



Fisheries Legislation Amendment Bill 2007

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Fisheries Legislation Amendment Bill 2007

Date introduced: 23 May 2007

House: House of Representatives

Commencement: Proposed sections 1 to 3 commence on Royal Assent. The majority of the operative provisions commence 28 days after Royal Assent. Items relating to the new forms of licence under the *Torres Strait Fisheries Act 1984* (see discussion of item 297 of Schedule 3 below) commence 12 months after Royal Assent.

Purpose

To amend various Commonwealth fisheries legislation to, amongst other matters:

- amend various Ministerial powers and fisheries management tools applying to Torres Strait fisheries
- make it easier to prosecute persons for illegal foreign fishing in Australian waters Fishing Zone and the expand the existing forfeiture provisions relating to such foreign fishing offences, and
- make preparations to alter the governance of the Australian Fisheries Management Authority in 2008.

Background

The main piece of Commonwealth fisheries legislation is the *Fisheries Management Act 1991* (the FMA). It regulates fishing within the Australian Fishing Zone (AFZ), including fishing by foreign-registered boats ('foreign boats'). The FMA also allows for cooperative arrangements between the Commonwealth and relevant States and the Northern Territory to manage fisheries that straddle State/Territory coastal waters (these go out to three nautical miles from coastal baselines) and the AFZ. The *Fisheries Administration Act 1991* (the FAA), created the Australian Fisheries Management Authority (AFMA), which is the relevant Commonwealth management body.

However, in the Torres Strait area, fisheries regulation is principally through the *Torres Strait Fisheries Act 1984* (TSFA). The TSFA gives effect to relevant aspects of the Torres Strait Treaty between Australia and Papua New Guinea. Amongst other matters, the Treaty establishes the Torres Strait Protected Zone. In turn, the TSFA provides for the Protected Zone Joint Authority (the PZJA), which is responsible for management of commercial and traditional fishing in the Australian area of the Protected Zone and designated adjacent Torres Strait waters. In this statutory role, the PZJA must currently

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have regard to the rights and obligations conferred on Australia by the Torres Strait Treaty, in particular the protection of the traditional way of life and livelihood of the traditional inhabitants, including their traditional fishing.

In recent years, the Commonwealth has been combating increased levels of illegal fishing by foreign boats. This has principally been in Australia's northern waters, but there have been significant incursions into the Torres Strait and also waters off Western Australia. There also have been a number of campaigns mounted to enforce Australian fisheries law against foreign boats operating illegally in the remote southern fisheries around Heard and MacDonal Islands.

As part of these efforts around Australia, the FMA has been progressively amended to increase the range of offences, make it easier to prosecute these offences, and impose harsher penalties, including the confiscation of foreign boats, fishing gear and any fish catch. Notably, a ship's master or owner does not have to be convicted by a court of an offence to have their boat, gear etc confiscated. An officer authorised under the FMA can seize a foreign boat, gear etc that he or she believes on reasonable grounds has been used in a commission of an offence. The ship's owner or master must then institute court proceedings within a certain period to recover these goods – effectively they would have to demonstrate that no offence was committed in order for the court to order the return of the boat and gear and order any suitable compensation. More recently, the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 1995* amended the FMA and TSFA to provide for a law enforcement and detention regime for suspected illegal foreign fishers consistent with the *Migration Act 1958*.¹

Financial implications

According to the Explanatory Memorandum:²

The amendments are expected to involve additional administrative costs to the Australian Government. Those costs relating to the Torres Strait fisheries are subject to cost-sharing arrangements with the Queensland Government. No additional costs will be imposed on the Torres Strait fishers as a result of the amendments.

Main provisions

Schedule 1 – Amendments to the *Fisheries Administration Act 1991*

AFMA's current functions, as set out in section 7 of the FAA, essentially relate to fisheries management, including the collection of relevant information pertaining to fisheries and fishing operations. **Item 3** will expand AFMA's functions to include the collection and dissemination of information relating to 'the control and protection of Australia's borders'.

