic fisheries to the Western Pacific Regional Fishery Management Council, which manages fisheries in the United States EEZ, for use in development of fisheries management policies.<sup>58</sup> The Committee was advised that: 'Total funding available for projects can be in the order of up to one million US dollars annually'.<sup>59</sup> A list of the current and recently completed projects can be found on the PFRP website.<sup>60</sup>

7.66 The Committee was also advised that the Standing Committee on Tuna and Billfish was consolidating the national efforts into a single assessment:

A stock assessment of fishery research takes into account a wide range of information. This information is gathered from a range of independent national programs; nevertheless it can be consolidated effectively, and the standing committee body ensures that that consolidation does take place. I do not envisage at this time that there is any need for a higher level of funding to ensure effective research. The stock assessments for the central and western Pacific region are probably some of the best for tuna research currently carried out in the world.<sup>61</sup>

## Scientific basis for conservation measures

7.67 In principle, the Committee supports the establishment of a Commission to manage the fish stocks of the central and western

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57 AFFA, *Submission 27*, p. 10.

58 The term 'pelagic' generally refers to fish that live in the near-surface waters of the ocean, often far from shore. AFFA, *Submission 27*, p. 3.

59 AFFA, *Submission 27*, p. 3.

60 <http://imina.soest.hawaii.edu/PFRP/>

61 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 60.

Pacific Ocean. Nonetheless, the Committee is concerned about an apparent conflict between the principles that the Commission will follow in adopting conservation measures. On the one hand, Article 5(b) requires the adoption of conservation measures to be 'based on the best possible scientific evidence'. On the other hand, Article 5(c) imports the precautionary approach is not clearly defined in the Convention text. Article 5(c) appears to qualify Article 5(b), thereby clouding the term 'best possible scientific evidence' with an ill-defined precautionary approach.

- 7.68 The Committee notes that there are widely acknowledged issues of definitional uncertainty relating to the precautionary approach. Evidence from a AFFA representative reflects the Committee's concern:

Certainly, that is a complex issue. In terms of dealing with the precautionary approach in all areas of endeavour, it would certainly be a minefield... this wording in section (c) is somewhat ambiguous in that it provides an open range and may not necessarily allude to that precautionary approach activity relating to tuna alone.<sup>62</sup>

- 7.69 The Committee is not satisfied that this issue has been adequately resolved by this Convention. Article 5(c) of the Convention applies the precautionary approach '...in accordance with this Convention and all relevant internationally agreed standards and recommended practices and procedures'. The relevant precautionary reference point, which is contained in Annex II states that this is:

An estimated value derived from an agreed scientific procedure ... which corresponds to a state of the resource and/or of the fishery and can be used as a guide for fisheries management.<sup>63</sup>

- 7.70 The Committee has no objection to the concept of a precautionary approach, which shifts the emphasis of the management of fish stocks from exploitation to the recognition that knowledge of these stocks is still largely deficient. However, the Committee is concerned about the vagueness of the standard adopted in the Convention, particularly the meaning of the phrase 'in accordance with this convention and all relevant internationally agreed standards and recommended practices

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62 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, pp. 60-61.

63 *Transcript of Evidence*, 23 June 2003, p. 60.

and procedures'. The Committee has been advised of past efforts to clarify the practical aspects of the precautionary approach in relation to highly migratory fish stocks:

Specific conferences have taken place in relation to tuna resources and highly migratory fisheries resources which have dealt with the application of the precautionary approach to management of those resources. Hopefully, those would be the ones that would be applied.<sup>64</sup>

- 7.71 The Committee believes that it would be premature for Australia to hold the expectation that 'hopefully' the results of these conferences would be adopted by the Commission as definitive version of 'all relevant internationally agreed standards and recommended practices and procedures'. It is a matter of concern that this issue has been left largely unexplored in the treaty text.

## Impact of the Convention

### East coast tuna industry

- 7.72 Mr Lee told the Committee that membership of the Commission would place Australia in the 'best position to influence, push for and contribute to responsible fishing practices that would benefit the east coast fishing industry'.<sup>65</sup> The East Coast Tuna Boat Owners Association however raised concerns about the costs of implementing the Convention and whether any compensation measures will be put in place to help them cover their costs.<sup>66</sup>

- 7.73 AFFA advised that:

...as for the level of the costs, no dollar values have yet been spoken of, so it is very difficult to say that it will cost industry X or 10 times X. We just do not know. But from our reading of it, our understanding of the way the commission will pan out is that the costs will not be a significant impost in any way on the east coast tuna industry.<sup>67</sup>

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64 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 60.

