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Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005

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Law and Bills Digest Section

Contents

Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005

Date Introduced: 17 February 2005

House: House of Representatives

Portfolio: Fisheries, Forestry and Conservation

Commencement: The Act itself commences on Royal Assent. The various operational provisions may commence at different times, but no later than six months after Royal Assent.

Purpose

The major purpose of this Bill is to amend the *Fisheries Management Act 1991* and *Torres Strait Fisheries Act 1984* to provide for a law enforcement and detention regime for suspected illegal foreign fishers consistent with the *Migration Act 1958*.

Background

The *Fisheries Management Act 1991* (FMA) is the main piece of Commonwealth legislation regulating fishing within the Australian Fisheries Zone (AFZ). With some exceptions, the outer limits of AFZ are the same as Australia's Exclusive Economic Zone (EEZ).

The *Torres Strait Fisheries Act 1984* (TSFA) gives effect to Australia's fisheries obligations under the 1978 Torres Strait Treaty. Amongst other matters, the Treaty establishes what is termed the protected zone which encompasses both the waters of Papua New Guinea (PNG) and Australia (ie the AFZ). This zone is intended to protect the traditional way of life and livelihood of traditional inhabitants, including fishing and movement across the PNG / Australian maritime boundary, as well as giving protection to flora and fauna. The Treaty also provides for cooperative fisheries management arrangements in and around the zone. Officers appointed under FMA do have some jurisdiction in the protected zone, but the TSFA creates its own law enforcement regime, including fisheries offences.

Under a 1974 agreement with Indonesia, Australia allows limited access by Indonesian fishers to some areas of the AFZ that have traditionally been fished by them. Species fished under such arrangements include trepang, trochus, abalone and sponges. However, according the Minister's second reading speech,[1] an increasing number of foreign fishing vessels have been apprehended in the northern AFZ for suspected illegal fishing activities,

and there has been a growth in illegal foreign fishing activity east towards Torres Strait and around the south-west coast of Western Australia.. A total of 299 vessels have been apprehended in the northern AFZ over the last two years, all of which originated from Indonesia.[2] The vast majority of these target shark species for their high-value fins. For example, on 3 March 2005, a foreign fishing vessel was apprehended with 176 shark fins on board. On a number of occasions, vessels have been apprehended with large freezer storage facilities on board. These vessels often target large quantities of reef fish species. Three of these vessels were apprehended on 26 February 2005 with a total of 4000 kilograms of fish on board.[3] The increasing problems in the northern AFZ has been in spite of the Government intensifying its efforts to stop the flow of illegal fishing vessels from Indonesia through various initiatives under the Australia-Indonesia Working Group on Marine Affairs and Fisheries.

The FMA contains substantial law enforcement powers to combat illegal foreign fishing. Where a boat is intercepted in the AFZ on suspicion of an offence, the boat is usually taken back to the mainland for investigation purposes. The crew of the boat are automatically given enforcement visas under the *Migration Act 1958* (Migration Act)[4] which allows them into the Australian migration zone. Detention of the crew is generally on their own boats at Broome, Darwin, Gove or Horn Island, except where their boats are unseaworthy, during periods of extreme weather or if fishers require medical attention. As at 2 March 2005, there were 58 suspected illegal foreign fishers under investigation for offences, 32 awaiting legal process and 28 fishers awaiting removal. Of the 28 fishers awaiting removal, 6 have medical issues and as such are unfit to travel at the moment. Travel documents are currently being organised for the removal of the remaining 22 fishers either by vessel or by commercial flight over the next few days.[5]

There has been criticism over the years about the conditions of detention in some cases, including a 1998 report by the Commonwealth Ombudsman[6] and more recently by a Northern Territory coroner's investigation of a death in 2003 of a detainee aboard a vessel in Darwin Harbour.[7] In 2004, the government allocated more funds to speed the processing of crews allegedly involved in illegal foreign fishing.[8] The Government has also decided to upgrade a Department of Immigration and Multicultural Affairs 'contingency' facility at Berrimah near Darwin to turn it into the main detention facility for these crews.[9]

If Commonwealth authorities so decide, crew may prosecuted under the FMA or TSFA and fined if found guilty. Because of restrictions under the article 73(3) of the United Nations Law of the Sea Convention (UNCLOS), no prison terms apply for the illegal foreign fishing offences, although in practice a person could be imprisoned for the non-payment of a fine. If a crew member is found guilty, their enforcement visa is cancelled and they become unlawful non-citizens. They are then deported by the Department of Immigration and Multicultural Affairs under the Migration Act.