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Item 21 in Schedule 2 allows for regulations to be made under the FMA to authorise the collection and disclosure of such information for purposes other than those related to fisheries.

The FAA provides that AFMA consists of a Chairperson, a managing director, a ‘Government director’ and five ‘nominated directors’. Whilst the nominated directors are appointed by the administering Minister, there is an extensive statutory process for their selection and appointment. **Item 7** will allow the Minister to appoint directors of AFMA for up to nine months without having to follow the statutory process. The rationale for this, as explained in the Explanatory Memorandum is that:³

The Government intends for AFMA to become a commission on 1 July 2008. If the establishment of a commission is delayed, a board will need to be retained beyond 30 June 2008 but appointment processes can take up to six months. The current legislation does not provide for the reappointment of directors.

The change to a Commission was previously announced in October 2006, and is in response to the *Review of the Corporate Governance of Statutory Authorities and Office Holders* (the Uhrig Review).⁴

Schedule 2 – Amendments to the *Fisheries Management Act 1991*

Items 4 to 7 make it easier to prosecute foreign fishing boats operating illegally within Australia’s 12 nautical mile territorial sea. The relevant offences were introduced into the FMA by the *Fisheries Legislation Amendment (Foreign Fishing Offences) Act 2006* and provide for a maximum penalty of 2 or 3 years imprisonment, depending on the particular offence.⁵ The changes have the effect that it is no longer necessary to prove that the person in charge of the boat was ‘reckless’ as to whether boat was in the territorial sea – the position of the boat will now be a strict liability element. The Explanatory Memorandum comments that:⁶

The Commonwealth Director of Public Prosecutions has not been able to prosecute people for these offences because there have been difficulties collecting sufficient evidence to prove that the people intended to be in the territorial sea. The amendment is required to ensure that Australia can prosecute and imprison persons guilty of committing a foreign fishing offence in Australia’s territorial sea. The amendments do not alter the other elements of the offence provisions, with the overall offence remaining one in which fault must be proven.

The defence of reasonable mistake of fact under section 9.2 of the *Criminal Code Act 1995* is available in cases of strict liability elements.

Existing sections 106-106H allow for boats, fishing gear and fish (including the proceeds of the sale of the fish) to be forfeited to the Commonwealth under certain circumstances. This can be as a result of a court order following a conviction on certain fishing offences

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or the result of ‘automatic forfeiture’ where, in the case of a foreign boat, an authorised officer has seized the boat because he or she believes on reasonable grounds it has been used in a commission of a certain offence.⁷ **Item 10** inserts **proposed section 106AAA** which will allow a court to order the forfeiture of fishing gear, fish or other equipment on a foreign boat that was involved in certain offences in cases where the order is made up to two years after the relevant offence occurred. Essentially this new section will mean that the Commonwealth will not have to prove that the various items were actually used in the relevant offence for which a person was convicted – it will be up to the master or owner of the boat to show that that they were not. **Item 14** makes a similar change by inserting **proposed section 106AA**, which deals with automatic forfeiture.

Item 15 inserts **proposed sections 106AC-AE**. The effect of existing forfeiture provisions in the FMA is that foreign boats and gear used for illegal fishing become the property of the Commonwealth from the time the relevant offence occurred. **Item 15** provides that fish subsequently caught using such ‘Commonwealth property’ also automatically become Commonwealth property unless such action was specifically authorised by the administering Minister. Similarly, anything subsequently added to the ‘Commonwealth property’ boat (such as a new engine, sonar etc) also becomes property of the Commonwealth.

Item 19 inserts **proposed section 106HA**. This deals with the situation where the owner or master has instituted civil proceedings to recover a foreign boat that has been seized by the Commonwealth under the FMA’s automatic forfeiture provisions. In such proceedings, the owner or master would attempt to show that, according to the balance of probabilities, no relevant foreign fishing offence was committed. **Proposed section 106HA** provides that conviction of a relevant offence in a criminal proceeding is admissible as evidence in the civil proceeding that the person committed that offence. Presumably the owner or master would have to produce evidence to the contrary to rebut the conviction. The Explanatory Memorandum comments:⁸

The provision provides for the exceptional circumstance where the person bringing the civil proceedings has further overriding evidence to show that the offence was not committed. Previously, the fact that a person had been convicted of the offence would not be sufficient to prove in civil proceedings that the offence had been committed or who had committed it. Moreover, evidence of a criminal conviction may not be admissible in civil proceedings.

