

# Chapter 1

## Introduction

### Conduct of Inquiry

1.1 The Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 was introduced into the House of Representatives on 17 February 2005 and passed on 17 March 2005.

1.2 On 9 March 2005 the bill was referred to the Rural and Regional Affairs and Transport Legislation Committee on the recommendation of the Senate Selection of Bills Committee. In referring the bill the Selection of Bills Committee gave two principal issues for consideration –

- The provisions enabling contract employees, rather than State or Commonwealth officers, to confiscate property and to exercise search powers, including strip searches and the associated accountability mechanisms; and
- The appropriateness of the detention regime, including possible length of imprisonment.

1.3 The Committee advertised this inquiry in *The Australian* on 16 March and 30 March 2005. The Committee also approached a number of interested organisations to provide evidence at a public hearing. The hearing took place on 17 March 2005 and witnesses are listed at Appendix 1. The Committee received two written submissions (see Appendix 2).

1.4 The Committee's evidence and submissions are available through the parliament's homepage at <http://www.aph.gov.au>

### Acknowledgements

1.5 In view of the brevity of the inquiry, the Committee appreciates the time and work of those who provided oral and written evidence to the inquiry. Their work has assisted the Committee's deliberations on this bill.

### The bill

1.6 The principal purpose of the bill is to strengthen the existing legal framework dealing with illegal foreign fishing within the Australian Fisheries Zone (AFZ) and the Torres Strait Protected Zone. The proposed amendments are designed to ensure that

breaches of the fishing rights by illegal foreign fishers in all areas of Australia's maritime jurisdiction are more efficiently managed.<sup>1</sup>

1.7 The bill proposes amendments to three existing Acts - the *Fisheries Management Act 1991* (Fisheries Act), the *Torres Strait Fisheries Act 1984* (Torres Strait Act) and the *Migration Act 1958* (Migration Act).<sup>2</sup>

1.8 Under the Fisheries Act the Australian Fisheries Management Authority (AFMA) has the power to intercept and prosecute suspected illegal foreign fishers in the waters within the AFZ. The Torres Strait Act enforces Australia's international obligations in the Torres Strait Protected Zone, which is a "zone of joint fisheries jurisdiction"<sup>3</sup> with Papua New Guinea. The *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as the Torres Strait, and Related Matters* (Torres Strait Treaty) provides for the joint fisheries jurisdiction. The proposed amendments are consistent with the Torres Strait Treaty.

1.9 Currently, there are some inconsistencies in the provisions for dealing with suspected illegal foreign fishing in the two zones under the Fisheries Act and the Torres Strait Act. Broadly, the amendments proposed in the bill to these two Acts will ensure that the policing of the illegal fishing in the AFZ and the Torres Strait is undertaken by officers with similar powers and responsibilities. The amendments also:

... clarify that an officer controlling a boat, using powers conferred by either of these Acts, is not unlawfully restraining the liberty of any of the people that are on the boat.<sup>4</sup>

1.10 Consistency between the two Acts will be further achieved by the amendments proposed to the Torres Strait Act relating to automatic forfeiture of boats.<sup>5</sup>

1.11 The amendments to each Act also provide for a "fisheries detention regime that is broadly consistent with current immigration detention arrangements."<sup>6</sup>

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1 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Explanatory Memorandum, p 3

2 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Explanatory Memorandum, p 3

3 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 3

4 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Explanatory Memorandum, p 3

5 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Explanatory Memorandum, p 4

6 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 3

1.12 One of the aims of the new fisheries detention regime is to facilitate a "seamless transfer of detainees from fisheries to immigration detention."<sup>7</sup> There are two primary sets of amendments to contribute to this outcome – the provision of a new class of officer to exercise limited powers<sup>8</sup> and the amendments to enable:

... fisheries officers to exercise the same powers in relation to searches and screening of people to those that currently exist for people detained as unlawful non-citizens in an immigration detention facility.<sup>9</sup>

1.13 The new class of officer are to be appointed by the Minister. The officers can include both employees and contractors employed by either AFMA or the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). Currently contractors are employed by DIMIA and preform duties under the Migration Act. Under the proposed amendments these contract employees will be permitted to "perform fisheries detention functions under fisheries legislation."<sup>10</sup> AFMA also have contract employees performing duties under fisheries legislation and these powers will continue.