Overall, the Bill incorporates new powers and functions into the FMA and the TSFA, mainly based directly on existing provisions in the Migration Act. This will enable law

enforcement officers and others assisting them to carry out a greater range of 'processing' functions (searches, identity checks etc) whilst persons are under fisheries detention.

Main Provisions

Schedule 1 – Fisheries Amendments

Existing section 84 of the FMA sets out the powers of 'officers'. In addition to fisheries officers appointed under the FMA, these include AFP or State / Territory police, Defence Force (ADF) members, and Customs officers. Included in section 84 powers is the ability to seize a boat reasonably believed to be have been used in contravention of the FMA and require the ship's master to take the boat to a nominated place for the purposes of further investigation. Section 42 of the TSFA contains similar powers.[10] In practical terms, the exercise of such powers means that the liberty of the master and crew is likewise restrained.

The legality of restraining liberty via exercising control over a ship was a key issue in the Commonwealth's actions in forcibly taking control of the *MV Tampa* in 2001. The Federal Court ruled at first instance such restraint was unlawful, although that was overturned within a week on appeal.[11] Within days of these cases, the Parliament passed the *Border Protection (Validation and Enforcement Powers) Act 2001*.[12] This Act provided that any restraint of liberty resulting from the detention of a ship or aircraft under specific provisions of the Customs Act or Migration Act was 'not unlawful' and that no criminal or civil action regarding the restraint could be mounted against Commonwealth authorities or persons involved. However, the relevant provision of the *Border Protection (Validation and Enforcement Powers) Act 2001* also provided that the High Court retained its original jurisdiction under section 75 of the Constitution. Amongst other matters, section 75 states that the High Court has 'original jurisdiction' (i.e. the authority to hear cases) in all matters:

> *(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party,…*
>
> *(v) in which a writ of Mandamus* [directing that an officer do a certain action] *or prohibition* [preventing an officer from doing a certain action] *or an injunction* [halting a current or future action for a period of time] *is sought against an officer of the Commonwealth.*

Section 75 ensures that the legality of actions by the Commonwealth and its officers can be tested in the High Court. As Chief Justice Gleeson said in *Plaintiff S157*, section 75(v) 'secures a basic element of the rule of law'.[13] His fellow judges agreed, saying that this provision:

> is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them…In the end…this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.[14]

Items 1-2 insert new provisions equivalent to the *Border Protection (Validation and Enforcement Powers) Act 2001* discussed above into the FMA and TSFA respectively. The intention is to confirm the Commonwealth's power to lawfully restrain liberty to fisheries enforcement, rather than just to migration and customs enforcement as is the case now. The effect of retaining the section 75 original jurisdiction is that if an officer was not entitled to seize and direct a boat into port (for example, if there were insufficient grounds to say there could have been a reasonable belief that the boat was contravening the FMA), the High Court could hear a case against the Commonwealth.

Items 3-11 delete various sections of the FMA as they become redundant with the new provisions included in **item 13.**

Item 12 inserts **new section 105Q** into the FMA which states that **new Schedule 1A** of the FMA 'has effect' – that is, becomes an operative part of the FMA. **Item 13** inserts the **new Schedule 1A**. This, along with a similar Schedule inserted into the TSFA by **item 20**, contains the majority of the Bill's provisions. In some cases, the various powers and authorisations contained in **item 13** are already contained in various parts of the FMA (but are due to be repealed by **items 3-11**). In other cases, such as the power to conduct strip searches and personal identification tests, these powers are currently contained in the Migration Act but not in the FMA.

New section 1 of Schedule 1A sets out the main objects of the schedule. They include providing for:

- the detention of suspected illegal foreign fishers for a 'limited period' for the purpose of determining whether they should be prosecuted
- searching, screening and identification of such detainees
- detainees to be 'given access to facilities for obtaining legal advice'
- the 'facilitat[ion]' of the transition of persons from fisheries detention to immigration detention, including by authorising the release of personal information to immigration organisations and authorities.