However, the above does not apply where the conviction is under appeal or where it has been quashed, set aside, or where a pardon been given: **proposed subsection 106HA(2)**.

Schedule 3 – Amendments to the *Torres Strait Fisheries Act 1984*

Item 5 broadens the definition of ‘fishing’ in existing subsection 3(1) of the TSFA to make it consistent with that in the FMA. For example, the definition now includes an

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activity that can reasonably be expected to result in the locating of fish. The net effect is that the range of situations which might involve unlawful fishing is significantly increased.

Currently, the meaning of a 'traditional inhabitant' under the TSFA is taken directly from the Torres Strait Treaty. **Item 11** will enable a 'traditional inhabitant' to also be defined through regulations. The Explanatory Memorandum states:⁹

A significant amount of administrative licensing policy has arisen to permit a broader range of people to qualify as traditional inhabitants than the current definition permits. This issue is important as it is the basis for qualifying to hold an indigenous (community) commercial fishing licence. These additional categories of people include former PNG nationals who obtained Australian citizenship through a Department of Immigration amnesty in 1978/1979, children of these traditional inhabitants and Aboriginal people living in the Australian coastal area adjacent to the Torres Strait on Cape York. This item provides a clearer legislative basis as the Torres Strait fisheries move to output controls to ensure that current fishers do not lose entitlements.

Regulations are of course disallowable by either House of Parliament in the usual fashion.

Item 19 amends **section 8** by inserting additional objectives that must be taken into account in the administration of the TSFA. Currently the focus in section 8 is on the traditional way of life and livelihood of traditional inhabitants. Item 19 proposes to expand this to include environmental protection, management of commercial fisheries for optimum utilisation and promoting economic development and employment opportunities for traditional inhabitants.

Existing section 12 gives the administering Minister the power to grant permits that authorise a person to fish for 'scientific purposes' under the conditions set out in the permit. **Items 25-27** will allow a new class of permit to be granted to authorise fishing for 'developmental purposes', including assessing the commercial viability of a fishery or the viability of certain fishing gear or methods. The Explanatory Memorandum suggests that this is modelled on similar provisions contained in the *Fisheries Act 1994* (Qld).¹⁰

Items 64-80 amend various aspects of section 15A. Section 15A deals with the content of fisheries management plans. **Item 65** will require a management plan to include performance criteria and timeframes against which the measures in the plan can be assessed. This brings the TSFA into line with the FMA. **Item 67** allows the fishing capacity of a fishery to be determined on a periodic basis. Currently there is no specific provision to enable the regular review and determination of a fishery's capacity on a regular basis. The objective seems to be to enable the fixing of a periodic total allowable catch for a fishery.

Existing section 17 provides that the administering Minister may require that the taking of fish in the course of community fishing may only be done under licence. Community fishing is essentially commercial fishing undertaken by traditional inhabitants. **Item 137**

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inserts **proposed subsection 17(IAA)** which gives the Minister the power to require that a person in charge of a boat used for such fishing must have a master fisherman's licence. The Explanatory Memorandum comments that the intent is:¹¹

so that output controls can be effectively monitored by recording catch or use against a single licence number. These amendments retain the position that community fishers do not need to comply with this requirement unless a specific declaration has been made. It is envisaged that declarations would only be made where output controls are in place.

Part V of the TSFA is currently titled 'Arrangements with Queensland'. **Item 161** retitles this to 'Protected Zone Joint Authority' in recognition of the fact that, under section 30, the Chair of the Torres Strait Regional Authority is also as a member of the PZJA.

