

Chapter Two

The Bills

Fisheries Legislation Amendment Bill 2007

2.1 The Legislation bill will amend the *Fisheries Management Act 1991* (FMA), the *Fisheries Administration Act 1991* (FAA), the *Torres Strait Fisheries Act 1984* (TSFA) and the *Surveillance Devices Act 2004* (SDA).¹

2.2 The measures included in the Legislation bill are intended to improve the management of the Torres Strait fisheries, to better enable monitoring of fishing activity in Commonwealth fisheries and to deter illegal, unreported and unregulated fishing in Australian waters.²

2.3 The key amendments to the TSFA are intended to:

- streamline the delegation powers of the Minister and the Torres Strait Protected Zone Joint Authority (PZJA);
- improve the management of Australia's rights and obligations under the Torres Strait Treaty with Papua New Guinea;
- facilitate the introduction of output controls and better fisheries management practices;
- improve operational and administrative effectiveness;
- improve consistency with other legislative regimes; and
- bolster compliance and enforcement procedures.³

2.4 The Legislation bill will introduce amendments arising from the implementation of the *Securing our Fishing Future* initiative and assist AFMA to implement the Ministerial Direction made in November 2005, under Section 91 of the FAA.⁴

2.5 Key amendments to the FAA include:

- expansion of AFMA's functions to include the collection and dissemination of information relating to the 'control and protection of Australia's borders';

1 Explanatory Memorandum, Fisheries Legislation Amendment Bill 2007, p. 1.

2 Second Reading Speech, Fisheries Legislation Amendment Bill 2007, p. 1.

3 Explanatory Memorandum, Fisheries Legislation Amendment Bill 2007, p. 1.

4 Explanatory Memorandum, Fisheries Legislation Amendment Bill 2007, p. 1.

- regulations which will authorise the collection and disclosure of such information for purposes other than those related to fisheries; and
- the provision of power which will allow the Minister to appoint directors of AFMA for up to nine months without having to follow the statutory process.⁵

2.6 The Legislation bill provides the Minister with the power to temporarily appoint AFMA directors without running a selection process. It is intended that this power will assist the transition of AFMA becoming a Commission.⁶

2.7 Key amendments to the FMA will result in:

- easier prosecution of foreign fishing boats operating illegally within Australia's 12 nautical mile territorial sea;
- removal of the requirement to prove that the person in charge of the boat was 'reckless' as to whether the boat was in the territorial sea – the position of the boat will now be a strict liability element; and
- courts being able 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.⁷

2.8 The key amendment to the SDA is to add additional FMA offences to those listed under subsection 6(1) and existing offences under the TSFA. All the offences relate to foreign, rather than Australian boats.⁸

Fisheries Levy Amendment Bill 2007

2.9 The Levy bill amends the *Fisheries Levy Act 1984* (the Levy Act) to allow levies to be collected in the Torres Strait fisheries in accordance with new management arrangements provided for in the *Torres Strait Fisheries Act 1984* (TSFA) as concurrently introduced by Legislation bill 2007.⁹

2.10 The Torres Strait Spanish Mackerel, Reef Line, Prawn and Tropical Rock Lobster fisheries have been moving toward the implementation of management plans which are underpinned by either output controls (individual quota) or unitised effort (the system used in the prawn fishery).

5 Bills Digest, *Fisheries Legislation Amendment Bill 2007*, 30 May 2007, No. 168. 2006-07, pp. 3-4.

6 Explanatory Memorandum, *Fisheries Legislation Amendment Bill 2007*, p. 1.

7 Bills Digest, *Fisheries Legislation Amendment Bill 2007*, 30 May 2007, No. 168. 2006-07, p. 4.

8 Bills Digest, *Fisheries Legislation Amendment Bill 2007*, 30 May 2007, No. 168. 2006-07, pp. 9-10.

9 Explanatory Memorandum, *Fisheries Levy Amendment Bill 2007*, p. 2.

2.11 The Levy bill provides broader powers to implement cost recovery in these fisheries consistent with Australian Government and PZJA policy. The amendments will guarantee that the arrangements outlined in management plans are recognised by the *Fisheries Levy Act 1984* for the purpose of calculating the levy amount to be charged to the fisher. The Levy bill also contains consequential amendments to ensure, where a levy is applied, a consistency of treatment for all commercial fishing licenses occurs, with or without a boat.

Comment of Senate Scrutiny of Bills Committee

2.12 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) has a standing brief to consider all bills as to whether they trespass unduly on personal rights and liberties, and related matters.

