**FISHERIES ACT AMENDMENT BILL 1988**

**Legislative Assembly, 9 November 1988, pages 1396-9**

Second reading

**The Hon. M.K. MAYES (Minister of Fisheries)** obtained leave and introduced a Bill for an Act to amend the Fisheries Act 1982. Read a first time.

The Hon. M.K. MAYES: I move: That this Bill be now read a second time.

I seek leave to have the second reading explanation inserted in Hansard without my reading it. Leave granted.

Explanation of Bill .

It provides for a number of amendments to the Fisheries Act 1982 to enable both the Government and the Department of Fisheries to more effectively meet the objectives of the Act as set out under section 20. Specifically, the amendments recognise the dynamic nature of fisheries management and the need to provide measures for the proper management and conservation of the State’s aquatic resources.

During 1982 when the Fisheries Act 1982 was in the process of being drafted, the penalties incorporated under the Act were increased substantially from those that applied under the Fisheries Act 1971. This was in recognition of the serious nature of fisheries offences, and the need for realistic penalties which would also serve as a deterrent to persons contemplating breaches of fisheries legislation. The need for appropriate penalties to act as a deterrent as well as reflect the current economic situation is fully supported by the fishing industry.

The major managed fisheries of South Australia are fully exploited. The stocks are limited and future yields from fisheries are dependent upon management measures which protect adult stocks and provide for adequate recruitment of juvenile fish. Controls placed on fishing effort such as gear restrictions, area and seasonal closures, legal minimum size and bag limits are management measures which provide for replenishment of stocks; and also for maximising the yield available from fish stocks.

Management of the fish stocks of South Australia involves biological, economic and social issues. Infringements of the management measures may result in substantial financial gain for the offender but have detrimental biological effects. In all cases, infringements result in some degradation of the fishing rights of other users of limited community owned resources. In addition, fisheries management can be difficult and expensive to police because of the large numbers of fishermen involved, and the often remote nature of fishing activities. What may appear to be relatively minor offences can have a substantial cumulative impact on the resource and how it is shared. Often, detection and successful prosecution of such offences are only achieved at great expense to the community. The penalties applied by the courts should demonstrate the gravity of fisheries offences and by providing a deterrent will assist in reducing the costs of fishing offences to the community.

Since 1982, the Adelaide CPI rate has risen in excess of 30 per cent. As a consequence, this has had the effect of eroding the deterrent value of current penalties for fisheries offences. In addition, a review of the penalty provisions contained in the Fisheries Act 1982 has shown that a number of the sections no longer reflect penalties commensurate with established increases in fish values. The penalties need to be increased to more realistic levels in line with increased fish values, and in keeping with the serious nature of fisheries offences.

The Bill proposes amendments to the penalties applicable to convictions for breaches of all sections of the Act. As an example, the more serious penalties are covered by sections 37, 41, 43 and 44 of the Act.

These sections deal with:

• contravention of licence conditions (37);

• engaging in a prescribed (illegal) class of fishing activity (41);

• fishing in contravention of the Act (43);

• the sale, purchase or possession of fish taken in contravention of the Act (44). The existing penalties are:

• first offence—$1 000;

• second offence—$2 500;

• subsequent offence—$5 000.

The proposal is to increase these penalties to:

• first offence—$2 000 (Division 7 fine);

• second offence—$4 000 (Division 6 fine);

•subsequent offence—$8 000 (Division 5 fine).

In the case of section 44, no graduated penalty is proposed. The penalty would be a Division 5 fine—$8 000. In addition, the Bill proposes an amendment to section 66 of the Act, which provides for the courts to impose an additional penalty where a person is convicted of an offence against the Act involving the taking of fish. The existing penalty is:

• five times the amount determined by the convicting court to be the wholesale value of the fish at the time at which they were taken; or

• ten thousand dollars; 9 November whichever is the lesser amount.

The proposal is to increase the $10 000 component to $30 000 to more adequately reflect the high value of catches, particularly in the abalone, prawn and rock lobster fisheries. Such increases would restore the deterrent value of penalties, which would in turn assist in the fisheries management process. I would make the point that the South Australian Fishing Industry Council and a number of other industry associations have urged the Government to increase penalties for offences under the Fisheries Act.