New section 3 allows for the appointment of 'detention officers' by the Fisheries Minister. They are subject to the directions of the Minister or the Australian Fisheries Management Authority (AFMA): **new section 4**. In exercising the powers given to them under the FMA or regulations, detention officers and any persons assisting them are immune from any legal action[15] provided that they have acted in good faith: **new section 5**. This reflects the existing legal protection given to 'officers' and persons assisting them in section 90 of the FMA.

New section 6 allows AFMA to authorise officers and/or detention officers in respect to carrying out functions or exercising powers contained in *specific* provisions of **new Schedule 1A:** these are called 'authorised officers'. The *Explanatory Memorandum* comments that this to 'ensure that tight control is maintained over the number and type of people who will be authorised to use certain powers'.[16] FMA officers and/or detention officers who are also authorised to carry out functions or exercise powers under the Migration Act are also automatically taken to be authorised officers with respect to the equivalent provision in the FMA listed in **new section 7.**

New section 8 allows officers to detain persons who are suspected on reasonable grounds of committing one of a range of illegal foreign fishing offences. This power is currently contained in paragraph 84(1)(ia) of the FMA, but this is due to be repealed by **item 3**. In exercising the power, an officer cannot use more force than is reasonably necessary. **New section 9** also provides that existing protections under Part IC of the *Crimes Act 1914* (such as access to interpreters and the right of contact with the relevant consular office) continue to apply to persons detained.

Once detained, persons may be moved within Australia, including between the mainland and external territories: **new section 12**. This power is currently contained in paragraph 84(1)(ib) of the FMA, but this is due to be repealed by **item 3**. Before moving a detainee, an officer or detaining officer must consider issues including the 'welfare of the detainee'. Again, an officer cannot use more force than is reasonably necessary to move the detainee.

Detainees cannot be detained under the FMA for more than 168 hours (1 week): **new section 13**. However, they must also be released sooner if any one of the following occurs first:

- as soon as an officer knows or reasonably believes that the detainee is an Australian citizen or resident
- at the time a detainee is brought before a magistrate for a fisheries offence listed in subsection 8(1), or[17]
- at the time a decision is made to not charge a detainee with an offence under that subsection.

These requirements are currently contained in subsection 84A(1), but this is due to be repealed by **item 5.**

New section 14 provides that escape from detention is an offence carrying a penalty of imprisonment for up to two years.[18] Existing section 98A contains this offence, but this is due to be repealed by **item 11**.

New section 15 allows for an authorised officer, or another person,[19] to search a detainee and any property under their immediate control for the purpose of finding out whether the person has hidden on their person (i) a weapon or other object capable of inflicting bodily injury or assisting them to escape from detention and/or (ii) any evidence relating to a

fisheries offence listed in **new subsection 8(1)**. No warrant is required. Detainees cannot be compelled to remove any clothing (strip searches are covered in **new sections 17 and 18**). The search must be done a person of the same sex, unless such a person is 'not available'. **New section 15** contains the standard provision on minimal use of force and protecting a person's dignity to the extent possible. Persons conducting a search are not liable to any civil or criminal action, provided they act in good faith and do not transgress the use of force and dignity provisions. The search powers and limitations are currently contained in paragraph 84(1)(ic) and section 84B, but these are due to be repealed by **items 3** and **5**.

New section 17 introduces strip searches into the FMA for the first time. The circumstances in which a strip search can take place mirror those in existing section 252A of the Migration Act. No warrant is required. Essentially, a **new section 17** strip search can only be done if an authorised officer suspects, on reasonable grounds, that the detainee has a hidden weapon or other object capable of inflicting bodily harm or assisting them to escape detention, and a strip search is necessary is get that object. In addition, strip searches must be authorised by at least SES Band 3 (Deputy Secretary) level, or if the person is at least 10 but under 18, by a magistrate.[20] In both cases, the person authorising the strip search must be satisfied that the grounds for the suspicion mentioned above are reasonable. The rules for the actual conduct of the strip search are laid down by **new section 18**, and are equivalent to those under 252B of the Migration Act. Note that if a detainee is being held in a State or Territory prison or remand centre, **new section 16** and **17** do not apply and any searches are regulated under the relevant law of that State or Territory: **new section 22**. This reflects section 252F of the *Migration Act 1958.*

New section 16 allows authorised officers to conduct screening on detainees for the purpose of finding out whether the person has a hidden weapon or other object capable of inflicting bodily injury or assisting them to escape from detention. Screening means using metal detectors, X-rays and the like. **New section 16** also contains the standard provision on minimal use of force and protecting a person's dignity to the extent possible. **New section 16** is based on section 252AA of the Migration Act. Currently, there are no screening powers in the FMA.

