



Fisheries Legislation Amendment (Foreign Fishing Offences) Bill 2006

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Law and Bills Digest Section

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Fisheries Legislation Amendment (Foreign Fishing Offences) Bill 2006

Date introduced: 25 May 2006

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: Sections 1 to 3 commence on Royal Assent. The operative provisions (Schedules 1 and 2) commence the day after Royal Assent.

Purpose

To provide for prison terms for certain offences of illegal foreign fishing occurring within Australia's territorial sea.

Background

International law

The basic convention regarding international law on fishing is the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Australia is a party to UNCLOS, as are almost all its neighbours, including Indonesia.

UNCLOS provides for a range of different national jurisdictional zones out from the coastline. In relation to fishing, the two major zones are the 'territorial sea' and the 'exclusive economic zone' (EEZ). The territorial sea extends from a country's coastal baselines¹ out to 12 nautical miles (nm), except in cases where the distance to a neighbouring country is small and thus the width of the territorial sea may be less. The EEZ goes from the outer edge of the territorial sea out to 200 nm, except again in cases where the distance to a neighbouring country is less than 400nm thus resulting in a smaller EEZ.

UNCLOS allows countries to regulate fishing, including by foreign vessels, in both its territorial sea and EEZ. However, Article 73 of UNCLOS places limitations on sanctions against unlawful foreign vessels in the EEZ. Specifically, foreign vessels and their crews arrested for suspected unlawful fishing must be released upon the posting of reasonable bond or other security. Also, and of particular relevance to this Bill, any penalties on conviction for a fishing offence in the EEZ cannot include imprisonment unless there are agreements between the coastal state concerned and the state whose citizens have been prosecuted for illegal fishing. Australia has not entered into any such agreements.

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Australian fisheries law

Commonwealth legislation enacted under the 1979 Offshore Constitutional Settlement (OCS) provides the states and the Northern Territory with the power to legislate, including with respect to fisheries, over waters out to 3 nm from the relevant coastline. The area lying beyond 3 nm out to the limits of the EEZ is known as the Australian Fishing Zone (AFZ) and is generally subject to Commonwealth jurisdiction. In some instances, the Commonwealth has entered into cooperative agreements with a particular state or the Northern Territory to alter these jurisdictional arrangements where desirable – for example where a fishery straddles the 3 nm boundary – and thus in limited circumstances some aspects of state or territory fisheries law can potentially extend beyond 3 nm.

Commonwealth law over foreign fishing vessels is contained in the *Fisheries Management Act 1991* (FMA), and with respect to the special arrangements for the [Torres Strait area](#), the *Torres Strait Fisheries Act 1984* (TSFA). Under the FMA, the most common offences under which illegal foreign fishers are prosecuted are:

- using a foreign boat for commercial fishing in the AFZ without proper authorisation, or
- being in charge of a foreign boat equipped with nets, traps or other equipment for fishing without proper authorisation where the nets etc are not stored and secured in an approved manner

Both of these offences have strict liability and fault versions. Obviously strict liability offences are easier to prove – for example it is not necessary show that the accused ships' master or crew knew, or suspected, that they were in the AFZ when fishing. Strict liability offences carry somewhat smaller fines (2,500 penalty units or \$275,000) as compared to the fault offences (5000 penalty units or \$550,000). However, if prosecutions for these strict-liability offences are done in state or territory courts of summary jurisdiction (for example, magistrates' courts), the maximum fine is reduced to 250 penalty units.

The TSFA also has a range of offences in respect of unlawful fishing. Again, the penalties for these offences do not include imprisonment.

As noted in the second reading speech to the Bill, some existing 'secondary' offences do carry prison terms. For example, obstructing fisheries officers in the course of their duties carries a penalty of up to 12 months imprisonment (FMA, section 108).