The Parliamentary Counsel is under instruction that where a substantial amendment is proposed to an Act of Parliament, the penalty clauses contained in that Act must be revised in accordance with the requirements of the Statutes Amendment and Repeal (Sentencing) Act 1987. Accordingly, all the monetary penalty amounts contained in the Fisheries Act 1982 have been reviewed, and changes made to bring penalty amounts into line with the levels of fines contained in the Statutes Amendment and Repeal (Sentencing) Act 1987.

The incidence of illegal taking and sale of fish, particularly abalone, from South Australian waters has dramatically increased over the past two years. In order to conteract these activities, fisheries officers have increased their surveillance efforts in an attempt to apprehend and prosecute offenders. In the case of the abalone fishery, such illegal activities are putting at risk a well managed, multi-million dollar industry. Offenders have a total disregard for the principles of responsible fisheries management.

Under the present legislation, section 44 of the Fisheries Act makes it an offence to sell, purchase or have possession of fish taken in contravention of the Act. The difficulty with this is that the Department of Fisheries must establish that the fish were in fact taken in contravention of the Act. In practice, this has become almost impossible when attempting to obtain convictions for the illegal taking of abalone because of the highly organised activities of the offenders. Their activities are all pre-planned so that any surveillance or attempted apprehension by fisheries officers is effectively foiled. Accordingly, the Bill proposes an amendment to section 44 of the Fisheries Act such that a person in possession of fish allegedly taken illegally must prove that the fish were not taken in contravention of the Act.

During 1987, the Attorney-General encouraged departments to consider the use of expiation procedures as a means of streamlining prosecutions. The Department of Fisheries has identified a number of offences prescribed under the Fisheries Act 1982 which may be resolved without necessitating court hearings.

Such offences include:

• failure to submit catch and effort returns;

• failure to mark a vessel with appropriate registration number; • use of unregistered gear;

• exceeding the number of permitted devices;

• exceeding bag limits;

• taking undersize fish.

It is proposed that the additional penalty provisions (i.e. five times the wholesale value of the fish) need not apply to those offences resolved by expiation.

With regard to seizure of fish taken illegally, it is proposed that where an expiation notice is issued, only those fish taken over the permitted bag limit or less than the legal minimum length will seized by the fisheries officer. Upon payment of the expiation notice, the seized fish will be forfeited to the Crown. The main advantages of having a fisheries offence expiation system would be:

• removal of the anxiety associated with attending court for relatively minor offences;

• reduction of delays in resolving minor prosecutions;

• reduction in time spent by fisheries officers processing minor briefs;

• reduction in demands on the Crown Solicitor’s Office prosecution staff;

• reduction in demands on the courts processing minor fisheries offences.

The Department of Fisheries would, of course, retain the option of pursuing court action for serious breaches of the fisheries legislation.

It should be noted that the fisheries expiation system will be in line with the provisions of the ‘Expiation of Offences Act 1987’, which outlines the principles of administering such a system. Accordingly, the Bill proposes the implementation of an expiation system for minor fisheries offences. The Department of Fisheries has a responsibility to protect the South Australian aquatic environment against the introduction of feral fish and exotic fish diseases.

Recently, there has been significant interest in the development of commercial aquaculture in this State, and a number of applications to establish marine and freshwater fish farms have been received by the department. Such undertakings are fully covered by the Fisheries Act 1982 as the definitions of ‘fish farming’ and ‘farm fish’ specifically refer to the activity of propogating or keeping fish for the purpose of trade or business.

However, as a result of this commercial development, a number of individuals have taken the opportunity to establish ‘fish farms’ for non-commercial purposes—e.g., food for the family. This type of operation does not come within the ambit of the Fisheries Act, and therefore the department cannot legally take steps to eliminate or control any outbreak of fish disease without the cooperation of the individual concerned.

The inherent risk in such a situation is that the owner could harbour diseased fish or contaminated water which may subsequently be transmitted into the State’s rivers or underground water system, which could then spread the disease further afield. This has the potential to affect other fish, possibly killing native or fish farm stocks elsewhere. In order to overcome this deficiency, an amendment to the definitions of ‘farm fish’ and ‘fish farming’ is warranted so that non-commercial fish farming comes within the scope of the Fisheries Act 1982. Therefore, the Bill proposes a redefinition of ‘fish farming’ and ‘farm fish’ so that the activity includes non-commercial as well as commercial operations.