New section 23 allows visitors to the detainees to be screened. This can be done by the same means as **new section 16**. In cases where an authorised officer suspects, on reasonable grounds, that a visitor has an object that might 'endanger the safety of the detainees, staff or other persons on the premises, or disrupt the order or security arrangements on the premises', they may also request the visitor to remove outer clothing, open containers etc so these can be inspected or otherwise left in the officer's care during the visit. A visitor has the right to refuse any screening, although as result they may be refused entry into the place where the detainee is held. **New section 23** is based on section 252G of the Migration Act.

If requested by the detainee, 'the person responsible for [their] detention must…provide the detainee with access to reasonable facilities for obtaining legal advice or taking legal

proceedings in relation to his or her detention: **new section 24**. There is no obligation on detaining officers to inform detainees that they have this right, which is somewhat curious given that one of the stated objects of new **Schedule 1A** is providing for detainees to be 'given access to facilities for obtaining legal advice'. However, because of the **new section 9** – which amongst other things, applies existing section 23G of the *Crimes Act 1914* - a detainee may already be aware of this right. Section 23G provides an 'investigating official' must inform a 'protected suspect' (which a detainee would be) of their right to attempt to contact a legal practitioner and, as soon as practical, give them reasonable facilities to consult with a practitioner. As a matter of drafting, it may have been helpful for a note to be attached to **new section 24** cross referencing the detainees rights under section 23G of the *Crimes Act 1914*.

New section 24 is based on section 256 of the Migration Act.

New sections 25-59 deal with how a detainee's identification may be established and how such identification and personal information is to be handled.

Subject to some exceptions, a non-citizen in detention must provide certain personal identifiers to authorised officers: **new section 28**. Identifiers that an officer may require can include:

- fingerprints or handprints
- a measurement of the person's height and weight
- a photograph or other image of the person's face and shoulders
- the person's signature,
- anything prescribed by regulations, except that these cannot include things such as providing blood or salvia or procedures that relate to the genitals or other intimate areas of the body.[21]

New section 28 is based on section 261AA of the Migration Act.

Under **new section 30**, before carrying out an identification test (that is, the method by which a personal identifier is obtained), the authorised officer must tell the detainee:

- that they may request both that an 'independent person' be present while the test is being carried out[22] *and* that it be carried out by a person of the same sex as the detainee; and
- of any other matters that are specified in the regulations.[23]

An independent person is defined in **new section 25** as a person (other than an officer, detention officer or authorised officer) who:

(a) is capable of representing the interests of a non-citizen who is providing, or is to provide, a personal identifier, and

(b) as far as practicable, is acceptable to the non-citizen who is providing, or is to provide, the personal identifier, and

(c) if the non-citizen is a minor—is capable of representing the minor's best interests.

New section 30 information must be given, through an interpreter if necessary, in a language in which the detainee 'is able to communicate with reasonable fluency'. The information may in oral or written form. **New section 30** is based on section 261AC of the Migration Act.

New section 31 details the general rules for carrying out identification tests on detainees. It is based on section 261D of the Migration Act which the *Explanatory Memorandum*[24] states is in turn based on the rules contained in section 23XI of the *Crimes Act 1914*. Amongst other things, the rules include that the test:

- must be carried out in circumstances affording reasonable privacy to the non-citizen, and
- if requested by the detainee, not be carried out in the presence or view of a person who is of the opposite sex, provided that it is practicable to comply with the request, and
- must not involve the removal of more clothing than is necessary for the carrying out of the test, and
- must not involve more visual inspection than is necessary for carrying out the test, and
- where it is practicable to do so, must be carried out at the same time as any other identification tests that are to be carried out on the detainee.

In respect to the second dot point, it is worth noting that the Crimes Act provisions do not have the 'practicable to comply' condition – thus the Migration Act and **new section 31** provisions contain less protection for the person being subjected to the test(s).

New sections 47-48 place restrictions on tests for persons under 15 years[25] and incapable persons. The latter are defined as persons who are incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier. For both class of persons, the only identifiers that may be taken are measurements of their height and weight or a photograph, or other image, of their face and shoulders. In addition, a parent, guardian or independent person must be present at the test.

