

# Administrative Sanctions for Commercial and Charter Fishing Operations

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## Policy Statement:

The Department is committed to the proper and consistent application of administrative sanctions set out in the *Fisheries Management Act 1994* (the FM Act) and its subordinate legislation.

This policy is designed to promote consistency in the administration of commercial and charter fishing operations, by identifying when suspension or cancellation of a fishing authority (administrative sanctions) is deemed necessary to deliver on departmental responsibilities as administrator of the FM Act. In particular, administrative sanctions may be considered where serious offences, such as assault on fisheries officials, demonstrate that the licence holder does not have the capacity to successfully engage in commercial fishing operations.

## Scope:

This policy, and the procedures made under it, apply to departmental staff, with appropriate delegations, considering whether to impose administrative sanctions on commercial fishing and charter fishing authority holders.

Administrative sanctions for failure to pay relevant fees are outside the scope of this policy and are addressed in a separate policy – Debt Recovery for the NSW Commercial and Charter Fishing Industries.

Certain decisions relevant to fishing authorities are prescribed as reviewable decisions to be heard before the NSW Civil and Administrative Decisions Tribunal (NCAT). The *Administrative Decisions Review Act 1997* (NSW) is appropriately recognised in this policy and associated procedures.

## Requirements:

### General requirements

1. Decision making and post-decision actions must comply with the law and have regard to principles related to natural justice and procedural fairness, including due process and providing an opportunity for a fair hearing, and to good decision making. That includes:
  - a. the FM Act must authorise the making of the decision, and the decision must be consistent with the FM Act as a whole,

- b. the decision must be made by the person who is named in the FM Act as the decision-maker, or their delegate,
- c. the decision must be made for a purpose that is consistent with the objects of the FM Act,
- d. the decision-maker must consider any mandatory matters prescribed by the FM Act, not consider any matters the FM Act says must not be considered,
- e. the decision-maker must consider any other relevant considerations and does not consider irrelevant considerations.
- f. the decision-maker may consider other factors, if permitted by the FM Act,
- g. the decision must be supported by evidence,
- h. the decision must not be unreasonable, that is, it is not “illogical and irrational”<sup>1</sup> and it does not lack an “evident and intelligible justification”<sup>2</sup>.
- i. the decision-making process affords the person “procedural fairness”: that is, the person affected is given notice of the proposed decision and the evidence to be relied upon and has an opportunity to be heard, and the decision-maker is not biased,
- j. the decision is made within any timeframes specified in legislation.

*Triggers for considering administrative sanctions – commercial fishing licences*

2. The decision-maker must consider whether it is appropriate for them to exercise their powers to refuse, suspend, cancel or not renew a commercial fishing licence if:
  - a. the licence holder is convicted of an offence under the FM Act or regulations, including offences relating to an assault, threat, obstruction and abuse of a fisheries officer, or contravening a condition of the licence, or an endorsement or section 37 approval,
  - b. the licence holder is convicted of an offence under the *Marine Estate Management Act 2014*,
  - c. the decision-maker becomes aware the licence holder is convicted of a fisheries offence under the fishing legislation of another Australian jurisdiction or New Zealand,
  - d. the decision-maker becomes aware that the licence holder is convicted of an offence under the *Crimes Act 1900* relating to theft of fish, fishing gear or a boat, or intentional damage to fishing gear or a boat, or assault on a fisheries official,
  - e. the decision-maker is aware that the licence holder has been required to forfeit any shares in a share management fishery.
  - f. the decision-maker believes that the person has made a statement in connection with the application that is false or misleading in a material provision.
3. In the case of renewal of a commercial fishing licence, if a decision has previously been made to issue, or to not cancel, a licence despite the existence of factors listed, a new determination is not required unless there are significant new factors which have arisen since the licence was last issued that may be considered.

*Triggers for considering administrative sanctions – charter boat licences*

4. The decision-maker must consider whether it is appropriate for them to exercise their powers to suspend, cancel or not renew a charter fishing licence if:
  - a. the licence holder is convicted of an offence under the FM Act or regulations, including offences relating to an assault, threat, obstruction and abuse of a fisheries officer or contravention of a condition of their charter fishing licence, or

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<sup>1</sup> *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; 289 FCR 21; 397 ALR 1.

