

principle and details of any means of access identified or established should be reflected in the ES to the instrument.

The committee requests the minister's advice as to:

- whether the requirement in section 10 is that noise certificates contain information required by the Annex as in force at the date of commencement of the instrument, consistent with the definition in section 4 and with the requirements of the *Legislation Act 2003*; and
- how the Annex is or may be made readily and freely available to persons interested in or affected by the instrument, including members of the public, freely and without cost.

The committee also requests that the instrument and/or its explanatory statement be amended to include this information.

<b>Instrument</b>	<b>Amendment of List of Exempt Native Specimens – NSW Estuary Prawn Trawl, NSW Ocean Trawl and NT Demersal Fisheries, April 2018 [F2018L00575]</b>
<b>Purpose</b>	Amends the List of Exempt Native Specimens by deleting specimens taken from the New South Wales Estuary Prawn Trawl and Prawn Trawl Fisheries, and the Northern Territory Demersal Fishery; and including specimens taken from those same three fisheries, subject to certain conditions
<b>Authorising legislation</b>	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
<b>Portfolio</b>	Environment and Energy
<b>Disallowance</b>	15 sitting days after tabling (tabled Senate 8 May 2018) Notice of motion to disallow must be given by 20 August 2018 <sup>11</sup>

### Legislative authority: power to make instrument<sup>12</sup>

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising

11 In the event of any change to the Senate's sitting days, the last day for the notice would change accordingly.

12 Scrutiny principle: Senate Standing Order 23(3)(a).

legislation. This may include any limitations or conditions on the power to make the instrument set out in the authorising legislation.

The instrument was made under paragraph 303DC(1)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). It amends the list of exempt native specimens established under section 303DB of the EPBC Act (exempt specimens list) by including and deleting items from the list.

Subsection 303DC(1A) of the EPBC Act provides that, in deciding whether to amend the exempt specimens list to include a specimen derived from a commercial fishery, the minister must rely primarily on the outcomes of any assessment in relation to the fishery carried out for the purposes of Division 1 or 2 of Part 10 of the EPBC Act. The requirement in subsection 303DC(1A) appears to be a precondition to the making of an instrument under subsection 303DC(1) to amend the exempt specimens list by including a specimen derived from a commercial fishery.

Schedule 2 to the instrument amends the exempt specimens list by including specimens derived from fish or invertebrates taken in the New South Wales (NSW) Estuary Prawn Trawl, NSW Ocean Trawl and Northern Territory (NT) Demersal Fisheries. The committee's research indicates that these fisheries may be commercial fisheries of the type contemplated by subsection 303DC(1A) of the EPBC Act.<sup>13</sup> If so, it would appear that the requirement in that subsection applies to the making of the instrument. Neither the instrument nor its explanatory statement (ES) specifies whether the specimens are derived from a commercial fishery.

The ES to the instrument does state that:

In determining to include the list of exempt native specimens regard was had to the Australian Government's 'Guidelines for the Ecologically Sustainable Management of Fisheries – 2<sup>nd</sup> Edition'. Those Guidelines establish the criteria for assessment of the ecological sustainability of the relevant fishery's management arrangements.

However, it is unclear to the committee whether the guidelines referred to in the ES constitute the outcomes of an assessment in relation to the fisheries mentioned in Schedule 2. Moreover, neither the instrument nor the ES provides any further information in relation to whether an assessment was made for the purposes of

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13 For example, the NSW Department of Primary Industries lists the NSW Estuary Prawn Trawl and Ocean Trawl Fisheries under the heading of 'commercial fishing'. See <https://www.dpi.nsw.gov.au/fishing/commercial/fisheries>. Similarly, the NT Department of Primary Industry and Resources lists the NT Demersal Fishery under the heading of 'commercial fisheries.' See <https://nt.gov.au/marine/commercial-fishing>.

Division 1 or 2 of Part 10 of the Act,<sup>14</sup> and if so, whether it was primarily relied on by the minister in adding the specimens listed in Schedule 2 to the list. It is therefore unclear whether the requirements in subsection 303DC(1A) of the EPBC Act applied and were satisfied in this instance.

**The committee requests the minister's advice as to:**

- **whether the specimens included in the exempt specimens list by the instrument were derived from a 'commercial fishery' within the meaning of subsection 303DC(1A) of the *Environment Protection and Biodiversity Conservation Act 1999*;**
- **if so, whether an assessment was made for the purposes of Division 1 or 2 of Part 10 of the Act in relation to the fisheries from which the specimens listed in Schedule 2 to the instrument were derived; and**
- **if so, whether the minister relied primarily on the outcomes of such an assessment when deciding whether to amend the list of exempt native specimens to include these specimens.**

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14 While Division 1 of Part 10 of the EPBC Act appears to provide some ministerial discretion in relation to certain assessments, Division 2 requires the Australian Fisheries Management Authority (AFMA), prior to determining a management plan for a fishery, to make an agreement with the minister for an assessment of the impacts of actions under the plan on matters protected under Part 3 of the EPBC Act. Similar requirements apply where AFMA proposes to determine that a management plan is not required for a fishery. It therefore appears that assessments in relation to fisheries (as contemplated by subsection 303DC(1A)) may be mandatory in certain circumstances.