New sections 25, 47 and 48 are based on sections 5, 261AL and 261AM of the Migration Act respectively.

New section 32 allows an authorised officer to use reasonable force to enable an identification test to be carried out or to prevent the loss, destruction or contamination of any personal identifier or any 'meaningful identifier derived from the person identifier'.

However, force cannot be used against a minor or incapable person, and in any other case cannot be used unless:

- the detainee has refused to allow the identification test to be carried out, and
- all reasonable measures to carry out the identification test without the use of force have been exhausted, and
- the use of force in carrying out the identification test is authorised under **new subsection 32(4)**. This authorisation can only be given by a 'senior authorising officer' that has been nominated by AFMA for the purposes of **new section 32**. Such a person can only authorise the use of force if they are reasonably satisfied that the situation named in first two dot points exists.

New section 32 is based on section 261AE of the Migration Act.

New section 33 also provides that carrying out of an identification test 'is not of itself to be taken to be cruel, inhuman or degrading…or a failure to treat a person with humanity and with respect for human dignity', but also that that nothing in the FMA authorises the carrying out of a test in manner that would violate this standard. As the *Explanatory Memorandum* notes,[26] the **new section 33** phrasing reflects the language of Articles 7 and 10(1) of the *International Covenant on Civil and Political Rights*. **New section 33** itself is based on section 261AF of the Migration Act.

If the detainee requests it, an identification test must only be carried out by an authorised officer of the same sex: **new section 35. New section 35** is based on section 261AH of the Migration Act. Under **new section 36**, an independent person must also be present at the test if:

- force is to be used in carrying in out the test; or
- the detainee requests the presence of such a person and they are readily available at the same place as the detainee and available to attend with a 'reasonable time'

New section 36 is based on section 261AI of the Migration Act.

New section 37 provides that identification tests may be videotaped. The Explanatory Memorandum notes that the subject of any such tape may request a copy of a tape through the *Freedom of Information Act 1982*.[27] **New sections 39-46** also deal with video recordings.

New section 40 states that a person may not 'access' a video recording made under **new section 37** unless authorised under **new section 41** or as a result of circumstances listed in **new subsection 42(2)**. Violation of **new section 40** is an offence carrying imprisonment of up to 2 years. A **new section 41** authorisation must specify the purposes for which is granted – the allowable purposes listed in **new section 41** are wide-ranging, but generally exclude access for the purpose of investigation or prosecuting an offence under Commonwealth, State or Territory law.[28] **New section 42** also creates an offence

punishable by imprisonment of up to 2 years, but it is for conduct that results in a video recording being provided to another person. Circumstances where an offence does not occur are listed in **subsection 42(2)**, but again they generally exclude circumstances where the provision of the recording is for the purpose of investigation or prosecuting an offence under Commonwealth, State or Territory law.[29]

New sections 43-44 create various offences of unauthorised modification and impairment of videorecordings, punishable by imprisonment of up to 2 years.

New sections 49-58 contain similar provisions to **new sections 39-46** except that they relate to a detainee's 'identifying information', rather than a videotape of a identification test. As well as personal identifiers, identifying information includes information that is derived from personal identifiers in some way. Access to, and disclosure of, identifying information must only take place where authorised or under listed circumstances. Again these cannot generally include for the purpose of investigation or prosecuting an offence under Commonwealth, State or Territory law.[30] However, disclosure can be permitted if it is in order to identify non-citizens who have a criminal history, who are of character concern (as defined under the Migration Act) or who are of national security concern, and also to combat document and identity fraud in immigration matters: **new subsection 53(2)**. AFMA may also authorise specified officers to disclose identifying information to foreign governments or prescribed international organisations: **new section 54**.

New section 59 deals with disclosure of detainees' personal information.[31] Disclosure may only be made to agencies or organisations that are, or will be, responsible for:

- taking the individual into immigration detention; or
- keeping the individual in immigration detention; or
- causing the individual to be kept in immigration detention; or
- the removal of the individual.

In addition, such disclosure may only be for:

- the immigration detention of the individual; and
- the removal of the individual; and
- the welfare of the individual while in immigration detention or being removed.