<sup>2</sup> *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

- b. the decision-maker becomes aware that the licence holder is convicted of an offence under the *Crimes Act 1900* relating to theft of fish, fishing gear or a boat, or intentional damage to fishing gear or a boat, or assault on a fisheries official, or
- c. the applicant has previously held a licence that has been suspended or cancelled by the Minister.

*Matters to consider when determining whether to issue a warning letter or proceed with a show cause process*

5. The decision-maker must conduct an initial review of the circumstances and consider relevant evidence the decision-maker has, including on:
  - a. the nature, seriousness and frequency of the offences for which the licence holder has been convicted,
  - b. the nature, seriousness and frequency of any complaints made against the licence holder,
  - c. the frequency and number of penalty notices issued to the licence holder,
  - d. the likelihood that the person will reoffend, be the subject of further complaints or commit further offences.
  - e. the health and wellbeing of staff that may be affected by the licence holder's offences and or behaviour.

*Warning letters following conviction for offences*

6. If a fishing authority holder is convicted of a fisheries offence, but the decision-maker decides that administrative sanctions will not be imposed, the decision-maker may send a warning letter to the fishing authority holder.
7. The warning letter will inform the authority holder that if they are convicted of a further offence in the future, the previous offence may also be considered, in accordance with the *Criminal Records Act 1991*, when considering imposing sanctions under this policy.

*Show cause process*

8. Decision-makers must allow those affected by decisions to be heard through a 'show cause' process.
9. In the 'show cause' process, the authority holder should be:
  - a. advised of the nature of the proposed administrative sanction, including the potential duration of any proposed suspension, and
  - b. advised of the proposed grounds for the administrative sanctions (including the legislative power and the evidence relied upon by the Department), and
  - c. invited to make a submission to the decision-maker about the proposed administrative sanctions before a specified deadline.

*Considerations*

10. Decisions must be impartial and unbiased.
11. Any decision is to be made only after consideration of the relevant circumstances, including:
  - a. the nature, seriousness and frequency of the offences for which the licence holder has been convicted,
  - b. the health and wellbeing of staff that may be affected by licence holder offences under section 247 FM Act and or behaviour,
  - c. the nature, seriousness and frequency of any complaints made against the licence holder,
  - d. the maximum penalty for the offence/s that may be imposed by the court and the relevant transcripts of judgements made in a court,
  - e. the frequency and number of penalty notices issued to the licence holder,

- f. likelihood that the person will reoffend, be the subject of further complaints or commit further offences,
  - g. the person's reputation in the community,
  - h. impact of sanctions on the business of the licensee, on employees, and on any communities who depend on their income,
  - i. the industry's view of the offences (ie. does industry consider this type of offending "most serious")<sup>3</sup>
  - j. the objects of the FM Act,
  - k. the need to maintain public confidence in the fishing industry.<sup>4</sup>
12. If consideration is given to a record of offences relating to commercial fishing operations under the law of the Commonwealth, another State, a Territory or New Zealand, the offences will be considered in the same way as offences under NSW legislation.
13. The decision-maker may seek advice from industry representatives regarding the industry's views on the seriousness of relevant types of offending.

#### *Sanctions*

14. Before a sanction is applied the decision maker must be satisfied that:
- a. the action is consistent with the objects of the FM Act, including to "conserve, develop and share the fishery resources of the State for the benefit of present and future generations,"
  - b. the decision is supported and justified by the available evidence, including any evidence provided by the authority holder during the show cause process,
  - c. the decision is reasonable, and is not unreasonable (in the sense that it is not illogical or irrational),
  - d. the Department is fulfilling its obligation to provide a safe work environment for departmental staff.
15. Following the show cause process, the person will be notified in writing of the outcome and any action that will take place. The notification must also contain information about the person's right to appeal the decision. and to request a "statement of reasons" for the decision.
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#### **Roles and responsibilities:**

- Legal Section: notice of convictions relevant to the application of administrative sanctions.
  - Commercial Fisheries Program Leader - Commercial Fisheries Customer Services: approve initial assessment and relevant documents.
  - Deputy Director General, DPI Fisheries: Decision-maker.
  - Director General DPI: Decision-maker during the internal review process.
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#### **Delegations:**

- Refer to current delegations made under the FM Act.
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#### **Definitions:**

- *Administrative sanction*: action including:

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<sup>3</sup> *Moyce v Minister administering the FM Act* [2002] NSWADT 62.