One of the main existing features of Part V is section 31, which allows the Commonwealth to come to an arrangement with Queensland that provides that either the PZJA, the Commonwealth or Queensland is to have the management of a particular fishery in 'waters adjacent to Queensland', which may include Queensland coastal waters. Such a fishery may be managed under Commonwealth or Queensland law, according its location and the relevant section 31 arrangement.

Where a fishery is managed by the PZJA under a section 31 arrangement, **item 169** will provide the PZJA with the same powers the Commonwealth administering Minister currently has to declare the use of certain equipment or boats to be outside the meaning of 'traditional fishing'. Similarly, where a fishery is managed by the PZJA, **item 170** will enable the PZJA to determine a fishery management plan, something the Commonwealth Minister can only presently do. The Explanatory Memorandum comments that under:¹²

[current] section 31 arrangements with Queensland, all commercial fisheries in the Torres Strait Protected Zone are managed by the PZJA. This item will ensure the PZJA can manage fisheries for which it has responsibility and enable the effective introduction of output controls.

Note that under **item 176**, the PZJA can delegate its powers and functions to an officer of the Commonwealth administering department, AFMA employee, Commonwealth officer in the Torres Strait Regional Authority or certain persons acting in the service of Queensland or operating under Queensland law. This power of delegation is the same applying to the administering Minister under item 20 of Schedule 3.

Authorised officers under the TSFA may require a boat to stop under certain circumstances for the purpose of boarding it. If the boat fails to stop as directed, and it is not an Australian boat, **item 184** authorises the officer to use reasonable force consistent with international law. This power is the same as currently contained in paragraph 84(1)(aa) of the FMA.

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Item 194 inserts **proposed sections 43A-43P**. **Section 43A** requires that an officer must not use force in the exercise of their powers unless it is necessary to ensure the safety of an officer or to overcome obstruction of an officer in the exercise of his or her power. Any force must not be more than is reasonably required in the circumstances. This is consistent with section 87J in the FMA.

Section 43B provides that an officer is not liable to a civil or criminal action, suit or proceeding relating to the exercise of powers under the TSFA or regulations, as long as the officer was acting in good faith. This protection is consistent with section 90 in the FMA.

Existing section 42 enables officers to obtain search warrants from a Justice of the Peace where the Justice is satisfied that there are reasonable grounds that there is evidential material as to the commission of an offence under the TSFA on any land or premises. These provisions are repealed by **item 189** and will be replaced by **proposed sections 43C to 43P** (item 194), which are modelled on more contemporary FMA provisions, with the exception of **proposed section 43K** (see comment below). Amongst other things, warrants will now be issued by Magistrates, and contain standard provisions such as an occupier being entitled to be present during a search. The Explanatory Memorandum notes that **proposed section 43K**, which deals with compensation for damage to electronic equipment during a search or subsequent examination, is based on the current Office of Parliamentary Counsel drafting direction 3.5 - *Offences, penalties, self incrimination, secrecy provision and enforcement powers*. The equivalent provision in the FMA, section 85G, is an older form of words, and arguably more restrictive in its scope in terms of when compensation is payable. It is not clear why section 85G has not been updated to bring it into line with the above drafting direction.

Items 237-240, 245 and 253 amend existing offences regarding illegal fishing within Australia's 12 nautical mile territorial sea. The amendments have the same effect as the equivalent amendments to the FMA introduced by **items 4-7** in **Schedule 2** – namely that it is no longer necessary to prove that the person in charge of the boat was 'reckless' as to whether a boat was in the territorial sea – the position of the boat will now be a strict liability element.

Item 255 adds **proposed sections 52AAA-52AAC**, dealing with court order forfeiture of a foreign boat, fishing gear etc. This is the same as the amendment inserted into the FMA by **item 10** in **Schedule 2**. Readers are referred to that item for a discussion of the proposed provision. **Item 259** makes a similar change by inserting **proposed section 52AA**, which deals with automatic forfeiture, and **items 260-264** also make changes to the TSFA equivalent to those proposed for the FMA in **items 15-19** of **Schedule 2**.