The way **new section 59** is phrased, it is arguable that all of these purposes have to be satisfied before the relevant information can be disclosed. If this is not what is intended, all doubt could be removed by amending the phrase in new subsection 59(1) 'for the purposes described' to 'for any of the purposes'.

Item 14 is a transitional provision. Once **new Schedule 1A** comes into force, any person that has already been detained under existing paragraph 84(1)(ia) of the FMA will be taken to have been detained under the provisions of **new schedule 1A**.

Items 15-20 deal with amendments to the *Torres Strait Fisheries Act 1984* (TSFA). They insert new sections that are in most cases identical to the provisions described earlier in this Digest that amend the FMA. Probably the only obvious major difference is in relation to **new section 13** of **item 20,** which with the end of fisheries detention. Where a person is detained on a foreign boat, the maximum detention period is 168 hours (this is also the limit under the FMA). However, **new section 13** provides that where the boat is a PNG boat or the person detained is a PNG citizen or permanent resident, the maximum time is 72 hours. Presumably this difference is related to the fact that persons on PNG boats, or PNG citizens or permanent residents, can only be prosecuted for fishing offences occurring in the Treaty area by PNG, not Australia.
It is also worth noting that the TSFA does not contain many of the detention-related powers that are currently in the FMA and thus collectively **items 15-20** represent a significant expansion of fisheries enforcement in the Torres Strait area.

Items 21-26 amend some of the existing search provisions in the FMA. In particular, **item 21** allows officers, without warrant, to search persons the officer reasonably suspects of foreign fishing boat offences for the purposes finding whether they have a hidden weapon or other object capable of inflicting bodily injury and/or (ii) any evidence relating to a fisheries offence. At present officers can search the boat, but cannot search persons until they have been detained. The new power is subject to **new section 84AA** (**item 23**) limitations (containing the standard provision on minimal use of force and protecting a person's dignity to the extent possible etc). **New section 84AA** is the same in all important respects as to existing section 84B. Existing section 84B is to be repealed by **item 5**.

Existing section 87H of the FMA allows an officer to board and inspect a boat on the high seas that is equipped for fishing if the officer has reasonable grounds to believe that the boat does not have a nationality (that is, it is not flying a flag or other identification that indicates in which country the boat is registered). **Item 26** inserts new subsections 87H(2A) and (2B) that will allow officers, without warrant, to search persons for the purposes finding whether they have a weapon or other object capable of inflicting bodily injury and/or (ii) any evidence relating to a fisheries offence. The new power is also subject to new section 84AA.

Items 28 and **33** insert the same provisions into the TSFA as **items 21** and **23** do for the FMA.

Currently, boats, equipment and catch seized under the TSFA on suspicion of illegal foreign fishing activity can only be forfeited by a court order following conviction on an relevant office. **Items 35-36** introduce automatic forfeiture provisions into the TSF along the lines currently contained in the FMA. Under these provisions, where a boat or other thing is seized by officers on the basis of a suspicion of illegal foreign fishing activity, the

owner or master of the ship must notify AFMA within 30 days that they intend to claim for the return of the thing. AFMA then allows the claimant 2 months to institute court proceedings to recover the thing. If the proceedings are not instituted within this time, or if the proceedings are unsuccessful, absolute ownership of the thing passes to the Commonwealth. Note that AFMA may release the boat or other thing back to the owner or master (as the case may be) either on payment of a fine that can be imposed under the relevant Act or payment of the value of the thing.

Items 42-45 expand the application of existing offences in the FMA and TSFA. The existing offences prohibit a person from assaulting, resisting or obstructing an officer in their duties. The amendments expand this by prohibiting the assault etc of a person who is not officer but is exercising a power or performing a function under the respective Act.

Schedule 2 – Enforcement Visas etc

When unlawful non-citizens are initially detained under the FMA on suspicion of illegal foreign fishing activity, they are automatically granted what are called enforcement visas. **Item 1** in **Schedule 2** of the Bill amends the definition of 'fisheries detention offence' in the Migration Act so that persons detained under the TSFA will now be granted enforcement visas. **Items 2-8** make related changes by including reference to the TSFA in various provisions of the Migration Act.

