THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FISHERIES LEGISLATION AMENDMENT (FOREIGN FISHING OFFENCES) BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Fisheries, Forestry, and Conservation,
Senator the Hon Eric Abetz)
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GENERAL OUTLINE

The Fisheries Legislation Amendment (Foreign Fishing Offences) Bill 2006 (‘the Bill’) would amend the Fisheries Management Act 1991 (‘the FMA’) and Torres Strait Fisheries Act 1984 (‘the TSFA’) to provide for custodial penalties for foreign fishing offences in those parts of Australia’s territorial sea that are within the Australian Fishing Zone (‘the AFZ’), within the meaning of the FMA, or within any ‘area of Australian jurisdiction’, within the meaning of the TSFA.

In general, the waters that would thereby become subject to the proposed custodial penalties are the waters from three to twelve nautical miles offshore from the Australian mainland or from most islands, including those of the Torres Strait. For the external territories, all waters out to 12 nautical miles would be subject to the proposed custodial penalties.

The waters within three nautical miles of the coast or which are internal waters, such as bays, rivers and sounds, are subject to the fisheries jurisdiction of a State or the Northern Territory, which have the power to impose custodial penalties for foreign fishing offences in these waters and in most instances have done so.

Illegal foreign fishing vessel incursions threaten Australia’s sovereign interests, posing threats such as serious quarantine risks, illegal immigration, importation of prohibited goods, depletion of fish stocks, degradation of marine protected areas and targeting of endangered species. The added deterrence of custodial penalties for foreign fishing offences would help to reduce these threats. The Bill, if enacted, would further strengthen the measures against illegal foreign fishing announced by the Government in the 2006 Budget.

Australia’s exclusive economic zone (‘the EEZ’), extending generally from 12 to up to 200 nautical miles offshore, has been excluded from the ambit of the new penalties in order to comply with the United Nations Convention on the Law of the Sea, to which Australia is party. Article 73 of the Convention requires that coastal State penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment in the absence of agreements to the contrary by the States concerned. This prohibition does not, however, apply in the territorial sea.

It has been longstanding legal practice in Australia not to impose custodial penalties for offences that are subject to strict liability. Accordingly, the Bill would amend the FMA and TSFA on the basis that the new custodial penalties would apply only to fault based indictable offences.

The maximum periods of imprisonment that the Bill would provide for vary from two years to three years, depending on the particular offence, broadly consistent with custodial penalties in other provisions of the FMA and TSFA (not directly associated with foreign fishing offences) and with, for example, those in the Fish Resources Management Act 1994 of Western Australia and the Fisheries Act of the Northern Territory. The proposed maxima do also, however, take account of the sovereignty violation inherent in a foreign fishing offence and the fact that some foreign fishers have been apprehended and convicted more than once. A court could take these and other relevant factors into account in deciding the appropriate period of imprisonment in a particular case within the maxima provided by the Bill.
Apart from the inclusion of the custodial penalties and their operation in defined parts of the territorial sea and not in the EEZ, the offences proposed in the Bill would closely follow the foreign fishing offences and associated (non-custodial) penalties already in the FMA and TSFA.

**FINANCIAL IMPACT STATEMENT**

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.
NOTES ON CLAUSES

Clause 1: Short Title

Provides for the Bill, once enacted, to be cited as the Fisheries Legislation Amendment (Foreign Fishing Offences) Act 2006 (‘the Act’).

Clause 2: Commencement

 Provides for the commencement date of the Act to be the day on which it receives the Royal Assent and for the Schedules to the Act (which contain the proposed amendments to the FMA and TSFA) to commence on the day after the Act receives the Royal Assent, as is normal for the commencement of offences.

Clause 3: Schedule(s)

Provides that each Act that is specified in a Schedule to this Act is amended or repealed as set out in the Schedule.

Schedule 1 – Amendment of the Fisheries Management Act 1991

Part 1 – Main amendments

Note: A reference to a State includes the Northern Territory unless otherwise stated.