<sup>4</sup> *Combat Sport Authority of NSW v Fisher* [2022] NSWCATAP 387.

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- Refusal, cancellation, or suspension of a commercial fishing licence under section 104(3) and 104(4)(e) of the FM Act and clauses 110, 112(3) and 113 of *Fisheries Management (General) Regulation 2019* (FM General Regulation).
  - Cancellation, or suspension of an endorsement in a share management fishery under section 68(7) of the FM Act and clause 8 of the *Fisheries Management (Supporting Plan) Regulation 2006*.
  - Cancellation, or suspension of an endorsement in a restricted fishery under clauses 113, 149 and 163 of the FM General Regulation.
  - Imposition of conditions on a commercial fishing licence under section 104(4)(a) of the FM Act.
  - Cancellation or suspension of a charter fishing licence under section 127CB(5)(d) of the FM Act and clause 213 of the FM General Regulation.
  - ***Fishing authority***: any licence, permit, determination certificate, certificate of registration or other authority relating to fishing activities or receiving fish issued or given under the FM Act.
  - ***Fisheries offence***:
    - An offence against the FM Act or regulations made under that Act.
    - An offence against the *Marine Estate Management Act 2014* or the regulations made under that Act.
    - An offence relating to assault (or other offence against the person) of a fisheries official under the *Crimes Act 1900*, or,
    - An offence relating to the theft of fish, fishing gear or a boat or intentional damage to fishing gear or a boat, under the *Crimes Act 1900*.
  - ***Repeat offender***: as defined in section 282B of the FM Act.
  - ***Serious fisheries offence***: as defined in section 282H of the FM Act.
  - ***Reviewable decision***: a decision that is reviewable by NCAT under section 126 and 127F of the FM Act.
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#### Legislation:

- *Administrative Decisions Review Act 1997*
  - *Fisheries Management Act 1994*
  - *Fisheries Management (General) Regulation 2019*
  - *Fisheries Management (Supporting Plan) Regulation 2006*
  - *Fisheries Management (Abalone Share Management Plan) Regulation 2000*
  - *Fisheries Management (Lobster Share Management Plan) Regulation 2000*
  - *Fisheries Management (Estuary General Share Management Plan) Regulation 2006*
  - *Fisheries Management (Estuary Prawn Trawl Share Management Plan) Regulation 2006*
  - *Fisheries Management (Ocean Hauling Share Management Plan) Regulation 2006*
  - *Fisheries Management (Ocean Trap and Line Share Management Plan) Regulation 2006*
  - *Fisheries Management (Ocean Trawl Share Management Plan) Regulation 2006*
  - *Marine Estate Management Act 2014*
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## Related policies and documents:

- Debt Recovery for the NSW Commercial and Charter Fishing Industries.
  - NSW Commercial Fisheries Administration Guide 2023.
  - Good Conduct and Administrative Practice - Guidelines for state and local government (Third Edition) – NSW Ombudsman 2017.
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## Legislative sources of power