Concluding Comments

The *Fisheries Management Act 1991,* and to a lesser extent the *Torres Strait Fisheries Act 1984,* have been progressively amended in recent years to increase the Commonwealth's ability to combat illegal foreign fishing in the AFZ. Part of this process has been the integration of fisheries enforcement with the Government's detention and deportation procedures and policies with respect to 'unlawful non-citizens' under the *Migration Act 1958*. The Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 is the latest example of this integration. It is worth noting that the Bill provides a very limited range of review mechanisms should a person wish to challenge the basis of their detention. Also as mentioned in the main provisions section of this Digest, the drafting of **new section 24** of **new Schedule 1A –** which deals with the provision of facilities for obtaining legal advice – could be improved to more adequately reflect the stated objects of **Schedule 1A.** In particular, the relationship between **new section 24** and **new section 9** (which provides detainees with certain rights about access to legal advice) could be made clearer.

Detention under the *Fisheries Management Act* 1991 is for a maximum of one week, although of course the total length of detention may be considerably longer once the fishers are held under the *Migration Act 1958*. As mentioned in the background to this Digest, the conditions under which suspected and convicted illegal foreign fishers have

been detained have been subject to some criticism. However, the background also noted that the Government has instituted a range of measures to address the criticisms. It is beyond the scope of this Digest to make a judgment on these. However, the general issue of detention was discussed recently in Senate estimates.[32]

Endnotes

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1 The Hon Warren Truss MP, *House of Representatives Debates,* 17 February, p.2

2 Personal communication, Department of Agriculture, Fisheries and Forestry, 4 March 2005.

3 Personal communication, Department of Agriculture, Fisheries and Forestry, 4 March 2005.

4 An enforcement visa will be in place while the detainee is under fisheries detention.

5 Personal communication, Department of Agriculture, Fisheries and Forestry, 4 March 2005.

6 Administrative Arrangements for Indonesian fisherman detained in Australian Waters. See http://www.comb.gov.au/publications_information/Special_Reports/IndonesianFishrmn.html

7 Inquest into the Death of Mansur La Ibu. See http://www.nt.gov.au/justice/docs/courts/coroner/findings/2004/mansur.pdf

8 Senator The Hon Ian Macdonald, *$3 million to combat northern illegal fishing,* Media Release 11 May 2004.

9 Senator The Hon Ian Macdonald, *New detention arrangements for illegal fishers*, Media Release 31 January 2005.

10 The definition of officers in TSFA is slightly different.

11 *Victorian Council for Civil Liberties Incorporated v the Minister for Immigration and Multicultural Affairs* [2001] 182 ALR 1; *Ruddock v Vadarlis* [2001] 183 ALR 1

12 See discussion in the relevant Bills Digest at http://www.aph.gov.au/library/pubs/bd/2001-02/02bd062.pdf

13 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482.

14 At pp. 513–14.

15 That is, legal action directed against them personally.

16 P. 8.

17 That is, an offence under section 99, 100, 100A. 101, 101A, 101B, 105E, 105F of the FMA or being an accessory after the fact in relation to any of these.

18 Due to the operation of the *Criminal Code Act 1995*, attempted escape is also an offence.

19 On request on the authorised officer.

20 Strip searches cannot be done on persons under 10. It is not clear what procedures apply if there is doubt about a persons age.

21 See the definition of 'intimate forensic procedure' in section 23WA of the Crimes Act for a full list.

22 Such a person must be present if the test is carried out using force – see **new section 36**.

23 The *Explanatory Memorandum* suggests at p. 22 that amongst other things, the kind of information that could be prescribed in the regulations might includes the way in which the test is to be carried out, including the power to use reasonable force, if necessary; that the identification test may produce evidence against the non-citizen that might be used in a court of law; and the non-citizen's right to make a complaint to the Privacy Commissioner

24 At. 50.

25 The *Explanatory Memorandum* comments at p. 29 that the 15 year age limit was set 'so as to be consistent with international comparisons and the *Migration Act 1958'*.

26 At p. 52.

27 It is unknown what Commonwealth Government policy is in respect of waiving the normal FOI application and processing fees in the case of an application by a detainee.

28 Except for an offence involving whether an identification test was carried out lawfully.

29 Except for an offence involving whether an identification test was carried out lawfully.

30 Except for an offence involving whether an identification test was carried out lawfully.

31 Under section 6 of the Privacy Act 1988, personal information is defined as 'Information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

32 Committee Hansard Senate Rural and Regional Affairs and Transport Legal Committee, Estimates agricultural, Fisheries and Forestry Portfolio, February 15 2005. pp. 88–93.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2764.