Item 1

Inserts a new section, s 100B, which closely mirrors existing s 100A and in s 100B(1) creates the fault based offence of fishing illegally from a foreign boat in a part of the territorial sea of Australia that is in the Australian Fishing Zone (‘the AFZ’ – which in general extends from 3 to 200 nautical miles offshore). It provides for a penalty of 7,500 penalty units or 3 years imprisonment, or both, if the boat has a length of 24 metres or more, or 5,000 penalty units or 2 years imprisonment, or both, if the boat has a length of less than 24 metres. The distinction based on boat length replicates that in the existing s 100A, which will continue to apply in the entire AFZ and does not include a custodial penalty.

Section 100B(2) excludes, from the s 100B offence, that part of the territorial sea that is normally in the coastal waters of a State and would otherwise be deemed a part of the AFZ in relation to a particular fishery because of s 76. Section 76 provides that where the Commonwealth and a State agree that a particular fishery is to be managed, inter alia in such coastal waters, in accordance with the law of the Commonwealth, those coastal waters are taken to be in the AFZ in relation to that fishery. The exclusion is a recognition that the new offences are not fishery-specific.

Section 100B(3) replicates the existing s 100A(2A) and provides a technical basis for boat length determination.
Section 100B(4) replicates the existing s 100A(4) defences to an offence, in this case to the new offence in s 100B(1) – in effect that the use of the boat in the place in question has been authorised. 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.

**Item 2**

Inserts a new section, s 101AA, which in s 101AA(1) creates the fault based offence of having a foreign boat equipped for fishing in a part of the territorial sea of Australia that is in the AFZ. It provides for a penalty of 5,000 penalty units or 2 years imprisonment, or both.

Section 101AA(2) replicates the existing s101A(4) defences to an offence, in this case to the new offence in s 101AA(1) – in effect that the presence or use of the boat in the place in question has been authorised, or that its fishing equipment has been stored and secured and its presence in the waters in question has been approved by the Australian Fisheries Management Authority (‘AFMA’), or that it is in the course of innocent passage through the AFZ with its fishing equipment stored and secured. The note to s 101AA(2) is identical to the note to s 100B(4), as explained at Item 1 above.

Section 101AA(3) provides an exclusion from the operation of s 101AA (in relation to coastal waters) similar to that provided in s 100B(2) and explained at Item 1 above.

**Item 3**

Inserts a new paragraph, s 166(2)(ba), into s 166 which relates to evidence. Sections 166(2) and 166(7) enable AFMA to give a certificate as prima facie evidence, in relation to the matters in the certificate, in proceedings for an offence against the FMA. The new s 166(2)(ba) would enable AFMA to give a certificate providing prima facie evidence to the effect that the waters where it is alleged a foreign fishing offence which includes a custodial penalty has been committed are in a part of the territorial sea to which the custodial penalty applies. This would mirror similar provisions in s 166(b) for giving a certificate in relation to an alleged (non-custodial) offence anywhere in the AFZ.

**Part 2 – Consequential and technical amendments**

**Items 4 and 5**

Extend relevant powers of search of a fisheries officer in s 84 to include such powers in relation to the new offences involving custodial penalties (ss 100B and 101AA).

**Items 6 and 7**

Add a note concerning the evidential burden of proof to the existing s 100A(4) and repeal s 100A(5), the effect of which is to follow current legal drafting practice in the existing s 100A in the same manner as outlined in relation to the new s 100B(4) at Item 1 above.
Item 8
Amends s 101A(4)(e) to ensure consistency of nomenclature. Elsewhere in the FMA the relevant location in relation to an offence or thing or event is designated ‘the place’ and the amendment will use that terminology in s 101A(4)(e) instead of the undefined term ‘that area’.

Items 9 and 10
Have the same effect concerning the evidential burden of proof in relation to the existing s 101A as do Items 6 and 7 above in connection with s 100A.