65 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

66 James Lee, *Transcript of Evidence*, 23 June 2003, p. 69.

67 James Lee, *Transcript of Evidence*, 23 June 2003, pp. 69-70.

- 7.74 The Committee notes that the cost of implementation was raised as an issue in its previous report on the Fish Stocks Agreement by fishing industry representatives. On that occasion, their concerns related to the imposition of costs additional to existing domestic fishing compliance costs.<sup>68</sup>

## Recreational fishing

- 7.75 The Committee is aware of concerns that recreational fishing catches may be considered part of the Convention and sought information on the extent of this fishing. The Committee was advised by AFFA that:

There has recently been a national recreational fishery and Indigenous fisheries survey that seeks to determine levels of catch for a range of recreational species, including yellowfin tuna and striped marlin—which are important target species for the recreational fishers off the east coast. The catches are extremely low compared to those catches taken by the Australian commercial industry, and almost minuscule or microscopic as far as the western and central Pacific Ocean is concerned. Also, the majority of fish are caught and then released...<sup>69</sup>

## State Governments

- 7.76 The Committee was advised that there would be some impact on the State governments. The Tasmanian Government noted that the implementation of the plans would require State cooperation. The Victorian Government however commented that there was likely to be a limited impact on Victorian fisheries. The Queensland Government observed that ‘determining national allocations could be difficult but should not impede ratification process’.<sup>70</sup>

- 7.77 The Committee notes comments by the NSW Government that:

Given the potential impact on commercial, recreational, and fisheries conservation interests, however, NSW considers that implementation of the Convention by the Commonwealth

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68 JSCOT, *Report 28: Treaties Tabled on 12 October 1999*, p. 12.

69 Dr John Kalish, *Transcript of Evidence*, 23 June 2003, p. 68.

70 Attachment 2, tabled with the NIA and Treaty text, p. 1.

must include multi-lateral consultation on any proposed allocation mechanism for fish stocks.<sup>71</sup>

- 7.78 The Committee also understands that the NSW Government desires that there be consultation with States and Territories in relation to implementation of the Convention before the Convention enters into force.<sup>72</sup> The Committee supports these proposals for additional consultations to the extent that they will promote the implementation of the purposes of the Convention.
- 7.79 When comments were invited by the Government on 14 March 2003 regarding Australia's proposed ratification of the Convention only positive feedback supporting the treaty action was received.<sup>73</sup>

## Fishing entities

- 7.80 Taiwan is not a party to the Convention; it is treated as a 'fishing entity' involved in the work of the Commission, as per Annex I to the Convention.<sup>74</sup> DFAT advised that:

A fishing entity is an entity on the international plane other than a State which takes on international responsibility for the fishing vessels listed in its register. The participation of such entities in the work of regional fisheries conventions is recognised in paragraph 3 of Article 1 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.<sup>75</sup>

- 7.81 DFAT also informed the Committee that:

The negotiating process was obviously quite a difficult one, given the participation of both China and Chinese Taipei throughout. Several versions were developed during that MHLC [Multilateral High Level Conference] process. But the overriding principle here is the conservation and management of the fisheries resource. Taiwan is a major

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71 NSW Government, *Submission 17*, p. 2.

72 NSW Government, *Submission 17*, p. 2.

73 Attachment 2, tabled with the NIA and Treaty text, p. 2.

74 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 57.

75 DFAT, *Submission 23.2*, p. 1.

worldwide fishing nation and, insofar as working towards conservation and management, there is a requirement to recognise the need to involve Chinese Taipei in that form. The mechanism that was used, as mentioned, is annex I, which deals with fishing entities. Taiwan is not actually classed as a party to the treaty; it is a fishing entity.<sup>76</sup>

- 7.82 The Committee was concerned about possible involvement of private Taiwanese interests involvement in situations of illegal fishing, including funding these operations. In the Committee's view it is important to have Taiwan involved as part of this Convention for the purpose of monitoring to protect migratory fish stocks.
- 7.83 The Committee was also concerned that the definition of a 'fishing entity' might permit unintended bodies becoming a signatory entity.
- 7.84 DFAT reassured the Committee that: 'The formulation is written in such a way as to only provide for participation by Taiwan.'<sup>77</sup>