1.14 The amendments propose the extension of powers to fisheries officers to search and screen people, include the capacity to conduct searches, strip searches and screening of persons.<sup>11</sup> The amendments are included in items 13 and 20 of the bill. Searches can be conducted to find a weapon or evidence of certain prescribed offences and no warrant is required. Proposed sections 17 and 18 set out the provisions relating to strip searches with section 18 detailing the rules for conducting a strip search. The Minister for Agriculture, Fisheries and Forestry in his second reading speech indicated that:

These powers will provide the necessary protection to officers and other detainees, as it will allow them to remove any weapons that a person may be concealing.<sup>12</sup>

1.15 In line with the existing provisions of the Migration Act, the bill also proposes that officers have the power to collect personal identity information from detainees. This information can include a number of personal statistics such as height and

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7 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 4

8 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 4

9 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 5

10 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 4

11 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 5

12 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 5

weight, but can also include fingerprints and handprints, an iris scan and anything prescribed by regulation so long as it does not include procedures to intimate areas of the body or blood or saliva (proposed new section 26). The purposes of the identification process are spelt out in the legislation (proposed subsection 26(3)) and the Minister informed the House that the purpose was to identify "repeat offenders" and factor "this into their prosecution."<sup>13</sup>

1.16 To further strengthen the regulatory regime for illegal foreign fishing the bill also proposes amendments to the Fisheries Act and the Torres Strait Act to broaden the class of persons protected by offences arising from behaviour to obstruct an officer in performing his/her duty. The proposal is that such an offence will be committed if those involved in the administration of fisheries legislation are obstructed "in the exercise or performance of any power, authority, function or duty under the Act."<sup>14</sup> This amendment is designed to extend the protection currently afforded to AFMA officers to detention officers, translators and medical staff. The offences include assault, resisting or obstructing such a person or "using abusive or threatening behaviour."<sup>15</sup> The Explanatory Memorandum indicates that the amendments will provide such persons with better protection when carrying out their duty.<sup>16</sup>

1.17 Finally, the bill proposes to amend Migration Act to ensure that the enforcement visa regime currently existing under that Act "applies consistently to illegal foreign fishing offences under both"<sup>17</sup> the Fisheries Act and the Torres Strait Act.

### **Consideration by the Senate Scrutiny of Bills Committee**

1.18 The Senate Standing Committee on the Scrutiny of Bills has a standing brief to consider all bills as to whether they trespass unduly on personal rights and related matters, and draws attention to any provision of a bill that has a retrospective impact. In relation to the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 the Scrutiny Committee notes that a number of provisions may trespass on the personal rights of those who may be detained or subjected to a search. The provisions that are the subject of comment<sup>18</sup> are:

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- 13 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 5
  - 14 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Second reading speech, p 6
  - 15 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Explanatory Memorandum, p 4
  - 16 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Explanatory Memorandum, p 4
  - 17 Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Explanatory Memorandum, p 4
  - 18 See Senate Standing Committee on the Scrutiny of Bills, Alert Digest No 2 of 2005, 9 March 2005, pp 16 to 21

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- Items 1 and 2 of Schedule 1 to the bill which insert a new subsection 84(1BA) into the Fisheries Act and a new subsection 42(2AAA) into the Torres Strait Act. These provisions relate to the clarification of the power of an officer to control a boat (paragraph 1.9)
  - Proposed new clause 8 of Schedule 1A of the Fisheries Act to be inserted by item 13 of Schedule 1 and proposed new clause 8 of Schedule 2 to the Torres Strait Act to be inserted by item 20 of Schedule 1 which provide for an officer to detain a suspected illegal foreign fisher to investigate whether an offence has been committed. There are currently similar provisions in the Fisheries Act.
  - Proposed new clause 15 of schedule 1A of the Fisheries Act to be inserted by item 13 of Schedule 1, proposed new paragraph 84(1)(aaa) of the Fisheries Act to be inserted by item 21 of Schedule 1, proposed new subsection 87H(2A) of the Fisheries Act, to be inserted by item 26 of Schedule 1 and proposed new clause 15 of Schedule 2 to the Torres Strait Act to be inserted by item 20 of Schedule 1 and proposed new paragraph 42(1)(aa) of the Torres Strait Act to be inserted by item 28 of Schedule 1. These provisions provide for searches without search warrants (paragraph 1.14).
  - Proposed new clause 17 of Schedule 1A of the Fisheries Act to be inserted by item 13 of Schedule 1 and proposed new clause 17 of schedule 2 to the Torres Strait Act to be inserted by item 20 of Schedule 1. These provisions provide for strip searches without search warrants. (paragraph 1.14).
  - A number of provisions declaring various instruments not to be legislative instruments.

The Committee notes that, having commented, the Scrutiny Committee left the Senate to determine whether rights had been unduly trespassed upon.