Item 11
Extends existing powers of a fisheries officer in s 101B, in relation to the use of a boat in support of a foreign boat being used for an offence against the FMA, to the new offences involving custodial penalties (ss 100B and 101AA).

Item 12
Repeals s 103(1E), which was to have been repealed by a provision of the *Fisheries Legislation Amendment (International Obligations and Other Matters) Act 2005* and replaced by a legislative note about the evidential burden. In the event, the legislative note was inserted at the end of s 103(1B), but s 103(1E) was not in fact repealed. The present Bill would now do so. This matter is unrelated to the substance of the present Bill.

Items 13, 14, 15 and 16
Extend existing provisions concerning the forfeiture of boats, gear, fish, etc (in s 106A), and concerning powers of detention and search, etc (in clauses 8, 10 and 15 of Schedule 1A of the FMA), in relation to offences against the FMA, to the new offences involving custodial penalties (ss 100B and 101AA).

Schedule 2 – Amendment of the Torres Strait Fisheries Act 1984

Part 1 – Main amendments

Item 1
Inserts four new sections, ss 46A, 46B, 46C and 46D, which together mirror the offences in the existing s 45 that are relevant in connection with providing custodial penalties for foreign fishing offences in a part of the territorial sea of Australia that is in an ‘area of Australian jurisdiction’ as defined by the TSFA. The offences concerned in this case are using a foreign boat for commercial fishing without authorisation (s 46A), or without a master fisherman’s licence (s 46B), or using a foreign boat for processing or carrying fish (s 46C) or for trans-shipping fish (s 46D), without authorisation.

Unlike the AFZ, which extends up to 200 nautical miles offshore from the Australian coast (other than in the Torres Strait region whose waters are in general not a part of the AFZ so as to avoid the FMA also applying there), the area of Australian jurisdiction in the Torres Strait is more limited in its extent by the proximity of Papua New Guinea. Treaty-based arrangements between the two countries define their respective areas of jurisdiction for fisheries purposes.
Nevertheless, the area of Australian jurisdiction does in general extend beyond the territorial sea of Australia and the four new sections proposed in Item 1 would operate only in that part of the area of Australian jurisdiction which is within the territorial sea - in essence, in waters from 3 to 12 nautical miles offshore from the Australian mainland or from the islands, reefs and low tide elevations of the Torres Strait. The waters from the shore to 3 nautical miles offshore are generally part of the coastal waters of Queensland and would not come within the ambit of the new custodial penalties proposed by the Bill.

A map which may assist in explaining the various categories of waters in the Torres Strait region is available at http://www.pzja.gov.au/resources/maps/overview_map.htm.

The penalty for an offence against each of s 46A(1), 46B(1), 46C(1) or 46D(1) is 2,500 penalty units or 3 years imprisonment, or both, if the offender was the master (or, in s 46B(1), in charge) of the boat, or 500 penalty units or 2 years imprisonment, or both, in any other case. The distinction based on whether the offender is or is not the master (or in charge) of the boat closely parallels that in the existing s 45, which will continue to apply in the entire area of Australian jurisdiction and does not include a custodial penalty.

Subsection (2) in each of the four new sections excludes those coastal waters of Queensland generally in the Torres Strait region (and designated in s 4 of the TSFA as the ‘Protected Zone coastal waters of Queensland’) from the operation of that section, in recognition that the new offences are not fishery-specific.

Subsection (3) in each of the four new sections specifies the circumstances which, if present, would be a defence to the offence in that section – generally that the fishing or fishery-related activity which is the subject of the new section is of an authorised type or that the use of the boat in question for fishing or for the related activity has been authorised. In each case, the note to subsection (3) follows current legal drafting practice and states that the defendant bears an evidential burden in relation to the matters in subsection (3) 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.

**Item 2**

Inserts a new section, s 49A, which closely mirrors the existing s 49. In s 49A it is an offence for the master of a foreign fishing boat to bring the boat without authorisation into a part of the territorial sea that is in an area of Australian jurisdiction. The penalty in s 49A(1) is 500 penalty units or 2 years imprisonment, or both.