As mentioned earlier, state and territory fisheries law usually applies out to 3 nm unless extended by a cooperative agreement with the Commonwealth. As such, state and territory fisheries laws do not thus generally extend into the EEZ and so are not restricted by UNCLOS from having prison terms for foreign fishing offences. For example, the Western Australian *Fish Resources Management Act 1994* carries maximum penalties of two years imprisonment for illegal foreign fishing in state waters.

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Position of non-government parties

This Bill was debated in the House of Representatives in the week following its introduction.

Whilst the Australian Labor Party supported the Bill, it criticised the Government for not doing enough to actually apprehend the very large numbers of unauthorised foreign fishing boats entering Australia's waters, particularly in the north. Much of the debate centred on the effectiveness of, amongst other things, the range of [initiatives](#) recently announced in the 2006–07 budget.²

Financial implications

The Explanatory Memorandum to the Bill states:³

The proposed amendments to the FMA and TSFA would have no direct financial impact. Indirectly, some additional costs could be expected in relation to the legal proceedings and terms of imprisonment involved. On the other hand, there are potential benefits to Australia's fishing industry (and in reducing other threats from illegal foreign fishing incursions) from custodial penalties that would more effectively deter illegal foreign fishing in Australia's waters.

Main provisions

Schedule 1 – Amendment of the *Fisheries Management Act 1991*

Part 1 – Main amendments

Item 1 inserts a **new section 100B** offence of unlawfully⁴ using a foreign boat for commercial fishing within that part of Australia's territorial sea which lies outside state / territory waters. This means that, in general, the new offence will apply in the zone between 3 nm and 12 nm from the coast. The various fault elements that must be proven by the prosecution are effectively the same as for the existing section 100A offence⁵ (unlawfully using a foreign boat for commercial fishing within the AFZ). However, in addition to substantial fines,⁶ the section 100B offence will carry maximum penalties of either two or three years imprisonment, depending on the size of the boat on which the fishing took place.⁷

Item 2 inserts a **new section 101AA** offence of having a foreign boat equipped for fishing within that part of Australia's territorial sea which lies outside state / territory waters when the nets and other fishing equipment are not stored and secured in the approved manner. The offence applies to the person who is 'in charge' of the boat or has it their 'possession'. The various fault elements that must be proven by the prosecution are effectively the same

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as for the existing section 101A offence. However, in addition to a substantial fine,⁸ the **new section 101AA** offence carries a maximum penalty of two years imprisonment.

Part 2 – Consequential and technical amendments

The bulk of these amendments insert references to the offences of **new sections 100B and 101AA** into various other provisions of the FMA.

Items 6, 7, 9 and 10 make some drafting changes to the existing offences in sections 100A and 101A, but these changes appear to be changes of form rather than any significant change of substance. The relevant changes relate to what evidence the defendant must show in order to demonstrate that certain elements of the offences are not made out. The current language of these sections states:

The only burden of proof that a defendant bears in respect of [the relevant element] is the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter in question existed.

For example, a relevant element might be the question of whether the boat's nets and other fishing equipment were stored and secured in the approved manner. **Items 7 and 10** delete the language quoted above and **items 6 and 9** replace it with a note stating that subsection 13.3(3) of the *Criminal Code Act 1995* applies instead. Subsection 13.3(3) (and subsection 13.3(6), which applies also) provides:

A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence..... **evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.** [emphasis added]

Given that the highlighted section above is essentially the same as the existing language found in sections 100A and 101A, it appears there is no significant legal effect resulting from this change. The Explanatory Memorandum, in commenting on the general issue of the defendant's evidential burden, states:⁹

The note to s 100B(4) follows current legal drafting practice and states that the defendant bears an evidential burden in relation to the matters in s 100B(4) and refers to the relevant subsection of the *Criminal Code*. The reversal of proof is appropriate here (and elsewhere in the Bill) where the matter to be established is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

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Schedule 2 – Amendment of the *Torres Strait Fisheries Act 1984*

Part 1 – Main amendments

Existing section 45 of the TSFA contains a number of offences for unlawful fishing. These include:

- unlawfully using a foreign boat for commercial fishing (paragraph 45(1)(a) and subsection 45(2)
- as part of a commercial fishing operation, unlawfully processing or carrying fish caught by another boat ((paragraph 45(1)(k) and subsection 45(3), and
- unlawfully trans-shipping fish to another boat (paragraph 45(1)(m) and subsection 45(3).