Item 266 inserts **proposed sections 54B and 54C**. These provide alternative enforcement processes to criminal prosecutions and are increasingly common in Commonwealth legislation.

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Proposed section 54B allows for a system of infringement notices. The detail will be set out in regulations, but persons alleged to have committed an offence under section 14 (which includes commercial fishing, or purchasing of such fish, taken in contravention of a Ministerial notice) or Division 2 of Part VI (a wide range of offences) may elect to pay a fine of not more than one-fifth that the maximum that would have payable if they had been successful prosecuted under the relevant offence provision.

Proposed section 54C allows for a system of demerit points. Again the detail will be set out in regulations, but demerit points may be accrued either for conviction of certain offences or following payment of **proposed section 54B** infringement penalties. The accrual of a certain number of points would lead to the suspension or revocation of the person's commercial fishing licence.

Item 283 allows for regulations to be made enabling the collection and disclosure of various types of information by persons exercising powers and functions under the TSFA. This appears to be intended to complement **item 3** of **Schedule 1**, which will expand AFMA's functions to include the collection and dissemination of information relating to 'the control and protection of Australia's borders'.

Section 19 of the TSFA currently allows for the granting of a commercial fishing licence – such a licence authorises a person to use a boat to catch, carry or process fish. **Item 297** amends section 19 to introduce two additional types of licences. The first is to commercially fish without using a boat and then subsequently carry or process such fish. The second type is to receive fish caught under a separate licence or authorisation. The intent appears to be to allow greater flexibility in managing relevant fisheries. The relevant part of the Explanatory Memorandum comments:¹³

There are a number of commercial fishing activities that may be undertaken without a boat. This amendment will enable greater flexibility and a more comprehensive tool kit to ensure the total allowable catch (TAC) of a fishery is maintained under output controls, such as permitting regulation of people who hand fish from shore. The provision also enables operators to retain their valuable licences when they lose their boat through misadventure at sea. Current arrangements rely on policy decisions to address these matters on a case-by-case basis...these amendments will [also] allow the Minister to regulate fish receivers to ensure the TAC is maintained under the output controls...receivers of Torres Strait fish currently comply with a voluntary system of information provision to AFMA and they were regulated, until recently, as fish buyers under Queensland law.

Schedule 4 – Amendments to the *Surveillance Devices Act 2004*

This Act covers the use of surveillance devices for the investigation of Commonwealth offences and State offences with 'a federal aspect'. Subsection 6(1) lists a number of offences under the FMA to which this Act applies. **Items 1-6** add additional FMA

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offences to the subsection 6(1) list, as well as for the first time adding a number of offences under the TSFA. All the offences relate to foreign, rather than Australian, boats.

Concluding comments

The amendments to the FMA increase the ability of Australian authorities to enforce fisheries law with respect to foreign boats operating in Australian waters. They are the latest in a trend to place an increased onus on the masters and owners of foreign boats to demonstrate that they were operating lawfully in such waters, and where they cannot, to increase the ability of the Commonwealth to confiscate the possessions of such persons.

The amendments to the TFSA are more fundamental in that they are part of reforms negotiated over several years to 'modernise' the management of Australian fisheries in the Torres Strait.

Endnotes

1. See the Digest for the (then) Bill for details at: <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd121.pdf>
2. Explanatory Memorandum, p. 2
3. *ibid*, p. 4.
4. 'Governance changes to AFMA' *Media Release*, Senator the Hon Eric Abetz, 18 October 2006. For more background on the Uhrig review, see Dr. Richard Grant, 'The Uhrig Review and the future of statutory authorities', *Research Note* no. 50, Parliamentary Library, 2004–05.
5. See the Digest for the (then) Bill for details at: <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd152.pdf>.
6. *op. cit*, p. 5.
7. As noted above, the ships owner or master can institute civil proceedings to recover the boat (that is, have it returned to them).
8. *op. cit*, p. 8.
9. *ibid*, p. 10.
10. *ibid*, p.12.
11. *ibid*, p. 18.
12. *ibid*, p. 21.
13. At: pp. 30–31.

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