Section 49A(2) excludes the ‘Protected Zone coastal waters of Queensland’ from the operation of s 49A for the same reason as explained above in Item 1.

Sections 49A(3) and 49A(4) provide for defences against the s 49A offence, because of an unforeseen emergency (s 49A(3)) or because the boat is authorised to be in the place in question or is being used for an authorised purpose (s 49A(4)). The notes to these subsections specify the burden of proof of the defendant and the relevant provisions of the Criminal Code. The justification for the reversal of proof in this case is as outlined above at Item 1 of this Part.

Section 49A(5) provides a definition for ‘fishing boat’ which encompasses a boat designed and equipped for fishing as well as boats designed and equipped to undertake or support a range of fishery-related activities, including processing or carrying fish.
Item 3

Inserts a new section, s 51A, which closely mirrors existing s 51 and creates the offence of having, without authorisation, a foreign boat equipped for fishing that is in a part of the territorial sea that is in an area of Australian jurisdiction. The penalty for an offence against s 51A is 2,500 penalty units or 3 years imprisonment, or both, if the offender was the master, or 500 penalty units or 2 years imprisonment, or both, in any other case.

This section is in essence the equivalent of s 101AA proposed to be inserted into the FMA by Item 2, of Part 1, Schedule 1 of the Bill, as explained above. It involves, in ss 51A(2) and (3), similar defences against and exceptions to the offence (and the same burden of proof) as those in s 101AA. It also excludes, in s 51A(4), the ‘Protected Zone coastal waters of Queensland’ from its operation for the same reason as explained above in Items 1 and 2.

Items 4, 5 and 6

Would amend s 57(2) of the TSFA, which relates to evidence. The purpose of the amendment, for the giving of a certificate as prima facie evidence in proceedings for an offence against the TSFA, is the same as explained above at Item 3 of Part 1, Schedule 1 in connection with s 166 of the FMA. In this case, the insertion of the new provision, s 57(2)(g), would enable a certificate to be given to the effect that the waters where an offence is alleged by the prosecution to have occurred are in fact in a part of the territorial sea that is within an area of Australian jurisdiction to which the custodial penalties proposed to be included in the TSFA by the Bill apply.

Part 2 – Consequential and technical amendments

Item 7

Inserts at s 3(1) the standard definition of the territorial sea of Australia, currently absent from the TSFA, to avoid any ambiguity as between the territorial seas, respectively, of Australia and Papua New Guinea.

Item 8

Extends relevant powers of search of a fisheries officer in s 42 to include those powers in relation to relevant new offences involving custodial penalties (in ss 46A, 49A and 51A).

Items 9, 10, 11 and 12

Have the same effect, in relation to the adoption of current legal drafting practice concerning (in this case) the legal burden of proof in the existing ss 49 and 51, as is explained in relation to the new ss 49A and 51A at Items 2 and 3 above.

Items 13, 14, and 15

Extend existing provisions concerning the forfeiture of boats, gear, fish, etc (in ss 52 and 52A), in relation to offences against the TSFA, to the new offences involving custodial penalties (in all or some of ss 46A, 46B, 46C, 46D as are relevant in each case, as well as in ss 49A and 51A).
Item 16

Amends s 55(3) and adds a note stating that offences against the new sections involving custodial penalties (ss 46A, 46B, 46C, 46D, 49A and 51A) are indictable offences. In the absence of these amendments, s 55(3) would on its face have required offences against these new sections to be punishable summarily rather than by indictment, which would be inconsistent with s 4G of the Crimes Act 1914.

Items 17, 18 and 19

Extend existing provisions concerning powers of detention and search, etc (in clauses 8, 10, 13 and 15 of Schedule 2 of the TSFA), to the new offences involving custodial penalties (in ss 46A, 46B, 46C, 46D, as well as, where relevant, in ss 49A and 51A).