All these carry penalties of fines at various levels, depending on the relevant offence and who is being prosecuted, but no prison terms apply.

Item 1 inserts four new sections (**46A, 46B, 46C and 46D**) which essentially replicate the existing section 45 offences mentioned above. However these new offences apply in that part of the territorial sea that lies within the ‘area of Australian jurisdiction’ as defined by the TSFA, but is not within Queensland state waters. The various fault elements appear to be the same as for the existing offences in section 45. In addition to fines, the offences will carry maximum penalties of either two or three years imprisonment, with three years applying if the person prosecuted is the ship’s master.

Existing section 49 contains the offence of a master of a foreign fishing boat unlawfully bringing the boat into the part of the Torres Strait that is a protected zone within Australian jurisdiction. This offence is one of strict liability – that is, no fault elements need be proved. **Item 2** inserts **new section 49A** containing a similar offence, but one only applying within that part of the territorial sea within the Torres Strait protected zone that is outside Queensland state waters. The maximum penalty for the new offence is a fine of 500 penalty units (\$55,000) or two years imprisonment, or both. As it carries a prison term, the offence is *not* one of strict liability. The existing defence of an unforeseen emergency requiring the securing of the safety of human life or of the boat also applies. However defendants must ‘prove’ that the emergency existed rather than the existing language in subsection 49(2) which requires them to ‘satisfy the court’. It is not clear whether under existing subsection 49(2) the defendant must satisfy the court according a ‘balance of probabilities’ standard or a ‘beyond reasonable doubt’ standard. If the former, the change in terminology may mean that a greater onus is placed on the defendant. Note also that **item 9** of Part 2 makes this change of terminology to existing subsection 49(2).

Existing section 51 contains the offence of having a foreign boat equipped for fishing in an area of Australian jurisdiction when the nets and other fishing equipment are not stored and secured in the approved manner. This offence is one of strict liability. **Item 3** inserts

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new section 51A containing a similar offence, but one only applying within that part of the territorial sea within the Torres Strait protected zone that lies outside of Queensland state waters. In the case of a ship's master, the maximum penalty for the new offence is a fine of 2,500 penalty units (\$275,000) or three years imprisonment, or both. For any other person, the maximum is a fine of 500 penalty units (\$55,000) or two years imprisonment, or both. As it carries a prison term, a section 51A offence is *not* one of strict liability. Again there is a terminology change – defendants must 'prove' the defences listed in subsection 51A(2) rather the existing language in subsection 51(4) which requires them to 'satisfy the court'. Note also that **item 11** of Part 2 makes this change of terminology to existing subsection 51(4).

Part 2 – Consequential and technical amendments

The bulk of these amendments insert into the TSFA references to the new offences created by Part 1. They also make the changes of terminology noted above.

Endnotes

1. These are generally the low-water mark, but may be drawn between coastal headlines and the like and around islands.
2. '\$388.9m budget boost in fight against illegal foreign fishing in Australian waters', Senator Abetz, *Media Release* 9 May 2006.
3. *Explanatory Memorandum*, p. 3.
4. That is, the boat is not authorised by an appropriate fishing licence.
5. See comments on items 6, 7, 9 and 10.
6. The fines are the same as in the existing section 100A and range up to \$825,000 for an individual.
7. The three-year term is applicable if the boat is 24 metres or more in length.
8. The maximum fine is the same as existing section 101A: up to \$550,000 for an individual.
9. *Explanatory Memorandum*, p. 5.

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