## Catch documentation

- 7.85 The Committee was interested in whether there had been any discussion in relation to certifying fish that are taken from the western Pacific and central Pacific as a means of tracking the sale of illegal fish.
- 7.86 The Committee was advised that this matter had not been raised because the species Australia is fishing in the convention area are not of significant value. Since they tend not to be sold as individual fish they are very difficult to track using a catch documentation scheme. However, in relation to highly valuable fish:

Regional fisheries management organisations are now implementing catch documentation schemes to keep tabs on significantly valuable fish resources. Certainly, as part of a scientific program, catches are recorded and data is collected on volumes. If it were seen that there was a need to introduce a catch documentation scheme for a particular species under the jurisdiction of this commission, then I am sure the

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76 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 57.

77 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, pp. 61-62.

commission would investigate that and implement such a catch documentation scheme.<sup>78</sup>

- 7.87 While tuna and billfish would come under the commission, the majority (1.2 million tonnes out of last year's total catch of 1.9 million tonnes) is skipjack tuna, which goes almost entirely into cans and provides 60 per cent of the world's canned tuna.<sup>79</sup> The Committee was advised that illegal fishing was not an issue with skipjack tuna, which had become almost uneconomic to fish:

Several years ago, the value per tonne was about \$US550 and it was almost impossible to break even under those circumstances. Certain measures by the industry have resulted in an increase in value to the order of \$US800 to \$1,000 per tonne. Nevertheless, that is not adequately lucrative to incite illegal, unregulated or unreported fishing. There is a significant fishery for yellowfin tuna of about 475,000 tonnes and for bigeye tuna of about 115,000 tonnes. These fish predominantly go to the sashimi markets in Japan and certainly there would be a potential for illegal fisheries to catch these animals.<sup>80</sup>

- 7.88 The Committee was also advised of a catch documentation scheme in place under the auspices of the Indian Ocean Tuna Commission in relation to bigeye tuna, which had been primarily driven by Japan to prevent overfishing, and that a similar documentation scheme would occur in the Pacific.<sup>81</sup>

## Subsistence fishing

- 7.89 The Committee was interested in what 'subsistence fishing' entailed under the Convention and what parameters were used in determining its meaning.
- 7.90 AFFA informed the Committee that the words 'subsistence, small-scale and artisanal' were not defined in the Convention text and that subsistence fishing had been defined on a case-by-case basis:

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78 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

79 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

80 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.

81 James Lee, *Transcript of Evidence*, 23 June 2003, p. 67.



In the absence of a formal definition of subsistence fishing it will be up to the Commission (created by the Convention) to decide what fishing activities are defined as subsistence, small-scale or artisanal and those that are defined as commercial.<sup>82</sup>

7.91 As a guide, the type of fishing will be defined by:

- The size, construction and method of powering a fishing vessel,
- The species of fish caught,
- The sophistication of the equipment used to catch fish,
- The volume and storage of the fish caught and the method by which it is disposed, and
- The geographical area in which the fishing is conducted.<sup>83</sup>

## Costs

7.92 AFFA advised that the cost to Australia of membership had yet to be resolved. DFAT also advised that while operational costs relating to monitoring, control and surveillance will be borne by industry, government will need to bear some of the costs of participation as there are direct benefits to Australia as a whole from being engaged:

Once fully established, it is possible that Australia's annual contribution will be upwards of \$130,000, but it could be greater in the initial years when the distant water fishing nations are still yet to join. It should be noted that many of the obligations imposed by the convention are already being met through the current activities of the Australian Fisheries Management Authority and the Department of Agriculture, Fisheries and Forestry.<sup>84</sup>

7.93 The Committee appreciates the reasons for costs being difficult to ascertain at this stage. The Committee is, however, concerned that while a budget contribution formula would have to be developed

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82 AFFA, *Submission 27*, p. 1.

83 AFFA, *Submission 27*, p. 1.

84 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

before the Convention was ratified,<sup>85</sup> it has received no evidence that suggests that this issue has been resolved.

- 7.94 Further, given the dearth of ratifications by DWFNs, the Committee is concerned that Australia would have to bear a much larger cost than the estimated \$130,000 per year. The Committee considers that Australia should seek a contribution from DWFNs to the operating costs of the Commission should the Convention come into force, as DWFNs stand to benefit from the conservation activities of the Commission and it would not be in the spirit of the obligation to cooperate for them not to contribute.