It must be pointed out that in the case of private fish farms, that is, non-commercial, the Department of Fisheries is only seeking powers at this stage over those aspects that relate to the introduction of feral fish and exotic fish diseases into South Australia. On the subject of fish processing, the Fisheries Act 1982 requires commercial fishermen who process their own catch to be registered as fish processors. The current definition of processing covers activities other than scaling, gilling, gutting or chilling fish.

During discussions between the department and the then Australian Fishing Industry Council, SA branch, (now SAFIC), when the fish processor regulations were introduced in their present format in 1984, it was agreed by the department and industry that the definition of processing be expanded to include scaling, gilling, gutting, filleting, freezing, packing, reselling, chilling or any other activity preparing fish for sale; and that commercial licence holders, who process their own catch, be excluded from the requirement to be registered as a processor.

At present, fish processors who purchase only from licence holders who process their own catch, are not required to register and submit statistical returns regarding value of catches—which is the basis for production data and fee calculation. As more fishermen become registered as processors, the fewer other processors there are to provide the required information.

The current provisions for fish processors are complicated and have only been made to work through the use of ministerial exemptions. An amendment to the definitions of ‘fish processor’ and ‘processing’ in the Fisheries Act would have little or no effect on policy, but would remove anomalies and simplify procedures.

Accordingly, the Bill proposes a redefinition of the terms ‘fish processor’ and ‘processing’ to encompass the activities of scaling, gilling, gutting, filleting, freezing, packing, reselling, chilling or any other activity preparing fish for sale— and to exempt commercial licence holders (including authorised fish farmers), who process only their own catch (or product from the fish farm), from the requirement to be registered as a fish processor.

In providing the above explanation of proposed amendments to the Fisheries Act 1982 I would inform the House that both the South Australian Fishing Industry Council, representing the interests of commercial fishermen, and the South Australian Recreational Fishing Advisory Council, representing the interests of amateur fisherman, have been consulted and support the proposed major amendments to the Act.

While drafting the proposed Bill to amend the Fisheries Act, the Parliamentary Counsel has taken the opportunity to make minor procedural amendments to sections 3, 34 and 48 of the Act. These amendments do not change the intent of the legislation, they only clarify existing provisions, and are described in the clause by clause explanation attached. I commend the measures to the House.

Clause 1 is formal. Clause 2 provides for commencement on a date to be fixed by proclamation. Clause 3 repeals section 3 of the principal Act. The repealed section set out the way in which the principal Act was arranged. Sections of this kind are no longer used.

Clause 4 amends section 5 of the principal Act (the definition section). A new definition of ‘expiable offence’ is inserted as subsequent amendments through clause 12 provide for the expiation of offences. The definitions of ‘farm fish’ and ‘fish farming’ are amended extending those definitions to include fish that are kept for purposes other than for the purpose of trade or business, namely, for food or for the control or eradication of aquatic or benthic flora or fauna. The definition of ‘fish processor’ is amended to provide that any person who for the purpose of trade or business processes or purchases or obtains fish is a fish processor. It is intended that certain classes of persons (registered fishermen who process their own catch and fish shop proprietors) will be excluded by regulation from the obligation to be registered. The definition of ‘processing’ is amended extending the definition to include scaling, gilling, gutting or chilling which were formerly excluded from the definition.

Clause 5 amends section 28 of the principal Act by inserting a paragraph in subsection (9) and by making a consequential amendment to paragraph (d) of that subsection. The amendments are required to provide for the forfeiture of fish or other perishable things where the offence in relation to which the fish or things were seized is expiated. The amendments provide that, where an offence is expiated, fish or perishable things seized in relation to the offence will be forfeited (if they have not already been forfeited by order of the Minister under that section) and that, whether the fish or things have been forfeited by the Minister or by virtue of the expiation, no compensation may be recovered in respect of the fish or things seized and forfeited.

Clause 6 amends section 34 of the principal Act by amending subsection (2) and repealing subsection (3). The effect of the repealed subsection is preserved by the amendment to subsection (2) but the regulation-making power is broadened. At present, section 34 (2) makes it an offence to use a boat for commercial fishing unless the boat is registered. Subsection (3) provides that subsection (2) does not apply to boats of a prescribed class, thus the regulationmaking power is limited to prescribing classes of boats to which the subsection does not apply. The proposed amendments preserve the regulation-making power but do not restrict it to prescribing classes of boats. The power is extended so that regulations may prescribe a situation or a set of circumstances in which a boat may be used lawfully for commercial fishing without the boat being registered.