2.13 The Scrutiny Committee commented on the following issues in relation to the Legislation bill.¹⁰

Commencement more than six months after assent (Schedule 3, Part 2)

2.14 The Scrutiny Committee noted that Item 4 in the table to subclause 2(1) of the Legislation bill provides that the amendments proposed in Part 2 of Schedule 3 will commence 12 months after Assent.

2.15 The Scrutiny Committee took the view that Parliament is responsible for determining when laws come into force and where the delay is longer than six months, the Committee would expect the Explanatory Memorandum to the bill to provide an explanation (in accordance with Paragraph 19 of Drafting Direction No. 1.3).

2.16 The Scrutiny Committee sought the Minister's advice as to the reason for the delayed commencement, and whether the explanation could be included in the Explanatory Memorandum to the Legislation bill.

2.17 The Scrutiny Committee further noted that:

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.¹¹

10 Information contained in the following section of this report is based on information contained Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 6 of 2007*, 13 June 2007, pp. 42-46.

11 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 6 of 2007*, 13 June 2007, p. 43.

Strict liability (Schedule 2, Item 5 and Schedule 2, Item 7)

2.18 The changes proposed under Items 5 and 7 apply strict criminal liability to the element of the location of a foreign fishing boat in the Australian Fishing Zone, contained in the offences in sections 100B and 101AA of that Act. The result of these amendments is that, in a prosecution under either of those sections, the prosecution will only have to establish that fishers were in the territorial sea of Australia, not that they *intended* to be in such waters.

2.19 The Scrutiny Committee referred to the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which states that applying strict liability to a particular physical element of an offence (as is proposed in this instance) may be considered appropriate where there is "demonstrated evidence that the requirement to prove fault of that particular element is undermining or will undermine the deterrent effect of the offence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element."

2.20 The Committee noted that it was not clear about the extent to which the imposition of strict liability in this instance is consistent with the *Guide*, particularly as the offences in sections 100B and 101AA were created by legislation which commenced as recently as 23 June 2006.

2.21 The Committee sought the Minister's advice as to whether the *Guide* was consulted in the course of framing these amendments, and, if so, what was the nature of the 'demonstrated evidence' and 'legitimate grounds' referred to in the *Guide*. The Committee indicated that pending the Minister's advice:

... the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.¹²

Non-reviewable decisions (Schedule 3, Item 160)

2.22 The Scrutiny Committee noted that proposed new subsection 26(5) of the *Torres Strait Fisheries Act 1984*, to be inserted by Item 160 of Schedule 3, would grant the Minister a discretion to cancel or suspend a person's commercial fishing licence if either of two conditions specified in the proposed subsection is satisfied.

2.23 The Committee indicated that there does not appear to be any provision for the holder of a licence to seek merits review of the exercise of the Minister's discretion under the *Administrative Tribunals Act 1975*.

2.24 The Committee drew attention to the fact that the provision excludes review by relevant appeal bodies and sought the Minister's advice as to whether the exercise

12 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 6 of 2007*, 13 June 2007, p. 44.

of the discretion granted by proposed new subsection 26(5) is subject to some form of review, and if not, whether it should be. It also noted that:

Pending the Minister's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon non-reviewable decisions, in breach of principle 1(a)(iii) of the Committee's terms of reference.¹³

2.25 The Scrutiny Committee had no comment to make in relation to the Fisheries Levy Amendment Bill 2007.¹⁴

Evidence received by the committee

2.26 The committee did not receive any submissions in relation to its inquiry. The committee did, however, hold a public hearing on Friday, 15 June 2007, to take evidence from the Department of Agriculture, Fisheries and Forestry and the Australian Fisheries Management Authority.

2.27 The Committee sought clarification on a number of issues during the hearing, including:

- whether information can, and will be collected and disseminated on lawfully licensed Australian fishers;
- whether information collected can, and will be passed on to State and Territory governments and authorities;
- whether, the Department of Environment and Water Resources will contribute to the cost incurred by AFMA in collecting information;
- the ministerial power to appoint directors including the maximum length of time appointed and the number of times the Minister can re-appoint directors after the stated time expires;
- the amendments that instigate strict liability as one of the elements of a foreign fishing offence;
- the formalisation of the '10 nautical mile gentlemen's agreement';
- the broadening of the definition of 'fishing' and any subsequent implications;
- the role of the Torres Strait Regional Authority in the issue of permits for developmental purposes;
- the benefit of, and the need for, a master fisherman's licence; and

13 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 6 of 2007*, 13 June 2007, p. 45.

14 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 6 of 2007*, 13 June 2007, p. 46.

- whether AFMA requires additional resources as a result of amendments to the *Surveillance Devices Act 2004*.

Recommendation

The Committee recommends that the bill be passed.

**Senator the Hon. Bill Heffernan
Chair**