## Consultation

- 7.95 The Committee noted the process of consultation as set out in the Annex to the NIA and is satisfied that the extent of consultation has been adequate.

## Implementation

- 7.96 The Committee was advised that Australia's obligations under the convention would be implemented through the Fisheries Management Act:

Australia is in the process of implementing a management plan for the long-line sector of the east coast tuna and billfish fishery. Once implemented, the management plan will clearly state how the fishery is to be managed and will be the vehicle by which Australia's obligations under the convention would be applied.<sup>86</sup>

- 7.97 Implementation will require minor amendments to the Fisheries Management Act and the Committee was advised that discussions are in progress between DFAT, AFFA and AFMA on the preparation of that legislation.<sup>87</sup>

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85 Attachment 2, tabled with the NIA and Treaty text, p. 1.

86 James Lee, *Transcript of Evidence*, 23 June 2003, p. 53.

87 Emma Kerslake, *Transcript of Evidence*, 23 June 2003, p. 58.

- 7.98 The need for State cooperation in implementing of Australia's approach to regional fisheries management was noted by AFFA and the Tasmanian Government.<sup>88</sup>

## Concluding remarks and recommendations

- 7.99 The Committee supports the intentions of the convention in establishing the Commission. The Committee agrees that the ability to participate in the work of the Commission and to retain access for Australian fishing vessels to the Convention area are both valid reasons to support the ratification of the Convention. However, the Committee's inquiry has revealed a number of concerns in relation to the effectiveness of the Commission.
- 7.100 First, the Committee is concerned that the fact that there have been no ratifications by the DWFNs may undermine the work of the Commission. The Committee is particularly concerned by this because the cooperation and involvement of all affected nations is essential to the successful management of the fish stocks in the Convention Area. Nonetheless, the Committee's view on this point is that Australia should be one of the first thirteen ratifying nations so as to ensure that the Australian fishing industry is not denied access to the Convention Area.
- 7.101 Secondly, the precautionary approach has not been defined with sufficient clarity in the treaty text. The Committee believes that this could undermine the implementation of effective conservation measures by the Commission.
- 7.102 Thirdly, the Committee is concerned that a number of DWFNs have not yet signed or ratified the Fish Stocks Agreement, which is the framework agreement under which the present Convention is to operate. The Committee has been advised that this limits the Commission's ability to secure the compliance of the vessels of non-members. The Committee is concerned about the fact that Australian vessels would be subject to different obligations to the vessels of the DWFNs who had not ratified the Fish Stocks Agreement. If this state of affairs were to continue for a great length of time it would undermine the authority of the Commission. Therefore, the

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88 Attachment 2, tabled with the NIA and Treaty text, p. 1.

Committee urges the Government to encourage those countries that are yet to sign and/or ratify the Fish Stocks Agreement to do so as soon as practicable.

- 7.103 Fourthly, the Committee is concerned that Australia would bear a large proportion of the costs of running the Commission until the DWFNs join.
- 7.104 The Committee considers that while these four concerns are substantial, they do not outweigh Australia's interest in signing the Convention so as to ensure Australia's participation in the work of the Commission and continued access to the fish stocks of the western and central Pacific Ocean for the Australian fishing industry.
- 7.105 Despite recommending ratification, the Committee considers that a far greater contribution from DWFNs is required before the present state of 'cooperation' can be considered meaningful. This is because the entry into force of the Convention would mean that DWFNs would still have access to the Convention Area despite not having ratifying either the Fish Stocks Agreement or the Convention or making a commitment to providing a financial contribution to the work of the Commission.
- 7.106 The Committee therefore recommends that the Government encourage and support through the preparatory conferences the aim of ensuring that countries that are proposed as members of this body ratify the Fish Stocks Agreement.

### **Recommendation 9**

**The Committee supports the Convention on Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and recommends that binding treaty action be taken.**

### **Recommendation 10**

**The Committee recommends that in future international Treaty negotiations of this kind, Australia seek to give preference to more rigorous language of the kind contained in Article 5(b) 'best possible scientific evidence' in contrast to the ill defined terms of Article 5(c) 'precautionary approach' with the consequent definitional and commercial uncertainty that this ill defined term carries at the international level.**

### **Recommendation 11**

**The Committee recommends that Australia support and encourage through the preparatory conferences the aim of ensuring that countries that are proposed as members of this body ratify the Fish Stocks Agreement.**