Clause 7 repeals section. 44 of the principal Act but replaces it with a new section that includes the substance of the repealed section with certain additions. Subsection (1) makes it an offence to sell or purchase fish that have not been taken by the holder of a fishery licence. Subsection (2) makes it an offence to sell, purchase or have the possession or control of fish taken in contravention of the Act or fish of a prescribed class. The class of fish likely to be prescribed for the purposes of subsection (2) are protected fish such as whales and dolphins. As regards fish taken in contravention of the Act the principal examples likely to be encountered are undersized fish or fish taken by an unlicensed person.

Subsection (3) provides a defence to a person charged with offences against subsection (1) or (2) if the person can prove that the fish (the subject of the charge) were obtained from a person whose ordinary business was that of selling fish, that the fish were obtained in the ordinary course of that business and that he or she did not know and had no reason to believe that the fish were fish that had not been taken pursuant to a licence, in contravention of the Act or were of a prescribed class.

Subsection (4) provides that, in relation to fish taken in contravention of the Act, regulations may prescribe a class of fish and a specified quantity of that class of fish. Where a person sells, purchases or has possession or control of more than the specified quantity of that class of fish and is not a licensed fisherman or registered fish processor the person will be found guilty of selling, purchasing or having possession or control (as the case may be) of that fish unless the person has the defence previously referred to or is able to prove that the fish were not taken in contravention of the Act. That is, persons who deal in large quantities of fish which have come into their possession otherwise than in the ordinary course of business will have the burden of proving that the fish were taken lawfully.

Clause 8 strikes out subsection (1) of section 48 of the principal Act and substitutes a new subsection (1) and makes a minor amendment to subsection (6). The amendment to subsection (1) makes it clear that the regulations or a permit that are contemplated by the subsection may permit persons to engage in a fishing activity in an aquatic reserve. The minor amendment to subsection (6) broadens the species of fish that may be excluded from the definition of ‘aquatic or benthic flora or fauna’ by regulations made pursuant to that subsection.

Clause 9 amends subsection (1) of section 54 of the principal Act and will enable regulations to be made as a result of which certain classes of person may act as a fish processor without being registered. This will enable regulations to be made that will allow licensed fishermen to process their own catch without being registered as fish processors. The clause amends also subsections (2), (3), (5) and (6) of section 54 by striking out the references to ‘unprocessed fish’. These further amendments are consequential upon the amendments made through clause 4 to the definitions of ‘fish processor’ and ‘processing’.

Clause 10 amends section 55 of the principal Act by striking out from paragraphs (b), (c) and (d) the references to ‘unprocessed fish’. These amendments are consequential upon the amendments made through clause 4 to the definitions o f‘fish processor’ and ‘processing’. Clause 11 amends subsection (10) of section 56 of the principal Act and is consequential upon the amendment made to section 44 through clause 7.

Clause 12 inserts a new Division in the principal Act that consists of sections 58a, 58b, 58c and 58d all of which relate to the expiation of offences. Section 58a contains definitions for the purpose of the Division. Section 58b provides for the issue of an expiation notice, the form of the notice, that it may relate to no more than three offences, that it may not be given to a person under sixteen years and that it may be issued only by a fisheries officer. A notice may be given personally or sent by post.

Section 58c provides that once an offence is expiated the person expiating cannot be prosecuted for the offence expiated but, where a notice relates to more than one offence and not all the offences are expiated, the alleged offender may be prosecuted for the offences that have not been expiated. The section provides also that expiation does not constitute an admission of guilt or of any civil liability and cannot be used as evidence to establish such guilt or liability.

Section 58d provides that the Minister may withdraw a notice where the Minister is of the opinion that the notice should not have been given or that the alleged offender should be prosecuted. A notice may be withdrawn even after expiation in which case the fee must be refunded but it cannot be withdrawn after 60 days have elapsed from the date of the notice. Withdrawal must be effected by written notice served personally or by post and, where withdrawal occurs after payment, the fact of payment is not admissible in proceedings against the alleged offender.

Clause 13 amends section 72 of the principal Act and enables regulations to be made to create expiable offences and expiation fees. Such fees may be variable depending upon the circumstances of the offence. The Schedule amends the penalties imposed by the principal Act and expresses them in the new form.

Mr S.J. BAKER secured the adjournment of the debate.