### *Refusal to renew a commercial fishing licence (cl 112, FM General Regulation)*

- (3) The Minister may refuse to renew the licence if—
- (a) the applicant has been convicted of an offence under the Act or the regulations or an offence relating to commercial fishing operations under the law of the Commonwealth, another State, a Territory or New Zealand, or
  - (b) the applicant has been convicted of an offence relating to the theft of fish, fishing gear or a boat or intentional damage to fishing gear or a boat, or
  - (c) the applicant has been convicted of an offence relating to an assault on a fisheries official, or
  - (d) the applicant has, in the opinion of the Minister, contravened a condition of the licence or of an endorsement on that licence or of an approval granted under section 37 of the Act, or
  - (e) ..., or
  - (f) the applicant has made a statement in connection with the application for renewal of the licence that is, in the opinion of the Minister, false or misleading in a material particular, or
  - (g) the applicant has been convicted of an offence under the [Marine Estate Management Act 2014](#) or the regulations made under that Act, or
  - (h) the applicant has been required to forfeit any shares in a share management fishery under the Act, or
  - (i) the applicant is not authorised, by or under section 103 (2) of the Act, to hold a commercial fishing licence, or
  - (j) ...

### *Suspension or cancellation of a commercial fishing licence (cl 113, FM General Regulation)*

- For the purposes of section 104 (4) (e) of the Act, the Minister may cancel or suspend a commercial fishing licence if—
- (a) the holder of the licence has been convicted of an offence under the Act or the regulations or an offence relating to commercial fishing operations under the law of the Commonwealth, another State, a Territory or New Zealand, or
  - (b) the holder of the licence has been convicted of an offence relating to the theft of fish, fishing gear or a boat or intentional damage to fishing gear or a boat, or
  - (c) the holder of the licence has been convicted of an offence relating to an assault on a fisheries official, or
  - (d) the holder of the licence has, in the opinion of the Minister, contravened a condition of the licence or of an endorsement on that licence or of an approval granted under section 37 of the Act, or
  - (e) ...
  - (f) the holder of the licence made a statement in connection with the holder's application for the issue or renewal of the licence that is, in the opinion of the Minister, false or misleading in a material particular, or
  - (g) the holder of the licence is not authorised, by or under section 103 (2) of the Act, to hold a commercial fishing licence, or
  - (h) ...
  - (i) the holder of the licence has been convicted of an offence under the [Marine Estate Management Act 2014](#) or the regulations made under that Act.

### *Refusal to re-issue a charter fishing licence (cl 208, 209, FM General Regulation)*

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The Minister is authorised to refuse an application for a licence if —

- (a) the applicant has been convicted of an offence —
  - (i) under the Act or the regulations, or
  - (ii) relating to commercial or recreational fishing under a law of the Commonwealth, another State or Territory or New Zealand, or
  - (iii) relating to the theft of fish, fishing gear or a boat or intentional damage to fishing gear or a boat, or
  - (iv) relating to an assault on a fisheries official, or
- (b) the applicant has previously held a licence that has been suspended or cancelled by the Minister, or
- (c) the applicant is not the owner of a charter fishing business, or
- (d) approving the application would result in more than 1 licence being held in connection with a recognised charter fishing business.

*Cancellation or suspension of a commercial fishing licence as an administrative sanction (cl 213, FM General Regulation)*

(1) For the Act, section 127CB(5)(d), the Minister may cancel or suspend a licence if —

- (a) the holder of the licence ceases to be eligible for the licence under clause 211, or
- (b) the holder of the licence is convicted of an offence —
  - (i) under the Act or the regulations, or
  - (ii) relating to commercial or recreational fishing under a law of the Commonwealth, another State or Territory or New Zealand, or
  - (iii) relating to the theft of fish, fishing gear or a boat or intentional damage to fishing gear or a boat, or
- (c) the holder of the licence is convicted of an offence relating to an assault on a fisheries official, or
- (d) the Minister is satisfied that the holder of the licence has contravened a condition of the licence, or
- (e) ...
- (f) the licence is no longer held in connection with a recognised charter fishing business, or
- (g) the licence no longer authorises a declared charter fishing activity.

(2) The Minister may also cancel or suspend a non-transferable licence held by 1 or more individuals if 1 or more of the individuals becomes bankrupt.

(3) The Minister may also cancel or suspend a non-transferable licence held by a corporation if —

- (a) a person has acquired or disposed of a controlling interest in the corporation, or
- (b) the corporation is the subject of a winding up order, or
- (c) a controller or administrator has been appointed for the corporation.